

Opinion No. 264.**Taxation—Personal Property Tax,
When Lien Upon Realty of an Estate
—Heirship.**

HELD: Any taxes levied upon personal property held by heirs of an estate (under the facts given) as tenants in common, which have not been paid, are a lien on the real property of the estate.

April 11, 1936.

Mr. W. R. Flachsenhar
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Your request for an opinion in the McLeod tax matter has been before me for some time, with the result that the matter itself has had serious and close consideration at my hands.

It appears from the data furnished that Neil McLeod died on November 13, 1918, leaving surviving him his wife, Isabelle McLeod, and four children. At the time of his death he owned ranch land in Prairie county, five horses and three cows. Thereafter, the county assessor assessed the land and the personal property thereon to Isabelle McLeod. It appears further that in the year 1928, or possibly earlier, Isabelle McLeod and her son Rhodie became the owners of a flock of sheep which, with other personal property, was also assessed to the former for the years 1929, 1930

and 1931. On or about September 25, 1931, the sheep were turned over to the State Bank of Terry in satisfaction of a chattel mortgage held by it. The first half of the taxes for 1929 and all of the taxes for 1930 have been paid, but the second half of the taxes for 1929 and the taxes for the years 1931 to 1935, inclusive, have not been paid. Now Ina McLeod, a daughter of Neil and Isabelle McLeod, wishes to take possession of the land in her own right and has requested that she be allowed to pay the taxes levied against the same without paying the taxes levied against the personal property, including the sheep. It is proper to add here that the estate of Neil McLeod has never been administered and it may be presumed that he died intestate.

All property in the state, with certain exceptions not relevant here, is subject to taxation. (Sec. 1, Art. XII, of the constitution; Sec. 1997, R. C. M. 1921; Homestake Exploration Corp. v. Schoregge, 81 Mont. 604.) The term "property" includes moneys, credits, bonds, stocks, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership. (Sec. 17, Art. XII, of the constitution; Sec. 1996, R. C. M. 1921; State ex rel. Rankin v. Harrington, 68 Mont. 1; Town of Cascade v. County of Cascade, 75 Mont. 304.) Ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. (Sec. 6663, R. C. M. 1921; Town of Cascade v. County of Cascade, above.) The ownership of property is either absolute or qualified. (Sec. 6675, R. C. M. 1921; Higgins v. City of San Diego, 63 Pac. 470.) The ownership of property is absolute when a single person has the absolute dominion over it, and may use or dispose of it according to his pleasure, and subject only to general laws. (Sec. 6676, R. C. M. 1921; Rodgers v. Bachman, 42 Pac. 448.) The ownership of property is qualified when it is shared with one or more persons. (Sec. 6677, R. C. M. 1921; in re Burdick's Estate, 44 Pac. 734.) The ownership of property by several persons is either of joint interests, partnership interests, or interests in common. (Sec. 6679, R. C. M. 1921; Hand v. Heslet, 81 Mont. 68.) A joint interest is one owned by several per-

sons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. (Sec. 6680, R. C. M. 1921; In re Gurnsey's Estate, 170 Pac. 402.) A partnership interest is one owned by several persons in partnership, for partnership purposes. (Sec. 6681, R. C. M. 1921; People v. Greening, 36 Pac. 665.) An interest in common is one owned by several persons, not in joint ownership or partnership. (Sec. 6682, R. C. M. 1921; Rodda v. Best, 68 Mont. 205; Isom v. Larson, 78 Mont. 395.) Every interest created in favor of several persons in their own right, including husband and wife, is an interest in common, unless acquired by them in partnership, for particular purposes, or unless declared in its creation to be a joint interest, as provided in Section 6680, above. (Sec. 6683, R. C. M. 1921; In re Hittell's Estate, 75 Pac. 53.)

Section 7072, Revised Codes 1921, provides that the property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the district court, and to the possession of any administrator appointed by that court for the purposes of administration. In this case, then, upon the death of Neil McLeod his heirs, namely his wife and children (Sec. 7073, R. C. M. 1921) succeeded to his real and personal property (Lamont v. Vinger, 61 Mont. 530; Hoppin v. Lang, 74 Mont. 558), and became tenants in common thereof. (Sec. 6682, above; McClure v. Colyear, 22 Pac. 175; Powell v. Powell, 126 Pac. 1058; Pomeroy v. Sam Thorpe Min. Co., 296 Pac. 255; 62 C. J. 416.)

Section 2014, Revised Codes 1921, provides that the undistributed or unpartitioned property of deceased persons may be assessed to the heirs, guardians, executors, or administrators, and a payment of taxes made by either binds all the parties in interest for their equal proportions. It is of no particular consequence, however, that the property left by Neil McLeod was at all times assessed to his wife only, instead of to his wife

and children. Under the circumstances, the same may be said of the sheep belonging to Rhodie McLeod and Isabella McLeod, which were assessed to the latter. (RCA Photophone v. Huffman, 42 Pac. (2d) 1059.) Section 2036, Revised Codes 1921, declares that no assessment or act relating to assessment or collection of taxes is illegal on account of informality. (Hill v. County of Lewis and Clark, 54 Mont. 479; Anderson v. Mace, 99 Mont. 421.)

Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all personal property of the delinquent. The judgment is not satisfied or the lien removed until the taxes are paid or the property sold for the payment thereof, (Sec. 2152, R. C. M. 1921; State v. Nicholson, 74 Mont. 346; State v. District Court, 53 Pac. (2d) 107.) Section 2153, Revised Codes 1921, as amended by Chapter 113, Laws of 1927, provides that "every tax due upon personal property is a prior lien upon such personal property assessed, and every tax due upon personal property is a lien upon the real property of the owner thereof, from and after 12:00 M., of the first Monday in March of each year."

Considering all that has been said, it is my view that any taxes levied upon the personal property held by the McLeod heirs as tenants in common, which have not been paid, are a lien on the land. It is my view, also, that the taxes levied upon the sheep up to and including the year 1931 and which remain unpaid are a lien, if not on the land, on the undivided interest of Isabella McLeod in the land. (San Pedro etc. Co. v. City of Los Angeles, 179 Pac. 393; Otter Tail Power Co. v. Degnan, 252 N. W. 619; Sandusky Bay Bridge Co. v. Fall, 181 N. E. 112.)

In order to clear the situation, therefore, Ina McLeod should be required to pay all the delinquent taxes, including not only those which are, strictly speaking, a lien on the undivided interest of Isabella McLeod in the land, but those which are a direct lien on the land itself. (61 C. J. 1249.) If payment be made in full by Ina McLeod she will then become entitled by way of subrogation to the benefit of the lien or liens held by the state

for the payment of the taxes. (62 C. J. 484; 61 C. J. 952; Fresno Inv. Co. v. Brandon, 249 Pac. 548.)

It need hardly be added that as Isabella McLeod and Rhodie McLeod parted with the title to and the possession of the sheep in September, 1931, the animals could not thereafter be legally assessed to them or either of them. It is unlawful to tax a person for property which he does not own. (Homestake Exploration Corp. v. Schoregge, supra.)