SALE OF DELINQUENT LANDS: Provisions of Sec. 9952b, Laws of Mo. 1935, p. 403 are mandatory.

October 16, 1936.

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Hon. Donald S. Russell,
County Treasurer,
Nodaway County,
Maryville, Missouri.

Dear Sir:

This department is in receipt of your letter of October 10, wherein you request an opinion, as follows:

> "We have discovered that in the advertisement of real estate for taxes we were one day late to come within the law. Our first insertion was on Monday, October 5, and the following ones would be on October 12 and 19.
>
> "The law states that the last insertion shall be at least fifteen days prior to the date of the sale. The insertion on October 19 will be only fourteen days prior to the date.
>
> "I'm wondering if only one or two properties might be offered on that date and the rest on the following days of that week as the law states that the properties shall be offered from day to day until all have been offered.
>
> "We have a number of small town lots on which the buildings have burned since 1931 and the taxes are so high that I feel certain that no one will pay for those particular properties the amount of taxes against them. In fact, a number of such properties have been offered in the last two years and no bid has been made on them.
>
> "If such a procedure is not advisable, would it be out of order to attempt to have the local paper in which the advertising is being done run a special Sunday Edition on the 19th of October?"

The section referred to in your letter as prescribing the procedure for the publishing of delinquent lands is Section 9952b, Laws of Mo. 1935, p. 403, which provides:

> "The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty-acre tracts or other legal subdivision, and the lots shall be described by number, block, addition, etc. * * * * To such list shall be attached and in like manner so printed and published a notice that so much of said lands and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the courthouse door of such county, on the first Monday in November next thereafter, commencing at ten o'clock of said day and continuing from day to day thereafter until all are offered. * * * * "

The portion of the statute with which we are primarily concerned is: "for three consecutive weeks - one insertion weekly, before such sale - the last insertion to be at least fifteen days prior to the first Monday in November." Has the Legislature in enacting a procedure for the sale of lands for delinquent taxes made such procedure mandatory or directory? If the procedure is directory, then it is possible that the fact that the last notice prior to the sale is 14 days instead of 15 as the statute states, is not fatal to the sale. We shall discuss the statute as to whether or not it is mandatory.

It is a general rule of law that there must be a strict compliance with the statute as it relates to the sale of land for delinquent taxes. 26 R. C. L. Sec. 354, p. 394, says:

> "There is no presumption in favor of the validity of a tax title based upon a sale by a collector as an administrative act. One who claims title to the property of another by virtue of a sale for nonpayment of taxes is bound to show the existence of every fact necessary to give jurisdiction and authority to the officer who made the sale, and a strict compliance by him with all things required by the statute in carrying out the sale. That the variation from the requirements of law was trivial and did the owner no harm is not sufficient reason for disregarding it. The maxim 'De minimis non curat lex' if applicable to tax sales at all should be applied with great caution. * * * * *"

As to defects or irregularities in the sale of land, the same authority, in Sec. 356, p. 397, states:

> "With respect to the proceedings of the collector in selling the property, no distinction is drawn between mandatory and directory requirements of law. Unless the collector acts as the law directs, he acts without authority and the sale is invalid, even if the requirement which he failed to comply with was not imposed for the protection of the owner of the land assessed. * * * * *"

In the case of Thompson v. Roe, 16 U.S. 387, the Court said:

> "The validity of a tax sale depends wholly upon compliance with the statutes authorizing the sale."

Regarding publication of notices, 61 Corpus Juris, Sec. 1594, p. 1181, makes this pertinent statement:

> "The purpose of the advertisement of a tax sale is to warn the owners and to apprise prospective purchasers of the property for sale, and hence statutes requiring notice by publication are regarded as mandatory, and a sale will not be valid unless their provisions are fully or substantially complied with."

As to the time and number of publications, 61 Corpus Juris, Sec. 1597, p. 1185, says:

> "The time prescribed by statute for the notice of sale is essential to its validity, and if the notice is given for anything less than the statutory time, the proceedings are, in most jurisdictions, as fatally defective as if no notice at all had been given; but there is some authority holding that publication for a less period than required will not void the sale. Where the statute requires a publication of the notice for so many weeks 'successively', or once a week for a certain number of weeks, or a certain number of times within a limited number of days or weeks, it must be literally and exactly complied with, at the risk of invalidating the sale, unless the omission of a week is due to a change in the date of publication of a weekly newspaper, in which case publication of the notice in successive issues will suffice."

The rulings in the states of California, Indiana, Kentucky and Maine are to the effect that if the notice be given for less than the statutory time, the same is as fatally defective as if no notice at all had been given.

Referring to the question you raise, to-wit, would it be legal to continue to hold the main sale of the delinquent lands on the 3rd day of November due to the fact that the statute permits the sale to be continued from day to day until completed, we think the case of Sullivan v. Donnell, 90 Mo. 278, while not directly bearing on the same point, has the same principle involved and is decisive of the question. In that case the Court said (l.c. 282-283):

> "The question then comes to this, is this deed still substantially in compliance with the form? By the form it is made to appear affirmatively, first, that the sale when first begun was publicly held, i.e., a public sale; second, that subsequently, and when this property was sold, it was exposed to public sale. Because of the omission of the word 'publicly'in the deed, the second affirmative statement only is made to appear, and, if the first appears at all, it is only by way of inference from the second. It was said in Hopkins v. Scott, 86 Mo. 144, when these same charter provisions were under consideration: 'It is true that other required recitals are made in the deed in the exact language used in the form prescribed, from which an inference can be drawn, that the collector did expose to public sale the property for the payment of taxes, * * * but this does not comply with the requirement of the law, which is that the recital shall be substantially and affirmatively made, and not that one fact, required to be affirmatively and substantially made, may be inferred from other facts recited in the deed, which the statute also requires to be substantially and affirmatively made.' The words contained in this deed, and not in the form, only relate to a continuance of the sale from day to day, and do not in the least aid the omitted recital. Applying, then, the principle upon which the Hopkins v. Scott case was decided, this deed must be held to be worthless, unless we can say it was immaterial whether the sale, when begun, was publicly held or not. This we cannot do. The charter everywhere contemplates and provides for a public sale, from first to last, no matter how long continued,

> and the collector has no power to make any other. If he does not begin the sale on the first Monday of October, under Section 42, he must commence it on the first Monday of November, under Section 52. While the sale may be continued from day to day, he must, at least, begin on that day, the day for which the notice of sale is given, and if not begun then the power to sell becomes functus officio. Prindle v. Campbell, 9 Minn. 212; Wilkins' Heirs v. Huse, 10 Ohio, 139. A sale begun on the first Monday and continued to the tenth, without being public, would be no sale at all within the contemplation of law. The recital that the sale, when begun, was publicly held, is, therefore, material. The fact it recites is material, and the form of the deed also makes it a material recital, and it cannot be supplied by inference from some other recital, which is also made matter of substance by the same form. The recitals in the deed need not be in the exact order in which they appear in the form, nor need they be in the same words. Other words of equivalent import will do, but when the form is departed from it should still leave all that certain which is made certain by the form. There is no hardship in this, for, in looking at the whole deed, it will be seen that the specific recitals relate to those matters occurring at the time of the sale and subsequent thereto, and in the most of which the purchaser, by himself or assignor, is a participant. He may well be required to see to it that he has a deed fair on its face, and especially when he has to but compare it with a statutory form."

The effect of the date of publication upon a local option election is discussed in the case of State ex rel. v. Johnson County Court, 138 Mo. App. 427, to the effect that compliance with the statute as to notice is essential to the validity of the election. Specifically, the Court said:

> "It would be unreasonable to say that a notice has been given when the medium

> of its publication is shut out from the eye of the persons for whom it is intended. To say that, would justify the statement that a verbal notice was given when the thought of the notice was conceived or matured instead of when the words were uttered. The publication of a notice in a newspaper is not the day it is set up in type and printed; it is the day that it may be seen and read in the paper by the public. Not that it must reach every member of the public, but its publication will date from the day when the public begin to receive it from the publisher."

In the case of State ex rel. v. Blair, 245 Mo. l.c. 690, the Court said:

> "The usual rule is that when the law requires a notice to be published for a certain number of weeks or days before legal proceedings are had, it is sufficient if the last insertion of the notice shall occur before such proceedings are had. (German Bank v. Stumpf, 73 Mo. 311; Drainage District v. Campbell, 154 Mo. 159; Harper v. Ely, 56 Ill. 179; Fry v. Bidwell, 74 Ill. 381)."

Under the above quoted decision, we think we are at liberty to say that the converse is true, i.e., if sufficient notice is not given as provided in the statute, it is not a compliance with the law.

Regarding the question of printing the paper one day prior to its usual publication date, we think the decision in the case of State ex rel. v. Johnson County Court, supra, stating "The publication of a notice in a newspaper is not the day it is set up in type and printed; it is the day that it may be seen and read in the paper by the public. Not that it must reach every member of the public, but its publication will date from the day when the public begin to receive it from the publisher," is decisive.

CONCLUSION

In view of the foregoing, it is the opinion of this department that Section 9952b, Laws of Mo. 1935, p. 403 must be strictly complied with in all respects - that the terms of said statute are mandatory, and the fact the statute provides that the insertion of the notice for the sale of delinquent lands must be made fifteen days before the day of the sale, same cannot be complied with by only fourteen days' notice.

We are further of the opinion that no legal sale can be made and no legal title given to said lands due to this irregularity. We are of the opinion that if the sale is adjourned from day to day, the same will not in any wise cure the defect or irregularity in the notice.

Respectfully submitted,

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Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

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