

**OPINION
46-121**

May 2, 1946 (OPINION)

HAIL INSURANCE

RE: Liens - State Lands

Re: Hail Tax Liens on Lands Mortgaged to Secure School Fund Mortgage

The Commissioner of University and School Lands has informed this office that he has made application to your department for the release of certain hail tax liens upon lands mortgaged to the State to secure loans of school funds to secure hail insurance premiums for insurance placed upon crops on said land subsequent to the date of the mortgage; and especially in cases where the mortgage attached subsequent to March 7th, 1933.

This office has studied this question and briefed leading authorities applicable thereto. These authorities and their application to this question are as follows:

LAND GRANTS. Sec. 11, Enabling Act.

Lands granted to the State by Federal Government "shall constitute permanent funds for the support and maintenance of the public schools * * *."

CONSTITUTION ACCEPTS GRANTS. Sec. 153.

"All proceeds of the public land that have heretofore, or may hereafter be granted by the United States for the support of the common schools in this state, * * * shall be and remain a perpetual fund for the maintenance of the common schools of the state. It shall be deemed a trust fund, the principal of which shall forever remain inviolate and may be increased but never diminished. The state shall make good all losses thereof." See also Sec. 159 of the Constitution.

Section 205:

The State of North Dakota hereby accepts the several grants of land granted by the United States to the State of North Dakota by an Act of Congress (Enabling Act) under the 'conditions and limitations therein mentioned.'

INVESTMENT OF FUNDS. Sec. 15-0304 R.C. 1943.

The board of university and school funds shall invest the money belonging to the permanent funds of the common schools * * * and other permanent funds derived from the sale of original grant lands or from any other source, in the following securities: (5) First Mortgages on farm lands in this state * * *."

Section 15-0305, Revised Code:

At least one-third of the whole amount of the several permanent funds * * * shall be invested in first mortgages on cultivated lands in this state * * *."

DECISIONS.

Lands granted by the United States to the State for school purposes are held in trust, and are not subject to taxation or assessment for benefits arising from the construction of drains." Erickson v. Cass County, 11 N.D. 494, 92 N.W. 841.

When a real estate mortgage is executed and delivered to the state, all of its subdivisions are charged with notice thereof."

* * * taxes on the real estate becoming due after the mortgage lien of the state is created are subordinate to the lien of the mortgage."

Where the state is given a mortgage lien upon real estate, and thereafter taxes are levied against said real estate, and become due after the mortgage lien is created, the tax lien and the mortgage lien are not of equal rank."

The mortgage lien attached when created and as the taxes were levied thereafter, the lien for the taxes attached subsequently. Both are liens of the state, the tax liens are not by virtue of themselves paramount to the mortgage lien of the state, and because of the rule of priority they cannot have equality of enforcement."

The lien for taxes is a lien of the state, and the state, through this lien, does not impair the lien which it already holds by reason of its mortgage."

The moment, therefore, that title to this (mortgaged) land vests in the state, the land itself becomes a part of the school fund. As such it cannot be subject to taxation in any form. * * * It seems clear, therefore, that in such case, and with reference to taxes becoming due after the mortgage lien attached, all liens obtained on the sale of the land for such delinquent taxes are extinguished as against such land. Otherwise there would be indirect taxation." State v. Divide County, 68 N.D. 708, 283 N.W. 184.

Chapter 137 L. 1933. (Sec. 26-2234, 26-2235 R.C.)

The provisions of Chapter 137, Laws of 1933, making the hail indemnity tax superior to mortgages attaching after March 7th, 1933, does not make such indemnity tax a superior lien to the state mortgage securing a loan of school funds for two reasons:

1. To give it such effect is to make it unconstitutional in that it attempts to tax the school fund which would be a violation of the guaranty to hold the fund as a trust fund and inviolate, found in sections 153, 159, and 205 of the

Constitution.

2. The act does not operate to deprive the state of any right or to jeopardize the security of its first mortgage.

The general rule is that acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with a very different, and often contrary, force to the government itself. It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general rules of a statute ought not to include the government or affect its rights, unless that construction be clear and indisputable upon the test of the act. *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 Pac. 646.

In this California case it was held that a public schoolhouse was not subject to the mechanic's lien laws.

It is the universally accepted rule that words of a statute applying to private rights do not affect those of the state, and that the sovereign authority is not bound by the general language of a statute which tends to restrain or diminish the powers, rights, or interests of the sovereign, and when the rights of a commonwealth are to be transferred or affected, the intention must be plainly expressed or necessarily implied."

State Land Board v. Campbell, 140 Oregon 196, 13 Pac. 2d. 346. See also:

State Land Board v. Schroetlin, 161 Oregon 146, 88 Pac. 2d. 316.

In this Oregon case, a statute giving a tax lien priority over a mortgage was held inapplicable to a mortgage given to secure a loan of school funds. See also numerous cases in *American Digests: Title Statutes*, Rep. No. 233. Officer follows opinion of attorney general: In the syllabus to a recent opinion of our Supreme Court, we find this:

State ministerial officers, consulting with attorney general and following his opinion, as to constitutional or other legal questions regarding their performance of official acts, are protected by such opinions, although later held erroneous, but otherwise act at their peril."

The statute requiring attorney general to give written opinions on all legal or constitutional questions relating to state officers' duties when requested, requires that attorney general's advice on constitutional questions be taken and followed by all state officers as on all other legal questions."

APPLICATION

When land is mortgaged to the state to secure a loan of school funds and thereafter the mortgagor insures crops with the state hail insurance fund, the lien to secure payment of premium provided by chapter 137, Laws of 1933, and amendments, is inferior to the lien of

the state's mortgage, and if an when the state secures title to the mortgaged premises, the lien for the hail premium, if any, is extinguished, and the state may resell the land to a purchaser other than the mortgagor, free from any lien for the hail premium, and, on application therefor, the insurance commissioner should release such lien, and direct the county auditor of the county wherein the land lies to cancel the hail indemnity tax from his tax records, since said act does not apply to mortgages taken by the state to secure school fund loans.

The extinguishment of this lien, however, does not affect the liability of the person whose crop was insured. his liability for the insurance premium is a contractual liability and can be enforced against him notwithstanding the loss of the lien.

It is, therefore, the opinion of this office, that whenever the Commissioner of University and School Lands makes a showing to the Insurance Commissioner that the land mortgaged has become a part of the school fund either by sheriff's deed on foreclosure, or by deed given by the mortgagor in lieu of foreclosure, the Insurance Commissioner should release the record lien and direct the county auditor to release the lien of record upon his tax records.

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