COUNTY COLLECTOR: County not liable for erroneous publication
TAXATION: of notice of tax sale.

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November 15, 1943

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Mr. Ray Holmes, Clerk
County Court of Oregon County
Alton, Missouri

Dear Sir:

This will acknowledge receipt of your letter of November 3rd, 1943, requesting an opinion from this department, which reads as follows:

> "Will you please advise whether the County is liable for costs of publications of lists of delinquent tax lands, in the following instance; The Collector of this County started his publication at such time that there would only be 4 days between the last insertion and the first Monday in November. Thereafter, after 2 weekly insertions, the Collector discovering this, the Collector inserted a notice in the paper to the effect that there would be no tax sales this year under said publication, after being advised that deeds executed upon such tax sales would not transfer title.
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> "Please advise if the County is liable for the costs of said publications, and if so whether the County has any remedy against the Collector for reimbursement for said costs."

Section 11126, R. S. Mo. 1939, leaves no doubt in one's mind as to the proper procedure to be followed in offering for sale delinquent tax lands, which, in detail and express terms, provides for each and every prerequisite to a valid

sale. The decisions in this state have repeatedly held that to constitute a valid sale there must be a strict compliance with the statutes relative to the procedure for offering such land for sale.

In Beckwith v. Curd, 347 Mo. 602, 148 S. W. (2d) 800, l. c. 802, the court said:

> "We think the rule is well established that when an administrative officer sells property at a tax sale, a strict compliance with the statutes is required. * * * * * * * * * *"

Also see Comfort v. Ballingal, 134 Mo. 281, 35 S. W. 609, l. c. 612, wherein the court said:

> "When the process of collecting taxes by the sale of lands for their nonpayment is a summary remedy, as in the case at bar, and the law requires that certain things be done by the officer making such a sale in connection therewith, nothing less than a strict compliance with such requirements will suffice, and, unless it appear that the law has been strictly complied with, the sale will be void.
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> "It would be a dangerous principle to adopt, that titles to land derived from tax sales may be sustained partly by record and partly by parol proof. The publication of notice of the tax sale, the certificate that such notice had been given, and filing the same in the office of the city auditor in the manner and time prescribed by law, were prerequisites to the validity of the tax deeds. And 'any neglect of the officer selling land for the nonpayment of taxes, which deprives the owner and bidders of the full information the law intended to give them, renders the sale invalid.' Jarvis v. Silliman, 21 Wis. 607."

In Lamar Township v. City of Lamar, 261 Mo. 171, l. c. 189, the court held that officers are not general agents and their duties are usually prescribed by statute, the persons dealing with them do so with full knowledge of the law which limits their authority and that if the officers fail to follow their statutory duty public policy demands that the cestui que trust, which in this case would be the county, shall not suffer. It is stated in the following language:

> "Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority."

In view of the foregoing authorities the County Collector, in failing to follow the law as provided under Section 11126, supra, which requires a list of such delinquent lands and lots be published for three consecutive weeks, the last insertion to be at least fifteen days prior to the first Monday in November, did not in any manner bind the county for the expense of publication. Had such statute been strictly followed by the County Collector such expenses for newspaper publication would have been paid out of the County Treasury and taxed as part of the costs of the sale of such lands and lots.

It has been held that when a public officer under the law is required to perform a ministerial act and for some reason fails to perform such function, then if any difficulties occur he is personally liable to the person damaged.

In Burton Machinery Co. v. Ruth, 194 Mo. App. 194, l. c. 197, the court said:

> "'It is well settled rule that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do the act, he is liable in damages at the suit of a person injured. In such cases a mistake as to his duty and an honest intention is no defense. (Amy v. Supervisors, 11 Wall. 136; Ins. Co. v. Leland, 90 Mo. 177, 2 S. W. 431; Mechem on Officers, sec. 664.)' (Knox County v. Hunolt, 110 Mo. 67, 74 and 75, 19 S. W. 628; Steadly v. Stuckey, 113 Mo. App. 582, 585, 87 S. W. 1014; State ex rel. Wheeler v. Adams, 101 Mo. App. 468, 471, 74 S. W. 497.)"

In Smith v. Berryman, 272 Mo. 365, l. c. 374, the court said:

> "The cases cited to us by learned counsel, as is so clearly pointed out by Judge REYNOLDS (Smith v. Berryman, 173 Mo. App. l. c. 161), are not in point, and are readily to be distinguished from the situation confronting us. Those cases simply hold that an action will lie against an officer whose duty it is to perform, but who refuses to perform, a ministerial act. There can be no doubt upon this point, and no one would be so bold as to contend otherwise, especially in a case which does not call for the exercise of official discretion. If the rule were not so, no suit would lie against an officer upon his official bond by a citizen, injured by a failure to correctly or timely perform a ministerial duty."

The duty placed on the Collector, under Section 11126, supra, of publishing notice in newspapers, and the setting out of the time same shall be published, makes the Collector's performance nothing more than a ministerial act. It leaves no discretion whatsoever to the Collector, but he must follow strictly the provisions of said act.

CONCLUSION

It is, therefore, the opinion of this department that the order of publication is the result of a ministerial act and, since said publication was erroneous, under the statute there is no liability against the County for said publication.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

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