

the various tables, but the principle involved is, in our judgment, *applicable to the entire situation* as developed by the facts before us."

The facts were necessarily the same in all the courts because the case was heard on a stipulation of the parties as to the facts.

It is therefore the opinion of this department that A should return for taxation the sum of money on which he had issued checks to B and C, such checks not being certified or presented for payment prior to tax listing day.

Respectfully,

JOHN G. PRICE,
Attorney-General.

1854.

MUNICIPAL CORPORATIONS—ORDER OF SALE OF MUNICIPAL BONDS.

1. *Municipal bonds to be sold by the financial officers of a municipality, should be first offered to the trustees of the sinking fund of said municipality, secondly to the state liability board of awards (now the industrial commission), and thirdly to the board of commissioners of the sinking fund of the city school district prior to their offering at public sale.*

2. *Sale of such bonds other than to the trustees of the sinking fund of the city, the industrial commission or the board of commissioners of the sinking fund of the city school district should be to the highest bidder and advertised as provided in section 3924 G. C.*

COLUMBUS, OHIO, February 11, 1921.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Receipt is acknowledged of your communication under date of January 19, 1921, requesting an opinion on the following:

"We are enclosing herewith question submitted by the city auditor to the city solicitor at Lorain, Ohio, and in view of the provisions of section 4169 G. C., we respectfully request your written opinion upon the following matter:

Question 1. May the financial officers of a municipality, when they have bonds for sale, sell such bonds to the council of the municipality for the purposes set forth in section 4169 G. C., previous to offering to the sinking fund of the city, of the school district, the state liability board of awards and advertising for bids?

Question 2. If not, may they be sold to the council before advertising for bids?"

The letter enclosed from the city auditor of Lorain, reads as follows:

"Some time ago, the council acting as cemetery trustees, was given the sum of \$5,000.00 by the department of public service from the cemetery fund to invest and hold in trust for the benefit of the cemetery. Some time afterwards the council passed a resolution authorizing the clerk of council to purchase \$5,000.00 worth of deficiency bonds of the city, which

resolution was not called to my attention at the time, and as I have already sold the bonds, I could not very well sell any of them to the clerk of council.

Section 3922 provides that bonds issued by the city shall be first offered to the sinking fund trustees of the city, and such of said bonds as are not then taken to be offered to the board of commissioners of the sinking fund of the city school district, and such of said bonds as are not then taken, to the state liability board of awards.

Will you kindly inform me whether it is valid to offer bonds to the council as trustees of the cemetery trust fund and at what time are they given an opportunity to purchase bonds."

In answer to the first question indicated above, as to whether the financial officers of a municipality may sell the bonds of the city by other methods or procedures than those specified by sections 3922 and 3923 G. C., it would be well to first examine the statutes which apply to the condition under consideration.

Section 3922 G. C. provides:

"When a municipal corporation issues its bonds, it shall first offer them at par and accrued interest to the trustees of the sinking fund, in their official capacity, or, in case there are no such trustees, to the officer or officers of such corporation having charge of its debts, in their official capacity. If such trustees or other officers of the sinking fund decline to take any or all of such bonds at par and accrued interest, the corporation shall offer to the board of commissioners of the sinking fund of the city school district such bonds or so many of them, at par and accrued interest and without competitive bidding as have not been taken by the trustees of the sinking fund, and the board of commissioners of the sinking fund of the city school district may take such bonds, or any part thereof."

Section 1465-58 G. C. provides:

"The state liability board of awards shall have the power to invest any of the surplus or reserve belonging to the state insurance fund in bonds of the United States, the state of Ohio, or of any county, city, village or school district of the state of Ohio, at current market prices for such bonds; provided that such purchase be authorized by a resolution adopted by the board and approved by the governor; and it shall be the duty of the boards or officers of the several taxing districts of the state in the issuance and sale of bonds of their respective taxing districts, to offer in writing to the state liability board of awards, prior to advertising the same for sale, all such issues as may not have been taken by the trustees of the sinking fund of the taxing district so issuing such bonds; and said board shall, within ten days after the receipt of such written offer either accept the same and purchase such bonds or any portion thereof at par and accrued interest, or reject such offer in writing; and all such bonds so purchased forthwith shall be placed in the hands of the treasurer of state, who is hereby designated as custodian thereof, and it shall be his duty to collect the interest thereon as the same becomes due and payable, and also the principal thereof, and to pay the same, when so collected, into the state insurance fund. The treasurer of state shall honor and pay all vouchers drawn on the state insurance fund for the payment of such bonds when signed by any two members of the board, upon delivery of said bonds to

him when there is attached to such voucher a certified copy of such resolution of the board authorizing the purchase of such bonds; and the board may sell any of said bonds upon like resolution, and the proceeds thereof shall be paid by the purchaser to the treasurer of state upon delivery to him of said bonds by the treasurer."

It would seem from a perusal of the above statutes that the process and procedure pertaining to the sale of municipal bonds by its municipal officers is not only indicated but clearly defined. It would also seem by the provisions of this section that the matter of offering the bonds first to the trustees of the sinking fund is clearly mandatory in its nature. So it would also seem to be the avowed intention of this statute to confer the privilege of buying first, or having the first opportunity of purchasing said bonds, upon the trustees of the sinking fund.

It would seem, therefore, that the sale of bonds indicated by the process suggested in your first question would not only be in contravention of section 3922 G. C., but would also defeat the substantial rights of the trustees of the sinking fund, under section 3922 G. C. as well as those of the Industrial Commission under section 1465-58 G. C. While such irregularity would not, perhaps, affect the validity of the bonds, yet it might raise the question of power in the municipality to sell its bonds otherwise than as prescribed by statute.

In answer to your second question, it would also seem that a sale of the bonds without the advertising for bids would be irregular and in contravention of section 3924 G. C. which provides as follows:

"Sales of bonds, other than to the trustees of the sinking fund of the city or to the board of commissioners of the sinking fund of the city school district as herein authorized, by any municipal corporation, shall be to the highest and best bidder, after publishing notice thereof for four consecutive weeks in two newspapers printed and of general circulation in the county where such municipal corporation is situated, setting forth the nature, amount, rate of interest, and length of time the bonds have to run, with the time and place of sale. Additional notice may be published outside of such county by order of the council, but when such bonds have been once so advertised and offered for public sale, and they, or any part thereof, remain unsold, those unsold may be sold at private sale at not less than their par value, under the directions of the mayor and the officers and agents of the corporation by whom such bonds have been, or may be, prepared, advertised and offered at public sale."

The question is asked in the above stated communication by the city auditor of Lorain of the city solicitor:

"Will you kindly inform me whether it is valid to offer bonds to the council as trustees of the cemetery trust fund, and at what time are they given an opportunity to purchase bonds?"

Section 4169 G. C. provides:

"The director shall turn over to the council property on hand or held by him as a permanent fund, for such purposes under his control, or such money as may thereafter come to him for such purpose, rendering a full statement thereof, by whom, when, and for what purpose paid. The council shall acknowledge receipt thereof in writing to the director signed by

its clerk. By resolution duly passed and entered on the minutes of its proceedings, the council shall pledge the faith and credit of the corporation to forever hold such money as a permanent fund, and pay in semi-annual payments, to the director as interest on the funds, sufficient to provide perpetual care of the lot and lots as agreed by the director. The council and its successors shall invest and keep invested such funds in interest bearing debts of the city, if any, and if no such debts are owing by the city, in safe interest bearing bonds, or stocks for the benefit of such cemetery funds, that will bear as great an income as possible, and all such money and the income thereof shall be exempt from taxation, the same as other cemetery property."

It would seem from the provisions of this section that it would be valid to sell the bonds to council as trustees of the cemetery trust fund the same as to any other bidder who had complied with the provisions of section 3924, after said bonds had been offered in accordance with the provisions of sections 3922 and 1465-58 G. C.

By the provisions of section 3922 G. C. the officers to whom bonds shall be first offered are designated as follows:

First: It shall offer them at par and accrued interest to the trustees of the sinking fund.

Second: To the board of commissioners of the sinking fund of the city school district.

This act has not been amended or repealed. Under the provisions of section 1465-58 G. C. quoting that part of the section which obtains in the present condition:

"and it shall be the duty of the boards or officers of the several taxing districts of the state in the issuance and sale of bonds of their respective taxing districts, to offer in writing to the state liability board of awards, *prior to advertising the same for sale*, all such issues as may not have been taken by the trustees of the sinking fund of the taxing district so issuing such bonds."

It would seem from an examination of this statute that the intention was to at least make the offering of the bonds to the Industrial Commission at a time necessarily prior to the offering of same for public sale, and it would also seem to be indicated that the offering of said bonds should be made to the Industrial Commission after they had been offered to the sinking fund as provided in section 3922 G. C.

This would then indicate that the bonds should be first offered to the sinking fund, secondly to the Industrial Commission; but section 3922 G. C. provides also for the second case by specifying "to the board of commissioners of the sinking fund of the city school district," etc., above indicated.

Since the statutes would seem to be irreconciled on the matter of numerical order in which this process should be carried on, and in view of the fact that section 1465-58 G. C. is the most recent statute, it would seem that its provisions should govern if in essence not in conflict with section 3922 G. C. This view of the matter would then indicate the numerical steps in their order as follows: Bonds should be first offered to sinking fund trustees, secondly to Industrial Commission, thirdly to board of commissioners of the sinking fund of the city school district and fourthly, if any of the bonds remain after offering to the three departments in the manner described above, such bonds should be sold to the highest and best bidder as provided by section 3924 G. C.

It is therefore the opinion of this department that when municipal bonds are to be sold by financial officers of a municipality, they should be first offered to the trustees of the sinking fund of said municipality, second to the Industrial Commission, and third to the board of commissioners of the sinking fund of the city school district prior to their being offered at public sale. It is also the opinion of this department that the purchase by council as trustees of the cemetery trust fund of the bonds above indicated should be in accordance with the provisions of section 3924 G. C.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

1855.

TAXES AND TAXATION—DELINQUENT TAXES—OPINION NO. 1776
 DATED DECEMBER 31, 1920, MODIFIED—WHEN COUNTY TREASURER ENTITLED TO COLLECT PENALTY.

Certain statements in Opinion No. 1776 under date of December 31, 1920, modified, but conclusion adhered to.

COLUMBUS, OHIO, February 11, 1921.

HON. V. W. FILIATRAULT, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—The thanks of this department are due to you for your courteous letter of February 1, quoting a letter from the tax commission of Ohio, which raises a question as to certain features of the holding in Opinion No. 1776 of this department, rendered December 31, 1920.

The commission refers to the case of *Hunter vs. Borck*, 51 O. S. 320, which was overlooked in consideration of Opinion No. 1776. The case holds, among other things, that a county treasurer is not entitled to collect the penalty of five per cent provided for by several of the sections referred to in said Opinion No. 1776 in case he merely receives delinquent taxes over the counter after the last date limited for the payment of taxes. The case draws the general distinction that was pointed out in Opinion No. 1776 between the function known as "receipt of payment of taxes" by the county treasurer and that known as "collection"; but it forces a modification of some of the language in said opinion No. 1776 by holding that some "special effort in person or through agent" must be made by the county treasurer in order to constitute a "collection" which may be used as the predicate of the penalty. The only direct statement on this point in Opinion No. 1776 which needs express modification is embodied in the following sentence:

"in contemplation of law the tax is not being *paid* after the last day limited for the payment of taxes; it is rather being *collected* by the treasurer."

This statement is incorrect.

Another statement in Opinion No. 1776 requires some qualification: that is the statement that

"the treasurer can not of his own motion hold open his books for the payment of taxes beyond January 20 under authority of a resolution of the commissioners extending the time until January 20."