Opinion No. 17-2045

August 14, 1917

BY: HARRY L. PATTON, Attorney General

TO: Hon. Robert C. Dow, District Attorney, Carlsbad, New Mexico.

Construction of Chapter 80, Laws of 1917, With Reference to the Time of Publication of Notice for Application for Judgment Against Property on Which Taxes Are Delinquent.

OPINION

I have your letter of the 6th instant in which you say that some of the treasurers in your district have not published a notice that application would be made to the District Court for judgment against property upon which taxes were delinquent, under the provisions of Chapter 80, Laws of 1917. You ask for an opinion as to whether this publication may be begun after the forty-five days, after the first day of June, have elapsed.

Section 1 of the act, in substance, provides that:

"within forty-five days after the first day of June in each year,"

the treasurer shall prepare and cause to be published once each week for four successive weeks, notice that, upon a date therein specified, he will apply to the District Court for judgment against the lands, real estate and personal property upon which taxes are delinquent and unpaid, and for an order to sell same to satisfy such judgment.

On June 14th I addressed a letter to Honcrable A. G. Whittier, State Traveling Auditor, in which I expressed the view that the four weeks publication required by the act should be completed within forty-five days. I later received a letter from Mr. Whittier in which he stated that, in many of the counties, it would be impossible to complete the publication within the prescribed time. In view of existing conditions, and to the end that the act might become operative, I modified my former opinion, by letter of July 6th addressed to Mr. Whittier, in which I advised that it would be sufficient if the publication should be begun within the forty-five days. In this letter, referring to my letter of June 14th, I stated:

"I still think that this was a safe construction to place upon this feature of the act. I am advised, however, that very few, if any, of the treasurers were able to prepare and complete the publication within the forty-five days. I want to assume an attitude of upholding the act and the proceedings had thereunder, and for that reason reversed the opinion expressed in my letter of June 14th."

I still think that the view first expressed by me was the safest course to follow, but, again in the desire to uphold the act and to make the same effective, I suggest that

proceedings may yet be instituted under the provisions of the act, although the full period of forty-five days has elapsed.

This construction of the act may be upheld under the doctrine announced in Kipp v. Dawson, (Minn.) 17 N. W. 961. The statutes of the State referred to required the County Auditor to file in the office of the Clerk, on or before June 15th, a list of delinquent taxes, and that the Clerk, within fifteen days thereafter, should make and deliver to the County Auditor, a copy of the list so filed with the prescribed notice attached. The law also required the County Auditor to cause this list and notice to be published once in each of two consecutive weeks in the proper newspaper, "the first publication of which list shall be made within fifteen days after," the delivery thereof. If all of these officers had complied with the directions of law, the first publication of this list would be made on or before July 15th. The court in its opinion said:

"In the present case this list and notice was first published July 22nd, seven days after the time directed by statute. The question, therefore, resolves itself into this: Is this provision of statute **Mandatory** or merely **directory?** If the former, the omission to comply with it renders the judgment void; if the latter, this omission does not necessarily affect its validity. As remarked in Cooley, Tax'n. 212 **Seq.,** all provisions of statutes not on their face merely permissory or dicretionary, are intended to be obeyed, or else they would never have been enacted, and therefore they came to the several officers who are to act under them as commands. But the negligence or mistakes of public officers, and other causes, will often prevent a strict compliance; and when the provisions which have been disregarded constitute, as in this case, a part of a complicated system, it becomes of the highest importance to ascertain the effect the failure shall have on the other proceedings with which they are associated. Does the authority to proceed with the proceedings terminate when that particular step has been neglected, or may the proceedings go on notwithstanding the omission? In other words, should the provision of law not complied with be declared mandatory or merely directory? The purpose of the provision ought generally to be conclusive on this point. No one should be at liberty to plant himself upon the nonfeasance or misfeasance of officers under these tax laws which in no way concerns or prejudices him. On the other hand, he ought always to have the right to insist that directions which the law has given for his benefit shall be strictly observed. The rule generally adopted (and we think the correct one) is that a statutory provision intended merely for the guidance of the conduct of officers in the conduct of public business, so as to insure the orderly and prompt performance of public duties, and a disregard of which cannot injuriously affect the rights of parties interested, will be deemed merely directory. Such, generally, are regulations as to the time within which a public officers shall perform an act, when the regulation is designed merely to insure system and dispatch in the proceedings. But where the regulation is intended for the protection of the citizen and to prevent a sacrifice of his property, and by a disregard of which his rights might be injuriously affected, it is mandatory.

"Subjected to this test, we think that the provisions as to the date of the first publication of the delinquent list are merely directory. They are in no way intended for the benefit of the taxpayer, but merely to insure the publication in time to allow the remaining

proceedings to be had according to law. The sale has to take place on the third Monday in September. Preceding this the list and notice of publication for judgment must be published for two weeks. A hearing on this application must be had and judgment rendered, and then, after judgment, notice of sale must be given for a specified length of time. The regulations of sections 70 and 71 and 72, as to time, are designed to insure the doing of the acts therein required in time to prevent the taking of these subsequent proceedings before sale. And if done in season to secure this the taxpayer is in no way prejudiced by the failure to perform them at the precise date fixed by the law. The provisions, so far as time is concerned, which are designed for his benefit, and to prevent any unjust sacrifice of his property, are -- **First,** the two weeks' publication of the list and notice of application for judgment so that he may have an opportunity to answer or object to the entry of judgment if he desires; and, **second,** the giving of the proper notice of sale at the time fixed by law so as to secure a fair sale. These, therefore, are mandatory. What the taxpayer is interested in is not the exact date of the publication of the list, but that he may have the kind and length of notice provided by law -- **First,** before judgment, and then, **Second,** before sale."

In my opinion, another reason for upholding a publication begun after the forty-five day period, is found in Section 1, Chapter 78, Laws of 1915, which amends Section 38, Chapter 84, Laws of 1913, and which reads as follows:

"Any final judgment for the sale of real estate for delinquent taxes, rendered according to law, shall estop all parties from raising any objection thereto which existed at or before the rendition of such judgment and could have been presented as a defense in such action in the court wherein the same was rendered, and as to all such questions the judgment shall be conclusive evidence of its regularity and validity in all subsequent proceedings, whether collateral or direct, and no bill of review or other action attacking the said judgment shall be entertained by any court except in cases where the taxes had been paid or the real estate was not liable for tax or assessment."

I have not overlooked the fact that at that time our statutes did not contain any provision for the rendition of final judgments in tax suits. For that reason, I am at a loss to know why such provision was embodied in our statutes. Since the same has apparently not been repealed, I think the Act of 1915 should be given full force and effect if possible. In the light of the provision last quoted, I think that, as to cases where the taxes had been paid, or the real estate was not liable for tax or assessment, all parties would be estopped from raising any objection thereto, which existed at or before the rendition of the judgment, and which could have been presented as a defense in such action. The objection to the sufficiency of the publication existed before the rendition of judgment and could have been presented as a defense in such action.

Section 23, Chapter 22, Laws of 1909, contained a provision very similar to the section last quoted. The Act of 1909 was superseded by Chapter 84, Laws of 1913 but Section 23 thereof was not embraced in the Codification of 1915. Our Territorial Supreme Court construed Section 23 of the Act of 1909, in Straus v. Foxworth, 16 N.M. 442, 117 Pac. 831 and upheld the provisions thereof and I see no reason why the provisions of

Chapter 78, Laws of 1915, above quoted, should not receive the same construction of the court.

You may note that I have assumed three positions upon this subject; in each succeeding opinion I have been more indulgent and less strict in my construction of the act than in the former opinion. As I have before stated, I have modified my views in a desire to uphold the act and to make the same effective, but I think I have about reached my limit and that hereafter I could not be more liberal in my construction of the act under consideration.