Irrigation Districts, Lands Within — Bonds Of — Warrants—Priority of Lien—Mortgages, Farm Loans.

The lien of bonds of irrigation districts date from the time of their issuance and confirmation by the district court, and constitute a prior lien over farm loan mortgages executed subsequent to the creation of the district.

The lien of warrants of irrigation districts date from the time of the creation of the obligation and constitute a prior lien over farm loan mortgages to the creation of the district.

Nov 8th, 1919.

Hon. Sidney Miller,
Register of State Lands,
Helena, Montana.

Dear Sir:

There is before this office for examination, a number of abstracts submitted in connection with applications for loans, which show that the property has been included in an irrigation district, organized under the provisions of Chapter 146 of the Session Laws of 1909 as amended and re-enacted by Chapter 145, Session Laws 1915, as further amended by Chapter 133, Session Laws 1917, and as further amended and re-enacted by Chapter 95, Session Laws 1919.

The question presented is: Can a farm loan be made on lands which have been included within a duly created and organized irrigation district, and to what extent the lien authorized under this Act would conflict with the provisions of Section 4 of Chapter 124, Session Laws 1917, providing that mortgages shall not be made on farm lands unless they are free and clear of all other encumbrances or liens of every nature and kind.

Under subdivision 5 of Section 4, Chapter 153, Laws of 1917, it is provided:

> "Every irrigation district established hereunder is hereby declared to be a public corporation for the promotion of the public welfare, and the lands included therein shal constitute all the taxable and assessable property of such district for the purpose of this Act."

It is further provided in the Act that for the purpose of organization or for any of the immediate purposes of this Act, or in order to meet the expenses occasioned by any calamity or unforeseen contingency, the

commissioners may in any one year incur an indebtedness not exceeding the sum of $5000.00, and may cause warrants of the district to issue therefor, bearing interest at six per cent.

The board is further authorized to make surveys and locate the necessary irrigation works, branches and laterals, appropriate proceedings for rights of way or land for reservoirs, acquire by purchase irrigation canals or works, constructed or in the course of construction, and for the purpose of carrying out the provisions of the Act the board may employ competent engineers to make surveys, maps, plans and estimates and report on the cost and feasibility of the project.

Upon receiving such report the board must proceed to determine the amount of money to be raised. Under Section 11, page 332, Session Laws 1917, it is provided:

> "For the purpose of providing the necessary funds for constructing necessary irrigation canals and works, and acquiring necessary property and rights therefor, and meeting the expenses incident thereto, and for the purpose of acquiring, by purchase or otherwise, water rights, canals and irrigation works, constructed or partially constructed, and for the assumption, as principal or guarantor of indebtedness to the United States on account of district lands, and for the purpose of otherwise carrying out the provisions of this Act, the board of commissioners of any district organized hereunder may issue the negotiable coupon bonds of the district upon petition signed by a majority in number and acreage of the holders of title or evidence of title to lands included in the district. Upon filing the petition the board is authorized to issue bonds of the district to the amount and for the purposes specified in the petition, which must be confirmed by proceedings in the district court."

Section 12 of the Act provides for the lien of bonds as follows:

> "All bonds issued hereunder, and all amounts to be paid to the United States under any contract between the district and the United States shall be a lien upon all the lands originally or at any time included in the district excepting on account of the exchange or substitution of water under the provisions of Section 36 of this Act; * * * and all such lands shall be subject to a special tax of assessment for the payment of the interest on, and the principal of, said bonds; and all amounts to be paid to the United States under any such contract between the district and the United States, and said special tax or assessment shall constitute a first and prior lien on the lands against which levied, to the same extent and with like force and effect as taxes levied for state and county purposes."

Section 54 of Chapter 96, 1919 Session Laws, provides:

> "On or before the second Monday in September of each year the board of commissioners shall furnish the county clerk in each county in which any of the lands of the district are situated a correct list of all the district lands in such county, together with the amount of the total taxes or assessments against said lands for district purposes and the county clerk of each county shall immediately thereafter cause said assessment roll to be entered in the assessment book of said county of each year, and prior to the delivery of the duplicate assessment book to the county treasurer of each county shall collect such taxes or assessments at the same time and in the same manner as county and state taxes."

It will be observed that immediately upon the organization of the district the board has power to contract indebtedness. In fact, they already are chargeable with the necessary expenses of the organization. To meet this indebtedness they may issue warrants, and later bonds.

The mode of providing the payment for the bonded and other indebtedness of the district is by special assessment. Special assessments are a species of taxation. They are not taxes in the true sense. They are levied on the theory of special benefits to the property in accordance with the benefit. In Hager v. Yolo County, 47 Cal. 22, the Court said:

> "The authority to compel the improvement necessarily comprehends the authority to compel payment therefor. 'That these assessments are not exercises of a taxing power' has over and over again been confirmed until the controversy must be regarded as closed. 2 Cooley on Taxation, 3rd Edition 1181."

Quoting from Billings Sugar Company v. Fish, 40 Mont. 256, the Court said:

> "Where no such limitation is found (in the Constitution), the Legislative Assembly has all power. We are of the opinion, therefore, in the light of the great weight of authority, what seems to us the better reasoning on the subject that assessments for local improvements are not prohibited by the Constitution. * * * it seems to us that the ruling here expressed is for the best interests of the state at large and conducive to the upbuilding of the agricultural as well as the urban portion of the commonwealth."

In this case the Court held that the legislature had power to provide for a general system of drainage where such system is conducive to the general public welfare, and that the special assessments therefor are not taxes in the sense in which the word is used in the Constitution. See also City of Kalispell v. School District No. 5, 45 Mont. 221, where it was said:

> "There special assessments, though a species of taxation, are not taxes."

While it is apparent that there is a distinction between the nature of a special assessment tax and a tax in the true sense, the question is discussed here for the purpose of questioning the power to make these assessments a prior lien on property already affected by existing liens and that the lien of mortgages made prior to the creation of the district is not therefore affected thereby.

There can be no question, however, of the authority of the legislature to declare bonded indebtedness of the district a lien on the land and to make the assessment levy to pay the same a first lien thereon.

The important question therefore is as to when this lien attaches. In a most recent case, that of the State vs. Frank Callis vs. Board of County Commissioners of Hill County (not yet reported) the Court through Mr. Justice Halloway said:

> "While it requires the vote of the electors to empower the board to incur an indebtedness * * * the favorable vote itself did not create the indebtedness. The additional indebtedness comes into existence only when Hill County becomes legally liable to pay it in whole or in part, or, in other words, in this instance, when the evidence of its indebtedness—the bonds or warrants are issued, or the binding contracts are made."

Davenport v. Kleinschmidt, 6 Mont. 502;
Jordan v. Andrus, 27 Mont. 22;
Palmer v. Hickman, 11 Mont. 541.

So far as the issuing of bonds is concerned, it is my opinion that the debt and the lien of the debt are therefore not created until the bonds are actually issued and have become an obligation of the district.

The board is authorized to issue bonds, but confirmation of the issue must be made by a decree of the district court so that this decree, unless appealed from, becomes conclusive and constitutes a public record of the time of issue and the date of lien. This bond issue does not, however, create the only indebtedness which the board is authorized to incur. They may, as heretofore indicated, issue warrants and may enter into contracts when the amount does not exceed $10,000.00 upon their own responsibility, and may enter into certain obligations with the United States for the construction of water works or distribution of water and may act as principal or guarantor to the United States for the irrigation of any federal lands within the district, and may deposit with the United States the bonds of the district for the performance of any such contract.

In case bonds are not deposited it becomes the duty of the board to include as part of the levy or assessment provided for in Section 46 an amount which will be sufficient to meet yearly payments accruing under the terms of such contract. This indebtedness is made a lien on the land to be paid by special assessments which is declared to be a first and prior lien on all lands except those included on account of exchange of water.

I know of no reason why the legislature may not make an assessment which, when levied, relates back to the time of the creation of the obligation it is levied to satisfy and constitute it a lien from that time. In fact, this would seem to be a necessary condition to protect the obligations which are primarily to accomplish the manifest purposes for which the district is organized.

This purpose necessitates expenses which must be paid by bond issues and special assessments and inasmuch a it would be a comparatively short time after the district was organized until these prior liens would attach, any investigation of title or examination of lands by the state would incur considerable expense and if not completed in time to effect a loan before lien attaches, would be of no avail.

I am, therefore, of the opinion that the liens provided for in the Act creating these districts dates in the case of bonds from their issue and confirmation by the district court, and that in the case of warrants and contracts the date of lien will be the date of the obligation and as there is no method of determining this time, that as a matter of precaution and safety to school funds, no new loan should be negotiated unless they have reached the stage where they are ready to close when the district is organized and then only upon a certificate of the board of commissioners that no warrants have been issued by the board to cover the costs of organization and other purposes, and that no contract has been entered into with the United States for the construction, operation, or maintenance of works for the delivery or distribution of water upon any land embraced within the project, and that they have not become principal or guarantor of any

indebtedness to the United States on account of district lands under the provisions of the Federal Reclamation Act or acts amendatory thereof or supplementary thereto or otherwise.

That all lands, excepting those included on account of exchange of water are perpetually liable to annual assessment made for administrative and maintenance purposes.

Respectfully,

S. C. FORD,

Attorney General.