

**OPINION
45-132**

March 21, 1945 (OPINION)

HAIL TAXES

RE: Priority

We are in receipt of your letter under date of March 17, 1945. It is possible that we have not correctly interpreted your letter and therefore do not comprehend the problem which you say confronts your county auditor. Under the provisions of section 11-1312 of the North Dakota Revised Code of 1943, the county auditor is required to ascertain from the books and records in his office, and the office of the county treasurer, if there are delinquent taxes or special assessments against the land described in the instrument.

The purposes of certification by the county auditor is to inform the register of deeds that he may record the instrument. Unless a patent or a deed bears the auditor's certificate to the effect that there are no delinquent taxes or special assessments, the register of deeds may not legally record the same. The purpose of requiring such certification is to insure payment of taxes, especially personal property taxes which have been extended against the land and which are not a lien against the land unless so extended.

Notwithstanding the efforts of the commissioner of insurance to have the "hail tax" regarded as an actual tax, the supreme court has, on constitutional grounds, consistently refused to recognize it as a tax. The court has always insisted that the hail tax is contractual obligation imposing a lien upon the land against which it is entered, and that such lien is superior to any contractual lien, such as a mortgage, imposed on the land after chapter 137 of the 1933 Session Laws became effective. Thus, in the case of Federal Farm Mortgage Corp. v. County of Stutsman, 67 N.D. 154, 270 N.W. 885, the supreme court held:

"The hail tax provided by chapter 137, laws 1933, is not a tax within the purview of the state constitution; neither is it a special assessment for benefits. The lien of the hail tax is not predicated upon the exercise of taxing power; it arises out of contractual relations, and the lien is a statutory lien to secure the payment of an obligation resting in contract."

In other words, the effect of the supreme court's decision in the case mentioned is that the hail tax is a contractual lien superior to other liens except taxes. Therefore, when land is sold to the county at tax sale and when, at the termination of the statutory period of redemption, a tax deed has been issued, the county takes title to the land clear of all encumbrances, including the lien of the hail tax. But the lien of hail taxes remain inchoate, and if the party who incurred the obligation for payment of this tax again becomes owner of the land within three years after the issuance of a sheriff's deed under foreclosure, then the lien of the hail tax immediately attaches.

The situation in this regard is analogous to that of a mortgagor who lost his land under foreclosure prior to the enactment of the act prohibiting deficiency judgments. If he afterwards acquired such land, the lien of the deficiency judgment became operative. When a county acquires land through tax sale, there is no reason for certification by the county auditor. The tax deed issued to the county is evidence of the fact that the land was acquired through tax sale, And when a county issues a county deed to any person other than the party who incurred the hail tax lien, such person takes the land free from the encumbrance of such lien.

If the holder of a mortgage, executed prior to the effective date of chapter 137, Laws 1933, redeems from a purchaser at a tax sale who has paid both general taxes and hail taxes, but to make such redemption pays only the general taxes, then such tax sale purchaser may file with the hail insurance department a claim for refund.

I call to your attention, however, to section 57-2411 of the North Dakota Revised Code of 1943, which provides:

"General taxes and hail indemnity taxes shall be advertised in the same notice and delinquent real estate tax list, but shall be separately stated and sold separately."

And I also call your attention to section 26-2237 of the North Dakota Revised Code of 1943, which provides:

"Hail indemnity taxes may be paid separately without the payment of other general taxes."

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