color of office and not otherwise paid out according to law, shall be due to the political subdivision or taxing district with which the officer is connected and shall be by him paid into the treasury thereof to the credit of a trust fund, there to be retained until claimed by the lawful owner; if not claimed within a period of five years after having been so credited to said special trust fund, such money shall revert to the general fund of the political subdivision where collected. * * *"

Section 286, supra, was construed in an opinion which appears in Opinions, Attorney General, Vol. II, 1915, at page 1183. The following language appears therein:

"While 'public money' as defined in Section 286 G. C., 103 O. L. 509, 'includes all money received or collected under color of public office,' etc., this definition must be read in the light of the further provisions of the same section at least and particularly that provision which limits the right of recovery of such public money by public authorities to an action 'in the name of the political subdivision or taxing district to which such public money is due.' It is thus clearly indicated that public money comprehends only such money received or collected under color of office, etc., as is due to some political subdivision or taxing district of the state."

I know of no authority in law which would authorize your department to make a finding under the circumstances outlined in your letter for the use and benefit of the several defendants. Any action instituted would necessarily have to be brought in the name of the political subdivision or taxing district to which such public money is due or such public property belongs. These sections of the General Code do not contemplate nor authorize a finding and an action being brought for the uses and benefits of private persons. Such defendants must seek their own remedies, if any now exist, in a court of competent jurisdiction.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2216.

BONDS—AGREEMENT BETWEEN CITY OF PIQUA AND PRIVATE BOND FIRM DISCUSSED—INVALID.

SYLLABUS:

Proposed agreement between a city and a firm engaged in the business of buying and selling bonds, for the sale by the city of notes bearing a specified rate of interest and having an average life of at least one year to said firm at par and accrued interest in consideration of the furnishing of certain services by said firm, which services are beyond the power of the city to contract or pay for, declared invalid.

COLUMBUS, OHIO, June 11, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication requesting my opinion, and which reads as follows:

"We are enclosing herewith copy of agreement between the City of Piqua and Siler, Carpenter and Roose, the second party agreement to render certain services which are ordinarily rendered by the City Solicitor.

Question: May a municipal corporation legally enter into an agreement of this character?"

Accompanying your communication you have submitted a copy of a memorandum of agreement between the city of Piqua and the bond firm referred to in your letter, which agreement is in the words and figures following:

"MEMORANDUM OF AGREEMENT.

The firm of Siler, Carpenter & Roose of Toledo, Ohio, agrees to prepare and furnish all necessary legislation, ordinances and resolutions and outline the procedure necessary for the issuance of notes and bonds and to prepare such bond and note resolutions for any improvement for which the City of Piqua, Ohio, is to borrow money.

The said firm of Siler, Carpenter & Roose agrees to furnish the blank notes ready for execution and also furnish a complete transcript for the issuance of bonds, for the purpose of refunding notes purchased by said firm from the City of Piqua and also will furnish, free of charge, the legal opinion of Messrs. Squire, Sanders & Dempsey of Cleveland, Ohio, on all bond and note resolutions and ordinances, said opinion to be furnished at the expense of said bond firm.

Said bond firm further agrees to pay par and accrued interest for notes having an average life for at least one (1) year, bearing interest at the rate of 5½ per cent interest per annum, no instalment of interest to become due prior to the due date of the notes at the option of said firm.

Said firm agrees to do only the things herein agreed to be performed in matters of improvement for which the City borrows money when the said firm buys the notes of the City at 5½ per cent per annum, as herein specified.

Said firm further agrees to do all things necessary to place on the market for sale, all bonds heretofore authorized to be sold, and to prepare all necessary legislation, furnish legal opinion of Messrs. Squire, Sanders & Dempsey and to furnish and complete all legislation for which bonds are to be sold, regardless of when said legislation is passed and to do all other things necessary to place all unsold bonds of the City of Piqua, Ohio, on the market, in the event that the Sinking Fund Trustees refuse to take any or all of said bonds.

As evidence of the good faith of the said firm in making the above proposal and upon the acceptance by the City, said firm agrees to forward their certified check in the sum of $1,000.00, said check to be held by the City and to be forfeited by said firm as full liquidated damages, in case they fail to fulfill the terms of the above proposal.

Said City, by its Auditor, agrees to sell the said firm, all notes bearing interest at the rate of 5½ per cent per annum, not maturing before one (1) year and all other notes which the said firm agrees to buy, regardless of maturity or interest, for the year of 1928.

The proposal of the said firm herein is to apply only to matters in which the said firm buys notes.

SILER, CARPENTER & ROOSE,
By G. A Roose.
THE CITY OF PIQUA, OHIO,
By A. Omer Patterson."

Briefly stated, the firm of Siler, Carpenter & Roose, hereinafter referred to as the bond firm, agrees to buy at par and accrued interest, all notes bearing interest at 5½ per cent, and having an average life of at least one year, issued by the City of Piqua in anticipation of bond issues for municipal improvements. The bond firm agrees to prepare and furnish all legislation and outline the procedure necessary for the issuance of such notes and the bonds anticipated thereby, furnish complete transcripts, do all things necessary to place the bonds on the market and furnish the opinion of Squire, Sanders & Dempsey as to the legality of such bonds. The bond firm also agrees, as evidence of good faith, to deposit its certified check in the sum of one thousand dollars, said check to be held by the city and to be forfeited to the city in case the firm fails to fulfill the terms of the contract.

The provisions of law relative to the sale of notes, such as those under consideration, are found in Sections 2293–27 and 2293–28, General Code.

Section 2293–27, General Code, provides:

> "Before selling any notes or bonds of the subdivision, the taxing authority shall offer the same at par and accrued interest to the trustees or commissioners or other officers who have charge of the sinking fund of the subdivision and such officers shall have the option of purchasing said notes or bonds or rejecting the same."

Section 2293–28, General Code, provides in part:

> "If said notes or bonds are rejected by such officers, then notes having a maturity of two years or less may be sold at private sale at not less than par and accrued interest * * *."

The above quoted provisions of Sections 2293-27 and 2293–28, General Code, permit the sale, at private sale, at not less than par and accrued interest, of notes having a maturity of two years or less, which have first been offered to and rejected by the trustees or other officers having charge of the sinking fund of the subdivision. Under the above quoted provisions there is no restriction on the sale of such notes than that they must first be offered to the sinking fund trustees or other officers having charge thereof, and it follows that they may be sold to any one, without competitive bidding, at any price the subdivision cares to accept, which must, however, not be less than par and accrued interest.

An examination of the agreement discloses no provision for first offering the notes to the trustees or other officers having charge of the sinking fund and the agreement is clearly invalid in the absence of such a provision.

Another question presented is as to whether or not the agreement in question is supported by good and sufficient consideration. In consideration of the agreement on the part of the city to sell to it at par and accrued interest all notes issued by the city in anticipation of bond issues, bearing five and one-half per cent interest per annum, and having an average life of at least one year, the bond firm agrees to pay for said notes, par and accrued interest, and to furnish certain services. The agreement to pay par and accrued interest for the notes cannot in and of itself be deemed a consideration for the agreement on the part of the city to sell because under the provisions of Section 2293-28, General Code, supra, the notes could not be sold for a lesser amount in any event. The bond firm therefore is not under the agreement paying any more for the notes than it would be compelled to pay if it bought them in the absence of the agreement and in the regular course.

The services which the bond firm agrees to render, to wit: the preparation and furnishing of legislation, outlining the procedure necessary, furnishing blank notes ready for signature, furnishing a transcript, placing the bonds on the market and furnishing the opinion of Squire, Sanders & Dempsey, are all services which a city may not contract for or pay for in any event, except perhaps the provision with reference to furnishing blank notes ready for signature. I would have no hesitancy in saying that a municipality may purchase blank notes ready for signature just as it may purchase blank bonds ready for signature. But such power presupposes the purchase of such notes prior to the sale of the same and not as a part of the contract of sale.

As to the remainder of the services to be furnished by the bond firm in the instant case, the city could not, independent of the agreement to sell the notes, contract for and expend public funds for such services. These services all fall within the province and duties of the city solicitor, as defined in Section 4305, General Code, and any contracts or any expenditure of public funds therefor would be clearly illegal. It follows, therefore, that a promise to perform or furnish such services cannot become the basis of a valid contract for the sale of notes by a city. However, even if the validity of that part of the consideration relating to the furnishing of blank notes ready for signature be conceded, the entire consideration fails because of the illegality of the remainder of the same. This rule is well settled and is stated in 13 C. J. page 513 as follows:

> "If any part of a single consideration for one or more promises is illegal, or if there are several considerations for one promise, some of which are legal and others illegal, the promise is wholly void, as it is impossible to say which part or which one of the considerations induced the promise, this rule being enunciated by statute in some jurisdictions. It is not material whether the illegality arises from statute or from the common law. * * *"

An additional reason exists for holding that the above agreement is beyond the power of the city to make and that is that while under the provisions of law in respect of the sale of notes issued in anticipation of bond issues, there are no restrictions on the sale of such notes at private sale at par and accrued interest, except that such notes must first be offered to the trustees or other officers having charge of the sinking fund, the law clearly contemplates that each issue of such notes shall be sold on such terms and for such price as will inure to the best interest of the municipality. In other words, each note issued should be sold only at the time it is issued and then for the best price obtainable. The price, of course, depends upon the condition of the money market at the time of sale and it is altogether possible that the city might be able to sell notes at par and accrued interest plus a premium, whereas, if an agreement such as the one under consideration were entered into the city should be limited to the sale of such notes at par and accrued interest only.

For the foregoing reasons it is my opinion that there is no consideration for the contract under consideration and that the city is without power and authority to make such a contract. The contract is therefore invalid and unenforcible.

Respectfully,
EDWARD C. TURNER,
Attorney General.