

Mortgages, Taxation Of. Taxation, Deductions For, Exemptions From Taxation.

1. A law which authorizes the deduction of the amount of mortgage on land from the value of the land for purposes of taxation, is unconstitutional.

2. The legislature may provide for taxation of mortgages on real estate in a manner different from the taxation of mortgages on personal property and unsecured credits.

Helena, Mont., Feb. 7th, 1907.

Hon. William Scallon.

Chairman, Judiciary Committee, House of Representatives,
Helena, Montana.

Dear Sir:—

I am in receipt of your favor of February 2nd, asking opinion of this office respecting the constitutionality of House Bill No. 66, entitled "An Act concerning the taxation of real estate encumbered by mortgages, etc."

Under the provisions of this proposed law, any person owning real estate encumbered with a mortgage may, for the purpose of taxation, deduct a part of the amount of such mortgage from the total value of such real estate, the specific questions submitted being:

"1. Whether the exemption provided for in the proposed Act is constitutional?

"2. Whether claims of creditors secured by mortgage on real estate such as is mentioned in the Act can be treated any differently in matters of taxation than debts secured on mortgage of personal property or unsecured credits?"

These questions are so united that their consideration requires reference to the same principles of law, and they will, therefore, be considered together.

Section 1 of Article XII of our constitution provides:

"The necessary revenue for the support and maintenance of the State shall be provided by the Legislative Assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article."

Under the provisions of this section all property must be valued for taxation and at a uniform rate except that specially provided for in the article, and this special provision is found in section 2, which

provides, in substance, that property of the United States, the State, Counties, Cities, Towns, School Districts, Municipal Corporations and Public Libraries, and all property used exclusively for agricultural and horticultural societies, for educational purposes, places for religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity may be exempt from taxation. No property not included in this section two is exempt from taxation and it is not within the power of the legislature to add to this list of exemptions, for that would, in effect, be amending the constitution by legislative enactment. The word "property" is defined by section 17 of said Article XII of the constitution as including moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, etc.

All real estate having private ownership and not used exclusively for any of the purposes named in said section two of Article XII is subject to assessment and taxation. The value of real estate is not affected by the existence of a mortgage, but, under the provisions of this proposed bill, a piece of land of the value of five hundred dollars that was mortgaged for four hundred dollars could not be assessed for the purpose of taxation for any greater sum than three hundred dollars, while the adjoining piece of land of equal value would be assessed for five hundred dollars. This violates the uniformity clause of the constitution, and is, in effect, an exemption of two-fifths of the value of the first piece of land from taxation, which is also violative of the State Constitution. The assessment and taxation of a mortgage in the hands of the mortgagee under our present law would not change this condition, for the mortgage does not create any estate in real property, the entire estate still remains in the mortgagor.

4 Kent's Comm. 174.

Gallatin County v. Beattie, 3 Mont. 173.

Holland v. Commissioners, 15 Mont. 460.

Hence, an assessment of the mortgage would not be an assessment of any part of the real estate, nor an assessment of any estate therein. Real estate must be assessed in the county where it is situate, but the situs for the assessment and taxation of a mortgage, under the law as it now exists, is the domicile of the owner.

A mortgage, cannot, therefore, be more than a secured credit, and credits, under section 17 of Article XII of the constitution, are made a distinct class of property.

In *Clark v. Maher*, 87 Pac. 272, the Supreme Court of Montana, in considering a question relative to the deduction of debts from credits, said.

"Section 3701 authorizes any taxpayer to deduct or have deducted from his credits all debts then owing by him; but this section does not authorize the deduction of debts from money on hand, and, if it attempted to do so, would clearly violate the provisions of the constitution."

This same conclusion is reached by the Supreme Court of Washington in *Pullman State Bank v. Manring*, 51 Pac. 464.

If debts cannot be deducted from money, on what theory can they be deducted from real estate which is more tangible property and represents money?

The provisions of our state constitution "are mandatory, and prohibitory," unless limited by express words.

Section 29. Article 3.

Under the plain provisions of sections 1, 2, 11, and 16, Article XII, and section 29, Article III of the State Constitution, and in conformity with the decision in *Clark v. Maher and Pullman State Bank v. Manring*, above cited, where the value of property for the purposes of taxation has been once ascertained (and which must be under a uniform rate of assessment), no deduction can legally be made therefrom under any pretext or for any purpose whatsoever.

In *Daly Bank & Trust Company v. Board of Commissioners*, 81 Pac. 950, the Supreme Court of Montana sustained the constitutionality of subdivision 6, Section 3701, Political Code, on the theory that the term "credit," as used in section 17, Article XII of the State Constitution had reference to net credits, and that this subdivision was a reasonable regulation for ascertaining the value of these net "credits."

In *State ex rel v. Smith*, 158 Ind. 543, the supreme court sustained a law similar to the proposed bill and under constitutional provisions similar to those found in our state constitution, but in that state a mortgage is held to be a defeasible sale; that is, the mortgage creates an estate in land.

Citizens State Bank v. Harris, 149 Ind. 208.

U. S. v. Harris, 142 Ind. 226.

Vinnedge v. Shaffer, 35 Ind. 341.

The case of *State ex rel v. Smith*, above, was carried to the Supreme Court of the United States, but that court declined to take jurisdiction.

Smith v. Indiana, 191 U. S. 139.

The decision of the Indiana Court in the *Smith* case was based largely upon the decision by the Supreme Court of the United States in *Savings & Loan Society v. Multnomah County*, in which latter case an Oregon statute was called in question, which provided:

"A mortgage, deed of trust, contract or other obligation whereby land or real property, * * * is made security for the payment of a debt, together with such debt, shall, for the purposes of assessment and taxation, be deemed and treated as land or real property * * * together with such debt, shall be assessed and taxed to the owner of such security and debt, in the county, city or district in which the land or real property affected by such security is situated."

Under this statute the mortgage created an estate in the land, and the interest or estate held in the land by the mortgagor was assessed to him and the interest or estate held in the same land by the mortgagee was assessed to him, so that the entire value of the land was represented in the assessment.

A case of this kind presents no element of exemption or deduction or lack of uniformity.

In *Baltimore Shipbuilding & Dry Dock Company v. Baltimore*, 195 U. S. 375, it is held that the State may tax different estates in land to the different parties thereto and sell only the interest of the party making default, and in *Central Pacific R. R. Co. v. Nevada*, 162 U. S. 512, it is held that the possessory claim to land is a proper subject for assessment and taxation. But under our system here, where the mortgage creates no interest in land and the value of the mortgage is deducted from the assessed valuation of the land, it necessarily follows that that part of the valuation of the land, equal to the value of the mortgage, would escape taxation.

From these considerations the conclusion is reached:

1. That the proposed bill, House Bill No. 66, violates the provisions of sections 1, 11, and 16. Article XII of the State Constitution.

2. That the legislature may provide for the taxation of mortgages on real estate, in a manner different from the taxation of mortgages on personal property or unsecured credits, as was done by the Oregon statute passed upon in *Savings & Loan Society v. Multnomah County*, 169 U. S. 421.

Respectfully submitted,

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Attorney General.