Irrigation District Tax—Whether the State Must Pay Upon Land to Protect Its Mortgage.

Mortgages upon real estate held by the State of Montana are inferior to liens created in favor of assessments levied for irrigation purposes, as well as the liens for general taxes, and the State, in order to protect its mortgage, must pay irrigation district assessments as well as other taxes.

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My dear Mr. Bailey:

You have requested an opinion from this office on the following question:

> "In a number of mortgages which are being foreclosed by the State, the lands described in such mortgages are included in what is termed an 'irrigation district,' such irrigation district being organized subsequent to the execution of the mortgage by the mortgagor to the State. The taxes assessed against the mortgaged premises have been allowed to become delinquent and included in such tax is the irrigation tax. The question arises as to whether or not the State, in order to protect its lien, can be compelled to pay the irrigation tax; or, in other words, is such irrigation tax inferior to the lien of the mortgage?"

Regarding the lien of assessments levied to pay the interest on the bonds of these irrigation districts, Section 3 of Chapter 252 of the Session Laws of 1921 provides:

> "Any bonds issued to redeem or pay the existing and outstanding bonds of any such irrigation district shall constitute a lien upon the lands within said district, and said lands shall be subject to a special tax or assessment for the payment of the principal and interest of said bonds, and such tax or assessment shall constitute a first and prior lien on said lands, as provided in Section 43 of said Chapter 146 of the Session Laws of Montana of 1909, as amended."

While Section 18 of Chapter 153 of the Laws of 1921 provides, in part, as follows:

> "All bonds issued hereunder shall be a lien upon all the lands originally or at any time included in the district for the irrigation and benefit of which said irrigation district was organized and said bonds issued, except as to such lands as may at any time have been included in such district on account of the exchange or substitution of water under the provisions of this Act, if any there be, and all such lands shall be subject to a special tax or assessment for the payment of principal and interest of such bonds; and said special tax or assessment shall constitute a first and prior lien on the lands against which levied to the same extent and with like force and effect as taxes levied for state and county purposes."

It is well settled that these special assessments are a proper exercise of the taxing power of the State.

2 Cooley on Taxation, 3rd ed. 1181.

In the case of Billings Sugar Co. v. Fish, 40 Mont. 256, it was held that the Legislature had power to provide for a general system of drainage where such system is conducive to the general public welfare, and that special assessments therefore are not taxes in the sense in which the word is used in the Constitution. The court in that case said:

> "Where no such limitation is found, the legislative assembly has all power. We are of opinion, therefore, in the light of the great weight of authority and what seems to us to be the better reasoning on the subject, that assessments for local improvements are not prohibited by our Constitution. * * * It seems to us that the ruling here expressed is for the best interests of the state at large, and conducive to the upbuilding of the agricultural, as well as the urban portions of the commonwealth."

In City of Kalispell v. School District No. 5, 45 Mont. 221, it was held that special assessments, though species of taxes are not taxes. However, the question presented by you is whether these special assessments take priority over the lien of an existing mortgage.

In the case of The State v. Kilburn, 81 Conn. 9, 69 Atl. 129, it was held that though an assessment was a prior lien over encumbrances generally, nevertheless a lien would not be given priority over a mortgage held by the State to secure a loan made from the school funds, where there was an express statutory provision that "no taxes assessed upon property mortgaged to the State of Connecticut to secure a loan from the school fund, shall be a lien upon said property which shall take precedence of such mortgage or mortgages thereon."

Quoting from the decision, the court said:

> "If, in the face of these provisions, any statute could avail to subject an investment of the fund, once properly made, to risk of loss from a cause subsequently arising, it would require at least a clear and unmistakable expression of the legislative will."

The court further said:

> "The city could not, without the permission of the State, assess benefits against it as the owner of land benefited by a public improvement. General expressions, granting it liberty to assess all persons specially benefited would not import such permission. The State holds the immunities in this respect belonging by the English common law to the King. It is not to be sued without its consent. Its rights are not to be diminished by statute, unless a clear intention to that effect on the part of the legislature is disclosed, by the use of express terms or by force of a necessary implication."

In the case of Aetna Accident & Liability Co. v. Miller, 54 Mont. 377, 170 Pac. 760, our Supreme Court upheld the common law prerogatives formerly enuring to the king and gave the State a preference over general creditors.

In Baldwin v. Maroney, 173 Ind. 574, 91 N. E. 3, 30 L. R. A. (N. S.) 761, it was said:

> "It is within the power of the Legislature to declare an assessment lien for the construction of a public drain or the improvement of a public highway shall have priority over other liens. They may be given priority over pre-existing mortgages."

In Indiana it was formerly held, under a statute which did not expressly confer priority on the lien of a special assessment, that such priority could not be accorded the lien, though the cases recognized the power of the Legislature to give such lien priority over other liens should it see fit to do so.

State v. Aetna L. Ins. Co., 117 Ind. 251, 20 N. E. 144.

In that case the court said:

> "We do not doubt that it would have been within the power of the legislature to provide by express words that the lien should have priority over pre-existing mortgages. * * * But there is no such provision in our statute, and the question is whether the courts can put one there. * * *
>
> "It is not necessary that it should in express terms declare that the lien shall be a paramount one, for, if the intention can be gathered from the general words and purpose of the statute, the courts will give it effect."

See to the same effect:

Pierce v. Aetna Life Ins. Co., 131 Ind. 284, 31 N. E. 68;
State v. Lovelace, 133 Ind. 600, 33 N. E. 622.

In the case of Provident Institution v. Jersey City, 113 U. S. 506, 514, the court said.

"What may be the effect of those statutes, in this regard, upon mortgages which were created prior to the statute of 1852, it is unnecessary at present to inquire. The mortgages of the complainant were not created prior to that statute, but long subsequent thereto. When the complainant took its mortgages, it knew what the law was; it knew that, by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgages subject to this law; and it is idle to contend that a postponement of its lien to that of the water rents, whether after accruing or not, is a deprivation of its property without due process of law. * * *

"In what we have now said in relation to the anterior existence of the law of 1852 as a ground on which this case may be resolved, we do not mean to be understood as holding that the law would not also be valid as against mortgages created prior to its passage. Even if the water rents in question cannot be regarded as taxes, nor as special assessments for benefits arising from a public improvement, it is still by no means clear that the giving to them a priority of lien over all other encumbrances upon the property served with the water would be repugnant to the Constitution of the United States. The law which gives to the last maritime liens priority over earlier liens in point of time, is based on principles of acknowledged justice. That which is given for the preservation or betterment of the common pledge is in natural equity fairly entitled to the first rank in the tableau of claims. Mechanics' lien laws stand on the same basis of natural justice. We are not prepared to say that a legislative act giving preference to such liens even over those already created by mortgage, judgment or attachment, would be repugnant to the Constitution of the United States."

See, also:

City of East Grand Forks v. Luck, 97 Minn. 375; 107 N. W. 394;
Drainage Com'rs v. East Carolina Home, etc. Asso., 165 N. C. 702, Ann. Cas. 1915C 40, 81 S. E. 949;
Haines Commercial Co. v. Grabill, 78 Ore. 383, 152 Pac. 897.

giving material and labor liens priority over mortgages, and other cases cited in 12 Rose's notes on U. S. Reports, page 930.

It has been held that such lien has priority even where the statute creating the lien did not expressly give it priority over other encumbrances. See:

Wilson v. State Bank, 121 Cal. 630, 54 Pac. 119;

Dressman v. Farmers, etc. Nat'l Bank, 100 Ky. 571, 38 S. W. 1052, 36 L. R. A. 121; and other cases cited under note in Ann. Cas. 1913C, p. 1210.

In City of Kalispell v. School District No. 5, supra, our Supreme Court, speaking through Mr. Justice Holloway, said:

> "If, then, there was necessity for making an express exemption in favor of public property from taxation, strictly speaking, for the stronger reason is it necessary that there should be an express exemption if such property is to be freed from paying for improvements to such property. * * *
>
> "The mere fact that the statute under which these special assessments are made provides that the assessment shall be a lien upon the property is not a valid objection to the assessment. The state may, if it so elects, permit a lien to be imposed upon property devoted exclusively to public use; but the validity of the assessment does not depend upon the means by which the payment is to be enforced, and if the assessment is valid, and the proceeding by foreclosure of the lien is not available, because of the character of the property, the right will not fail because of failure of a specific remedy, but the courts will invoke any appropriate remedy to meet the exigencies of the particular case."

Section 62 of Chapter 153 of the Laws of 1921 provides:

> "The State Land Board for and on behalf of the State of Montana is hereby empowered to sign a petition for the inclusion of any lands belonging to the State in an irrigation district, and to pay all annual assessments thereon to the treasurer of the county in which the lands are located out of appropriations made by the legislative assembly for such purpose; such payments shall be added each year to the appraised value of the land, and the land shall thereafter be sold for a sum not less than the appraised value, plus all assessments paid to date of sale."

By this provision, it was the manifest intention of the Legislature to permit State lands to be included in irrigation districts. Manifestly, it would be unjust and unfair for the State of Montana to take advantage of the irrigation of its lands without bearing any portion of the expense, or to require those within the irrigation district to bear the cost of irrigation until the State should obtain a purchaser.

Quoting again from the case of City of Kalispell v. School District No. 5, supra, we have the following language by Mr. Justice Holloway:

"We hold that these improvements are specially beneficial to the school property—in fact, considering the surrounding circumstances, they might well be held to be absolute necessities; that good faith, fair dealing, and justice require that the school district should pay for the benefits which its property receives, and not impose its burdens upon the other property owners who happen to be within these particular improvement districts."

The foregoing is particularly applicable to this case.

Under Section 3 of Article XI of the State Constitution, it is declared:

"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."

The foregoing provision simply means that the State has guaranteed these funds against loss. Whether the investment of the general school funds in farm loans was a safe investment or whether the funds so invested are, in fact, actually lost, cannot affect this guarantee by the State. The legislative intent has been clearly expressed to the effect that the liens, created by the assessments to pay these bonds and interest, shall be a first and prior lien on the lands included in irrigation districts. No exception was made to lands on which the State held a mortgage, although it must be presumed the Legislature knew of the great number of State mortgages on farm lands throughout the State and of the likelihood that such lands would be included in irrigation districts.

In State ex rel. Evans v. Stewart, 53 Mont. 18, it was held that the investment of school funds in farm mortgages was not in violation of the Constitution or the Enabling Act. In so holding, it is a fair inference that the court had under consideration the usual incidents of a farm mortgage and that its lien is not prior to the lien of taxes and irrigation assessments, and it must be concluded that the farm loan mortgages, so upheld, are not prior liens to taxes and assessments.

This conclusion is further supported by the reason upon which such assessments as those within irrigation and improvement districts are upheld as not depriving an owner of his property in violation of his constitutional rights. This reason is that such assessments are presumed to enhance the value of the property in an amount equal to the assessment, and, therefore, there is no deprivation of property. It follows from this presumption that the security of the loan is not lessened or postponed.

It is my opinion therefore, that the mortgage lien of the State is inferior to the lien created in favor of assessments levied for the purpose of irrigation, as well as to the lien for general taxes and that the State in order to protect its mortgage must pay the irrigation district taxes.

Very truly yours,

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Attorney General.