No. 391

TAXATION AND TAX-DEED LANDS—SALE OF TAX-DEED LANDS—LEASING OF TAX-DEED LANDS—DISTRIBUTION OF PROCEEDS FROM SALE AND LEASE OF TAX-DEED LANDS—SPECIAL IMPROVEMENT ASSESSMENTS—COUNTY-OWNED PROPERTY, Sale of—LIENS—WAIVER OF LIENS

Held: Section 4465.25, Revised Codes of Montana, 1935, governs the leasing and distribution of any proceeds of county-owned property other than tax deed lands and the proceeds of tax deed lands.

Section 4465.9, Revised Codes of Montana, 1935, governs the sale and disposition of the proceeds of sale of county-owned property other than tax deed lands and proceeds of tax deed lands.

Chapter 171, Laws of 1941, governs the leasing, the reservation of oil, gas, and minerals produced and saved from such tax deed lands and the sale thereof—and in parts (a), (b), and (c) of Section 6 of Chapter 171, Laws of 1941, is found the mandate relative to the disposition and apportioning of the proceeds of sale of such lands and of the income and proceeds form the leasing of such lands.

By the provisions of part (a) of Section 6 of Chapter 171, Laws of 1941, on the sale of such land only may the general fund be reimbursed not to exceed the sum of ten dollars ($10.00) for expenditures made from said general fund for the costs of procuring tax deed and holding the sale thereof.

Where a county has taken tax deed to lands within and subject to special improvement district assessments, where such improvements and obligation were incurred prior to the enactment of Chapter 100, Laws of 1929, such special improvement assessments were wiped out by the taking of such tax deed.

Where the special improvements were made and the obligation incurred after the enactment of said Chapter 100, Laws of 1929, and tax deed taken by the county, then such special assessments payable after the execution of such tax deed are a first lien on the property—the legislature's having waived the sovereign's first lien and made such special assessments superior thereto.

Special assessments becoming payable during the time such tax deed lands are county-owned are a first lien thereon.

The legislature has not provided any method or procedure for the county to pay such special assessments, nor has the legislature authorized or empowered the county—through its board of county commissioners—to make any levy of taxes or pursue any other method to pay such special improvement assessments.

April 6, 1942.

Mr. J. E. McKenna
County Attorney
Fergus County
Lewistown, Montana

Dear Mr. McKenna:

You have submitted the following questions and asked my opinion thereon:

1. Which law governs the leasing and distribution of the proceeds derived from such lease and any other proceeds from county-owned property other than tax deed lands?
2. Which law governs the sale and distribution of the proceeds of county-owned property other than tax deed lands?
3. Which law governs the sale, leasing, exchange and the disposition and distribution of the proceeds of county-owned tax deed lands?
4. Where the county has taken tax deed to lands lying within special improvement districts in cities and towns, must the county pay special improvement district assessments levied against such lands to the cities or towns?

I will answer your questions in sequence.

The law governing the leasing and the distribution of the proceeds derived from county-owned property other than tax deed lands, whether by rental or any other income from such property other than the sale thereof, is Section 4465.27, Revised Codes of Montana, 1935, as amended by Chapter 152, Laws of 1937. It will be noted Section 2 of Chapter 193, Laws of 1939, repealed only so much of Chapter 152, Laws of 1937, as was in direct conflict with the provisions of Chapter 193, Laws of 1939, and, as the latter chapter dealt only with the tax title lands, there was no conflict or repeal of the provisions of Chapter 152, Laws of 1937, dealing with leasing and the distribution of the proceeds from said property, other than the proceeds of sale of such property. It will be further noted Chapter 193, Laws of 1939, was repealed by Chapter 171, Laws of 1941.

Therefore, I agree with your very able opinion the leasing of such property shall be in accordance with the provisions of Chapter 152, Laws of 1937, and all income derived from such property from lease or otherwise shall be distributed as provided by Chapter 152, Laws of 1937, wherein it states:

> "On the tenth day of January and the tenth day of July in each year the county treasurer shall distribute such revenues to the several county, trust and agency funds on the basis of the tax levy for the preceding calendar year."

Answering your second question, it will be noted that, in Section 4465.9, Revised Codes of Montana, 1935, the legislature granted the power to the board of county commissioners to sell any property, real or personal, however acquired, belonging to the county, and provided for the disposition of the proceeds from such sale. This statute governs the sale of all county-owned property other than tax deed property.

See: Chapter 55, Laws of 1939;
Blackford v. Judith Basin County, 109 Mont. 578, 585, 98 Pac. (2nd) 872, 875.

In answering your third question, we turn to Chapter 171, Laws of 1941. We find this Chapter 171 is an act dealing with and relating solely to land acquired by a county by tax deed proceedings, defining the powers and duties of the board of county commissioners in regard to the sale of such tax deed lands, the leasing, the reserving of oil, gas, and minerals produced and saved from such lands and the sale of said lands. In parts (a), (b) and (c) of Section 6 of Chapter 171, Laws of 1941, is found the mandate of the legislature relative to the disposition and apportionment of the proceeds of the sale or lease of such lands.

However, it should be noted the provision of part (a) of Section 6 of Chapter 171, Laws of 1941, only applies upon the sale of such land—and it is only out of the proceeds of each sale the county general fund may

be reimbursed up to the amount of ten dollars for expenditures made from said fund in connection with the procuring of the tax deed and the holding of the sale.

All other rents and other proceeds derived from such tax deed lands shall be apportioned as provided in part (b) and (c) of Section 6 of Chapter 171, Laws of 1941.

Our Supreme Court, speaking of Section 2235, Revised Codes of Montana, 1935, as amended by Chapter 181, Laws of 1939, stated:

> "It is apparent that Section 2235, as so amended, being an Act relating solely to sales of tax-acquired property, is controlling in such cases."
>
> Blackford v. Judith Basin Co., 109 Mont. 578, 585, 98 Pac. (2nd) 872.

Your fourth question involves the interpretation of Chapter 100, Laws of 1929, as amended by Chapter 176, Laws of 1933, and carried forward as Section 2215.9, Revised Codes of Montana, 1935, and amended by Chapter 63, Laws of 1937.

Prior to the enactment of Chapter 100, Laws of 1929, our Supreme Court had held:

> By the enactment of Section 2215, Revised Codes of Montana, 1921, providing that a tax deed conveys absolute title "free from all encumbrances, except the lien for taxes which may have attached subsequent to the sale," a new title in the nature of an independent grant from the sovereignty is created, extinguishing all former titles and liens not expressly exempted from its operation. That special assessments are not taxes within the meaning of said Section 2215, and, therefore, the liens of such assessments were extinguished upon the issuance of the tax deed.
>
> State ex rel. City of Great Falls v. Jeffries, 83 Mont. 111, 270 Pac. 638.

After said amendment by Chapter 100, Laws of 1929, our Supreme Court held:

> "Section 2215, supra, was amended by Section 9 of Chapter 100, Laws of 1929, by excepting from the provisions of Section 2215, local improvement assessments falling due after the execution of the deed."
>
> State ex rel. Malott v. Board of County Commissioners, 89 Mont. 37, 296 Pac. 1.

Again in 1930, after the amendment by Chapter 100, Laws of 1929, the Court held:

> "Some of the provisions of the decree are in conflict with the holding in the Jeffries case, as affected by Chapter 100 of the Laws of 1929. The judgment, insofar as it attempts to restrain the city treasurer from asserting liens for assessments levied in September and July, 1929, and payable after the execution of the tax deed to relator, conflicts with that chapter . . . and to that extent is void."
>
> State ex rel. Costello v. District Court, et al., 86 Mont. 387, 395, 284 Pac. 128.

Again our Supreme Court—in State ex rel. City of Billings v. Osten, 91 Mont. 76, 5 Pac. 562—assumed without question Section 9 of Chapter 100, supra, amended Section 2215; the application of Chapter 100, supra, is not retroactive but prospective.

Our Supreme Court had this same question before it again as to the title conveyed by tax deed in the case of Cascade County v. Weaver, et al., 108 Mont. 1, 90 Pac. (2nd) 164, in which the Court in considering the effect of Section 9 of Chapter 100, Laws of 1929, on Section 2215, supra, and after reviewing the former decisions of the Court held:

"The plain wording of the statute then would indicate that it was the legislative intent to amend Section 2215, Revised Codes of Montana, 1935, by this section and to limit the title conveyed by tax deed, under any method provided by statutes, so as to preserve the lien of these special assessments payable after the execution of the deed. An examination of the history of this section and of Chapter 100 would seem to bear out this interpretation."

It must be understood what we have said would not apply to improvements made or obligations incurred prior to the enactment of Chapter 100, supra; but we specifically limit what we have said above in connection with the constitutional provision, to those cases where the improvements were made and the obligations incurred after the enactment of Chapter 100.

". . . It is well settled that the legislature has full power to waive the priority of the lien of general taxes or to postpone it to the lien of special assessments, such as the assessments in this matter."

Cascade County v. Weaver, et al., 108 Mont. 1, 90 Pac. (2nd) 164.

From the foregoing decisions of our Supreme Court, it is apparent that where the special district improvements were made or obligations incurred prior to the enactment of Chapter 100, Laws of 1929, and deed taken, the lien for such assessment was wiped out.

It is likewise obvious that, where the improvements were made and the obligations incurred after the enactment of Chapter 100, Laws of 1929, and deed taken, the assessments levied against the property and payable after execution of the deed are a first lien upon such property.

Where the county takes tax deed to land subject to a special improvement assessment, where the improvement was made and the obligation incurred after the enactment of Chapter 100, supra, the county—under the foregoing decision—is liable for the payment of such assessments as become due and payable while the county owns the said land.

The question then arises as to the power or authority of the county in making such payments, and I agree with the decision of Chief Justice Callaway in his able opinion in State ex rel. City of Billings v. Osten, supra, wherein he holds:

"If it be conceded that the rules which apply to parcel A do not apply to parcel B, now owned by the county, we do not see how the county treasurer can collect the special assessment. We do not know of any law which authorizes the county to pay it. Surely it cannot be urged that the county must offer its own property at tax sale to pay the same."

It appears, therefore, we here have a situation created by the legislature providing the lien for special assessments is made superior to the sovereign lien, but there is no method provided by statute authorizing the county to pay the assessments falling due while the county owns the property.

A similar statutory situation confronted the Supreme Court of the United States in the case of Federal Housing Administration v. Burr, 309 U. S. 242, wherein the F. H. A. was garnisheed on a debt owed to Burr by an employee of F. H. A. The Court held that—while garnishment would lie—yet the wages of the employee were in the hands of the treasurer of the United States, and therefore could not be reached. The Court held:

"To conclude otherwise would be to allow proceedings against the United States where it has not waived its immunity. This restriction on execution may as a practical matter deprive it of utility, since funds of petitioner appear to be deposited with the treasurer of the United States and payments and other obligations are made through

the chief distributing officer of the Treasurer. But that is an inherent limitation, under this statutory scheme, on the legal remedies which congress has provided. And since respondent obtains its right to sue from congress, it necessarily must take it subject to such restrictions as have been imposed. The fact that execution may prove futile is one of the notorious incidents of litigation, as is the fact that execution is not an indispensable adjunct of judicial process."

Therefore, I am confirming your very able opinion—and it is my opinion:

Section 4465.25, Revised Codes of Montana, 1935, governs the leasing and distribution of any proceeds of county-owned property other than tax deed lands and the proceeds of tax deed lands.

Section 4465.9, Revised Codes of Montana, 1935, governs the sale and disposition of the proceeds of sale of county-owned property other than tax deed lands and proceeds of tax deed lands.

Chapter 171, Laws of 1941, governs the leasing, the reservation of oil, gas, and minerals produced and saved from such tax deed lands and the sale thereof—and in parts (a), (b), and (c) of Section 6 of Chapter 171, Laws of 1941 is found the mandate relative to the disposition and apportioning of the proceeds of sale of such lands and of the income and proceeds from the leasing of such lands.

By the provisions of part (a) of Section 6 of Chapter 171, Laws of 1941, on the sale of such land only may the general fund be reimbursed not to exceed the sum of ten dollars ($10.00) for expenditures made from said general fund for the costs of procuring tax deed and holding the sale thereof.

Where a county has taken tax deed to lands within and subject to special improvement district assessments, where such improvements and obligation were incurred prior to the enactment of Chapter 100, Laws of 1929, such special assessments were wiped out by the taking of the tax deed.

Where the special improvements were made and the obligation incurrred after the enactment of said Chapter 100, Laws of 1929, and tax deed taken by the county, then such special assessments payable after the execution of such tax deed are a first lien on the property—the legislature's having waived the sovereign's first lien and made such special assessments superior thereto.

Special assessments becoming payable during the time such tax deed lands are county-owned are a first lien thereon.

The legislature has not provided any method or procedure for the county to pay such special assessments, nor has the legislature authorized or empowered the county—through its board of county commissioners—to make any levy of taxes or pursue any other method to pay such special improvement assessments.

Sincerely yours,

JOHN W. BONNER
Attorney General