

RECORDER: In cities of 600,000 inhabitants or more, and in adjoining counties, the recorder shall identify and stamp notes or bonds secured if lien is intended to be created on real estate.

July 24, 1936. 7-24

Honorable Oliver Senti,
Associate City Counselor,
St. Louis, Missouri.



Dear Sir:

We acknowledge your request of July 21st, which is as follows:

"Enclosed is a letter from Buder & Buder in reference to a supplemental indenture, extending the time of payment and reducing the rate of interest (pursuant to a Federal decree in a proceeding under Section 77 of the Bankruptcy Act) on bonds secured by a mortgage (the original indenture), which has been submitted to the Recorder of Deeds for recording without presenting for identification, in accordance with Section 3096-B, Laws of Missouri 1933, page 192, new bonds, which, under the decree, are to be distributed to holders of and in exchange for the bonds secured by the original indenture.

"It is the contention of the Recorder of Deeds that while the lien is created by the original indenture and not by the supplemental indenture, the purpose of Section 3096-B is to identify the evidences of debt secured by the mortgage or original indenture, and since the new bonds are to be substituted for the original ones, they thereby become the holders' only evidence of the debt secured by the original indenture, and that unless the new bonds are identified

in the manner prescribed by the statute, its purpose is defeated.

"Since the question involves the construction of a State law, the Recorder should be guided by your interpretation of its terms, and I respectfully request that you advise the City Counselor whether, in your opinion, the Recorder of Deeds can lawfully require the production of the new bonds for certification before recording the supplemental indenture, so that we can advise him accordingly.

"Mr. W. W. Crowder, of Buder & Buder, will be in Jefferson City on Wednesday, and would like to submit his views concerning the matter for your consideration."

Section 3096b, as found in the Laws of Missouri, 1933, page 191, in part, is as follows:

"In all cities in this State which now have, or which may hereafter have 600,000 inhabitants or more, and in counties adjacent to such cities, when any mortgage or deed of trust or other instrument intended to create a lien upon real estate to secure the payment of a debt or obligation evidenced by an instrument or instruments in writing, shall be filed for record, the instrument or instruments representing the principal of such debt or obligation or any part thereof shall be presented to the recorder of deeds at the time of such filing for record, or in case said mortgage or deed of trust or other instrument is to be filed in more than one county then to the recorder of the county where first filed, and the recorder shall, for the compensation of ten cents for each of the first four (4) of such instruments identified by him and two cents for each additional instrument identified by him, stamp or write upon each such instrument evidencing principal so secured an identification thereof as being a note, bond or

other evidence of debt described by such mortgage, deed of trust or other instrument of security."

We assume the property referred to is in the City of St. Louis, which has a population of more than 600,000 inhabitants, and therefore said section applies.

It will be noted that said section applies to transactions where it is "intended to create a lien upon real estate."

The Supplemental Indenture under consideration here is the instrument bearing date of April 15, 1936, between United Post Offices Corporation, a Delaware corporation, and Chicago-Edgewater Postal Building Corporation, an Illinois corporation, and Chicago Lawn Postal Building Corporation, an Illinois corporation, and Chicago-Cragin Postal Building Corporation, an Illinois corporation, first parties, and Irving Trust Company, a New York corporation, and Robert N. Hawes of St. Louis, Missouri, as trustees, second parties, and Raymond D. Brown of Indianapolis, party of the third part.

Section 1 of Article IV of said Supplemental Indenture provides, among other things, the following:

"The Company and the Associated Companies hereby ratify and confirm the prior mortgage, conveyance and assignment to the Trustees of all property mentioned or described in the Original Mortgage or the supplements thereto, and do hereby further assure that said property is and has been mortgaged, pledged, granted, bargained, sold, aliened, released, remised, conveyed, transferred, assigned, and warranted unto the Trustees, their successors and assigns, to have and to hold for the purposes and upon the trusts provided and set forth in the Original Mortgage, as modified, amended, and altered by this Supplemental Indenture, said property (exclusive of leases the terms of which have expired prior to the date of this Supplemental Indenture) being more fully described as follows: * * *"

We observe that on page 22½ of said Supplemental Indenture is the following provision under Subdivision B of Section 3:

"All other property of whatsoever kind or description, whether real or personal, now owned or which may at any time hereafter be acquired by the Company or the Associated Companies, and whether or not expressly conveyed, mortgaged or pledged under the Indenture, except such stocks of merchandise and other personal property as shall now or hereafter be owned, held or acquired for sale in the ordinary course of business, and except all cash, bills, notes, and accounts receivable, owned or held by the Company or the Associated Companies. All such other property not excluded as aforesaid from the lien hereof shall, as herein provided and by indenture or indentures supplemental hereto, be expressly conveyed, mortgaged or pledged and delivered to the Trustees by the Company or with its consent by anyone on its behalf, provided, however, that the failure of the Company to execute and deliver such supplemental indenture or indentures, or to deliver any of said property to the Trustees, shall not affect the lien hereof thereon."

By this latter provision the Supplemental Indenture conveys not only the property which is now covered by the primary mortgage, and which primary mortgage this mortgage is supplemental to, but it provides that all after-acquired property is subject to the terms of this mortgage. By this provision an equitable lien is created upon the after-acquired property of the company.

In the case of Clayton v. Gentle, et al., 14 S. W. (2d) 672, the court says:

"No mortgage on after-acquired property conveys title to such property. All it does do is to convey an equitable lien, which attaches when the property is acquired. Wright v. Bircher, 72 Mo. 179, 37 Am. Rep. 433; Rutherford v. Stewart, 79 Mo. 216; (Mo. App.) Langford v. Fanning (J. I. Case Threshing Machine Co., Intervener), 7 S. W. (2d) 726, 728."

37 C. J., page 315, Par. 19, states the following:

"As a general rule any express executory contract in writing, based upon a valuable and adequate consideration, whereby one party clearly indicates an intention to charge or appropriate some particular property, real or personal, therein described or identified, as security for a debt or other obligation, or whereby one party promises to assign, convey, or transfer the property as security for such a debt or obligation, creates an equitable lien upon the property so indicated which is enforceable against the property in the hands, not only of the original contractor, but also of his heirs, personal representatives, assigns, or purchasers or encumbrancers with notice."

37 C. J., page 324, Par. 32, in part, is as follows:

"But where the parties by their contract clearly show an intention to create a positive lien or charge upon real or personal property, whether then owned by the contractor or not, * * * it attaches in equity as a lien or charge upon the particular property as soon as the property comes into existence or the contractor acquires a title thereto, * * * ."

In *Wright v. Bircher*, 72 Mo. 179, l. c. 185, the court approvingly quotes from Justice Story in *Mitchell v. Winslow*, 2 Story 630, the following:

"It seems to me the clear result of all the authorities, that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy."

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In *McQuie v. Peay*, 58 Mo. 56, l. c. 58, the court says:

"The doctrine has long been settled, that in addition to the actual, conditional conveyance of land, which constitutes a legal mortgage, courts of equity recognize certain other liens arising from the implied agreement of the parties, or the justice of the case, but not depending upon any express transfer of the title. These are termed equitable mortgages, and in general an agreement in writing to give a mortgage * * * will create a mortgage in equity, or a specific lien on the property so mortgaged."

It necessarily follows that the parties intend to create a lien upon real estate by including in the Supplemental Indenture the provision whereby after-acquired property comes within the terms of the mortgage and becomes additional security for the payment of the bonds.

CONCLUSION

It is our opinion that by the terms of the Supplemental Indenture in question the parties do thereby intend to create a lien upon real estate, and said Section 3096b, supra, provides that at the time of the filing for record of such an instrument in the City of St. Louis, there shall also be presented to the recorder of deeds the instrument or instruments representing the principal of said debt or obligation secured, and it becomes his duty to identify, stamp or write upon each such evidence of indebtedness so secured an identification thereof as being a note, bond or other evidence of debt described by such mortgage, deed of trust or other instrument of security.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

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