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Tax Titles in Montana

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NOTES

TAX TITLES IN MONTANA

STATUS OF TAX DEED

The uncertain status of tax titles in Montana has led to a great deal of litigation. The problem stems primarily from two sources: first, the statutes are not clear on many points; and second, the rule of strict compliance has been carried to such an extreme that deeds may be invalidated for innocuous technicalities. County officers and private individuals seeking such deeds commonly fail to follow the statutes closely enough, and hence no title ever passes.

The Montana court has stated its position thus:

> . . . conduct of those vested with power to sell lands for delinquent taxes must be closely scrutinized in order that there might be some security for property rights. The officer who makes the sale sells that which he does not own. The proceedings are to a large extent *ex parte,* the owner is an unwilling party, is seldom if ever present at the sale, is generally ignorant of it, and a tax almost always bears a small proportion of the value of the property sold. Upon these considerations it has generally been held proceedings on tax sales should strictly comply with the statute. . . .
>
> . . . A tax deed must be contrued most strongly against him who claims under it and, if one of two constructions will support the claim of the citizen, the deed must be held invalid.[1]

Though this reference is to the duty imposed upon the county officer conducting the proceeding, the same rigid standards are imposed on the one seeking the deed, whether he be a private party or the county in its capacity as a purchaser. Instead of lending security to property titles this doctrine of strict construction has accomplished the opposite, upsetting long unquestioned titles for sheer technicalities.

This Note will examine the statutory steps in securing a tax deed and the construction the court has given to these statutes, to illustrate wherein the difficulties lie, and to determine the precise status of a tax deed in Montana. This process will provide a warning and guide to county officers conducting the proceeding and to those seeking the deed, and also present a plea for reform.[2]

[1]Rush v. Lewis and Clark County, 36 Mont. 566, 569, 93 Pac. 943, 944 (1908).

[2]The purpose of this note is not to cover the remedies for defective or doubtful tax titles, but a brief indication of the available methods may serve as a point of reference. Revised Codes of Montana (hereinafter cited R.C.M.), 1947, § 84-4158 incorporates some special provisions relating to the ordinary proceeding to quiet title when tax title is involved; R.C.M. 1947, § 84-4142 provides for quieting of title by the county in the manner provided in R.C.M. 1947, §§ 93-6203 to -6211; R.C.M. 1947, §§ 84-4144 to -4150 permits an action in district court to get a confirmation deed and quiet title (either by the county or a private party) whenever the validity of any deed issued before enactment (Feb. 15, 1945) of the provision (Laws of Montana, 1945, c. 43) appears doubtful; and R.C.M. 1947, § 84-4161 is a special short method for quieting title discussed *infra* under the sub-title "Acquiring the Deed."

THE TITLE AND INTEREST CONVEYED BY A TAX DEED

At the outset it should be understood what title the grantee of a tax deed acquires. The matter is wholly statutory, there being at least two types of title that a state can confer.

> "[T]he legislature has power to provide either that a tax sale shall create a new title, cutting off all prior liens, encumbrances, and interests, or to provide that the tax purchaser shall acquire the interest only of the person in whose name the land was assessed or of the real owner." (3 Cooley, *Taxation,* 4th ed., 2930, § 1492). By the enactment of § 2215, Revised Codes 1921 [now § 84-4161] providing that a tax deed conveys absolute title "free from all encumbrances except a lien for taxes which may have attached subsequent to the sale," our legislature adopted the first course. The tax deed mentioned is not derivative but creates a new title in the nature of an independent grant from the sovereign, extinguishing all former titles and liens not expressly exempted from the operation.[3]

Thus any lien, interest, encumbrance, or title is extinguished by the sales unless it can come within an express statutory exception.[4] Even tax liens which attached prior to the sale are extinguished.[5] Montana apparently adheres to the doctrine that only separate interests in fee are separately taxable, lesser interests being included in a single assessment against the owner of the freehold estate.[6] Thus a sale of a separately taxed life estate does not affect the remainder interest. But any interest dependent upon the fee is accepted subject to the above legal limitation. This includes mortgages,[7] leases and royalty interests,[8] and the right to exercise a possibility of reverter.[9] An easement, however, is not an encumbrance but is carved out of the estate and separately taxed. Therefore it is not extinguished by the sale of the servient estate;[10] and other restrictive covenants, though not creating easements, are held to survive.[11] The remedy for the holder of such dischargeable interests lies in his right of redemption, for it is not the sale that extinguishes the interest, but the final transfer of the

[3]State *ex rel.* Great Falls v. Jeffries, 83 Mont. 111, 116, 270 Pac. 638, 640 (1928).
[4]Special and local improvement assessments [State *ex rel.* Great Falls v. Jeffries, 83 Mont. 111, 270 Pac. 638 (1928)], as well as irrigation district bond liens [State *ex rel.* Malott v. Board of County Commissioners, 89 Mont. 37, 296 Pac. 1 (1931)], have been held not to be true taxes within the meaning of the statute and hence have not been protected by the tax lien exception. As a result of these holdings the legislature amended the statute in 1929 to include special local improvement liens for assessments falling due after execution of the deed [Laws of Montana, 1929, c. 100, § 9; R.C.M. 1947, § 84-4170]. In 1937 the statute was amended again to include irrigation district assessments payable after execution of the tax deed [Laws of Montana, 1937, c. 63; R.C.M. 1947, § 84-4170] though the bonds were issued prior thereto [Hartman v. Nimmack, 116 Mont. 392, 154 P.2d 279 (1944)].
[5]State *ex rel.* Great Falls v. Jeffries, 83 Mont. 111, 270 Pac. 638 (1928).
[6]See Rist v. Toole County, 117 Mont. 426, 159 P.2d 340 (1945).
[7]Richardson v. Loyd, 90 Mont. 127, 300 Pac. 254 (1931).
[8]Rist v. Toole County, 117 Mont. 426, 159 P.2d 340 (1945).
[9]Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P.2d 792 (1937).
[10]*Ibid.*
[11]85 C.J.S. *Taxation* § 907 (1954). *But see* Tilden v. Chouteau County, 85 Mont. 398, 402, 279 Pac. 231, 232 (1929), wherein the court expresses "considerable doubt" as to this, at least as to prior taxes.

title after the redemption period has expired. Thus if the owner or a redemptioner redeems, the property remains subject to all prior liens, etc.[12]

JURISDICTION TO HOLD A TAX SALE

In order to vest the county treasurer with jurisdiction to sell land for delinquent taxes, there must be (1) a valid assessment, (2) a valid levy, and (3) nonpayment of the tax. Absence of any one of these elements will render a tax sale absolutely void as a matter of due process, and property interests are not affected thereby. However, "these jurisdictional requirements appearing, the requirement to sell is mandatory."[13]

TREASURER'S DELINQUENCY LIST AND NOTICE OF SALE[14]

The tax deed proceeding begins with a report, which the county treasurer must make twice a year to the county clerk, containing a complete list of all delinquent taxes.[15] Since at least 1927, cities and towns have not been allowed to conduct sales to collect their own taxes and assessments but are required to certify their delinquency list to the county treasurer who must include it in the county delinquency list and notice of sale. Thereafter the property is sold at one time at the county sale.[16]

Probably the most important thing in this list is an accurate description of the land upon which the tax is a lien.

> In tax proceedings "the description must be certain of itself and not such as to require evidence aliunde to render it certain. . . . Certainty in the description is required to apprise the owner that his property is advertised for sale and to enable him to prevent the sale by payment of the taxes thereon, and to impart information to bidders of the actual extent and location of the premise to be sold. All subsequent proceedings depend on this certainty. An inaccurate or uncertain description defeats every step subsequently taken and as we have already seen, the uncertainty cannot be cured by evidence aliunde.[17]

After the June report has been made, the county treasurer must publish a notice of sale specifying therein: (1) that, at a given time and place designated in the notice, all the property in the county upon which delinquent taxes are a lien will be sold at public auction unless before such sale the taxes, together with all interest, penalties, and costs, are paid, and (2) that there is on file in the treasurer's office, subject to public inspection, a complete list of all persons and property in the county owing taxes, including all city and town property as to which taxes or taxes and assessments are delinquent.[18]

[12] 85 C.J.S. *Taxation* § 907 (1954).
[13] Martin v. Glacier County, 102 Mont. 213, 56 P.2d 742 (1936); State *ex rel.* Spokane & Western Trust Co. v. Nicholson, 74 Mont. 346, 240 Pac. 837 (1925); 3 COOLEY, TAXATION § 1393 (1924).
[14] This note refers to the 1947 Code except where reference to earlier laws is made necessary. However, validity of a proceeding will undoubtdly be tested by the statutes in force at the date of the sale in question. *Accord*, Fariss v. Anaconda Copper Mining Co., 31 F. Supp. 571 (D. Mont. 1940).
[15] R.C.M. 1947, §§ 84-4111 to -4113.
[16] R.C.M. 1947, § 84-4727.
[17] Miller v. Murphy, 119 Mont. 393, 407, 175 P.2d 182, 189 (1946).
[18] R.C.M. 1947, §§ 84-4117, -4119.

The notice must be published once a week for three consecutive weeks in such county newspaper as the board of county commissioners directs, and if there is no newspaper published in the county then by posting a copy of the list in three public places.[19] Failure of the notice to comply strictly with the requirements of the statute is fatal to the sale. However, the Montana statutes provide that the affidavit of proper publication which the county treasurer is required to file with the county clerk is prima facie evidence of all facts stated therein.[20]

Publication is the sole statutory method of notice. There is no requirement that personal notice of sale be given the delinquent taxpayer, as a tax sale is a proceeding in rem and not in personam. Consequently a published notice with an accurate description of the property suffices to fulfill the requirements of due process, and the fact that a person does not receive actual notice of the sale is immaterial.[21] Every owner of Montana property is held to know that it is taxed annually and if the tax is not paid his property will be sold. Thus a non-resident must take measures to insure that he will be represented when his property is called into requisition; if he does not, and he fails to get the published notice, he must accept the consequences. When property is sold as the property of a particular person for taxes which have been correctly imposed upon the land, no misnomer of the owner or supposed owner, or other mistake relating to the ownership thereof will affect the sale or render it void or voidable, because the sale is a proceeding in rem.[22] Thus if property is assessed in the name of *X*, or *X* appears as the owner on the delinquency list, when in fact the true owner is *Y*, the validity of the subsequent tax and tax sale proceeding is not affected thereby.[23]

If an assessment is valid in part and void in the balance, the owner of the property may, prior to six days before the advertised sale date, deliver to the county treasurer a written protest against such sale, signed by himself or his agent, specifying the portion of the tax he claims to be invalid and the ground upon which the claim is based. Otherwise the validity of the sale and subsequent proceeding may not be challenged on that ground.[24] When such a protest is properly made the treasurer must by statute either: (1) sell the property for the whole amount appearing upon the duplicate assessment book, or (2) withdraw the property from the sale and report the case to the board of county commissioners. The board may either direct the foreclosure of the lien of such tax or direct the treasurer to proceed with the sale.[25] This statute obviates any question which might otherwise arise as to the validity of a sale where part of the

[19]R.C.M. 1947, § 84-4118.

[20]R.C.M. 1947, § 84-4121; Towle v. St. Paul Permanent Loan Co., 84 Minn. 105, 86 N.W. 781 (1901); Genella v. Vincent, 50 La. Ann. 956, 24 So. 690 (1898); 85 C.J.S. *Taxation* § 793 (1954).

[21]Meyer v. Chessman, 132 Mont. 187, 315 P.2d 512 (1957); Sutter v. Scudder, 110 Mont. 390, 103 P.2d 303 (1940).

[22]R.C.M. 1947, § 84-4180.

[23]Sutter v. Scudder, *supra* note 21; County of Musselshell v. Morris Development Co., 90 Mont. 201, 11 P.2d 774 (1932); Cullen v. Western Mortgage & Warranty Title Co., 47 Mont. 513, 134 Pac. 302 (1913).

[24]R.C.M. 1947, § 84-4184.

[25]R.C.M. 1947, § 84-4185.

tax is illegal. Of course if the assessment is wholly invalid, no proceeding thereon can ever be valid and the whole matter is a nullity.[26]

There is a curative statute[27] which purports to validate all deeds executed before its enactment (1931) which are either merely irregular or utterly void due to some failure to comply with the statutes relating to the time, place, or manner of publishing the notice of sale. Such currative statutes are, however, held in this state to be subject to the limitation that they cannot cure any defect of a jurisdictional nature which necessarily causes the deed to be utterly void.[28] This matter will be more fully discussed below.

SALE

Time

The sale must be held not less than twenty-one nor more than twenty-eight days from the time of the first publication of notice[29] and must be commenced between the hours of 10:00 a.m. and 3:00 p.m.[30] While Montana has not ruled on this point, other jurisdictions have held compliance with statutory time requirements to be a prerequisite to a valid sale.[31] Within these general provisions, however, it is left to the discretion of the officers charged with the duty to sell to determine the precise day and hour; but the general rule is that it cannot be held on Sunday or some other non-judicial day. And the sale must be held on the exact day specified in the notice or the sale is void.[32] The day of commencing a sale may be postponed from "day to day," but it must be completed within three weeks of the day first fixed.[33] Though Montana has not interpreted this last provision there are at least two possible constructions. One is that postponement cannot be for more than a day at a time except that it may be set over a legal holiday.[34] The other, that it may be set from one day to another day certain.[35] If the sale is held at a time to which there has been no legal adjournment (and presumably postponement as well) it has been held to be invalid.[36] The statute requires the county treasurer to give notice of the day to which it is postponed but makes no specific requirement as to the method or form of such notice.[37]

[26]Martin v. Glacier County, 102 Mont. 213, 56 P.2d 742 (1936); 85 C.J.S. *Taxation* § 754 (1954).

[27]R.C.M. 1947, § 84-4160.

[28]Martin v. Glacier County, *supra* note 26.

[29]R.C.M. 1947, § 84-4120.

[30]R.C.M. 1947, § 84-4122.

[31]85 C.J.S. *Taxation* § 801 (1954).

[32]*Ibid.*

[33]R.C.M. 1947, § 84-4123.

[34]Collins v. Sherwood, 50 W. Va. 133, 40 S.E. 603 (1901).

[35]Burns v. Lyon, 4 Watts 363 (Pa. 1835). The Burns case, and the Collins case, note 34, *supra*, pertained to statutes for adjournment of a sale when it was not "completed" on the first day, while the Montana statute pertains only to postponing "the day of commencing the sale," but these decisions do represent the two possible alternative constructions of our statute.

[36]City of Fall River v. Connecticut Mills, 294 Mass. 98, 1 N.E.2d 36 (1936).

[37]R.C.M. 1947, § 84-4122. As to time of sale, see 85 C.J.S. *Taxation* § 801 (1954).

Place

The sale must be held in front of the county treasurer's office.[38] Montana has not construed this section but it undoubtedly is a mandatory provision. Some jurisdictions have used such strict construction that under a statute requiring the sale to be held "before the court house door," a sale held inside the court house was void.[39] Other jurisdictions, however, have held that a failure to hold the sale in the precise place is merely an immaterial irregularity.[40] There is, however, a Montana case discussed in the following paragraph which, if literally followed, would require absolute compliance.

Manner of Conducting Sale

A recent Montana case lays down a rule which holds the treasurer to the strictest compliance with every provision of the statute at the risk of voiding the sale.[41]

> Proceedings on tax sales are in invitum. Every essential or material step of the statute must be followed. If the requirements of the statute are not strictly followed the sale may be avoided. In the county treasurer's proceeding to sell the land there is no distinction recognized between the mandatory and directory requirements of the statute. The county treasurer must act as the statute directs. Otherwise, he acts without authority and the purported sale which he assumes to make is invalid. This holds true though the requirement with which the county treasurer fails to comply was not one enacted for the protection of the owner of the land.

To abolish the distinction between mandatory and directory provisions in the statute seems to mean that no deviation, however slight, can be considered as a mere irregularity, but that every deviation will result in voiding the entire proceeding. How closely this will be adhered to is yet to be seen, but it is certainly a warning to the county officers that complete compliance with the statute will be the only way of insuring against void sales.

There being only a few express statutory provisions governing the manner of tax sales, the general rules applicable to judicial and execution sales seemingly govern.[42] The statute indirectly provides the sale shall be at a public auction[43] and rules for such a sale should be analogous.[44] The statute provides the treasurer shall commence at the head of the list and continue in an alphabetical or numerical order of lots and blocks until completed.[45]

If a portion of tax-delinquent property will satisfy the county lien, either the owner or the occupant has the right to request in writing

[38]R.C.M. 1947, § 84-4120.
[39]Sommers v. Ward, 41 W. Va. 76, 23 S.E. 520 (1895).
[40]Meyer v. Corn, 191 Okla. 537, 131 P.2d 62 (1942).
[41]Perry v. Maves, 125 Mont. 215, 217, 233 P.2d 820, 821 (1951).
[42]These are found in R.C.M. 1947, §§ 93-5826 to -5845.
[43]R.C.M. 1947, § 84-4117.
[44]R.C.M. 1947, §§ 66-201 to -219; 85 C.J.S. *Taxation* § 799 (1954).
[45]R.C.M. 1947, § 84-4122.

what portion of his property he wants sold. But if no request is made the land must be sold in its entirety.[46] Apparently every separately assessed piece of land must be sold separately and a sale of several lots *en masse* for a lump sum is void if the tracts are not contiguous, except when the county is the purchaser.[47] If the purchaser fails to pay the tax and costs before 10:00 p.m. of the day following the sale, his purchase is annulled and the property must be resold on the next sale day, before the regular sale.[48] A purchaser who refuses to make payment is disqualified from bidding on any other property advertised in the delinquency list of that year.[49]

The county cannot compete in the bidding.[50] If it does the sale will be void. Its right to buy at a tax sale is wholly governed by the statute and exists only when there is no other buyer in good faith the first day the property is offered for sale.[51] In such case the whole amount of the property assessed must be struck off to the county as the purchaser, and this may be done the same day that the property was offered for sale.[52] Separate non-contiguous tracts can be struck off *en masse* to the county.[53]

Where the county has become the buyer, the duplicate certificate must be delivered to the county treasurer for filing. Thereafter he must assign the interests of the county to any willing purchaser as provided in section 84-4138, upon payment of taxes and costs.

CERTIFICATE

After the treasurer has received the amount of the taxes and costs to be paid, the buyer is entitled to a certificate evidencing the assignment of the state's lien to him. The county treasurer must make two copies of the certificate, dated the day of the sale, enumerating therein six items: (1) the name of the person assessed (if known), (2) description of the land sold, (3) the amount paid therefore, (4) that it was sold for taxes, (5) giving the amount and year of assessment, (6) the time when the buyer will be entitled to a deed.[54] Before delivering the certificate the treasurer must enter in a book the facts of sale as required by section 84-4129. The certificate must be signed by him and one copy delivered to

[46]R.C.M. 1947, § 84-4124.
[47]Skillen v. Harris, 90 Mont. 389, 3 P.2d 1054 (1931); Lindeman v. Pinson, 54 Mont. 466, 171 Pac. 271 (1918); Horsky v. McKennan, 53 Mont. 50, 162 Pac. 376 (1916); Cullen v. Western Mortgage & Warranty Title Co., 47 Mont. 513, 134 Pac. 302 (1913); North Real Estate Loan & Title Co. v. Billings Loan & Trust Co., 36 Mont. 356, 93 Pac. 40 (1907); Casey v. Wright, 14 Mont. 315, 36 Pac. 191 (1894).
[48]R.C.M. 1947, § 84-4125.
[49]R.C.M. 1947, § 84-4126.
[50]Jensen Livestock Co. v. Custer County, 113 Mont. 285, 124 P.2d 1013 (1942).
[51]R.C.M. 1947, § 84-4124.
[52]Jensen Livestock Co. v. Custer County, 113 Mont. 285, 124 P.2d 1013 (1942). Prior to an amendment in 1929 the law was that after the first day if there was no bona fide purchaser the property should be offered again and then, if no purchaser, struck off. Therefore, a sale to the county could not be made on the first day. But the amendment eliminated the requirement of a subsequent offering and thereby eliminated the necessity of waiting till a subsequent day to strike it off. Failure to repeal the reference to "the first day the property was offered for sale" was an oversight since repeal of the other part leaves it without significance.
[53]Jensen Livestock Co. v. Custer County, *supra* note 52.
[54]R.C.M. 1947, § 84-4127.

the buyer and the other filed in the office of the county clerk.[55] *Upon filing by the clerk,* the lien of the state vests in the purchaser and can only be divested by redemption.[56] The certificate creates or vests no title[57] and does not entitle the buyer to possession of the land,[58] but gives only an inchoate right which, if pursued and protected, may ripen into title[59] and entitles the holder to a deed passing title after the expiration of the period of redemption.[60] When genuine and valid on its face it imparts to a subsequent buyer of the land constructive notice of the sale.[61]

Ordinarily, a buyer at a tax sale takes strictly under the doctrine of caveat emptor.[62] But by Montana statute a certificate owner or an assignee of the state is given a right to recover from the taxing authority, when the sale is adjudged void for irregularity, the amount of the money paid with interest at eight per cent per year from the date of payment.[63] In addition, he is given a lien on the land for any taxes, penalties, and interest he has paid on the land. If he is in possession he cannot be ejected until the full amount is paid to him.[64] However, if the tax for which the property was sold was void, the tax-sale buyer will not have a right to recover the subsequent taxes paid by him.[65]

The compensation statute is worded in broad terms; by not enumerating specific grounds it apparently authorizes reimbursement so long as the sale was declared invalid for any "irregularity in assessment, levy, or sale." What can be recovered for costs and improvements is not specified,[66] but recovery is provided for indirectly. Section 84-4158 provides that in any action to set aside a tax deed, quiet title, etc., the court may order any person claiming rights hostile to the tax title to deposit in court, to the use of the purchaser, the amount of certain taxes and "all sums reasonably paid thereafter by said purchaser or his successors after three years from the date of said tax sale in preserving said property or in making improvements thereon while in possession thereof." If the adverse claimant is successful in the action, the sum shall be paid to the purchaser or his successors.[67]

Section 84-4124 contains a curative provision validating any certificate theretofore issued to any county and now held by the county, regardless of irregularities in the manner of publishing the delinquent tax list, in holding the sale, in selling the property, in issuance of the certificate of sale, or in the form thereof, providing the taxes for which it was sold were authorized by law to be assessed against the property and were lawfully assessed and have not been paid. Retrospective curative statutes, however, apply only

[55]R.C.M. 1947, § 84-4128.
[56]R.C.M. 1947, § 84-4130.
[57]Bozievich v. Slechta, 109 Utah 373, 166 P.2d 239 (1946).
[58]Anderson v. Mace, 99 Mont. 421, 45 P.2d 771 (1935).
[59]State *ex rel.* City of Billings v. Osten, 91 Mont. 76, 5 P.2d 562 (1931).
[60]Tumlinson v. Tyler, 191 Okla. 518, 131 P.2d 98 (1942).
[61]Grant v. Cornell, 147 Cal. 565, 82 Pac. 193 (1905); 85 C.J.S. *Taxation* § 822 (1954).
[62]Larson v. Peppard, 38 Mont. 128, 99 Pac. 136 (1909); Birney v. Warren, 28 Mont. 64, 72 Pac. 293 (1903).
[63]R.C.M. 1947, § 84-4131.
[64]*Ibid.*
[65]Barke v. Early, 72 Iowa 273, 33 N.W. 677 (1887); 85 C.J.S. *Taxation* § 1012 (1954).
[66]See 85 C.J.S. *Taxation* §§ 1013-14 (1954).
[67]Schull v. Lewis and Clark County, 93 Mont. 408, 19 P.2d 901 (1933).

to matters or acts which the legislature could have made immaterial by previous statute, *i.e.*, matters which in their nature are merely irregularities and do not extend to matters of jurisdiction.[68] If this statute is taken at face value, and if there is substantial compliance with the statutes as to notice of sale, a certificate of sale is valid despite other irregularities.[69] However, it appears that the statute is applicable only to certificates issued before the 1923 law and then only if the county were the purchaser and still holds the certificate.[70]

REDEMPTION

The property sold can be redeemed by the owner or by any person having any interest in or lien upon the property[71] within thirty-six months from the date of purchase, or at any time prior to the giving of the notice and application for a deed[72] as required in sections 84-4151 and 84-4156. The date on which the period is to commence is subject to at least two interpretations. In *Brasch v. Mumey*,[73] where the statute read, "within one year after the sale," the court held the language was not indefinite or ambiguous but referred to the day on which the sale was made by the commissioner. But under a statute reading exactly like Montana's, *i.e.*, "from the date of purchase," it was held this meant the day the money was paid in full to the county by the buyer or in the case that the county is the purchaser, when it pays the full amount due the state.[74] Montana apparently has not construed this phrase but it is possible that the redemption period might be found to begin on the date the certificate is filed with the county clerk, that being the time that the lien of the state passes to the buyer and arguably the day the purchase is "complete."[75] The general statutory rule for computing the time will probably be applied; *i.e.*, exclude the first day and include the last unless the last is a holiday and then it is also excluded.[76] Thus a deed issued on the last day for redemption would be invalid. The redemption period continues and does not expire until notice and application for tax lien are duly made as provided in section 84-4151.[77]

The amount necessary to redeen is the amount paid at the tax sale by the buyer, one per cent additional for each month which elapses from the

[68]Martin v. Glacier County, 102 Mont. 213, 56 P.2d 742 (1936).
[69]Morse v. Kroger, 87 Mont. 54, 285 Pac. 185 (1930) (dictum).
[70]The 1923 amendment (Laws of Montana, 1923, c. 46, § 1) added the curative portion of R.C.M. 1947, § 84-4124. Subsequent amendments to and re-enactments of the statute have neither changed this portion of the statute nor indicated a legislative intent to enlarge its scope. This fact, coupled with R.C.M. 1947, § 43-510, results in R.C.M. 1947, § 84-4124 curing only certificates of sale issued to any county prior to the effective date of the 1923 amendment, which were at that time still held by the county. See Snidow v. Montana Home for the Aged, 88 Mont. 337, 292 Pac. 722 (1930).
[71]Jensen Livestock Co. v. Custer County, 113 Mont. 285, 124 P.2d 1013 (1942).
[72]R.C.M. 1947, § 84-4132.
[73]99 Ark. 324, 138 S.W. 458 (1911). *Accord*, In re Seick, 46 Cal. 363, 189 Pac. 314 (1920).
[74]Durham v. Crawford, 196 Ga. 381, 26 S.E.2d 778 (1943).
[75]See Tennessee Marble and Brick Co. v. Young, 179 Tenn. 116, 163 S.W.2d 71 (1942).
[76]R.C.M. 1947, § 90-407.
[77]Hartman v. Nimmack, 116 Mont. 392, 154 P.2d 279 (1944).

date of sale until redemption,[78] and any taxes which the buyer might have paid on the land subsequent to the tax sale with interest at eight per cent per annum from the date of such payment.[79] Taxes assessed for years prior to the sale need not be paid in order to redeem.[80] If the county is the buyer or holder of the certificate, section 84-4186 requires that the property be assessed the following year. If these taxes are not paid when due, the land will be again sold and this will continue so long as the taxes are not paid or the property redeemed from such sales. However, no such sale may be made unless the Board of County Commissioners so directs.[81] No deed can be issued to any buyer other than the county under such sales until the applicant pays all the taxes, penalties and interest accumulated at the time of the application. Purchasers of certificates of tax sales for the years subsequent to the oldest outstanding certificate have the same privilege of redemption of the oldest outstanding tax sale certificate as the original owner of the property. If the county is the buyer and the property is subsequently assessed according to section 84-4146, the redemption amount includes the subsequent assessment, costs, fees and interest.[82] The amount can be paid to the certificate owner or his assignee or the county treasurer for the use of the former, in which case the treasurer must credit the amount paid to the person named in the treasurer's certificate and pay this on demand to the person or his assignee.[83] Section 84-4135 provides that upon receiving the certificate of sale the county clerk must file and enter it. When the clerk is presented with a receipt from the person named in the certificate or from the county treasurer for the use of the former, for the total amount of the redemption money, he must mark redemption on the certificate and in the book where the entry of the certificate is made.[84] The redemption statutes are to be liberally construed in favor of any person entitled to redeem.[85] The right of redemption is considered to be a vested property right[86] and every opportunity will be given a delinquent owner to redeem. Likewise, every presumption will be raised to prevent a forfeiture.[87] Thus a person under a disability is generally held able to redeem regardless of his inability to contract[88] and a corporation which has not qualified to do business in Montana may redeem as mortgagee, redemption not being considered as "doing business."[89] But the right is wholly statutory so that a person must bring himself within the statute provisions.[90]

However, the redemptioner need not redeem the entire property.

[78]R.C.M. 1947, § 84-4130.
[79]R.C.M. 1947, § 84-4131.
[80]Tilden v. Chouteau County, 85 Mont. 398, 279 Pac. 231 (1929).
[81]R.C.M. 1947, § 84-4187.
[82]R.C.M. 1947, § 84-188.
[83]R.C.M. 1947, § 84-4133.
[84]R.C.M. 1947, § 84-4136.
[85]Stensvad v. Ottman, 123 Mont. 158, 208 P.2d 507 (1949); State *ex rel.* Bell v. McCullough, 85 Mont. 435, 279 Pac. 246 (1929).
[86]Lowery v. Garfield County, 122 Mont. 571, 208 P.2d 478 (1949).
[87]*Ibid.*; Mitchell v. Garfield County, 123 Mont. 115, 208 P.2d 497 (1949); Ross v. First Trust & Savings Bank, 123 Mont. 81, 208 P.2d 490 (1949).
[88]See annotations in 65 A.L.R. 582 and see Stensvad v. Ottman, 123 Mont. 158, 208 P.2d 507 (1949).
[89]Stensvad v. Ottman, 123 Mont. 158, 208 P.2d 507 (1949).
[90]State *ex rel.* Bell v. McCullough, 85 Mont. 435, 279 Pac. 246, 66 A.L.R. 1033 (1929).

Piecemeal redemption of any portion of the land is expressly provided for,[91] upon payment of a proportionate amount of taxes for which it was sold, plus payment of subsequent taxes thereon and the appropriate portion of any other tax which is a lien thereon.[92] Other states allow apportionment and piecemeal redemption only where the property is owned in severalty and not in conjunction with any other party.[93]

In addition to the right of redemption, the delinquent taxpayer is given a preferred right of purchasing from the county after issuance of the deed.[94]

The treasurer is required by law to assign all the interests of the county in any land bid in by the county to any person who will make payment of the required amount;[95] and the assignee is to be in the same position for acquiring a deed thereto as any buyer of land at a tax sale.[96]

ACQUIRING THE DEED

Any time after the expiration of the thirty-six month redemption period the certificate owner is entitled to a tax deed. There are two methods of applying for and obtaining such a deed in this state and the holder of the certificate has the option as to which method he will employ.[97] The more formal method is by an action in the district court to obtain the deed; in such an action the state is a necessary party defendant.[98] It is commenced and prosecuted as the ordinary civil action, with judgment ordering the issuance of the tax deed to the plaintiff. The alternative is an informal statutory method[99] in which the buyer applies to the county treasurer for the deed after giving notice to the owner and others specified in section 84-4151. This proceeding is wholly *ex parte,* except for the notice required to give opportunity for redemption; the courts have no part therein. It is in effect an action in rem, to which all parties interested in the property are parties defendant.[100] The title conveyed and the rights of the grantee by either method are exactly the same.[101] Discussion here is limited to the statutory method, as it is the more common and gives rise to more litigation than any other step in the entire tax deed proceeding.

Notice

Montana, according to a federal case, has adopted the general rule that the law enforced at the time of the tax sale and issuance of the certificate governs the notice of application to be given.[102] The statutory

[91]R.C.M. 1947, § 84-4155; Mitchell v. Garfield County, 123 Mont. 115, 208 P.2d 497 (1949).
[92]State *ex rel.* Federal Land Bank v. Hays, 86 Mont. 58, 282 Pac. 32 (1929).
[93]State *ex rel.* Onderton v. Sommers, 242 Wis. 484, 8 N.W.2d 863, 145 A.L.R. 1324 (1943); 85 C.J.S. *Taxation* § 878 (1954).
[94]R.C.M. 1947, § 84-4190.
[95]R.C.M. 1947, § 84-4138.
[96]R.C.M. 1947, § 84-4139; 85 C.J.S. *Taxation* § 838 (1954).
[97]Sanborn v. Lewis and Clark County, 113 Mont. 1, 120 P.2d 567 (1942).
[98]R.C.M. 1947, §§ 84-4162 to -4169; State *ex rel.* Freebourn v. Yellowstone County, 108 Mont. 21, 88 P.2d 6 (1939).
[99]R.C.M. 1947, §§ 84-4151 to -4153, -4156, -4157.
[100]State *ex rel.* Freebourn v. Yellowstone County, *supra* note 98.
[101]Richardson v. Lloyd, 90 Mont. 127, 300 Pac. 254 (1931).
[102]Fariss v. Anaconda Copper Mining Co., 31 F. Supp. 571 (D. Mont. 1940).

requirements of this method apply with equal force whether the buyer be the county or a private party.[103] Under the statutory method the first and most important step is the giving of written notice by the certificate holder indicating his intention to apply for a deed in compliance with section 84-4151.[104] The purpose of the notice is to warn the landowner and others interested of the impending issuance of the tax deed and termination of the right of redemption.[105]

The giving of notice is jurisdictional and unless compliance with the law is accomplished and verified by an affidavit filed with the county treasurer, the tax deed should not issue. The law imparts the dignity of process to the notice. To deprive the title holder of his property without this notice is to deprive him of his property without due process of law.[106] Consequently, the issuance of a deed void for want of notice of application for deed does not start the running of the statute of limitations.[107] The notice must be given by the certificate owner at least sixty days before either expiration of the redemption period or the date of his application for a deed. If either the redemption or notice time limit is violated the notice will be void and no valid deed can issue.[108]

If notice is not properly served on one party entitled thereto, the ensuing deed is not only void as to him but absolutely void as to the whole world and any interested party may take advantage thereof, even though he himself had proper notice.[109]

Notice must be given to three classes of persons: (1) the owner, (2) any occupant, and (3) any holder of an unreleased mortgage of record or his assignee. There are three references in the statute as to the manner in which notice is to be given. The first sentence states that the purchaser must "serve" the notice; this at face value would seem to mean personal service. But it is immediately qualified by the second provision that "notice of any owner, mortgagee, or assignee of any mortgagee shall be given by registered letter addressed to such mortgagee or assignee at the post office address of said owner, mortgagee, or assignee as disclosed by the mortgage records in the office of the county clerk and recorder." The third statutory provision is that if the land is unoccupied or is a mining claim, the notice must be by registered mail, deposited in the post office, addressed to any known record owner residing in or outside the county.[110] In all cases where the address of either the owner, mortgagee, or assignee is unknown, notice must be published once a week for two consecutive weeks in a newspaper published in the county where the property is situated; the first publication being at least sixty days before the date of the end of the three-year redemption period or of application for the deed. There is no provision made for the possibility that there is no news-

[103]Small v. Hull, 96 Mont. 525, 32 P.2d 4 (1934); Hinz v. Musselshell County, 82 Mont. 502, 267 Pac. 1113 (1928).
[104]Sanborn v. Lewis and Clark County, 113 Mont. 1, 120 P.2d 567 (1942).
[105]*Ibid.*
[106]Small v. Hull, 96 Mont. 525, 32 P.2d 4 (1934).
[107]Lowery v. Garfield County, 122 Mont. 571, 208 P.2d 478 (1949).
[108]Fariss v. Anaconda Copper Mining Co., 31 F. Supp. 571 (D. Mont. 1940).
[109]Jensen Livestock Co. v. Custer County, 113 Mont. 285, 124 P.2d 1013, 140 A.L.R. 658 (1942); *but see* Milne v. Leiphart, 119 Mont. 263, 174 P.2d 805 (1946).
[110]Sutter v. Scudder, 110 Mont. 390, 103 P.2d 303 (1940).

paper published in such county. The requirement of publication depends not on whether the name is known, but upon whether the post office address is known. If the registered letter is returned to the sender, the notice must be published in the statutory form.

Notice is to be given to the occupant by personal service in all cases. Occupancy, and consequently the right of the occupant to notice, is determined not by the right to occupancy but by whether the use which he makes of the property constitutes actual occupancy so that an observer of the scene would be reasonably apprised of the fact that it was occupied.[111]

The written notice is to state (1) that the property or a portion thereof has been sold for delinquent taxes, (2) the date of the sale and the amount of property sold and the amount for which it was sold, (3) the amount due, and (4) the time when the right of redemption will expire or when the purchaser will apply for a deed. Deviation in substance will be strictly scrutinized, and cause the notice to be absolutely void.[112]

"... '[S]uch notice' does not mean 'some notice' or 'any notice' and neither the county treasurer nor the judiciary may substitute their own ideas as to what should be considered the equivalent of or substitute for the notice required by the legislature.'"[113] The fact that a party had actual knowledge is immaterial; it is the notice required by the statute which is controlling.[114]

In ordinary cases our statute does not require that the property owner be named in either the written or published notice.

> The proceedings to enforce the tax lien are *in rem* and 'if the owners are named in the proceeding and personal notice is provided for, it is rather for tenderness to their interests, and in order to make sure the opportunity for a hearing is not lost to them, than from any necessity that the case shall assume that form.' §1405, Cooley, *Taxation*, 4th ed.[115]

But where an undivided interest in a mining claim is involved, the name of the owner must appear; otherwise the description of the property will be so uncertain and ambiguous as to be incapable of identification.[116]

An inaccurate or uncertain description defeats every step subsequently taken and uncertainty cannot be cured by evidence aliunde.[117] But by our statute the description is not defective merely because it includes property of more than one owner.[118]

The notice must state exactly the amount due so the owner will be apprised of the amount he will have to pay to redeem. Otherwise notice is invalid.[119]

[111]Shumaker v. Tracy, 126 Mont. 477, 253 P.2d 1053 (1953); Van Voast v. Blaine County, 118 Mont. 395, 167 P.2d 572, 169 A.L.R. 681 (1946); Van Voast v. Blaine County, 118 Mont. 374, 167 P.2d 563 (1946).
[112]Hinz v. Musselshell County, 82 Mont. 502, 267 Pac. 1113 (1928).
[113]Perry v. Maves, 125 Mont. 215, 218, 233 P.2d 820, 821 (1951); Jensen Livestock Co. v. Custer County, 113 Mont. 285, 296, 124 P.2d 1013, 1019 (1942).
[114]Kerr v. Small, 112 Mont. 490, 117 P.2d 271 (1941).
[115]Sutter v. Scudder, 110 Mont. 390, 396, 103 P.2d 303, 306 (1940).
[116]Miller v. Murphy, 119 Mont. 393, 175 P.2d 182 (1946).
[117]*Ibid.*
[118]Sutter v. Scudder, 110 Mont. 390, 103 P.2d 303 (1940).
[119]Hinz v. Musselshell County, 82 Mont. 502, 267 Pac. 1113 (1928).

In all cases proof of service of notice, in whatever manner given, supported by the affidavit required by section 84-4156, must be filed immediately with the county clerk and recorder. Thereafter such proof of notice is prima facie evidence of the sufficiency of the notice. No valid deed can issue until this proof is filed.

An example of sufficient proof where the county is the buyer has been an affidavit filed by the county clerk in the treasurer's office showing he deposited in the United States Post Office at a certain time a registered envelope containing a copy of the notice, postage prepaid, addressed to the owner (stating the name and address).[120] Though the case makes no mention of the registered return slip, it would seem to be a necessary part of the proof. But an unsworn statement of the county clerk is no proof at all, and the proof must show when the notice was mailed.[121]

Affidavit of Service of Notice

Along with the proof of service of notice the applicant is required to file an affidavit detailing the facts of such service.[122] The filing of an affidavit which meets the statutory requirements is jurisdictional. Without such an affidavit the treasurer is wholly lacking in power and authority to issue the deed.[123] This particular element of the tax deed procedure constitutes one of the most dangerous traps in the entire tax deed proceeding; many an otherwise perfectly good tax deed has been held invalid because of a technical defect in the affidavit. The affidavit, in particular, is the basis on which the treasurer is to act and the conditions upon which his power to issue the deed arises must appear therein.[124] References in the affidavit to records in other public offices will not suffice because the treasurer is limited in his determination of what has transpired to an inspection of the documents before him.[125] It is not enough that proper and valid notice was in fact given, or that he had knowledge of it but did not correctly state it in the affidavit. In Montana it is a firm rule that in determining the sufficiency of tax title proceedings, the records alone can be considered and defects or omissions may not be corrected or supplied in any manner dehors the record.[126] On the other hand, however, even though the record affirmatively shows that all necessary steps were taken, evidence outside the record is admissible to show that a requirement was not complied with in fact and thereby establish the voidability or voidness of a deed.[127]

The affidavit must be explicit. The county treasurer has no authority to indulge in any presumptions with regard thereto. Nothing can be read into it that does not plainly appear therein. The provisions of the statute are mandatory and absolute. Any failure to comply with the statutory re-

[120]Milne v. Liephart, 119 Mont. 263, 174 P.2d 805, 140 A.L.R. 666 (1946).
[121]Sanborn v. Lewis and Clark County, 113 Mont. 1, 120 P.2d 567 (1942).
[122]R.C.M. 1947, §§ 84-4151, -4156.
[123]Lowery v. Garfield County, 122 Mont. 571, 208 P.2d 478 (1949).
[124]Harrington v. McLean, 70 Mont. 51, 223 Pac. 912 (1924).
[125]Bentley v. Rosebud County, 230 F.2d 1 (9th Cir. 1956).
[126]Lowery v. Garfield County, 122 Mont. 571, 208 P.2d 478 (1949).
[127]Kerr v. Small, 112 Mont. 490, 117 P.2d 271 (1941).

quirements relating to the affidavit will void the deed subsequently issued.[128]

Although the wording of this provision has been somewhat moderated since 1935,[129] the interpretation will probably continue to be the same.[130]

The affidavit must state the essential facts as distinguished from mere conclusions showing that the notice required has been given, or statements that such notice has been given in the manner required by law.[131] Therefore it is mandatory that the affidavit show affirmatively whether or not the property is occupied or unoccupied.[132] If the affidavit is silent as to occupancy the treasurer cannot properly determine from it whether he is authorized to issue the deed.[133] If the property is occupied, the affidavit must show that the person on whom notice was served was at the time occupying it.[134] Otherwise the deed issued thereunder is void.[135]

The affidavit is defective if it is worded with uncertainty and alternatives, (*e.g.*, "owner or owners, and mortgagees if any") and fails to state clearly and specifically the acts that were done and the persons to whom notice was given and how and when served.[136]

The affidavit must show the date of service, to inform the treasurer whether the notice was given at least sixty days before he issues the deed.[137]

There are two curative statutes relating to the notice requirements. Section 84-4153 validates any deed issued to any county, city or town before the 1927 enactment of the provision, despite defects in the notice, provided that such notice was actually given or posted and caused to be published and proof thereof made by someone acting in behalf of the county, city or town. Section 84-4160 (1) validates any deed issued before the 1933 enactment of the provision, despite any defects in the form,

[128]Lowery v. Garfield County, 122 Mont. 571, 208 P.2d 478 (1949).
[129]R.C.M. 1935, § 2212, now R.C.M. 1947, § 84-4156.
[130]The 1935 section required the affidavit to show "that the notice hereinbefore required to be given, has been given *as herein required.*" This phrase, and particularly the italicized words, gave rise to an extremely critical policy in passing upon the validity of the affidavit. The 1947 amendment does not incorporate this part of the old statute. See Perry v. Maves, 125 Mont. 215, 233 P.2d 820 (1951).
[131]Perry v. Maves, 125 Mont. 215, 233 P.2d 820 (1951).
[132]Davis v. Steingruber, 131 Mont. 468, 311 P.2d 784 (1957); Mitchell v. Garfield County, 123 Mont. 115, 208 P.2d 497 (1949); Ross v. First Trust & Savings Bank, 123 Mont. 81, 208 P.2d 490 (1949); Lowery v. Garfield County, 122 Mont. 571, 208 P.2d 478 (1949).
[133]Jensen Livestock Co. v. Custer County, 113 Mont. 285, 124 P.2d 1013, 140 A.L.R. 658 (1942).
[134]Cullen v. Western Mortgage & Warranty & Title Co., 47 Mont. 513, 134 Pac. 302 (1913).
[135]Harrington v. McLean, 70 Mont. 51, 223 Pac. 912 (1924). In Lowery v. Garfield County, 122 Mont. 571, 208 P.2d 478 (1949) the property was sold for delinquent taxes for 1926, the deed issued to the county in 1939, the county conveyed to the defendant in 1941, the plaintiff, owner, brought an action in 1946, twenty years after the tax assessment and seven years after the deed was issued. At the time of service of the notice and for fifteen years prior thereto, the land was unoccupied. The plaintiff, owner, was the only person entitled to notice and the statutory requirements as to notice were fully complied with. But the affidavit was silent as to the fact of occupancy. *Held*, the affidavit was invalid and consequently the subsequent deed was invalid and the plaintiff can redeem the property. Angstman's dissent, urges that the fact of occupancy was not required by the statute and that the majority substitutes shadow for form.
[136]Miller v. Murphy, 119 Mont. 393, 175 P.2d 182 (1946).
[137]Bentley v. Rosebud County, 230 F.2d 1 (9th Cir. 1956).

substance, or amounts stated to be due in the notice, and, as of 1939, for any failure to give the full sixty days notice required by section 84-4151, provided at least thiry days notice was given.

Though there are relatively few cases elaborating on the specific defects cured by these and similar statutes, several observations have been made as to the effect of curative statutes in general. "The general rule in the application of validating statutes is that a curative statute may cure any requirement or step which the legislature might have made immaterial by a prior law,"[138] but the legislature is "powerless to enact valid legislation exempting tax deeds from attack for failure to comply with requirements of a jurisdictional nature. . . . Enforcement of such legislation would result in the unconstitutional taking of one's property without due process of law.[139] Likewise, "a curative statute cannot breathe life and validity into void tax deed proceedings or void tax deeds."[140]

Hence the real questions are, what requirements are of a "jurisdictional" nature, and what defects cause a deed to be void rather than voidable. This is as yet not a settled matter, although there are a few cases relating to the subject. It is certain that no curative statute can correct a complete failure to give any notice at all.[141] The description of property is also jurisdictional and the deed is void and incurable if the description is uncertain and ambiguous.[142] But an error in stating the correct amount due is not jurisdictional.[143]

What other defects in notice will be cured is uncertain. One case would severely limit the operation of section 84-4160, declaring that the act, Laws of Montana, 1937, c.132, "relates only to mistakes in stating in the notice the amount due and required to be paid in order to redeem."[144] The court held that there were other "defects and omissions in the service of the notice as to show a complete failure to follow the requirements of the law in that respect, which render the tax deed application proceedings clearly insufficient without regard to the statement in the notice of the amount required to redeem." There was no mention in the case of the possibility of the "substance" of the notice being cured. It seems this language may overrule *Stoican v. Washburn*.[145] The *Stoican* decision recognized the other part of the curative statute. It held that if there were any other defects in the notice (other than the amount necessary to redeem) they were of such nature as to be within the validating statute.

Section 84-4159, a statute setting a two-year statute of limitations on actions to set aside tax deeds, was held to be unconstitutional as a special law in *Lowery v. Garfield County*.[146]

[138]Miller v. Murphy, 119 Mont. 393, 410, 175 P.2d 182, 191 (1946). *Accord*, Martin v. Glacier County, 102 Mont. 213, 219, 56 P.2d 742, 744 (1936).
[139]Lowery v. Garfield County, 122 Mont. 571, 583, 208 P.2d 478, 484 (1949). *Accord*, Kerr v. Small, 112 Mont. 490, 117 P.2d 271 (1941); Small v. Hull, 96 Mont. 525, 32 P.2d 4 (1934).
[140]Miller v. Murphy, 119 Mont. 393, 409, 175 P.2d 182, 191 (1946).
[141]Small v. Hull, 96 Mont. 525, 32 P.2d 4 (1934).
[142]Miller v. Murphy, 119 Mont. 393, 175 P.2d 182 (1946).
[143]Howard v. Newlon, 112 Mont. 189, 114 P.2d 272 (1941); Martin v. Glacier County, 102 Mont. 213, 56 P.2d 742 (1936).
[144]Sanborn v. Lewis and Clark County, 113 Mont. 1, 19, 120 P.2d 567, 575 (1942).
[145]112 Mont. 603, 120 P.2d 426 (1941).
[146]122 Mont. 571, 208 P.2d 478 (1949).

Deed

The issuance of the deed is the final step in the proceeding. The treasurer is compelled by statute[147] to issue a tax deed when the property is not redeemed within the thirty-six month period, if all the essential requirements of the statutes have been met so that he has the necessary authority. He either does or does not have such authority, and thus the deed cannot be good as to some parties and void as to others. It will either be good or bad as to the whole world.[148] Where a county, city or town is the purchaser and certificate holder when the time of redemption expires (presumably the thirty-sixth month), there is at least three years thereafter in which it is left to the discretion of the board of county commissioners or city or town council or commission as to when it will require the proper official to apply for the deed[149] and no one can complain that application was not promptly made.[150] However, on the expiration of the three year discretionary period, it apparently becomes the mandatory duty of the official body to order the proper official to apply for the tax deed. In all cases, such application must be made in accordance with section 84-4151.

If the deed is drafted in the form set out in section 84-4157, it will when duly acknowledged and approved be prima facie evidence that:

1. The property was assessed as required by law.
2. The property was equalized as required by law.
3. The taxes were levied in accordance with law.
4. The taxes were not paid.
5. Notice of tax sale was given and published, and property sold at the proper time and place as provided by law.
6. The property was not redeemed, and the proper notice of application for deed was served or posted as required by law.
7. The person who executed the deed was the proper officer.
8. Where the real estate was sold to pay taxes on personal property, that the real estate belonged to the person liable to pay the tax.

It must be kept in mind that the deed will be construed most strongly against him who claims under it and if one of two constructions will support the claim of the citizen, the deed must be held invalid.[151] But if all the proceedings are regular and the grantee is entitled to legal title, the treasurer must correct a defective deed and execute another deed which is proper.[152] Deeds have been held void for an uncertain and ambigious description of the property.[153] The substance of a certificate and deed will vary when the county, and not a cash purchaser, is taking it. Language in an early case went somewhat beyond the issue to state that where the county is the buyer at the sale

[147]R.C.M. 1947, § 84-4137.
[148]Jensen Livestock Co. v. Custer County, 113 Mont. 285, 124 P.2d 1013 (1942).
[149]R.C.M. 1947, § 84-4152.
[150]Hartman v. Nimmack, 116 Mont. 392, 154 P.2d 279 (1944).
[151]Rush v. Lewis and Clark County, 36 Mont. 566, 93 Pac. 943 (1908).
[152]Gallash v. Willis, 90 Mont. 148, 300 Pac. 569 (1931).
[153]Miller v. Murphy, 119 Mont. 393, 175 P.2d 182 (1946).

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> The recitals in the deed must show the right of the county to take the property, and that it did not enter the list as a competitive bidder for the same. Unless the recitals of the deed show these things, or if the deed recites, as does the deed in question, matters showing the county was a competitive bidder at the sale, the deed on its face is void.[154]

Likewise

> where a county becomes the purchaser of property at a tax sale . . . the certificate of sale, as well as the deed, should show that there was no purchaser in good faith for the property on the first day that the property was offered for sale . . . and that the whole amount of the property assessed was struck off to the county as a purchaser, and should otherwise truthfully state the facts.[155]

SHORT FORM FOR QUIETING TITLE

There is no longer any provision in our statutes making the deed conclusive evidence of the facts recited therein as appeared in the 1935 Code. There is, however, a very liberal short method of quieting title found in part 2 of section 84-4761 which purports to allow a quick and complete method of perfecting title. The provision validates any deed issued more than three years and thirty days after sale "irrespective of any irregularities, defects, or omissions, or total failure to observe any of the provisions of the statutes recording the assessment, levying of taxes, and sale. . . [other than that the taxes were not delinquent or have been paid]." To benefit by this provision the deed holder need only publish a notice one a week for two weeks stating the facts set out by the statute and stating the name of the person in whose name the property was assessed or taxed and asserting a demand that such person pay within thirty days the amount of taxes, interest, and penalties or bring a suit to quiet title or set aside the deed. If within the thirty days the demand is not complied with, the deed is to be valid despite defects. However, research has not disclosed any case to date which has applied or construed this provision.

The date that the title passes has been held to be the date of application for the deed.[156] Section 84-4161, which clearly states that the time was the date of expiration of three years following the date of sale, was amended by Laws of Montana 1937, c.63 (now section 84-4170) which provides with less clarity that title is conveyed, "as of the date of expiration of the period for redemption." The "date" was construed in *Hartman v. Nimmack*[157] to be the date of application and not the end of the three-year term, the reason for the holding being that a party can redeem any time until the application is made.

[154]Rush v. Lewis and Clark County, 36 Mont. 566, 569, 93 Pac. 943, 944 (1908).
[155]Rush v. Lewis and Clark County, 37 Mont. 240, 243, 95 Pac. 836, 837 (1908).
[156]Hartman v. Nimmack, 116 Mont. 392, 154 P.2d 279 (1944).
[157]*Ibid.*

PREFERENTIAL RIGHT TO PURCHASE

When the county becomes the owner of land by tax deed the statute requires that the board of county commissioners, within six months after acquiring title, order a sale of the land at public auction at the front door of the court house, after giving the required notice set out in the statute.[158] No sale can be made for a price less than the fair market value as fixed by the board before making the order. The original owner or his successor in interest is given a preferential right to purchase, subject to the conditions of the statute, if he acts before the time fixed for the first offering of the property for sale, by payment of the full amount of the taxes, penalties, and interest due at the time the deed was taken. The statutory permission to buy necessarily imposes upon the board a mandatory obligation to sell.[159] But the right is purely statutory and its terms must be strictly complied with. Consequently, if the original owner fails to exercise the right before the time fixed for the first offering, it is forever lost.[160]

CONCLUSION

From the earliest days tax titles have given rise to one of the largest single items of litigation in this state. Time and space do not permit an examination of the state of the law elsewhere or how the situation has been dealt with by others, but the problem is by no means peculiar to this jurisdiction. In 1888 Henry Campbell Black wrote in his treatise on tax titles:[161]

> The amount of litigation in regard to tax titles has of late years largely increased; and at the present this has become one of the most considerable -- as it has always been one of the most intricate -- branches of real property. . . . There was a period in the history of our jurisprudence when it had become proverbial that a tax title was no title at all; . . . and when the strictness of the laws and the severity of the courts combined to make the risking of one's money upon a tax title an experiment so hazardous that it would have been regarded as foolhardy, save for the smallness of the stakes. . . .
>
> But this aspect of affairs has changed. The various states applied themselves to the task of rescuing their tax titles from the reproach into which they had fallen, of imparting greater security to the holders of such titles, and at the same time, of giving increased facility and certainty to the working of their revenue systems. To this end retrospective and prospective curative statutes were adopted, the rule of exact compliance with the statutory formulas was considerably relaxed, short statutes of limitations were enacted, and tax deeds were made presumptive evidence of title. . . .

[158]R.C.M. 1947, § 84-4190.

[159]Blackford v. Judith Basin County, 109 Mont. 578, 98 P.2d 872, 126 A.L.R. 639 (1940).

[160]Beckman Bros. Inc. v. Weir, 120 Mont. 305, 184 P.2d 347 (1947).

[161]BLACK, THE LAW OF TAX TITLES iii-iv (1888); see also 1 BLACKWELL, POWER TO SELL LAND 3-4 (5th ed. 1889).

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But the state of affairs did not change in Montana, as the decisions cited have illustrated. It is interesting to note that the legislature did try each of the reforms enumerated by Mr. Black, but each in its turn was either struck down by the court or deprived of its intended scope and effect. It is clearly a rare exception that a tax title is upheld once it reaches the courtroom, and until the attitude of the judiciary changes, further statutory revision would seem vain. It has long been established that where land is subject to taxation, the land can be sold to collect the taxes,[162] and it follows that it is essential to the taxing power of the government and the interests of purchasers and their privies that there be substance, not mere form, to the proceeding. A just balance must be reached between the need to protect the rights of land owners and the equal social need to protect rights acquired through the tax sale. The Montana Supreme Court has recently evidenced a new awareness of the problem in finding adverse possession under the theory that a void tax deed is color of title.[163] But adverse possession is not an adequate solution; the remedy still lies in a more liberal construction of the entire tax proceeding.

LAWRENCE S. SWENSON

THE NEW MULTIPLE USE MINING LAW

Within the next few years many Montana attorneys, if their advice has not already been sought, will be called upon to counsel their clients about the ramification of the 1955 Multiple Use Mining Law.[1]

This law is not designed to divest the miner of his sub-surface rights, nor of the surface rights necessary to his mining operations, but it is designed to encourage simultaneous development of the other surface resources of the same tract of land.

The law applies to public land administered by the Department of Agriculture and the Bureau of Land Management in the Department of the Interior; it does not apply to land in any national park or monument, or to any Indian lands.[2] The new law has no application whatsoever to any patented mining claim.[3] It is intended to affect but two classes of mining claims: (1) unpatented mining claims located *after* its enactment [July 23, 1955], and (2) unpatented mining claims located prior to its enactment which are based on *invalid* discoveries. However, as will

[162] BLACK, THE LAW OF TAX TITLES 60-61 (1888).

[163] Schumacher v. Cole, 131 Mont. 166, 309 P.2d 311 (1957); Long v. Pawlowski, 131 Mont. 91, 307 P.2d 1079 (1957); Hentzy v. Mandan, 129 Mont. 324, 286 P.2d 325 (1955). These cases in general uphold the proposition that seasonal adverse possession, as for instance, sheep grazing in the summer, is sufficient if that use is one for which the land is suited. A county may adversely possess. Griswold v. Lagge, 132 Mont. 23, 313 P.2d 1013 (1957). Actual possession of a part of a tract with color of title to the whole extends the possession to the limits fixed by the color of title. Fitschen Bros. Co. v. Mayes Estate, 76 Mont. 175, 246 Pac. 773 (1924). See also Shepherd v. Cox, 191 Miss. 715, 4 S.2d 217 (1941).

[1] 69 Stat. 367-372 (1955), 30 U.S.C. §§ 601, 603, 611-15 (Supp. IV, 1957). Hereinafter, all citations to the foregoing sections of 30 U.S.C. are to Supplement IV, 1957.

[2] 30 U.S.C. § 601.

[3] 30 U.S.C. § 612 (b).