

Farm Loan Act—First Mortgage—Irrigation Contract.

A mortgage on land already covered by an agreement with an irrigation company for water, giving to such company certain easements and a lien upon the lands "superior to any and every other encumbrance or lien" to secure the payment of the water charges, would not be a "first mortgage" within the contemplation of the Farm Loan Act.

January 6, 1917.

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

Dear Sir:

I am in receipt of your letter of January 5th, asking if loans can be made by the State Board of Land Commissioners, secured by lands under agreement for water with the Montana Reservoir & Irrigation Company in the Prickly Pear Valley, copy of which agreement was enclosed.

Among other provisions in this agreement between the Company and the water user are the following.

3. "As a further consideration to the above specified payment, it is agreed that the purchaser will, and he does hereby grant unto the said Company forever, a right of way and easement over, across, and upon the above described lands, for the purpose of constructing the necessary main ditches, for the purpose of conveying the said water to the said lands of the purchaser and to the lands of other purchasers, together with the right on the part of said company, to have free and uninterrupted ingress to and egress from the said lands for the purpose of constructing, maintaining and inspecting the said main ditches or main canals, and for the purpose of inspecting any lateral conveying water from said main canals."

10. "It is agreed that the right to use the said water, as herein provided, shall be, and the same is hereby made, inseparably appurtenant to the foregoing described lands during the term of this contract; that such water shall be used upon the premises above described and upon no other; and that upon any assignment or transfer of said land, or any portion thereof, the right to use the said water and the obligations imposed by this contract shall be deemed to be, and they are hereby expressly made covenants running with said lands, and that the purchaser of any portion of said lands shall, and he does hereby, agree to be bound by the terms and conditions of this agreement, and shall, and does hereby, agree to receive and pay for such a proportionate part of the water which is herein agreed shall be paid for by the purchaser, as the area of the land conveyed to him bears to the whole of the land herein described."

12. "In order to secure the payments to become due under this contract, the purchaser hereby grants to the Company a lien upon all of the land herein described, and covenants and agrees that such lien shall be superior to any and every other encumbrance or lien, except such as may heretofore have attached to the said land. It is further agreed that in the event of default in any payment or payments to become due under this contract, the Company may, at its option, proceed either in law or in equity to collect the same, and to that end the Purchaser agrees that the Company shall have the right to enforce the lien hereby granted in the same manner as is provided by the statutes of the State of Montana for the foreclosure of the lien created by a mortgage upon real estate."

"The term Purchaser, as herein used, shall include his heirs, executors, administrators, grantees and assigns."

Section 1 of the Farm Loan Act, initiated and passed by the people at the general election in November, 1914, provides as follows:

"Section 1. All moneys belonging to the permanent common school and all other permanent state educational, charitable and penal institution funds must be invested by the State

Board of Land Commissioners in bonds of school districts
* * * * in first mortgages on good, improved farm
land in the State, in the manner provided herein."

The primary plan, outlined in this Farm Loan Act, was held constitutional in the recent case of *State ex rel Evans v. State Board of Land Commissioners*, decided November 13th, 1916. "Section 1 provides that the permanent common school fund and the other permanent educational, charitable and penal institution funds shall be invested by the State Board of Land Commissioners in (a) certain school district bonds; (b) in bonds of this state; (c) in bonds of the United States; (d) in certain state warrants; (e) in capital building bonds of this state; (f) in irrigation district bonds; and (g) in first mortgage on good, improved farm lands of this state.

By Section 5731 of our Civil Code, a Mortgage is defined as "a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession."

Section 5734 provides as follows:

"Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is deemed a pledge."

Our Supreme Court, in the case of *Krueger v. Speith*, 8 Mont. at 490-1, in construing the statute relating to the affidavit of an attaching creditor that his debt has not been secured "by a mortgage, lien or pledge upon real or personal property", uses the following language:

"The word 'lien' is used here with the words 'mortgage' and 'pledge'. All these words, while having a different legal signification, are somewhat analogous, and the use of them in connection, and in the same sentence, serves to explain their meaning, and the sense in which they were intended in the act. Bouvier defines the word 'lien' as follows: In its most extensive signification, this term includes every case in which real or personal property is charged with the payment of any debt or duty, every such charge being denominated a lien on the property. In more limited sense it is defined to be a right of detaining the property of another until some claim is satisfied." Doubtless the word is more comprehensive than either a mortgage or a pledge; it includes these, as it does all similar obligations by which specific property may be subjected to the payment of a particular debt."

The Supreme Court of Pennsylvania, in the case of *Green's appeal*, 97 Pa. St. on pages 347 and 348, defines a first mortgage as follows:

"In the business of half a century, a first mortgage has come to be very well understood to be one prior to all other liens. That is the kind of mortgage which was guaranteed, and the bonds thereby secured Noble received on his contract. The learned judge of the Common Pleas well said 'When the parties covenanted for a first mortgage, it implied a first

lien as clearly as if words to that effect had been inserted in the agreement itself. In the plain, ordinary and popular sense, first mortgage means first lien. When railroad bonds are sold in the open market as first-mortgage bonds all persons understand them to be first liens. When we speak of lending money on first mortgage, no thought of anything but a first lien is entertained.'

"This meaning of first mortgage is so thoroughly grounded as to lead to the sequence that a second mortgage is understood to be one without intervening liens between it and the first.

"The court is not simply called on to say whether 'mortgage' and 'lien' are synonymous. The question is not one of synonyms, nor of technical definitions of words as found in dictionaries. But what does a written contract made in Pennsylvania respecting securities on real property mean? When it calls for a first mortgage it means one prior to all other liens."

In view of the foregoing, and by virtue of the fact that the water user in the agreement submitted by you not only grants certain rights of way and easements to the Company, but also grants a lien upon the land "superior to any and every other encumbrance or lien," and the right to enforce that lien in the same manner as a mortgage, I am of the opinion that a loan by the State of Montana, secured by land covered by such an agreement as the one submitted, would not be a "first mortgage" within the contemplation of the Farm Loan Act.

Respectfully,

S. C. FORD,

Attorney General.