

1924.

MUNICIPALITY—MAY PUBLISH NOTICE OF SALE OF BONDS IN "THE BOND BUYER"—HOME RULE DISCUSSED.

SYLLABUS:

A municipal corporation under the home rule powers granted to it and by Section 3 of Article XVIII of the state constitution may, by charter provision or ordinance, provide for publishing notices of the sale of bonds issued by such municipal corporation in a publication such as "The Bond Buyer," in addition to the publication of such notices in the manner provided by Section 2293-28, General Code.

COLUMBUS, OHIO, March 31, 1928.

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

GENTLEMEN:—This is to acknowledge the receipt of a communication from you in which my opinion is requested upon the question therein stated. Your communication is as follows:

"Copy of Opinion No. 1344 dated December 9, 1927, and holding that the publication 'The Bond Buyer' was not a newspaper within the meaning of the statutes, was forwarded to The Bond Buyer in answer to their questions respecting the power of Ohio municipal corporations to advertise the sale of bonds in that publication.

On December 15, 1927, we received a letter from the Bond Buyer which reads:

"We are this day in receipt of your letter of December 9th enclosing Opinion No. 1344 of the Attorney General of Ohio in which it is held: "A publication having its circulation only among bond buyers is not a newspaper of general circulation, etc." We suggest that the Attorney General has not answered the question submitted to you by us in our letter of November 9th.

What we wish to know is whether an Ohio municipality, in addition to advertising in a local newspaper in compliance with the law, may also advertise in a publication published outside the state and circulating among bond dealers.

It would seem to us that the Attorney General merely says that a paper like The Bond Buyer does not qualify as a newspaper of general circulation within the meaning of Section 2293-28, General Code. This we have never questioned. The only point is, may your municipalities expend funds for additional bond advertising which is not called for by statute, but which is not specifically prohibited.

We hope you will resubmit the question."

Section 2293-28, General Code, referred to in your communication, is a part of The Uniform Bond Act, (112 O. L. 364, 376), and reads as follows:

"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, and all bonds and notes having a maturity of more than two years shall be sold to the highest bidder, after being advertised once a week for three consecutive weeks and on the same day of the week, the first

advertisement being published at least twenty-one full days before the date of sale, in a newspaper having general circulation in the county where the bonds are issued. The advertisement shall state the total amount of bonds or notes and interest thereon to be sold, how long they are to run, the rate of interest to be paid thereon, the dates of payment of interest, the purpose of the issue and the day, hour and place in the county where they are to be sold. Such advertisement may also state that any one desiring to do so may present a bid or bids for such bonds based upon their bearing a different rate of interest than specified in the advertisement, provided, however, that where a fractional interest rate is bid such fraction shall be one-quarter of 1 per cent or multiples thereof. Such advertisement may also require every bidder to file with his bid a bond or certified check in a specified amount."

Touching the powers of municipal corporations prior to the constitutional amendment of 1912, the court in its opinion in the case of *Billings, et al., vs. The Cleveland Railway Co.*, 92 O. S. 478, at page 482 of the report of this case, said:

"Under the constitution, previous to the amendment in 1912, municipal corporations in their public capacity possessed such power, and such only, as were expressly granted by statute and such as might be implied as essential to carry into effect those which were expressly granted. *Ravenna vs. Pennsylvania Co.*, 45 Ohio St., 118.

Cities and villages were created by acts of the Legislature, which could confer upon them, or withdraw from them, powers at will. This authority was exercised under Article XIII, Section 6, which provides that 'the General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power.' As stated by the Supreme Court of the United States in *Mt. Pleasant vs. Beckwith*, 100 U. S., 514, 524: 'Counties, cities, and towns are municipal corporations created by the authority of the Legislature, and they derive all their powers from the source of their creation, except where the Constitution of the state otherwise provides.'

In the year 1912, Article XVIII of the state Constitution was adopted. This article of the constitution relates generally to the classification and powers of municipal corporations. Sections 3, 7 and 13 of said Article XVIII provide as follows:

Sec. 3. "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Sec. 7. "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this article, exercise thereunder all powers of local self-government."

Sec. 13. "Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books, and accounts of all municipal authorities, or of public undertakings conducted by such authorities."

In this connection, Section 6 of Article XIII, originally adopted as a part of the Constitution of 1851, may be noted. This section reads as follows:

“The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power.”

Tested by the rules relating to the powers of municipal corporations applied before the constitutional amendments of 1912, the question presented in your communication would have to be answered in the negative, for the reason that there is no statutory provision authorizing a municipal corporation to advertise the sale of its bonds other than the provisions of Section 2293-28, General Code, which limits such publication to a newspaper of general circulation in the county where the bonds are issued.

The further question here presented is, whether municipal corporations may advertise the sale of bonds issued by them in the particular publication referred to in your communication, under the general powers of local self-government conferred upon them by Section 3 of Article XVIII above quoted. With respect to the scope and effect of Section 3 of Article XVIII of the state Constitution above quoted, the Supreme Court, in the case of *Village of Perrysburg vs. Ridgway*, 108 O. S. 245, held:

1. “Since the Constitution of 1912 became operative, all municipalities derive all their ‘powers of local self-government’ from the Constitution direct, by virtue of Section 3, Article XVIII, thereof.

* * *

3. The above constitutional grant of power to municipalities is ‘self-executing,’ in the sense that no legislative action is necessary in order to make it available to the municipality.

4. The exercise of ‘all powers of local self-government,’ as provided in Article XVIII, Section 3, is not in any wise dependent upon or conditioned by Section 7, Article XVIII, which provides that ‘a municipality *may* adopt a charter,’ etc.

5. The grant of power in Section 3, Article XVIII, is equally to municipalities that do adopt a charter as well as those that do not adopt a charter, the charter being only the mode provided by the Constitution for a new delegation or distribution of the powers already granted in the Constitution.

6. * * * ”

With respect to the meaning of the phrase “all powers of local self-government,” the Supreme Court in its opinion in the case of *Billings vs. The Cleveland Railway Co.*, *supra*, quoting from the earlier case of *State ex rel. City of Toledo vs. Lynch, Auditor*, 88 O. S. 71, said:

“They are such powers of government as in view of their nature and the field of their operation are local and municipal in character.”

And, quoting from the case of *Fitzgerald, et al. vs. City of Cleveland*, 88 O. S. 338, 344, the Court in its opinion in the *Billings* case further on this point said:

“It is sufficient to say here that the powers referred to are clearly such as involve the exercise of the functions of government, and they are local in

the sense that they relate to the municipal affairs of the particular municipality.”

Chief Justice Marshall in a concurring opinion in the case of *Lorain Street Railroad Co. vs. Public Utilities Commission of Ohio*, 113 O. S. 68, 78, after referring to certain earlier cases decided by the Supreme Court, said :

“These cases and others which will hereafter be noticed have settled the proposition that there are some powers of local self-government which may be exercised by municipalities, regardless of conflict with general laws. While this court has never declared in a single case any definite rule for determining which powers and functions of municipalities may be classed as local self-government, a survey of the cases which have been decided by this court does state lines of distinction from which a rule can be evolved.”

The Chief Justice further stated that the line of distinction running through these cases is that :

“matters of health and public schools are matters of general governmental cognizance, not to be affected by special local regulations, and, on the other hand, that those matters which relate to the internal government of a municipality, such as local elections of municipal officers and the powers, duties, and functions of such municipal officers, are matters of local self-government, which may not be influenced or controlled by general laws.”

Before proceeding further with the consideration of the question of whether or not the proposed power and authority of municipal corporations to advertise the sale of bonds issued by them otherwise than is provided in Section 2293-28, General Code, is a power and authority within the meaning of the phrase “all powers of local self-government,” as the same is used in Section 3 of Article XVIII of the state Constitution, it may be well to note the provisions of Section 6 of Article XIII and of Section 13 of Article XVIII of the state Constitution above quoted. Touching the application of Section 13 of Article XVIII to the power granted by Section 4 of Article XVIII of the state Constitution authorizing and empowering any municipality to acquire, construct, own, lease and operate within or without its corporate limits any public utility, the product or service of which is, or is to be, supplied to the municipality or its inhabitants, the Supreme Court in the case of *State, ex rel. City of Toledo vs. Weiler, et al.*, 101 O. S. 123, held that grant of power from the Legislature is not a prerequisite to the exercise of the power granted by Section 4 of Article XVIII, and that

“under the provisions of Section 13, Article XVIII of the State Constitution, the indebtedness which may be incurred for such purpose is subject only to the limitation prescribed by the Legislature as to the extent of general tax levies and the aggregate amount of indebtedness that may be incurred for all local purposes.”

“Each municipality assumes responsibility consonant with the authority conferred, and is not only permitted but required to determine for itself the portion of its taxing and debt incurring power which shall be used for any authorized municipal purpose, within such constitutional and legislative limitation.”

The court in its opinion in this case, speaking of the provisions of Section 13 of Article XVIII of the state Constitution, said :

"This reservation does not authorize the Legislature to annul or curtail the powers expressly granted by the constitution. It may limit the levies of taxes and the extent of bonded indebtedness for local purposes, but it may not, either by action or inaction, preclude the exercise of power expressly conferred by the constitution, or deny the use of its revenues from taxation or its general credit for any purpose authorized by constitutional provision or for any purpose within the powers of local self-government thereby conferred. It was not contemplated that any grant of power by the Legislature was essential, nor that it should be permitted to deny or limit the purpose, but only prescribe the limitation of taxation and bonded indebtedness for *all* local purposes."

The court in this case did not give any consideration to the provisions of Section 6 of Article XIII of the state Constitution and whether, in a case properly before it, it would adopt the same construction with respect to Section 6 of Article XIII is a matter of conjecture. In its application to the question at hand, however, I am inclined to the view that inasmuch as the contract entered into by a municipal corporation for advertising the sale of bonds issued by it would be one contracting a debt within the meaning of Section 6 of Article XIII of the state Constitution, it would be competent for the Legislature to restrain and limit municipal corporations in the contract of such indebtedness, by legislative enactment.

In this connection it may be noted that in the case of *City of Cleveland vs. The Legal News Publishing Co.*, 110 O. S. 360, the Supreme Court gave effect to the provisions of Section 6251, General Code, limiting the rates which publishers of newspapers are authorized to charge for the publication of advertisement of the state, and of municipal corporations and other political subdivisions, and held that the municipal corporation was authorized to recover from the publisher of a newspaper the amount paid to such publisher for publishing municipal advertisements in excess of the rates provided for by such section of the General Code. In this case no question was made or considered with respect to the home rule powers of the municipal corporation which made the contract, calling for the expenditure of public funds for legal advertising, in excess of that permitted by Section 6251, General Code; but, nevertheless, I am inclined to the view that this case is of some significance with respect to the proper construction to be given to the provisions of Section 6 of Article XIII of the Constitution above quoted.

However, with respect to the question presented in your communication, it may be noted that no statute has been enacted by the Legislature expressly negating the power of municipal corporations to advertise the sale of bonds issued by them in a publication other than in a newspaper of general circulation in the county where the bonds are issued, as provided for in Section 2293-28, General Code.

The solution of the question here presented, therefore, depends on whether or not the power and authority of municipal corporations to publish notices of the sale of bonds issued by them is a power and authority within the meaning of the phrase "all powers of local self-government," as the same is used in Section 3 of Article XVIII of the state Constitution, and whether Section 2293-28, General Code, is in itself a limitation on the exercise of such power and authority, under the provisions of Section 6 of Article XIII or of Section 13 of Article XVIII of the state Constitution.

In an opinion of this department under date of August 28, 1917, Opinions of the Attorney General for 1917, Vol. 2, p. 1630, it was held that an ordinance of a charter city providing for an issue of bonds to pay such city's share of the cost and expense

of certain street improvements could be legally published, in accordance with the provisions of the charter of such city relating to the publication of ordinances, and publication of such ordinances in the manner provided by Section 4228, General Code, was not necessary.

In the case of *State ex rel Hile vs. City of Cleveland, et al.*, 26 Ohio App. p. 265, decided by the Court of Appeals of Cuyahoga County, April 19, 1927, and reported in the Ohio Law Bulletin and Reporter for March 19, 1928, which involved the question of the right of the city of Cleveland to issue bonds to acquire lands for a landing field for aircraft, it was held that the publication of the ordinance providing for the issue of such bonds, in accordance with the provisions of the charter of said city, was a legal publication of such ordinance, although such publication was not such as complied with the provisions of Section 4228, General Code. In its opinion in this case the court said:

“By the Constitution, the power of local self-government is granted to the city of Cleveland, and such power in a charter city includes the right to determine how and for what length of time its ordinances should be published, unless other provisions of the Constitution provide to the contrary or authorize the Legislature to provide to the contrary.

There is a provision in the Constitution which places the duty upon the Legislature to restrict the power of municipalities as to taxation, assessment, borrowing money and contracting debts and loaning their credit, in order to prevent the abuse of such power (Section 6, Article XIII), and by another provision of the Constitution the Legislature is given authority to pass laws to limit the power of municipalities to levy taxes and incur debts for local purposes (Section 13, Article XVIII).

We hold that these provisions of the Constitution do not authorize the Legislature to pass laws controlling charter municipalities in matters of mere procedure, in exercising the powers given them under Article XVIII of the Constitution; that the Legislature may restrict the power of municipalities in the matter of taxation and the borrowing of money and may limit their power to incur debts, but that the enactment by the Legislature of Section 4228, General Code, requiring ordinances to be published in two newspapers, is not the exercise of the power given by Section 6 of Article XIII of the Constitution.”

If Section 4228, General Code, providing generally as to the manner in which municipal ordinances of a general nature are to be published, is not a limitation upon the power of a charter city to provide how the ordinances of such city shall be published, it is not apparent how the provisions of Section 2293-28, General Code, can be deemed to be a limitation upon the power and authority of a charter city to provide by charter for the publication of notices of the sale of bonds issued by such city.

Prior to the enactment of Section 2293-28, General Code, Section 3924, General Code, made general provision with respect to the manner in which notices of the sale of bonds issued by municipal corporations should be published.

In an opinion of this department under date of June 8, 1920, Opinions of the Attorney General for 1920, Vol. 1, p. 655, it was held that a city could, by the terms of its charter, regulate not only the publication of ordinances providing for the issuance of bonds, but that by its charter such city could also provide how notices of the sale of such bonds should be published without reference to the then provisions of Section 3924, General Code. In the opinion of this department above referred to it is said:

“The question presented * * * is whether the constitutional provision above referred to providing that

'Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, * * * ' confers upon the General Assembly the power to prescribe the length of time which ordinances authorizing the issuance of bonds and notices of the public sale of bonds shall be published, or whether the municipality may, by the provisions of its charter properly adopted, otherwise regulate and prescribe the duration of such publication. This in turn raises the question as to whether or not the method and duration of the publication of ordinances authorizing the issuance of bonds and of notices of the sale of such bonds constitutes a limitation upon the power of the municipality to incur debts for local purposes.

The Legislature is undoubtedly authorized to prescribed by general laws limitations upon the debt incurring authority of municipalities. It was apparently the intent and purpose of the constitutional provision above quoted to authorize the General Assembly to limit the amount of the debts which a municipal corporation may incur rather than the method of procedure to be followed in incurring such debts, and I am convinced that the mere matter of publishing ordinances authorizing the issuance of bonds and the publishing of notices of the public sale of such bonds do not constitute a limitation upon the debt incurring capacity of a municipality, but are merely regulations for the purpose of giving proper publicity to the proceedings of council, and as such are matters subject to the home rule powers of such municipalities as have by proper procedure adopted charters."

If municipal corporations which have adopted charters may lawfully provide thereby for the publication of notices of bond sales in a manner otherwise than that provided by general law, the case of *Perrysburg vs. Ridgway*, supra, compels the conclusion that a municipal corporation which has not adopted a charter likewise has the power to provide for the publication of notices of the sale of bonds issued by such municipality otherwise than is provided by statute.

On the other hand, it was apparently held in the case of *Berry, et al., vs. City of Columbus*, reported without opinion in 104 O. S. 607, that proceedings relating to street improvements and assessments therefor were not matters within the powers of local self-government granted to municipal corporations by Section 3 of Article XVIII of the state Constitution, but that the same were matters regulated by statutory provisions. The decision of the Supreme Court in the case of *Berry vs. City of Columbus*, supra, was followed by said court in its decision in the case of *State ex rel vs. Williams*, 111 O. S. 400. If proceedings of a municipal corporation relating to street improvements and assessments are not matters in the exercise of the home rule powers of a municipal corporation within the provisions of Section 3 of Article XVIII of the state Constitution, it is not easily seen how the proceedings of such municipal corporation relating to the issue and sale of bonds in anticipation of the collection of assessments for the construction of street improvements would be the exercise of a home rule power of such municipal corporation. The same observation must be made, in my opinion, with respect to the issuance and sale of bonds of a municipal corporation in anticipation of the collection of taxes for the purposes of acquiring or constructing public property or improvements.

Again, if under the home rule provisions of Section 3 of Article XVIII of the state Constitution municipal corporations have power and authority to advertise the sale of bonds issued by them independently of the power and authority conferred by statute, it would seem that a municipal corporation under its home rule powers could enter into a contract with an individual to secure a market for bonds issued by such municipal corporations, and to pay such individual a reasonable amount of money

for such services. That municipal corporations have no such power is, however, expressly recognized in the case of *Hicksville vs. Blakesley*, 103 O. S. 508. However, it does not appear that any question with respect to the home rule powers of the municipal corporation was involved or discussed in this case.

In the present state of the decisions of the Supreme Court of this state relating to the home rule powers of municipal corporations under Article XVIII of the state Constitution, the question here submitted is not one easy of solution. However, I am inclined to the view that the question as to how a municipal corporation may proceed to and dispose of bonds issued by it for local purposes is one to be decided by such municipal corporation in the exercise of the authority conferred upon it by the home rule provisions of said article of the state Constitution, and that any municipal corporation may, by charter provision or by ordinance, provide for publishing notices of the sale of bonds issued by such corporation in a publication such as that referred to in your communication, in addition to the publication of such notices in the manner provided by Section 2293-28, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1925.

REAL ESTATE LICENSE—CHANGE FROM PARTNERSHIP TO CORPORATION—MUST GET NEW BROKER'S LICENSE.

SYLLABUS:

Where a partnership composed of three members has heretofore been licensed as a real estate broker and thereafter a corporation is formed by the partners for the purpose of engaging in the real estate brokerage business, the license of the partnership may not be transferred to the new corporation, but application must be made in the ordinary way on behalf of such corporation for a broker's license and the proper fee paid therefor.

COLUMBUS, OHIO, March 31, 1928.

HON. CYRUS LOCHER, *Director of Commerce, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your recent communication as follows:

“A partnership composed of A, B & C have incorporated the A, B & C Corporation.

Request is made of the Board of Real Estate Examiners to transfer the broker's license issued to the partnership in January, 1927, to the A, B & C Corporation.

Question: Should the board require the corporation to make a new application and pay an additional fee for 1927?”

A question of somewhat similar character was submitted by you recently and the answer is found in Opinion No. 1422 of this office dated December 22, 1927. The syllabus of that opinion is as follows: