Taxation — County Property — Tax Property — Sales — Leases — County Commissioners — Appraisements — Per Diem — Expenses.

Subdivision number 10 of chapter 100, session laws 1931, repeals section 2235, R.C.M. 1921, as amended by chapter 162, laws of 1929, insofar as their provisions are in irreconcilable conflict.

Sales of tax property of a value in excess of $100.00 are controlled by said subdivision 10 as are also sales of such property when the value is less than $100.00.

Proceeds of sale of tax property should be distributed according to directions contained in said chapter 162. Proceeds from sale of property owned by the county in its own right are governed by subdivision 10.

Subdivision 10 governs the leasing of tax property.

County commissioners are not authorized to charge per diem and expenses for making appraisements under subdivision 10.

Mr. F. S. P. Foss, March 18, 1931.
County Attorney,
Glendive, Montana.

My dear Mr. Foss:

I have your letter of March 10th in which you say that Dawson county is the owner of considerable real property acquired by it through tax deeds and that the board of county commissioners desires to sell or lease the same as soon as possible. You state that under sub-section 10 of substitute senate bill for senate bills numbers 23 and 26 the commissioners are required to appraise the property before selling the same and you inquire if the commissioners are entitled to per diem for making the appraisements.

Your question assumes that said senate bill covers the sale of property acquired by the county through tax proceedings and that its provisions should be followed in making said sales. This brings up for consideration the question of whether that assumption is correct and also other features of the bill which will be hereinafter discussed. It may

be said at the outset that owing to the apparent conflict between the provisions of sub-section 10 and of section 2235 R.C.M. 1921 as amended by chapter 162 of the laws of 1929, resort must be had to construction to determine what was the legislative intent in the enactment of said sub-section 10, and because of the unusual situation presented by section 2 of said substitute senate bill, the bill itself, as well as the entire statutory general powers of boards of county commissioners must, if possible, be saved by construction from repeal by said section 2.

Said substitute senate bill purports to be an amendment of section 4465 R.C.M. 1921 as theretofore amended, relating to the general and permanent powers of boards of county commissioners. It is so stated to be in its title, and section 1 provides that section 4465 as amended "be, and the same is hereby amended to read as follows." Then follows twenty-nine subdivisions enumerating the powers of the boards of county commissioners, some of which are copied without change from section 4465 as theretofore amended, while other provisions contain amendments to the provisions of said section 4465, and still other provisions add new powers to those previously existing under and by virtue of said section 4465 as theretofore amended. Section 2 of the bill reads as follows:

> "Section 4465 of the Revised Codes of Montana of 1921 and the subsequent amendments of said section 4465 are hereby repealed."

It will thus be seen that section 1 of the bill purports to amend section 4465 as theretofore amended, while section 2 of the bill declares that the same section and all subsequent amendments are by the bill repealed. This most extraordinary situation has few precedents in legislative enactments that have come before the courts for interpretation. However, the general rule is that the courts, when confronted with a situation such as this, will not give such a strict interpretation as will declare the legislative intent to be an absurdity of the degree which is apparent upon the face of the provision of section 2 of the bill but, on the other hand, they will, if possible, make such a construction as will impute to the legislature a reasonable intention in enacting the bill as may be determined from the whole of the bill itself and this rule applies to repealing clauses or sections, as well as to other parts of the bill. If it appears that the intention was that the repealing section should be effective only in a limited sense, effect must be given to such intention even though the repealing clause or section be in absolute and unqualified terms.

> Home Building and Loan Association vs. Nolan, 21 Mont. 205, 53 Pac. 738 and cases cited.
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> First National Bank vs. Lee, 274 S. W. 127.

In the case of McKee vs. English, 228 S. W. 43, the supreme court of Arkansas had before it for construction a statute containing inconsistent provisions similar to the one under consideration here and the court said:

> "It is contended that the amendatory section repealed itself as well as the three sections mentioned in the original statute. The statement of the argument affords the best answer, for we

> cannot assume that the lawmakers intended to do the absurd thing of expressly re-enacting certain sections with the intention at the same time to repeal them. What was clearly meant was to repeal the amended sections as originally written and substitute the new sections as re-written."

The same reasoning can be applied to the bill under consideration. It would be illogical to conclude that the legislature would go to the trouble of re-enacting some of the provisions of section 4465 as theretofore amended, changing others and adding still others thereto, if it intended by section 2 of the bill to destroy the whole thereof and discard the entire statutory law defining the general and permanent powers of boards of county commissioners. The reasonable conclusion to be drawn from the entire bill is that the repealing section was intended merely to declare that the provisions of section 4465 as they appeared after amendments prior to the enactment of the substitute senate bill in so far as they were embodied in the senate bill without change, were to remain as the law of the state as theretofore, and that the provisions which were amended by the substitute bill and the new ones added therein should be the law upon the subjects affected thereby from the passage and approval of the bill and that in so far as the prior laws were changed by the new bill they were repealed. By this construction, which I think to be a reasonable one, the bill as a whole is preserved from its own self-destruction, as is also preserved the statutory general and permanent powers of the boards of county commissioners.

Recourse can also be had, if necessary, to the constitution to save the bill and section 4465 as against the disastrous effects of the repealing clause in section 2 of the bill. If section 2 of the bill was to be held to repeal section 4465 of the codes and all subsequent amendments thereto, the effect would be to declare that the legislature did not intend to amend said section 4465 but to repeal the same and that in enacting section 1 of the bill purporting to amend section 4465 the legislature merely went through an idle procedure. The effect of the bill as a whole would be one of repeal instead of amendment and the title would not only fail to express the real subject of the act but would be actually deceptive as to the real purpose of the legislation. Under such circumstances the repealing clause would be void.

We now come to the question of whether or not subdivision 10 of said senate bill applies to property acquired by the county through tax proceedings. This subdivision is an amendment of subdivision 10 as it existed prior to the enactment of the senate bill. Subdivision 10 of said section 4465 as amended prior to the enactment of the senate bill did not apply to the sale of property acquired by the county through tax proceedings where the value was in excess of $100.00. It only had application to those cases where the county had become the owner of property in its own right and where the property acquired by tax proceedings was of a value less than $100.00. In the last mentioned case it was made specifically applicable under and by virtue of the provisions of chapter 162 of the laws of 1929. The sale of property acquired by tax proceedings where the value was in excess of $100.00 was governed exclusively by

the provisions of said chapter 162 amending section 2235 R.C.M. 1921. If subsection 10 as amended by the senate bill is now to be held to govern sales of property acquired by tax proceedings in all cases, it is a new departure in the law in this respect.

Prior to the amendment by the senate bill, subsection 10 authorized the board of county commissioners to sell "any property, real or personal, belonging to the county," and this was held to mean property acquired by the county in its own right as distinguished from property acquired by tax proceedings which it held in the nature of a trustee for the benefit of the several funds interested therein, and the sale of which was governed exclusively by chapter 162 of the laws of 1929. By the amendment made by the senate bill the board was authorized to sell "any property, real or personal, **however acquired,** belonging to the county," the underscored words having been inserted by the amendment. Inasmuch as prior to the amendment the provisions of subsection 10 were broad enough to cover all property which the county acquired, except that acquired by tax proceedings, it is apparent that the words "however acquired" inserted by the amendment must be given an interpretation that will enlarge the class of property authorized to be sold under the provisions of subsection 10; otherwise the amendatory words have no meaning whatever. There is only one other kind of property to which these words words could have reference and that is property acquired by tax proceedings as that is the only property that was left outside of the class which previously could have been sold by the board of county commissioners under subsection 10 prior to the amendment.

That by the insertion of the words "however acquired" in subsection 10, the legislature intended to include property acquired by tax proceedings within the provisions of said subsection 10 as amended, is also apparent from an amendment which was made to the original substitute senate bill which provides that if any real estate attempted to be sold under the provisions of said subsection, which has not been sold within three years may be traded or exchanged by the board of county commissioners for real estate of equal value located in proximity to the lands owned by the county. It is common knowledge that counties are not possessed of a great deal of real estate, except that which is acquired by tax proceedings, and the character of that real estate (other than tax lands), is generally not such as would call for a provision of the law authorizing its trade or exchange for other lands. This provision is, however, peculiarly applicable to the great body of lands which counties have acquired through tax proceedings.

That property acquired by tax proceedings was intended to come within the provisions of subdivision 10 as amended by the senate bill is also indicated by subdivision 28 of the bill. This subdivision was inserted in the bill to cover the provisions of a bill introduced by Senator Garber, known as senate bill No. 26. That bill specifically provided for the leasing of lands acquired by tax deeds. It was no doubt the intention of the committee on counties and towns when it introduced the substitute senate bill under consideration to cover the provisions of senate bill No. 26 by the use of the phraseology contained in sub-section

28. It will be observed that the property which the county can lease is that "however acquired" and for which immediate sale cannot be had. The description of the property which is authorized to be leased by subdivision 28 being couched in the same words as that which is authorized to be sold under subdivision 10, it is apparent that if sub-section 28 includes tax deed property that sub-section 10 does likewise. That said sub-section 28 does include tax property is further evidenced by the provision that the trust and agency funds interested in the land because of delinquent taxes shall receive a portion of the moneys arising from the leases. No such provision would have been necessary in the case of property owned by the county in its own right, as all of the funds would belong to the county and the trust and agency funds would have no right to any part thereof.

It is therefore my conclusion that subdivision 10, as amended, includes the sale of property acquired by tax proceedings, and that there is an irreconcilable conflict between its provisions and those of chapter 162 of the laws of 1929 relating to the manner of sale, in so far as the property is of a value in excess of $100.00. Under said chapter 162 the county commissioners could sell the property, where it was of a value in excess of $100.00, for any price they could get for it, except where it was land in an irrigation district and was burdened with a lien for irrigation bonds issued at a time when the law provided otherwise. (Mallott vs. Board of County Commissioners recently decided by our supreme court but not yet reported.) Under sub-section 10 the land must be appraised by the commissioners and may not be sold for less than 90% of the appraised value. Also the land may be sold at private sale but only after the inability to sell it at public sale for at least 90% of its value, whereas, under chapter 162 no private sale could be had at all. To the extent that said sub-section 10 is in irreconcilable conflict with said chapter 162, the provisions of said sub-section 10 of the senate bill will control. It is the rule that where two statutes contain conflicting provisions which cannot be reconciled, the later enactment will prevail over the former to the extent of the inconsistent portions, and that to that extent the statute last enacted repeals by implication the former.

State ex rel. Esgar vs. District Court, 56 Mont. 464, 182 Pac. 157;
U. S. vs. 196 Buffalo Robes, 1 Mont. 489;
In re Naegele, 70 Mont. 129, 224 Pac. 260.

It is the rule also that where the provisions of a later general act are irreconcilably in conflict with those, or some of those of a prior special act, to the extent of the inconsistency the general repeals the special act, if from the terms of the general act the intention of the legislature so to do is unmistakably apparent.

Hampton vs. Hickey, (Ark.) 114 S. W. 707;
People vs. Kaye, 146 N. Y. S. 398;
Ex parte James (Okla.) 111 Pac. 947;
State vs. Hewitt Land Company, (Wash.) 134 Pac. 474.

In accordance with these decisions and because of the irreconcilable conflict hereinbefore pointed out, it is my opinion that the manner of sale mentioned in subdivision 10 as amended by the senate bill must

control the sale of all property acquired by the county by tax proceedings of a value in excess of $100.00 and that to that extent chapter 162 laws of 1929 has been repealed. As to such property of a value less than $100.00 there is no conflict because chapter 162 specifically directs that that property shall be sold as is provided in subdivision 10 of section 4465 R. C. M. 1921 and the amendments thereto.

However, it will be observed that subdivision 10 of the senate bill provides that the purchase price must be paid into the county treasury "for the use and benefit of the county." This was also the provision of the subdivision prior to its amendment by the senate bill and when the subdivision applied only to property other than that acquired by tax proceedings. In such cases, of course, the county being the sole owner of the property the proceeds would go into the county treasury for its use and benefit. I do not think that the legislature intended that the proceeds from the sale of tax property should all be paid into the county treasury for the use and benefit of the county. Such a result would be extremely disastrous for the state, cities, school districts, irrigation districts and other quasi public corporations who are interested in the property to the extent of delinquent taxes levied for those bodies politic, as they would be deprived of these taxes, if such a law did not contravene the constitution.

It is a rule of law that if effect can be given, consistent with legislative intent, to a part of the provisions of an older statute, without violation of the provisions of the new, repeal by implication of the old statute by the new will be held to be partial only.

State ex rel. Esgar vs. District Court, supra;
Levy et al vs. Jones, (Ala.) 93 So. 739.

Chapter 162 of the laws of 1929 provides for the disbursement of the moneys received from a sale of tax property to the various funds which are represented by delinquent taxes against the land sold. There is no irreconcilable conflict between subdivision 10 as amended by the senate bill and this provision of said chapter 162 as they both can be given effect by holding that in the case of the sale of tax property the proceeds must be distributed according to the provisions of said chapter 162, whereas, in the case of property which the county owns in its own right, the proceeds must be paid into the county treasury for the use and benefit of the county. This, in my opinion, is consistent with the intent of the legislature.

In leasing property acquired by tax proceedings the board should be governed by the provisions of sub-section 28 of said substitute senate bill.

As to the question of whether or not the county commissioners are entitled to per diem for appraising the value of property acquired by tax proceedings as a step required to be taken prior to sale, will say that it is a general principle of law that county commissioners must point to a statute authorizing them to charge per diem before they may do so. There is no statute which authorizes the payment of per diem to commissioners for this service. Of course, if the appraisement was made as a part of the functions of the board of county commissioners when con-

vened in session, the members would be entitled to per diem while convened as a board transacting the business of the county but this charge would be for attending the meetings of the board rather than for specific appraisements of property. They could not charge per diem for traveling over the county for the purpose of viewing the various pieces of property to gain information for appraisement purposes. This conclusion is strengthened by the fact that in the original senate bill 23, one of the bills for which the bill under consideration is a substitute, provided that the appraisement should be made by the member of the board in whose district the property is situated and that for his services he would be entitled to charge $8.00 per day and expenses. This provision was not incorporated in the substitute bill which strongly indicates that the legislature did not intend that the commissioners should receive per diem or expenses for making appraisements.

Very truly yours,

L. A. FOOT,

Attorney General.