

Opinion No. 18-2077

January 19, 1918

BY: C. A. HATCH, Assistant Attorney General

TO: The State Tax Commission, Santa Fe, New Mexico.

Improvements on Unpatented Homesteads are Subject to Taxation.

OPINION

We have your favor of recent date, requesting an opinion from this office, as to whether or not improvements on unpatented home-steads are taxable under our laws.

In this connection we are advised that the Honorable Frank W. Clancy, former Attorney General, held such improvements were not taxable. In his opinion he recites that Section 4018, of the Compiled Laws of 1897, was omitted from the 1915 Codification; this Section provided the term "improvements" as therein used, included all buildings, fixtures and structures erected upon or affixed to land, whether the title to the land had been acquired or not; he also calls attention to Section 5427 of the Codification, which provides that, lands entered or held under or by virtue of an Act of Congress, shall not be taxable until the patent thereto is issued. Being of the opinion that such improvements became a part of the land, Mr. Clancy concludes that under the terms of Section 5427, of the 1915 Codification, and, because Section 4018 of the Compiled Laws of 1898, is not contained in the Codification, that the improvements are not subject to taxation.

Having the utmost respect for the opinion of the former Attorney General, we have hesitated to express a contrary view, but, for the reasons hereafter set forth, we find we cannot agree that the improvements on unpatented homesteads are not subject to taxation.

Section 5427, of the 1915 Codification, provides, among other things, as follows:

"All property, real and personal, in this State, shall be subject to taxation, except as in the Constitution and existing laws, otherwise provided."

From the above quotation, it is apparent it was the intention of the lawmakers, that all property of whatever kind or nature, within the State, should be subject to taxation. This being true, it only remains to be seen whether or not improvements on unpatented home-steads are property within the meaning of the above Statute, and, if so, whether they are exempted from taxation under the provisions of the Constitution or existing laws.

That improvements on public lands, are property in which the owner has an interest, separate and distinct from the land upon which they are situated, is evidenced by various provisions of our Statutes. Section 4634 of the 1915 Codification, provides:

"That the owner of improvements on public lands of the United States, shall be deemed in possession of a transferable interest therein, and any sale of such improvements, shall be considered a sufficient consideration to support a promise."

This view is further evidenced by the fact that the United States makes no claim to the improvements located upon public land, even though, the entry may be cancelled. In the case of *Wheeler v. Rogers*, Volume 28, of the Decisions of the Department of the Interior, Relating to Public Lands, 252, the Commissioner said:

"A judgment sustaining his entry does not determine any rights as to the ownership or right to the possession of the improvements. That question is with the courts, and so far as this Department is informed, the right to remove his improvements is generally if not always awarded to the unsuccessful litigant."

The recognition by the Legislature, that the owner of the improvements has a transferable interest in them, distinct from the land, also that the United States makes no claims to the improvements, we think, warrants us in the conclusion that such improvements constitute property separate and distinct from the land on which they are situated. Therefore, under the terms of the Statute we have previously quoted, making all property in the State subject to taxation, it is our opinion such improvements should be taxed, unless they are exempted either by the terms of the Constitution, or Laws enacted pursuant thereto. It, therefore, becomes necessary to determine whether or not they are so exempted.

Section 3, Article 8, of the Constitution, enumerates certain things as exempt from taxation. It is as follows:

"The property of the United States, the State and all Counties, towns, Cities and School Districts, and other municipal corporations, public libraries, community ditches and all laterals thereof, all church property, all property used for educational or charitable purposes, all cemeteries not used or held for private or corporate profit, and all bonds of the State of New Mexico, and of the counties, municipalities and districts thereof shall be exempt from taxation."

We do not think improvements on unpatented homesteads, could be said to come within any of the exemptions enumerated in the above Sections, unless it be contended that they come under the first exemption, property of the United States. Such a contention could not be maintained, for the reason that it has been repeatedly held by the courts that an exemption of property of the United States, does not carry with it the improvements located on such property. The general rule in this regard is stated in 37 Cyc. page 869, and is as follows:

"The exemption of public property from taxation does not extend to improvements on the public lands made by pre-emptioners, homestead, and other claimants, or occupants, at their own expense, and these are taxable by the State."

This text is supported by considerable authority, and, we think, states the correct rule.

With reference to Section 5427, of the Codification, which provides that "lands entered or purchased under the Act of Congress, shall not be subject to taxation until patent therefor has been issued." We do not think this can be construed as exemption of the improvements located on such land. Having previously determined that improvements constitute property distinct and separate from the land itself, this provision can have no application to such improvements. Even if the terms of Section 5427 could be construed as an exemption of the improvements, it is our opinion such exemption would be invalid, for the reason that they are not included within the exemptions enumerated by the Constitution, and, neither does the Constitution give the Legislature power to exempt improvements on unpatented homesteads.

It is the opinion of this office that an enumeration of exemptions in a Constitution is a limitation upon the Legislature. It constitutes such a limitation that the Legislature cannot exempt property not enumerated in the Constitution, unless there is specific grant of power to the Legislature authorizing such exemptions.

As we have said, such improvements are not included within the exemptions enumerated by the Constitution. We are unable to find where any authority is given the Legislature to exempt such property. Therefore, we believe, as previously stated, that even though Section 5427 should be construed as exempting the improvements on unpatented homesteads, such an exemption would be void.

Having concluded that property placed by individuals upon government lands, are, before final proof, the property of such individuals; that the Constitution and Statutes passed thereunder, contemplate the taxation of all property not specifically exempted, and, that such improvements have not been exempted, it is our opinion, they are subject to taxation.