

Opinion No. 45-4828

December 13, 1945

BY: C. C. McCULLOH, Attorney General

TO: C. R. Sebastian State Comptroller Santa Fe, New Mexico

{*166} We are in receipt of your letter of November 24, 1945, and the enclosed letter from Kirby L. Vidrine with respect to the default on the Bayard water revenue bonds. In your letter you state that in 1939 water revenue bonds were issued for the purpose of providing funds for the construction of a complete water works system. You further state that the bonds were termed "first mortgage" bonds. Mr. Vidrine, in his letter, states that the Village of Bayard executed a deed of trust covering the water works system to the title company in Albuquerque, to be held in trust to secure the payment of these bonds.

In view of these circumstances, you ask our opinion as to whether it is legal to issue a first mortgage to secure the re-payment of revenue bonds under the Revenue Bond Act, and, secondly, if the trust agreement executed by the Village of Bayard is binding.

Apparently these bonds were issued under Chapter 57 of the Laws of 1933 which is compiled as Sections 14-3508 to 14-3513, inclusive, of the 1941 Compilation. Section 14-3511 provides in part as follows:

"Provided further that when such revenue bonds are issued under this act for the purchase of wells, cisterns, reservoirs or other sources of water supply and pumping plants or other works or machinery necessary for the operation thereof and the land and real estate upon which the same are situated or located, the municipality purchasing the same may as an additional and further assurance of the payment of the purchase-price thereof according to the terms of said revenue bonds, secure the payment thereof by a mortgage of the property so purchased, conveying said property to a trustee for the benefit and security of the holders of said bonds."

In view of the foregoing provision, it is my opinion that in 1939 a village could properly execute a mortgage covering the property purchased through the issuance of the bonds. This does not necessarily mean that a village could execute a mortgage covering the entire waterworks system; it could only execute a mortgage covering the property purchased through the sale of such bonds.

I take it from your letter that you assume that there is both a mortgage and a trust agreement. I seriously doubt this. A deed of trust is an instrument used to accomplish the same purpose as a mortgage. By a mortgage, property is deeded to the creditor to secure the payment of the loan with the right of foreclosure vested in him. By a deed of trust, the property is conveyed to a third person called a trustee for the benefit of the creditor. The trustee is then given the right to foreclose. As used in New Mexico, there is no material difference in a deed of trust and a mortgage. You will observe that the

Legislature, in Section 14-3511, cited above, authorizes the execution of a mortgage and then provides that such mortgage shall convey said property to a trustee. It is because of this language that the security is referred to as a mortgage {*167} and is referred to by Mr. Vidrine as a deed of trust.

In view of the foregoing, it is my opinion that the town of Bayard, in 1939, had the power to execute a deed of trust. I could not, of course, express an opinion as to this particular deed of trust regarding its validity without examining the same. I enclose herewith the letter of Mr. Vidrine.

By ROBERT W. WARD,

Asst. Atty General