State Land Grants for Educationl Purposes, Bonding of Same—Use of Funds Derived from the Sale of Such Lands.

The land grants made to the State of Montana by congress for educational purposes under the provisions of the Enabling Act and constitution can be used only for the support and maintenance of such institutions. The moneys secured from the leasing of the lands or interest upon the permanent fund secured from the sale of the lands are dedicated solely and exclusively for the support and maintenance of such institutions, and an attempted bond issue against the Normal School land grant of one hundred thousand acres, for the payment of which bonds the moneys received from the sale of such lands and licenses to cut trees, and moneys derived from the leasing and interest derived from the fund is unconstitutional and void. The money secured from the sale of such lands must be held and remain inviolate and sacred to the trust.

Although the act in question, Chapter 3, Laws 1905, provides that the State shall not be held liable for the payment of the bonds, and that they shall run from the State Board of Land Commissioners to bearer, still the state receives the benefit and must be held to be the debtor.

Helena, Montana, Oct. 9, 1905.

Hon. J. H. Rice, State Treasurer, Helena, Montana.

Dear Sir:—A short time ago a proposition was favorably entertained by the State Board of Land Commissioners, pursuant to authority conferred by law, to invest $75,000 of the common school fund in your hands, in the purchase of what are known as the "State Normal School Bonds of 1905." The issuance of said bonds had theretofore been authorized under and by virtue of Chapter 3, laws 1905, entitled, "An Act to Enable the Normal School Land Grant to be further utilized in providing additional buildings and equipment for the Montana State Normal College," approved February 2, 1905. At the time this law was up for consideration by the legislative assembly I had some misgivings as to its con-

stitutionality and the legality of any bond issue which might be issued under or by virtue of its authority. After the passage of the law, I was called upon by the State Board of Land Commissioners to prepare the form of bond, and the form was by me prepared with strict reference to the provisions of the law authorizing the bond issue and not with regard to the constitutionality of the same. At the time of the action of the Board of Land Commissioners in authorizing the investment of such moneys in your hands, as State Treasurer, as aforesaid, the question of the legality of the bond issue or the adequacy of the security for investment of said fund was not raised or considered nor given any more than passing notice, because of the similarity of the act to other acts authorizing the bonding of state land grants passed and acted upon theretofore, and because of the presumption of constitutionality which always attaches to an act of the legislature. Shortly after the last meeting of the board of examiners, at which the first claims against this bond fund were presented and approved, I became interested to know the sufficiency of the security and the constitutionality of the law authorizing said bond issue, for the money thus invested; and, in consequence, with my office force, gave the question of the constitutionality of the law careful and thorough consideration, with the result that we have one and all been reluctantly forced to the unalterable conclusion, that the law is unconstitutional and the security for the state funds so invested inadequate and void. The whole matter has been by us given thorough and conscientious consideration as we well realize that the vital interests of the various educational institutions of the state are involved and know the effect of an adverse decision bo our office upon these interests as well as upon the state's faith and cerdit. After having reached this conclusion, I am constrained by a sense of official duty to no longer remain silent, though no formal request for an opinion upon this subject has been presented to my office. I believe it my sworn duty to see that the permanent funds belonging to the various educational institutions be held as a sacred trust, and that they be not, through any action or inaction on my part, dissipated or diverted from the use to which they were dedicated by the United States government, and by our constitution, accepted and guaranteed against loss or diversion.

The effect of calling your attention, and that of the public, to the condition of affairs existing in our state respecting the bonding of land grants, and the funds derived from the sale thereof, dedicated by congress to the "maintenance of educational institutions," will, at first blush, appear bold and not for the best interests of the state; still the evil effect will be but temporary and far less disastrous than were we to remain silent and permit the permanent funds belonging to the various educational institutions, or the common school fund, realized from the lands donated by congress, to be dissipated and diverted from the use to which they were sacredly dedicated. If we are wrong in our conclusions, the supreme court can and will at an early date by its decision set matters aright.

I believe, when doubt arises respecting the use or investment of

moneys in the hands of the State Treasurer, or the legality or constitutionality of any law authorizing or directing such use, that that of itself is sufficient for me to act adversely in the premises and leave the question for decision by the supreme court rather than assume such responsibility myself.

It was intended by congress at the time of the enactment of the Enabling Act, and by our people at the time of the adoption of our supreme law—the constitution, that the land grants and the money derived upon the conversion of the same into cash, should be held and remain inviolate sacred to the use for which the grants were made—namely, the maintenance of these institutions. And that only the moneys derived from the leasing of such lands and the interest upon the fund secured from the sale thereof should be expended for such maintenance; and unless this trust is carried out strictly in accordance with its terms and the mandates of our constitution, when the lands dedicated to such trust ahve been all disposed of and the moneys derived from their sale exhautsed, the onerous burden of supporting these institutions will rest upon the taxpayer. Whereas if the intent of the Enabling Act and the mandates of the constitution are carried out to the letter in time to come the taxpayer will receive the full benefits intended from these land grants without the burden of taxation for the support of educational institutions, as the income from the lands and from the permanent fund secured from their sale, will be almost, if not entirely, sufficient for their support and maintenance.

Having reached this conclusion I deem it my sworn duty as the legal adviser of state officials to direct you to refuse payment of the warrants drawn on said bond fund. Such an investment of the common or district school fund in void bonds issued in the name of a state institution of learning, must necessarily subject such fund to the danger of irreparable loss and to diversion from the intent and purpose of the trust. The state constitution provides that these school funds shall be held and remain inviolate and has guaranteed the same against loss or diversion. Moreover, I am of opinion that a breach of the trust provisions of the grant of lands made by congress to the State of Montana would subject the grant to forfeiture if the United States government saw fit to hold the State to the solemn and express provisions of the trust.

In addition to the $75,000 invested by the State Board of Land Commissioners in said Normal School bonds issue of 1905, no part of which has as yet been paid out by you upon warrants or otherwise, it appears upon reference to your books that the following amounts have been expended or invested in like securities out of the common or permanent school fund prior to the year 1905, to-wit: School of Mines Building bonds, $120,000, State of Montana Deaf and Dumb Asylum $9,000, State Normal School, $25,000, or a total of $154,000.

As you know, there have been no bond issues against the land grants of educational institutions issued or attempted to be issued during this year other than said Normal School Bonds of 1905 and the University

Bonds No. 2 for $30,000, which said last mentioned bond issue has not as yet been accepted by the purchaser.

In support of the position of myself and assistants hereinabove outlined, we give you the following argument and brief of authorities:

BRIEF AND ARGUMENT.

The act of the legislature authorizing the issuance of the bonds in question provides "the state board of land commissioners of the State of Montana is hereby authorized and directed to issue coupon bonds to the amount of Seventy-five Thousand (75,000) Dollars * * * and they shall be known as State Normal School Bonds of 1905."

"All funds realized from the sale or leasing of the lands and licenses to cut trees thereon, (being one hundred thousand acres) granted by the United States to the State of Montana for the establishment of the State Normal School * * *, are hereby pledged as security for the payment of the principal and interest of the bonds issued."

"The moneys derived from the sale of said bonds shall be used to erect, furnish and equip an addition to the persent state normal school building," etc. (Secs. 1, 4 and 7 of the act of February 2, 1905, laws 1905, p. 3.)

This act of the legislature is in contravention of the provisions of the state constitution, for the reasons:

1. It authorizes the expenditure of a part, or all, of the permanent Normal School fund for the payment of indebtedness, which fund the constitution provides shall remain inviolate.

2. It authorizes the income derived from the permanent school fund to be used for a purpose violative of constitutional provisions.

3. It is an increase of the indebtedness of the state to an amount in excess of one hundred thousand dollars without the law having been first adopted by a vote of the people at a general election.

1 AND 2.

The first two specifications involve practically the same principle, and they will be considered together.

The act of congress of February 22, 1889, known as the Enabling Act, donates and grants to the State of Montana large tracts of lands for certain educational purposes. Among these grants, in Section 17 of the act, we find the following: "For state normal schools, one hundred thousand acres." Section 11 of this Enabling Act provides, "That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legisatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such lands shall not be subject to pre-empton, homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

The State of Montana accepted this grant "upon the terms and con-

ditions therein provided." (Subdiv. 7, Ordinance No. 1.) Section 12 of Article 11 of our state constitution provides:

"Sec. 12. The funds of the State University and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the State against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties shall be devoted to the maintenance and perpetuation of these respective institutions.' Section 1 of Article 17 of the constitution further provides: "All lands of the State that have been, or may hereafter be, granted to the State by congress, and all lands acquired by gift or grant or devise from any person or corporation shall be public lands of the State and shall be held in trust for the public to be disposed of as hereafter provided for the respective purposes for which they have been or may be granted, donated or devised."

Sections 2 and 3, of Article 11, of the State constitution, further provide:

"Sec. 2. The public school fund of the State shall consist of the proceeds of such lands as have heretofore been granted, or may hereafter be granted, to the State by the general govrnmnt, known as school lands; and those granted in lieu of such; lands acquired by gift or grant from any person or corporation under any law or grant of the general government; and of all other grants of land or money made to the State from the general government for general educational purposes, or where no other special purpose is indicated in such grant; all estates, or distributive shares of the estates that may escheat to the State; all unclaimed shares and dividends of any corporation incorporated under the laws of the State, and all other grants, gifts, devises or bequests made to the State, for general educational purposes."

"Sec. 3. Such public school fund shall forever remain inviolate, guaranteed by the State against loss or diversion, to be invested, so far as possible, in public securities within the State, including school district bonds, issued for the erection of school buildings, under the restrictions to be provided by law."

These lands were donated and granted to the State for a specific purpose, with the express provision that the proceeds arising from the sale thereof shall constitute a permanent fund, no part of which shall be used but "the interest of which only shall be expended in the support of said schools," and "shall be devoted to the maintenance and perpetuation of these respective institutions." The terms "support," "maintenance" and "perpetuation," as used in said Section 11 of the Enabling Act and said Section 12 of our constitution, do not include costs incurred in the erection of buildings, but "mean continued, regular expenditures for the maintenance of the schools." (Sheldon v. Purdy, (Wash.) 49 Pac. 228.)

It is clearly the intent and meaning of this act of congress that all money derived from the sale of these lands shall constitute a permanent

school fund, no part of which shall ever be used, and that all income derived or obtained from such fund by whatever business transaction the same may be procured, whether as interest on money loaned, or as rent, or otherwise, shall be used only in the manner specified in the granting act, which says: "In the support of said schools."

The supreme court of Montana, in State v. Cook, 17 Mont. 529, in considering the constitutionality of an act providing for the manner of expending the state capitol building fund, said: "The state cannot use the fund created by this act for any purpose except as provided for by the act of congress. The state officers have no control over it except to carry out the trust relation; and the treasurer is merely an agent for receiving and disbursing the fund under the act of congress and in manner provided by the law of the state. So, too, the auditor is but one of the agents or sub-agents designated by the law of the state in the execution of the trust. All this seems very clear to us from the law."

This language of the supreme court is equally applicable in considering the constitutionality of an act dealing with the permanent school fund.

It is clear from the above quotations from the Enabling Act and the constitution that the proceeds received from the sale of any of the lands granted by congress to the State for educational purposes cannot be used for any purpose. Such proceeds are to be invested in public securities and only the interest thereon and the income received from leases of land not yet sold are to be used. And the use of the interest from such invested funds and the income from such leased lands is limited itself to the support, maintenance and perpetuation of such educational institutions.

An act of the legislature authorizing the issuance of bonds in the name of one of the state institutions of learning for the purpose of erecting buildings for such institution and pledging, as security for the payment of such bonds and the interest thereon, the proceedes received from the sale of the lands granted to such state institution or the interest derived from the investments of the proceeds received from the sale of such lands or the revenue received from the leasing of such lands is wholly unconstitutional.

As was said in State v. McMillan, (N. D.) 96 N. W. 304, in discussing said Section 11 of the Enabling Act, "It is entirely clear from the provisions of the Enabling Act just quoted that the entire grant of lands to the state for educational purposes was in trust, and that the express terms of the grant require the state as trustee to maintain the permanency of the funds so granted; and, further, that it limits the state to the use of the interest of the permanent fund, and requires that such interest shall be used 'only for the support of schools.' '. (See also, In Re Canal Certificates (Colo.) 34 Pac. 274.'

III.

At the time of the passage of this act the indebtedness of the State of Montana was and is now, including bonds heretofore issued in the name of the various state educational institutions and now unpaid, far

in excess of the sum of $100,000, to-wit, the sum of $495,000, aside from any outstanding warrants.

Section 2, Article 13, of our constitution, provides: "The Legislative Assembly shall not in any manner create any debt except by law which shall be irrepealable until the indebtedness therein provided for shall have been fully paid or discharged; such law shall specify the purposes to which the funds so raised shall be applied and provide for the levy of a tax sufficient to pay the interest on, and extinguish the principal of such debt within the time limited by such law for the payment thereof; but no debt or liability shall be created which shall singly, or in the aggregate with any existing debt or liability, exceed the sum of one hundred thousand dollars ($100,000) except in cases of war, to repel invasion or suppress insurrection, unless the law authorizing the same shall have been submitted to the people at a general election and shall have received a majority of the votes cast for and against it at such election."

The question then arises, are these instruments bonds of the State of Montana?

Normal schools are state institutions, they are not corporations, they are not legal entities, and cannot contract indebtedness beyond the approporiation made by the legislature for their support and operation. The trustees or directors of these institutions are merely agents of the State to execute the will and commands of the State. When acting within the scope of their authority they bind their principal—the State. If the law giving them the authority to act is void, they do not bind the State, nor do they bind the institution, for the State, and not the instiution, is the principal. Hence, any indebtedness created by these agents, if valid, is a State debt and not a debt against the institutions, which have no legal entity and which are only creations of the State, established and supported by the State, (Sec. 1, Art. 10, Const.) and at all times under the absolute jurisdiction and control of the State. Only the owner of property can mortgage it or charge it with debt. The State owns these lands; the title thereto vests in the State; the proceeds arising from the sale of the lands belong to the State; the interest on such proceeds is State property, and the same is true of rent received from leases and from money derived from the sale of timber growing on such land. (Const. Sec. 1, Art. 17; Sec. 17 Enabling Act.)

"It makes no difference whether the debt is contracted on the general credit of the State or on the credit of a fund belonging to the State." (Rodman v. Munson 13 Barb. 63; Newall v. People, 7 N. Y., 9; Joliet v. Alexander (Ill.) 62 N. E. 861.)

This act provides that the State shall not be liable for the payment of these bonds, but it does authorize the pledging of a part of the state's property (the normal school lands) to secure their payment. Nowhere in the constitution is the State authorized to act as surety for any person or corporation, or to permit its property to be pledged for that purpose. It is either liable as principal or not liable at all.

A debt cannot exist without both a debtor and a creditor. The pur

chaser of the bonds is the creditor. Who is the debtor? Surely not the institution, for it has no legal entity and cannot contract a debt. Not the fund derived from the sale of the land, for that constitutes a permanent fund which must forever remain intact and inviolate. It necessarily follows that "the bonds in question are bonds of the State or bonds of no one."

The State of North Dakota was admitted under the same Enabling Act, and at the same time, with the State of Montana, and the land grants to North Dakota were practically the same as those to Montana. The constitutional provisions of the two states on this subject are practically the same.

The supreme court of North Dakota in State v. McMillan, 96 N. W. 310, in passing upon an act of the legislature authorizing the issuance of certain bonds by the board of trustees of the state normal school, said: "The character of the bond, however, is not to be determined by provisions which relate to mere matters of form or to the manner of their execution, or to the name assigned to them by the legislature, but must be determined by those provisions of the act authorizing their issuance, and upon which their validity rests, which go to the substance of the obligation. Judged by this test, it will, we think, be readily seen that they are state obligations masquerading in the name of 'normal school bonds.' This must be true if they have any validity whatever, for the bonds of the state normal school * * * are a legal impossibility. This institution is not a school corporation or a legal entity. It cannot levy and collect taxes; it owns no property; its trustees cannot contract debts except within the limits of the appropriation made by the legislature for its support; and when such debts are contracted they are not debts of the institution but are the debts of the state. The state is charged with its support and maintenance as one of the educational institutions of the state. This institution and the other state educational and charitable institutions are not legal and independent entities, but are mere agencies or instrumentalities through which the state promotes its educational and charitable interests, and for the support of which all of the taxable property of the state is chargeable; and the power of their trustees to contract debts is limited by legislative appropriation. As was said by the supreme court of Wisconsin in State v. Mills, 55 Wis. 229, 12 N. W. 359, 'it cannot be said too emphatically, or repeated too often, that the various boards of trustees and managers of the benevolent and penal institutions of the state have no power to contract debts beyond the appropriation made by the legislature for the support and operation of their respective institutions. A debt against one of these institutions is a debt against the state; and, if such boards could contract debts ad libitum, the constitutional limitation of state indebtedness to one hundred thousand dollars (Article 8, Section 6), might become utterly inoperative. (See Sloan v. State, 51 Wis. 623, 8 N. W. 393;' See also Jewell Nursery Co. v. State, 4 S. D. 213, 56 N. W. 113; Weary v. State University, 42 Iowa 336; Neil v. Board, 31 O. St. 15; State ex rel. v. White, 82 Ind. 278, 42 A. Rep. 496.) We therefore agree with counsel for the board that the 'bonds in question

are bonds of the state or bonds of no one." * * * As we have seen, they are not the obligations of the state normal school, for there is no such legal entity. It is apparent therefore that they evidence the obligations of the state, if they evidence any obligations whatever. That they are state obligations is, we think, entirely apparent, and for these reasons: First, the state authorizes their issuance; second, they are given for money borrowed by the state; third, the money to be procured from the loan is for state purposes—that is, to erect buildings for the state for one of its educational institutions; and, finally, the promise to repay the loan, both principal and interest, is made by the state. * * * It should require no argument to show that the act is invalid. Its violations of the following provisions of the constitution are manifest: (1) It authorizes the creation of a state debt in excess of the debt limit and contrary to Section 182 of the constitution: (2) It authorizes the creation of a state debt and contains no provision 'for levying an annual tax sufficient to pay the interest semi-annually and the principal within thirty years,' contrary to the requirements of the section last referred to; and, (3) It appropriates for the payment of the principal and interest of a state debt the interest and income of the permanent funds of the normal school, which was dedicated to the support of said school by congress and by the state constitution, and thus diverts such interest and income from the purpose for which it was dedicated. Finally, the bonds themselves are invalid because the act authorizing them is invalid, and for the further reason that they are not certified by the auditor and secretary to be within the debt limit, as is essential to the validity of state bonds under Section 187 above quoted."

The court also held that Section 11 of the Enabling Act applied to all grants of land to the state for educational purposes. This opinion of the court in the McMillan case is such a thorough discussion of every question involved herein that further argument is unnecessary.

Respectfully submitted,

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Attorney General.

Note.—Upheld by Supreme Court decision rendered Jan. 9th, 1906, in case entitled State ex rel. Hare vs. Rice, 83 Pac. 874. Rehearing denied in opinion dated Feb. 27th, 1906, (83 Pac.) Certified upon Appeal taken to Supreme Court of United States, March 27th, 1906.