

1157.

TAXES AND TAXATION—MUNICIPAL CORPORATION—MAY ISSUE REFUNDING BONDS FOR PURPOSE OF PROVIDING FOR PAYMENT OF BONDS ISSUED SINCE JANUARY 1, 1913—WHAT LEGAL METHOD MIGHT PREVENT SUCH ACTION—VILLAGE OF LYNCHBURG.

It is not lawful for the taxing authorities of a subdivision of the state, the sinking fund of which is impaired, to issue refunding bonds for the purpose of providing for the payment of bonds issued since January 1, 1913, instead of performing their mandatory duty by making increased sinking fund levies sufficient to repair the deficiency. Such illegal course could be prevented by mandamus or injunction. However, the power to issue refunding bonds still exists and extends to the refunding of bonds issued since January 1, 1913, so that, however wrongful or illegal such action might be, the bonds themselves would be valid.

COLUMBUS, OHIO, April 16, 1920.

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

GENTLEMEN:—Receipt is acknowledged of your recent letter submitting for the opinion of this department the following question:

“Under date of February 27th, 1920, we received the following communication from the mayor of Lynchburg, Ohio:

“The village of Lynchburg is without a legal department and is in a peculiar financial situation that promises to become critical if not soon relieved. We desire an opinion from the attorney-general on the following statement of fact and will appreciate your reference of the matter to that office.

Briefly stated, our situation is as follows: We have total outstanding bonded debt of approximately \$30,000.00. This was incurred principally for the erection of an auditorium, during the years 1915-16. Same was issued without a vote of the people.

At the time of issuance and sale of these bonds the tax valuation of the village was approximately \$1,750,000.00.

It was thought to be good business policy at the time to make the bonds of short duration and pay the same off soon.

Shortly after the issuance of same our duplicate shrunk by reason of the fact that 56 per cent of our taxes was being paid by The Freiberg & Workum distillery, located here, which is now a thing of the past—we losing a great part of this valuation.

Result: We have defaulted on \$2,000 worth of our bonds which were due last September; and have past due \$2,000 more. We have coming due in March approximately \$3,000 more, and have less than \$2,000 in our sinking fund to meet the indebtedness. In other words, by reason of the limits of taxation we are unable to meet our obligations at maturity.

As mayor, I feel that it is improbable that the people will vote for an additional levy under the Gardner law, but in any event this would do us no good this year.

I am preparing to recommend to the council a bond issue under section 3916 “to extend the time of payment but not to increase the existing indebtedness” on the theory that the same cannot be met by the limits of taxation.

We would like the opinion of the attorney-general as to our ability to legally issue such bonds under the law,

and we are respectfully requesting your written opinion upon the following question:

Owing to insufficient levy having been made on the duplicate to take care of the redemption and interest on the bonded debt, can such bonds as described, issued since the constitutional amendment of 1912, be legally refunded under section 3916 of the General Code, so long as the levy for sinking fund allowed by law, which would be all allowable, if necessary, is not exhausted?"

Article XII, section 11 of the constitution provides 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."

Section 5649-1 of the General Code provides that:

"In any taxing district, the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking fund and interest purposes for all bonds issued by any political subdivision, which tax shall be placed before and in preference to all other items, and for the full amount thereof."

It is clear that under the combined effect of the constitutional provision and statute above quoted the making of adequate sinking fund levies is mandatory.

State vs. Zangerle, 94 O. S. 447.

Such levy must be made regardless of the other needs of the taxing district. In a sense, therefore, it is clearly illegal for a taxing district which merely finds it inconvenient to make the proper sinking fund levies, even to repair deficiencies in the sinking fund caused by past shortcomings in this respect, to omit to make such levies and instead to assert the power to refund the debt by the issuance of new bonds to take up those due and unpaid.

But it is believed that certain distinctions must be drawn. In the first place, the statement of facts submitted by the mayor shows that the deficiency in the sinking fund may have occurred originally without any neglect of duty on the part of the taxing officials of the village. Sinking fund levies supposed to be adequate may have been made and their inadequacy may have resulted from an unforeseen shrinkage of the duplicate; for the council of a village or any other original levying authorities are required to submit a budget of their needs in terms of dollars—not rates; the rates are then to be arrived at through the agency of the budget commission and the county auditor on the basis of an estimated duplicate. (See sections 5649-3a to 5649-3c, inclusive, G. C.). If this estimate proves to be false the result can not be imputed as a fault to the original levying authorities. A striking example of the possibilities here occurred in the village of East Cleveland on the occasion when a very wealthy gentleman, who was alleged to be a

resident of that city, was assessed in respect of his personal property therein. The assessment so made entered into the estimated duplicate of the village and the rates were based on that duplicate. The assessment was, however, contested successfully in the courts and such was the amount of it that a tremendous shrinkage in the duplicate of taxable property in the village took place. One could not say that the resultant deficiencies in the sinking funds of the village which must have ensued were due to any fault on the part of the levying authorities.

However, it is nevertheless true that once a deficiency occurs, whether fortuitously or not, in the sinking fund of a taxing district, the combined effect of the constitutional and statutory provisions above cited as applied by the court in the case mentioned is to require immediate reparation to be made through the making of increased sinking fund levies in future years. This duty, as previously pointed out, is paramount to the duty to provide for the current needs of the taxing district. Such duty could be enforced by mandamus; and possibly the choice of any other course of action which might be open to the financial authorities of the taxing district might be prevented by injunction.

In spite of these conclusions, however, we have to deal with a slightly different question. We must assume that no mandamus is pending or threatened and that no taxpayer or bondholder is threatening injunction proceedings. The question is as to whether or not the council of the village has the legal power to refund the bonds on which default has been made. Such legal power may exist even though it would be wrong to exercise it.

Turning to article XII, section 11, it is to be observed that the words "or renewed" occur in that section. It is clear, therefore, that the section does not prohibit all refunding of bonds. It may, nevertheless, be argued that it impliedly prohibits the refunding of all bonds issued after January 1, 1913, so that the phrase "or renewed" must be held to have application only to the refunding of bonds issued prior to January 1, 1913. Such an argument would be based upon the mandatory requirement of the constitution to the effect that provision shall, in the legislation under which bonds are issued or refunded, be made for levying and collecting annually a tax sufficient to provide for the interest and sinking fund requirements of the bonds. Here a duty is declared, and it is clearly mandatory; but the section does not prescribe the consequences of a violation of this duty. It is only by inference that we arrive at the conclusion that because it is the duty of the taxing officials to maintain the integrity of the sinking fund therefore, if they fail to do so a statute authorizing a refunder would be unconstitutional. Such an inference encounters the opposition, as it were, of the words "or renewed" in the section itself. On the whole, it is believed impossible to read into article XII, section 11 all the language that would be necessary fully to express the idea that a refunder of bonds issued subject to its requirements would be unconstitutional. Such language would be something as follows:

"and in the event that such legislation is not complied with in any year, the tax levies of subsequent years shall be increased so as to make up the deficiency; and in no event shall any bonds issued after this section takes effect be refunded."

The consequences of such an interpretation may be briefly considered. It is conceivable that with such language as has been imagined in the constitution the taxing authorities of a district might still fail to comply with its mandate. The result would be that at the end of the period for which the bonds were issued there would be no money in the treasury of the district to pay them; so that if it were illegal to refund them the district could do nothing but default and the bondholders would lose their investment. To be sure, it might be argued that this was

the design of the constitution and that its result is that the bondholders, furnished a weapon by which they can compel the making of the necessary tax levies through the legislation which the constitution commands, should lose unless they are diligent in the use of such weapon. Such an interpretation, however, seems to me should be avoided, if possible, in favor of one which will safeguard the honor and credit of the taxing districts of the state. The debates in the constitutional convention in connection with article XII, section 11, have been examined, and while they all disclose the purpose on the part of the framers of the section to deal with the evil of the improper management of sinking funds and retirement of public debt, yet there is discernible therein no purpose to carry the provision of the constitution to the extreme just suggested.

In view, therefore, of the express mention of refunding in article XII, section 11, I am unable to arrive at the conclusion that that section makes it absolutely illegal to refund bonds issued since it has been in effect. Its true force, it seems to me, extends no further than to impose upon taxing authorities the duty of making the necessary sinking fund levies. The constitution is self-executing in this respect and the duty can not be escaped in the academic sense at least—that is, it may be enforced by mandamus; but if it is not enforced and the expedient of refunding is employed instead, I am unable to find in article XII, section 11, any evidence of an intention to make such refunding illegal in the sense that the refunding bonds would be void. It is probably true in this connection that the culpable officials might be subject to some liability for the additional interest charge imposed upon the district by the neglect of which they may have been guilty.

The reasoning above applied to article XII, section 11 is also applicable, it is believed, to section 5649-1, G. C. This section imposes a mandatory duty as held in the case cited. But if the duty is not discharged there is nothing in this section which has the implied effect of invalidating a refunding issue of bonds.

Having thus disposed of the negative side of the question, brief reference may be made to its affirmative aspect. Under sections 3916 and 5656 G. C. refunding bonds may be issued. These sections authorize the refunding of bonds issued since 1913 unless article XII, section 11 impliedly amended or repealed such sections as to the refunding of such bonds. The general schedule to the constitutional amendments of 1913 continued in effect all statutes not inconsistent with the newly adopted amendments. For reasons previously stated, it can not be said that sections 3916 and 5656 G. C. are inconsistent with article XII, section 11 even as to the refunding of bonds issued after January 1, 1913. They are inconsistent in spirit, to be sure, inasmuch as the whole idea of refunding bonds issued since that date is inconsistent with the controlling purpose of the amendment, which is that there shall never be any occasion to refund such bonds. But, strictly speaking, there is no such irreconcilable inconsistency as will prevent the use of the sections even when the exercise of such power would involve the element of abuse of power amounting to a violation of the constitution.

So, also, with section 5649-1 G. C. This section is not irreconcilably inconsistent with sections 3916 and 5656 G. C. and worked no implied repeal or amendment of those sections.

The correctness of the views above expressed is demonstrated, it seems to me, by consideration of the fact, apparently conceded in the question as you ask it, that if through unforeseen circumstances the total permissible levy for sinking fund purposes did not produce enough to provide for interest and sinking fund on bonds issued after January 1, 1913, there would be no way to provide for the payment of such bonds except through refunding. That is, if the limitations imposed by law on tax levies were to be held controlling—and no reason appears for holding them otherwise under such imaginary circumstances—there would, under such circum-

stances, come a time when the sinking fund would be impaired. The taxing authorities would not have levied annually a sufficient amount to provide for interest and sinking fund and thus in a sense might be held to have violated the constitution, yet they would have levied all they could levy within the limits of the law. The refunding sections would have to be held applicable to such a situation or else repudiation would ensue. Thus it appears that under such circumstances at least we would be driven to the conclusion that sections 3916 and 5656 G. C. would authorize the issuance of refunding bonds to take up bonds issued after January 1, 1913. But if this be conceded, I can not bring myself to the conclusion that the mere fact that the same result might come about through neglect or violation of duty on the part of the taxing authorities would alter the case with respect to the question of power to refund.

On the basis of the foregoing discussion, it is the opinion of the attorney-general that the question submitted by you must be answered in the negative, in the sense that it would be unlawful for the taxing authorities of a subdivision of the state, the sinking fund of which is impaired, to issue refunding bonds for the purpose of providing for the payment of bonds issued since January 1, 1913, instead of performing their mandatory duty by making increased sinking fund levies sufficient to repair the deficiency; and such illegal course could be prevented by mandamus or injunction; and possibly (though no final opinion is expressed on this point) might be made the predicate of pecuniary liability on the part of the delinquent officials; but it is further the opinion of this department that the power to issue refunding bonds still exists and extends to the refunding of bonds issued since January 1, 1913; so that, however wrongful or illegal in the sense above described such action might be, the bonds themselves would be valid.

Respectfully,

JOHN G. PRICE,

Attorney-General.

1158.

KENT STATE NORMAL COLLEGE—WHERE CONTRACT MADE WITH BOARD OF EDUCATION OF RURAL SCHOOL DISTRICT TO MANAGE RURAL SCHOOL—WAIVER OF PROVISION OF CONTRACT FOR RURAL SCHOOL DISTRICT TO PAY ONE HALF OF EXPENSE OF "EDUCATIONAL EQUIPMENT" CONSIDERED—WHAT MONEYS COME WITHIN PROVISIONS OF SECTION 24 G. C.—SURPLUS FROM FEES PAYABLE INTO STATE TREASURY—PAYMENTS FOR COMPENSATION OF STATE NORMAL SCHOOL TEACHERS AND EMPLOYEES SHOULD BE AUTHORIZED BY BOARD OF TRUSTEES.

1. *Where a state normal school, pursuant to section 7654-7 G. C. (107 O. L. 627) makes a contract with a board of education of a rural school district to assume the management of a rural school, and one of the provisions of said contract is that the rural school district shall pay one-half the expense of "educational equipment," the state normal school has the right to waive the performance of said provision when such waiver seems to the board of trustees of said normal school desirable.*

2. *Fees for such student activities as the athletic association, lecture course, entertainments and the college paper, authorized by the board of trustees of a state normal school to be imposed and collected by the school authorities from all*