Opinion No. 184.

Irrigation Districts—Bonds—Counties —Taxation—Tax Deeds—Lands Taken on Tax Deed—Income and Rents, Distribution of— Fair Market Value Defined.

HELD: 1. Where federal court has held that bonds of irrigation district are general obligations of the district, the income and rents from lands therein taken by county on tax deeds should be distributed pro rata according to the assessments between the irrigation district, the county and the various funds entitled thereto.

2. Lands taken by county on tax deeds for delinquent assessments and taxes are held by the county in trust, as are also the income and rents therefrom before sale, and latter should be distributed pro rata to the various funds entitled thereto.

3. Where federal court has held irrigation district bonds to be a general obligation of the district and has ordered such lands, taken by county on tax deeds, to be sold for the fair market value, the fair market value is the present value above the irrigation district bonds, even though such value may be only nominal, and not the normal value.

October 2, 1935.

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You have submitted in substance the following facts: The Judith Basin Irrigation District, organized under the Act of 1909 and Acts amendatory thereof, consisting of 4253 acres in Fergus County, Montana, in January, 1920, issued 160 bonds, each of a value of $1,000. There being default in the payment of the bonds, certain bondholders thereof, Conner Malott and E. B. Favre, upon action brought in the United States District Court of Montana, obtained a judgment in October, 1931, for the sum of $77,716. The judgment being unpaid, the said bondholders, upon petition to the District Court on November 27, 1931, obtained an alternative writ of mandamus, commanding the County Commissioners of Fergus County to fix

the fair market value of each of the several tracts of land embraced in the district, upon the assumption that said bonds constitute general obligations of the district, for the payment of which all the lands in the said district are subject to assessments and taxes until the indebtedness evidenced by the said bonds is fully paid, and to advertise and offer for sale said lands at not less than the market value so fixed. The writ further commanded that, in the event a levy of the taxes or assessments shall not be made for said irrigation district by the Commissioners of said district for any year, to ascertain the total amount necessary to be raised for all purposes of said district, and make a levy for that year and furnish the county clerk and recorder of said county with a list of the lands and the amount of the assessments, as required by Section 7240, Revised Codes of Montana, until the bonds and judgment are fully paid. On appeal to the Circuit Court of Appeals, the order of the district court was affirmed on October 15, 1934, 73 Federal (2d) 142.

Since the judgment was rendered, a considerable number of additional bonds have matured, which, with interest, are unpaid. The commissioners of the irrigation district resigned and have not functioned since 1923. By agreement of counsel action in the above case was deferred pending attempts at settlement. Recently, the said bondholders have requested the County Commissioners of Fergus County to settle the matter along the lines of a proposed offer or to proceed to carry out the terms of the writ of mandate. The county took tax deeds to the lands in March, 1931. In the years 1931 to 1935, including a small amount in 1930, the county commissioners have collected rentals from the said lands amounting to about $20,000. The total indebtedness of the district, matured and to mature, amounts to approximately $320,000. In normal times irrigation lands of the quality in this district are fairly worth $100 per acre. The said petitioners in the mandamus action have made an offer involving the appraisal of the lands at a nominal value and the payment to the petitioners of the proceeds of the 1935 rentals on said land, which have not been allocated to the respective funds entitled to them. Upon said payment the petitioners will waive all claim to their share of the rentals for the years preceding 1935, amounting to approximately $10,000. Upon these facts you have submitted the following:

1. Should the commissioners proceed to levy such assessments for each of the years in default, no assessments having been levied on these lands for maintenance and payment of indebtedness for several years?

2. Must the commissioners apply the proceeds from the rentals of said lands to the payment of such assessments?

3. May the rentals be applied on the payment of the general taxes or should they be divided proportionately between the bondholders and the county? The general taxes on the lands of the district amount, at the date of the deeds to the county in March, 1931, to approximately $25,000.

4. Can the commissioners lawfully accept a proposal of this nature?

5. Is it obligatory upon the commissioners to appraise these lands at such a price only as could be procured by a present sale thereof, or may they appraise them at a normal value? May the commissioners, in appraising the said lands, value them at an amount which an owner, who is willing but not compellable, to sell, would accept from a purchaser who is desirous, but under no obligation to purchase? The petitioners insist that only a nominal value should be placed upon these lands.

Addressing ourselves to the first question, the peremptory writ of mandate of the United States District Court, which was affirmed by the Circuit Court of Appeals, specifies:

"* * *

"And you, and each of you, are further commanded, in the event a levy of the taxes or assessments shall not be made for said irrigation district by the commissioners of said district for any year, to ascertain the total amount necessary to be

raised for all purposes of said district, and make a levy for that year for said district as provided in Chapter 89 of the Laws of Montana, 1931, and furnish the county clerk and recorder of said county with a list of said lands and the amount of the taxes or assessments, as required by Section 7240 of the Revised Codes of Montana, 1921, until the judgment in this action and said bonds are fully paid. * * *"

While this writ is dated April 5, 1932, and was stayed by the appeal to the Circuit Court of Appeals until October, 1934, when the order of the District Court was affirmed, it is the general rule that equity will treat that as done as should have been done. Acting on that theory the county commissioners should treat the levies as having been made or should proceed now to obey the writ. Unless this is done, the purpose of the writ of mandate and the order of the court will be defeated by the appellants by their appeal. It will be noted that the writ is broad enough, as was the petition on which it is based, to cover each year beginning with 1932 and subsequent thereto.

The District Court and the Circuit Court of Appeals held that the bonds were a general obligation of the district and not merely a lien upon the lands, which would be wiped out by the taking of the tax deeds. In so holding, the above named federal courts are in line with the holding of the Supreme Court of the State of Montana in the earlier cases of: Cosman v. Chestnut Valley Irrigation District, 74 Mont. 111, 238 Pac. 879, 40 A. L. R. 1344; Clark v. Demers, 78 Mont. 287, 254 Pac. 162; Drake v. Schoregge, 85 Mont. 94, 277 Pac. 627; and contrary to the later holding of the Supreme Court of the State of Montana in the case of Malott v. Board of County Commissioners, 89 Mont. 37, 296 Pac. 1, in which case the court reversed its earlier decisions and held that the bonds were not general obligations of the district, but merely a charge against the lands within the district, and that each tract of land was only liable for its proportion of the entire bonded indebtedness.

Our Supreme Court, in State ex rel. Malott v. Board of County Commissioners, supra, has said that when the county acquires land by tax deed on account of delinquent taxes and irrigation district assessments, it takes and holds such title as trustee and that the moneys derived from the sale of such lands are trust funds, in which the school districts, bond holders, debenture holders and the county itself are interested. The following is the language of the court: "It has been suggested by counsel for respondents that the county holds title to these lands as a trustee. While this matter is not directly before the court for determination, yet we observe in connection therewith that, when the county acquires these lands by tax deed on account of delinquent taxes and irrigation district assessments, it takes and holds such title as a trustee. The moneys derived from the sale of such lands are trust funds. The parties and entities interested in that fund are the school districts within the county, the county itself, the state to the extent of the taxes owing to it, the bondholders, and the holders of the debenture certificates. * * *"

Compare with State ex rel. School District v. McGraw, 74 Mont. 152, 240 Pac. 812, where it was held that the county was liable to a school district for the loss of money occasioned by depositories of the county becoming insolvent, and State ex rel. Cartersville Irrigation District v. McGraw, 74 Mont. 164, 240 Pac. 817, holding that the county was liable to irrigation districts for funds redeposited by the county treasurer in county depositories which failed.

If the county holds the title to the lands in question in trust and the proceeds of the sale are trust funds and must be distributed to the various parties interested therein, then obviously, on the same reasoning, the county has no right to the income and rentals derived from the lands before the sale thereof, but must distribute such income and rentals in the same manner as the proceeds of sale. We know of no authority or theory upon which a county would be permitted to retain all such income and rentals for itself.

So far as concerns the rights of the parties in these lands and the rentals

thereof, they must be considered as finally adjudicated by the Circuit Court of Appeals. The effect of the ruling of that court in holding that the indebtedness is a general obligation of the district, in my opinion, gives them a right to a share in the proceeds of the rentals to the extent of the assessments made. They would, therefore, be entitled to share pro rata in the rentals from said lands for the year 1932 and the years subsequent thereto. Such pro rata share should be computed by taking the total assessments, which should have been levied by the county commissioners as directed by the writ of mandate, and the total taxes levied by the county against said lands for all the governmental purposes, state, county and school districts. The petitioners should receive such proportion thereof as the total of the irrigation district assessments (levied and which should have been levied) bears to the whole of said assessments and taxes for all purposes. For example, if such irrigation district assessments amount to $150,000 and the taxes levied by the county for governmental purposes amount to $25,000, the county would be entitled to one-seventh of the rental and the bondholders to six-sevenths thereof. It goes without saying, of course, that the one-seventh part should be distributed to the various funds entitled thereto. (School District v. Pondera County, 89 Mont. 342; 297 Pac. 498.)

On the facts submitted by your request it would seem that if the county accepts the proposal made by the petitioners the state, county and school districts would actually be receiving more than they would receive if the rentals are distributed pro rata for all the years as above stated, and that an acceptance thereof would be advantageous to the state, county and school districts as they would be receiving about one-half of the rentals instead of one-seventh, which is about the fractional part they would receive according to said pro rata calculations.

There remains the question the value at which these lands should be appraised. The writ commands the county commissioners as follows: "You are hereby commanded immediately upon service of this writ and without delay to fix the **fair market value** of each of the several tracts of land within the Judith Basin Irrigation District, for which tax deeds have issued to said county,—such values to be fixed upon the assumption and in view of the fact that the bonds of said district constitute general obligations of said district, for the payment of which all of the lands in said district are subject to irrigation district assessments and taxes until the indebtedness evidenced by said bonds is fully paid, and that a sale of said lands by said county will be made subject to future taxation by said district for the payment of the principal and interest of said bonds as determined and decided by this court,—and after fixing said values, as aforesaid, thereupon to advertise and offer said lands for sale by said county at not less than the market values or prices so fixed, and proceed to sell said lands, all as provided in and required by the statutes of Montana."

The effect of this order is that the purchasers of these lands must pay the indebtedness of the Judith Basin Irrigation District. If the fair market value of these lands is only a nominal amount above the indebtedness of the district, then they should be so appraised. The Circuit Court of Appeals says: "According to the law, as we interpret it, the land would still be subject to the outstanding bonds and the market value should be fixed with that fact in mind as directed by the trial court. * * *"

It is my opinion that the "fair market value" is the value at the present time rather than the value during normal times. If the "normal" value is placed upon the lands as the price for which they should be offered for sale, then the mandate of the court to "* * * * immediately fix the fair market value of each of the tracts of land, etc., * * * and * * thereupon to advertise and offer said lands for sale * * " may be voided. As I understand the order of the court the intention was to cause the immediate sale of the land rather than at some indefinite time in the future when normal values might be fixed. The following definition of "fair market value" was approved in Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94

S. W. 860, 961: "The fair market value of land is the price which it would bring when offered for sale by one who is willing, but not obliged, to sell, and bought by one willing, but not obliged, to buy, and is not the price which property would bring at forced sale, but what it would bring in the hands of a prudent seller, with liberty to fix the time and conditions of selling." See also 25 C. J. 431 and cases cited in Note 27 and 38 C. J. 1261, Section 17.