

Taxes, on State Lands. State Lands, Taxes on. Drain Tax. On State Lands. Special Taxes, on State Lands.

While the statute declares that state lands are subject to drain tax, such tax cannot be enforced by the sale of the lands, nor can they be paid until an appropriation is made therefor by the legislature.

Helena, Montana, October 28, 1915.

Hon. State Board of Land Commissioners,

Helena, Montana.

Gentlemen:

I am in receipt of your letter of the 25th instant, submitting for the construction of this office the statute relating to the assessment of state school lands for drain taxes. Section 2443, Revised Codes, as amended by Section 7 of Article IV of Chapter 147, Session Laws of 1915, contains the provisions of law relating specifically to this subject. That municipally owned real estate (unless otherwise provided by law, or by the terms of a governmental grant) may be made subject to the payment of a special tax for improvements thereon, is elemental.

City of Kalispell v. School District No. 5, 45 Mont. 221, 122 Pac. 742.

The disposition of school lands granted by the general government to the state, and the investment of the proceeds thereof, are governed by the provisions of the Act of Congress making the grant, known as the "Enabling Act," and by the provisions of the State Constitution. The section of the state law above referred to, not only gives authority for the taxation of school and state lands for drain purposes, but provides therein: (1) that the collection of such taxes shall be enforced as state and county taxes against lands are collected and enforced;

(2) That the state auditor upon receiving information from the county commissioners as to the amount of the tax, must draw his warrant therefor, and that the state treasurer shall pay the same out of any funds in his hands not otherwise appropriated;

(3) That no deed shall issue for such lands until such drain taxes are paid with interest at 6%.

The manner of enforcing payment of state and county taxes against lands is by sale of the lands for the payment of the tax. Hence, if this first division of this section is of any force or effect, these lands in default of a payment of such tax by somebody, may be advertised and sold, and the title thereby passed from the state to the purchaser, unless such lands are redeemed. The provisions of Section 11 of the Enabling Act gives specific direction to the effect that (1) that these lands shall be disposed of "only at public sale" (2) at a price not less than ten dollars per acre; (3) the proceeds to constitute a permanent school fund; (4) the interest of which only shall be expended in the support of said schools. Section 1 of Article XVII of the State Constitution, contains the same provisions and restrictions relative to the disposition of these lands, and Section 2 of Article VII of the State Constitution, contains the same directions and restrictions relative to the creation and maintenance of the permanent school fund, and further provides that "such public school fund shall forever remain inviolate, guaranteed by the state against laws or diversion to be invested, etc." It is also elemental and fundamental that these lands can not without a plain violation of the terms of the grant, and of the provisions of our state constitution, be pledged as security for the payment of any obligation whatsoever,—

State v. Maynard, 31 Washington, 132, 71 Pac. 775;

State v. McMillan, 12 N. D. 280, 96 N. W. 310;

Roach et al v. Goody et al. (Ida.), 81 Pac. 642;

State v. Rice, 35 Mont. 363;

But if a tax lien may be created on these lands for improvement expenses, and the lands sold to satisfy the lien, *as other lands are sold*, then the state is divested of title by reason of the improvement on lands, which does not then own, and the school fund receives no benefit whatsoever. This is so clearly in violation of the provisions of both the Enabling Act and the State Constitution, that further discussion is unnecessary.

The second division of the Section in effect sanctions the making of certain improvements for the benefit of certain state lands, but not any appropriation is made for paying the expenses thereof. It provides in effect that the state auditor shall draw his warrant, and that the state treasurer shall make the appropriation and pay the warrant from the general fund of the state. Section 10 of Article XII of the State Constitution provides:

"All taxes levied for state purposes, shall be paid into the state treasury, and no money shall be drawn from the treasury, but in pursuance of specific appropriations made by law."

It is further provided in Section 12, this same Article, that:

"No appropriation of public money shall be made for a longer period than two years."

But here no appropriation at all is made. It is claimed, however, that in as much as the State Board pays a part or all of the expenses of administering the state lands from the income, that it may likewise pay these taxes from such income. Attention, however, is drawn to the fact that the payment of the general expenses of administering the state lands is made from the income by virtue of specific legislative authority (Sec. 2230 R. C.), and that these expenses apply to all lands of the state. Whatever may be the meaning of this section, it cannot be construed to authorize the taking of money from the income of any of the various school funds, and using it for improvements upon some specific tract of land.

The third division of the section is simply a prohibition against the issue of deeds for these lands until a certain thing has been done, to-wit. the payment of a drain tax. From these considerations, the conclusions are reached (1) that this drain tax is not, and cannot be made a specific lien on the lands to the extent of authorizing a sale thereof for the enforcement or collection of such tax; (2) that not any authority is vested in the state land board, or any other state board or state officer, to pay these taxes at all until an appropriation has been made therefor by the state legislature.

Yours very truly,

J. B. POINDEXTER,

Attorney General.