Opinion No. 21-2980

May 21, 1921

BY: A. M. EDWARDS, Assistant Attorney General

TO: Mr. James L. Seligman, Secretary, Capitol Addition Commission, Santa Fe, New Mexico.

Validity Capital Extension Debentures.

OPINION

*{*59}* This office has your oral inquiry as to the validity of the proposed debentures to be issued by your Commission for the purpose of raising funds with which to build an extension to the capitol, under the provisions of Chapter 81, Laws of 1921.

Three possible objections might be raised as to the validity of those debentures. First: Is their issuance prohibited by section 8 of Article IX of the Constitution, which requires that a law authorizing the state to contract a debt shall not take effect until it shall have been submitted to a vote of the qualified electors of the State? Second: If it is not such a debt as is included in Section 8 of Article IX, does the limitation of $ 200,000 in section 7 of Article IX apply? Third: Does the restriction of section 10 of the Enabling Act, which provides that no mortgage or other encumbrances of lands ceded by the United States to the state shall be valid, apply?

*{*60}* As to the first, we do not believe that the proposed debentures are a debt of the state within the provisions of section 8 of Article IX, because that section expressly refers to the preceding section in the same article. In section 7 of Article IX, it is provided that the state may borrow money for necessary expenses. Under the ruling of our Supreme Court in State vs. Marron, 17 N.M. 304, it is held that the word "necessary" when used in connection with expenses does not mean those expenses which are absolutely indispensable but that the Legislature is the judge of the necessity and that the courts will not question the reasonable exercise by the legislature of its discretion.

As to the second, the limit of $ 200,000 upon the amount which the state may borrow does not apply to an indebtedness of the kind contemplated by this act. The debt is not properly a debt of the state but is rather an anticipation of the revenues to be derived and credited to a certain fund. This act does not pledge the credit of the State of New Mexico to the payment of the debentures to be issued. It pledges merely the revenues coming into the public building funds. See Borrowdale vs. Board of County Commissioners, 23 N.M. 1.

As to the third point it will be noted that section 10 of the Enabling Act restricts the words "mortgage" and "encumbrance" to the lands. In other parts of the Enabling Act, in

which the purposes for which the lands are to be devoted are enumerated, the Enabling Act specifically provides that neither the lands nor the income derived therefrom or the natural products thereof shall be devoted to any but the uses stated in the act. It is significant that with reference to mortgaging or encumbering the lands, no provision is made inhibiting the mortgaging or incumbrance of the proceeds of such lands.

The pledging of the revenues derived from the sale and leasing of these lands cannot by any stretch of terms be said to mean the mortgaging of the lands. An encumbrance of lands has been defined as a lien which binds the realty and it may be enforced by a sale of the property. Gordon vs. McCulloh, 7 Atl. 458, 66. Md. 245; Jenks vs. Ward, 45 Mass. 404, 413; Sout vs. Simpson, 124 Pac. 754, 757; Clark vs. Fisher, 54 Kan. 403; Brass vs. Vandecor, 70 Neb. 35; Simons vs. Diamond Match Co., 159 Mich. 241; Fritz vs. Pusey, 31 Minn. 368.

Under these and other judicial definitions it cannot, in our opinion, be held that the prohibition by the Enabling Act of an encumbrance upon lands ceded to the state embraces a prohibition against pledging the proceeds from the sale of such lands.

We are of the opinion, therefore, that the contemplated issue of debentures by your Commission is valid and that there is nothing in either the Constitution or the Enabling Act which would invalidate them.