Liens—Mortgages—State Liens—Releases—Obligations.

The release of liens held by the state may be made when they are valueless without violating section 39, article V of our constitution.

March 31, 1928.

Max P. Kuhr, Esq.,
County Attorney,
Havre, Montana.

My dear Mr. Kuhr:

You state that the board of county commissioners has been asked to release a seed loan mortgage under the provisions of section 111 of chapter 60, laws of 1927, and that you believe this section is in conflict with the provisions of section 39, article V of the constitution in view of the supreme court decision in the case of Sanderson v. Bateman, 78 Mont. 235.

You have asked for an opinion on this matter.

Section 111 of chapter 60 provides that the board of county commissioners is empowered and directed to release and satisfy of record any seed loan mortgage, drouth relief lien, or other similar instrument appearing on the county records as a second mortgage or lien against any lands on which the state holds a first mortgage whenever the attorney general shall request such cloud on the state's title to be removed and cancelled.

Section 39 of article V of the constitution provides:

> "No obligation or liability of any person, association or corporation, held or owned by the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released or postponed, or in any way diminished by the legis-

lative assembly; nor shall such liability or obligation be extinguished, except by the payment thereof into the proper treasury."

In the case of Sanderson v. Bateman, referred to, the court quoted from Oliver v. City of Houston, 93 Tex. 201, 54 S. W. 940 with approval the following:

"Its terms are broad enough to cover any conceivable obligation or liability, the remission of which would diminish the public revenue and thereby either directly or indirectly impose a heavier burden upon those not affected by the exemption."

In this case the court also discussed the question of whether the county was a municipality within the meaning of the constitutional provision. On this point the court said:

"The county is a creature of the state; the state made it and can unmake it * * *. The state could not remit, release nor diminish those taxes directly or indirectly, and what the constitution prohibits the state from doing it cannot authorize its creature, the county, to do. The manifest intent of Section 39 of Article V is to prohibit the county, a political subdivision of the state for governmental purposes, from doing the things forbidden when the state cannot do them."

As the section reads, it requires the board of county commissioners to release and satisfy of record any of the liens therein specified whenever the attorney general shall request such cloud on the state's title to be removed and cancelled.

There is no presumption of law that a second mortgage or subsequent lien upon real property is of no value before the first mortgage has been foreclosed. The property may be of sufficient value to satisfy the subsequent lien or liens, and in the absence of proof to the contrary the presumption would be in favor of value.

The release of the liens does not affect the personal obligation of the persons owing the obligation, save and except in cases where the liens have a value.

Under section 9467 R. C. M. 1921 it is provided in substance that there is but one action for the recovery of debt secured by mortgage upon real estate or personal property. However, the supreme court of this state has held that this section does not prohibit a personal action when the security has become valueless without the fault of the creditor.

In the case of Brophy v. Downey, 26 Mont. 252, the court had under consideration the provisions of section 9467 relative to the release of security and the right to maintain an action against the debtor without resorting to the security. The court said:

"Section 1290, (Codes of 1895 now Section 9467) was adopted from the Code of Civil Procedure of California, and in Merced Bank v. Casaccia, 103 Cal. 641, the Supreme Court of

that state says of the enactment: 'The obvious purpose of the statute is to compel one who has taken a special lien (by mortgage) to secure his debt to exhaust his security before having recourse to the general assets of the debtor. When he has done this, or when, without his fault, the security has been lost, the policy of the law does not prohibit a personal action'. To the same effect are: Savings Bank v. Central Market Company, 122 Cal. 28; Otto v. Long, 127 California Reports, 471, 59 Pacific Reporter, 895; Toby v. Oregon Pacific Railroad Company, 98 California Reports, 490, 33 Pacific Reporter, 550; and Blumberg v. Birch, 99 California Reports, 416, 34 Pacific Reporter, 102, 37 American State Reports, 67."

See also the case of Largey v. Chapman, 18 Mont. 563. In the case of Vande Veegaete vs. Vande Veegaete, 75 Mont. 52, the court said:

"It seems clear from the statutory provisions quoted, and from the authorities, that in this state, while, if no mention of the mortgage is contained in the note, it is not necessary to allege the fact that a mortgage was given and then avoid its effect, and, further, that, if the existence of the mortgage is not set up as a defense, the plaintiff may secure judgment as though no mortgage had ever been given, such procedure is possible only by reason of the forbearance of the defendant, for if the defendant sees fit to plead the fact that the mortgage was given to secure the payment of the note, such pleading constitutes a complete bar to the plaintiff's action, unless the plaintiff can thereafter show that the security, through no fault of his, has become valueless."

It is therefore my opinion that section 111 of chapter 60 of the laws of 1927 does not violate section 39 of article V of the constitution when applied to those liens only that are valueless.

It is further my opinion that it was contemplated by the legislature that this section was intended to apply only to those liens that have ceased to have a value, and that before the same should be ordered released the attorney general should make a finding to the effect that the lien is valueless. It may be suggested that such a finding would not be binding upon the person who is sought to be held on his personal liability, and hence that there would be a cloud upon the title by reason thereof.

I do not believe this contention is worthy of serious consideration. Such a remote consideration cannot operate as a cloud upon the title. If it could be regarded as a cloud upon the title then with a like show of reasoning it could be contended that no title could be held clear without a judicial adjudication that each grantor was of sound mind at the time of the respective transfers. Such a requirement has never been suggested by even the most exacting title examiner.

Very truly yours,

L. A. FOOT,
Attorney General.