

have refused to assume any responsibility for this bond. On these facts you inquire:

"Should all of the land in school district No. 30 be turned back to the county, would the state have any recourse or would the bonds of the district inevitably go in default and this amount, therefore, be lost to the public school funds?"

"If refunding bond proceedings are instituted, what governing body should conduct them? Would it be possible or proper for the refunding bonds to be issued for enough additional money to take care of any incidental expense of advertising, printing, etc., which might be incurred in the course of proceedings? As you know, Section 1224.2 of the Revised Codes of Montana, 1935, provides that refunding bonds may be issued only for the actual unpaid balance on the old bonds, less any money which may be available in the sinking fund for payment upon such balance?"

Section 2215 provides that a tax deed conveys "to the grantee the absolute title * * * free and clear of all encumbrances except the lien for taxes which may have attached subsequent to the sale."

In *State ex rel. City of Great Falls v. Jeffries*, 83 Mont. 111, 116, 270 Pac. 638, 640, our court said:

"However, 'the legislature has power to provide either that a tax sale shall create a new title, cutting off all prior liens, encumbrances, and interests, or to provide that the tax purchaser shall acquire the interest only of the person in whose name the land was assessed or of the real owner.' (3 Cooley on Taxation, 4th ed., 2930, sec. 1492.) By the enactment of section 2215, Revised Codes, 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,' our legislature adopted the first course. The tax deed mentioned is not derivative, but creates a new title in the nature of an independent grant from the sovereignty, extinguishing all former titles and liens not expressly exempted from its operation (*McQuity v. Doudna*, 101 Iowa 144, 70 N. W. 99;

Opinion No. 114

Taxation—Tax Deeds—Title Obtained By—Schools—School Bonds— Public School Funds, Guar- anteed by Constitution.

HELD: Bonds of a defunct school district in which the lands have been sold and tax deeds issued would not be collected.

Section 3, Article XI of the Montana Constitution guarantees school funds against loss.

July 29, 1939.

Mrs. Nanita B. Sherlock
Commissioner of State Lands and In-
vestments
The Capitol

Dear Mrs. Sherlock:

You say that the State Board of Land Commissioners holds a bond in the sum of \$3,000, issued August 1, 1920, payable in twenty years by School District No. 30, Jefferson County; that nearly all of the land in this district has been sold for delinquent taxes except that belonging to two persons; that the district has been abandoned for many years and is now a part of District No. 26; that there have been no school trustees in District No. 30 for seventeen years and that the trustees for District No. 26

Clark v. Zaleski, 253 Ill. 63, 79 N. E. 272; Frederick v. Goodbee, 120 La. 783, 45 South. 606), and irrespective of whether section 2215, above, impliedly makes the lien for general taxes paramount to that of special assessments (Woodill & Hulse Electric Co. v. Young, 180 Cal. 667, 5 A. L. R. 1296, 182 Pac. 422), the tax deed extinguishes the lien of the assessment by its express terms, unless such assessments are included in the term 'taxes' as used in the section."

This language was quoted with approval in *State ex rel. Malott et al., v. Board of County Commissioners*, 89 Mont. 37, 80, 296 Pac. 1, and in *Northwestern Improvement Co. v. Lowry*, 104 Mont. 289, 300, 66 Pac. (2) 792. We must therefore conclude that should all the land in School District No. 30 be sold for delinquent taxes and tax deeds issued, the state would have no recourse and the lands could not be subjected to the payments of the bonds. In view of our answer to this question, we think that the question of refunding may be passed because of practical, as well as legal obstacles.

In the Malott Case, 89 Mont. 37, 95, our court overruled its earlier decision in *Cosman v. Chestnut Valley Irrigation District*, 74 Mont. 111, 40 A.L.R. 1344, 238 Pac. 879, 881, in which they held that the bonds of the irrigation district were general obligations of the district. The Federal Court, on the other hand, refused to follow the Montana Supreme Court in the Malott Case in *Judith Basin Irrigation District v. Malott* (9th Cir., 1934), 73 Fed. (2) 142. Since the decision of the United States Supreme Court, however, in *Erie Railroad Co. v. Tompkins* (1938), 304 U. S. 64, the Federal Court would be obliged to apply the state law as declared by the highest state court.

It does not follow, however, that this money must necessarily be lost to the public school fund, for such fund is guaranteed by the State Constitution, Section 3, Article XI, which reads:

"Such public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion, to be invested, so far as possible, in public securities within the state, in-

cluding school district bonds, issued for the erection of school buildings, under the restrictions to be provided by law."

The remedy, however, is through the legislature as in the case of the Capitol Building Bonds (see Chapter 133, Laws of 1939), which was recently upheld by our Supreme Court in *Lodge v. Ayers et al.*, 108 Mont. 527.