

hire, lease or occupy, either in whole or in part, a room, building, or other structure for the exhibition and sale of such goods, wares and merchandise.

In view of the foregoing, and in specific answer to your inquiry, I am of the opinion that the holder of a state auctioneer's license who makes sales by auction according to law on vacant lots or plots of ground is not required to obtain a peddler's license or an itinerant vendor's license.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4872.

BOND ISSUE—ORDER OF PAYMENT WHERE PREVIOUS BONDS
UNPAID AT MATURITY—BOARD OF EDUCATION MAY ENTER
INTO PERSONAL SERVICE CONTRACTS ALTHOUGH MONEY
NOT APPROPRIATED.

SYLLABUS:

1. *There is no priority or preference among the holders of individual bonds which make up an issue of "term bonds," so far as their being paid is concerned; the order of presentation determines the order of payment.*

2. *When an issue of bonds to fall due in a series is made, a levy of taxes should be made each year sufficient to redeem the bonds next thereafter maturing. The levy of each year must be applied to the payment of the bonds for which the levy is made, although the bonds maturing prior thereto have not been paid in full.*

3. *A contract of a board of education for personal services such as contracts with teachers, bus drivers and janitors, is good, providing these persons are paid by regular payroll, even though the money to pay the same is not appropriated under paragraph (b) of Section 5625-33, General Code, and there is no certificate of the fiscal officer as provided by paragraph (d) of Section 5625-33, General Code.*

COLUMBUS, OHIO, January 6, 1933.

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

GENTLEMEN:—This will acknowledge the receipt of your request for my opinion in answer to the two following questions which have been submitted to you by the Board of Education of the City School District of Maple Heights, Ohio:

"1. What are the legal rights of holders of bonds on which the board has defaulted payment, to secure a preference over bonds falling due now out of this next tax settlement?

2. What guarantee must the Clerk of the Board have as to the funds available for that purpose in entering into a contract for personal services covering the ensuing year?"

With reference to your first question, it may be stated that there is very

little authority with respect to this matter. The general rule is stated in Abbott on Public Securities, Section 354, as follows:

"The debt represented by an issue of securities for purposes of payment is considered as an entirety and indivisible. There can be therefore no priority or preference in the payment of individual bonds when the whole issue falls due. The holder of bond No. 1, for illustration, is not entitled to a preference over the holders of bonds bearing a sequent number. The order of presentation determines the order of payment."

There is cited by the author in support of the text quoted above, the case of *Ranger vs. New Orleans*, 2 Woods, 128.

The above statement of law is no doubt applicable where an issue of what are known as "term bonds" is involved. In other words, where an issue of bonds has been made all to become due at some future time and a sinking fund for the payment of interest thereon and the redemption of the bonds at maturity is built up from year to year from the proceeds of taxes levied for that purpose, there is no doubt that the several bonds involved in the issue would have no priority over each other except as they might be presented for payment, one ahead of the other.

Where, however, an issue of serial bonds is involved, where one of the bonds of the series comes due annually or semi-annually for a period of years after the issue is made, the rule, in my opinion, is somewhat different. The Constitution of Ohio, in Section 5, of Article XII, provides:

"No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state distinctly, the object of the same, to which only, it shall be applied."

In Section 11, Article XII, of the Constitution of Ohio it is provided that:

"No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

By force of said Section 11, of Article XII, of the Constitution of Ohio, it becomes the duty of the taxing authority of any political subdivision to levy year by year, a sufficient amount to redeem each bond of a series as it becomes due, and it is the duty of the budget commission to approve such levy without modification. (Section 5625-23, General Code.)

When such levy is made to redeem a particular bond or bonds the proceeds of that levy should be applied to the redemption of that bond. If, through inadvertance, a levy is not made for that purpose, or, if the levy is made, and for some reason or other it is not collected and no money is otherwise made available by transfer, whereupon the political subdivision defaults in the payment of that particular bond, there is no authority or power in the taxing authority to take the proceeds of a levy made for the next year for the purpose of redeeming the bond then coming due to redeem the one upon which it has defaulted. It is necessary, in my opinion, that the proceeds of levies made for the specific purpose of redeeming bonds due

in a certain fiscal year, must be used for that purpose although the bonds maturing a year before may not have been paid in full.

This conclusion is borne out by the Supreme Court of Washington in the case of *Baker vs. Mecham, City Treasurer*, 18 Washington, 319, 51 Pac. 404, where it is held:

"Under Laws Washington 1893, page 231, which provides that, when the cost of district bonds is charged by special assessment against specific property, assessments shall be levied each year sufficient to redeem the installments of such bonds next thereafter maturing, the assessment of each year must be applied on the bonds maturing that year, although the bonds maturing the year before have not been paid in full."

I come now to the consideration of your second question. I assume the "contract for personal services" which you speak of, has reference to contracts with teachers, janitors, bus drivers and the like, who are paid by regular pay-roll.

Section 5625-33, General Code, provides in paragraph (d) thereof, in substance, that no subdivision or taxing unit shall make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that there is money in the treasury or in process of collection when due.

The same section, however, provides:

"The term 'contract' as used in this section, shall be construed as exclusive of current payrolls of regular employes and officers."

It was held by a former Attorney General in an opinion found in Opinions of the Attorney General for 1928, at page 1540, that the certificate of the clerk of the board of education spoken of in Section 5625-33, paragraph (d) was not necessary where teachers were employed. The same would be true when any personal services were involved in the contract providing those services were paid for by regular payroll. The same question was before the Court of Common Pleas of Stark County in the case of *Lee vs. Brewster Village School District*, 29 O. N. P. (N. S.) 134:

"A contract of employment of a regular employe is good, even though the money to pay the same is not appropriated under paragraph B, Section 5625-33, at the time the contract is made."

I am therefore of the opinion, in specific answer to your questions, that:

1. There is no priority or preference among the holders of individual bonds which make up an issue of "term bonds," so far as their being paid is concerned; the order of presentation determines the order of payment.
2. When an issue of bonds to fall due in a series is made, a levy of taxes should be made each year sufficient to redeem the bonds next thereafter maturing. The levy of each year must be applied to the payment of the bonds for which the levy is made, although the bonds maturing prior thereto have not been paid in full.
3. A contract of a board of education for personal services such as contracts with teachers, bus drivers and janitors, is good, providing these persons are paid by regular payroll, even though the money to pay the

same is not appropriated under paragraph (b) of Section 5625-33, General Code, and there is no certificate of the fiscal officer as provided by paragraph (d) of Section 5625-33, General Code.

Respectfully,
 GILBERT BETTMAN,
Attorney General.

4873.

TORRENS ACT—METHOD OF PROCEDURE IN THE DEDICATION
 AND VACATION OF STREETS OVER TORRENIZED LANDS.

SYLLABUS:

1. *When lands lying without a municipality the title to which has been registered under the Ohio Land Title Registration Act, have been subdivided and the plat of such subdivision or allotment duly recorded and subsequent thereto it becomes advisable to vacate a portion of one of the streets lying within such allotment, proceedings to accomplish such purpose should be had by virtue of the provisions contained in Section 6862 et seq., General Code rather than Section 3600, General Code, and a memorial of such proceedings entered upon the land title registration certificate.*

2. *Method of procedure in the dedication and vacation of streets over Torrenized lands discussed.*

COLUMBUS, OHIO, January 6, 1933.

HON. HOWARD M. NAZOR, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—Your recent request for opinion reads:

“In October, 1928, 765 acres of land in Rome Township, Ashtabula County, Ohio, were registered under the Torrens Act (on application of The Grand River Acres Company, an Ohio corporation dealing in real estate.)

On April 19, 1929, 115 acres of the above tract were platted and the plat recorded at said time with the County Recorder. Of the 180 lots contained in the plat, 55 have been sold, and it is now desired to vacate a portion of one of the streets in the plat for a distance of approximately 430 feet. All the owners which abut directly on the part of the street sought to be vacated are favorable to the vacation, but there is one owner, who owns a lot a distance of about 120 feet from one end of the part sought to be vacated, who is opposed to the vacation. Of course, none of this plat is within the limits of a municipal corporation.

What I would like to inquire is what is the proper method of vacating this part of the street? Does Section 3600 apply, or would it be necessary to make application through the County Commissioners, in accordance with Section 6862?

Also, I would like your opinion as to whether or not the streets and ways contained in the plat are public or private streets?”