

yet it is Company C that issues the certificate referred to as "X" Plan Certificates". Again, we have a corporation other than a building and loan association which places or sells the certificates. As in the former plans, the certificates are sold on a partial payment or installment plan. These characteristics are sufficient to constitute Company C a bond investment company, so far as the definition of a bond investment company is concerned, it makes no difference whether the securities it invests in, referred to as its portfolio, are held directly by it as is shown by Company B, or held by a trustee under the terms of a trust agreement which is the plan adopted by Company C. Each of these companies is engaged in placing or selling investment securities on the partial payment or installment plan which constitutes each of them bond investment companies.

In specific answer to your inquiries under Plan III, it is my opinion that:

1. Company C is operating as a bond investment company.
2. Since none of its capital stock has been sold in Ohio, for the reasons given under Plan II, I am of the opinion that the Division of Securities has no control over Company C, and that the supervisor of bond investment companies has jurisdiction over its sales of "X" Plan Certificates."

Respectfully,

THOMAS J. HERBERT,
Attorney General.

937.

BOARD OF EDUCATION—LANDS VESTED—MAY BE ASSESSED FOR PUBLIC IMPROVEMENTS BY MUNICIPAL AUTHORITY—SECTION 3812 G. C.—FAILURE TO PAY ASSESSMENT—AMOUNT, INTEREST AND PENALTY MAY BE COLLECTED BY SUIT IN ACTION AGAINST BOARD.

SYLLABUS:

Lands vested in a board of education may be assessed by municipal authorities, for public improvements, under and by authority of Section 3812, General Code, the same as property otherwise owned and if the assessment is not paid at the proper time as fixed by the municipal authorities making the assessment, the amount assessed, together with interest and the penalty as provided by statute, may be collected by suit in an action against the board of education as provided by law for the collection of such assessments, interest and penalty.

COLUMBUS, OHIO, July 25, 1939.

HON. NORTON C. ROSENRETER, *Prosecuting Attorney, Port Clinton, Ohio.*

DEAR SIR: I am in receipt of your request for my opinion, which reads as follows:

"This office would appreciate the opinion of your office relative to whether or not a board of education may be charged with the 10% penalty by the Treasurer of the county upon special assessments which have become delinquent.

Briefly stated the facts in the case are as follows:

The Village of Genoa, in this county, constructed a water supply system and levied a special assessment on abutting and benefited properties. This water line passes the property of the board of education and they have been consuming water therefrom and have been paying their annual portions of said special assessment. In this particular year, due to the fact that their payments were not received from the School Foundation Program until after the Treasurer had closed the books for the February settlement, the board of education was unable to pay its portion of said assessment and the Treasurer added on the above mentioned 10% penalty.

"We find that General Code Section 4759 exempts real or personal property of any board of education from taxation and from sale on execution or other writ or order in the nature of an execution. We also find cases which hold that exemption from taxation does not exempt from assessment for local improvements. However, by virtue of the above mentioned section of the General Code, it would seem that the Treasurer, acting on behalf of the county, would have difficulty in collecting a judgment for said penalty even if said judgment were obtained. It further seems that this would involve the question as to whether or not a political subdivision, such as a board of education, might be penalized by what might be called superior subdivisions of the same state."

By the terms of Section 3812, General Code, each municipal corporation is granted special power to levy and collect special assessments through its council, upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation to cover any part of the entire cost and expense connected with the improvement of any street, alley, wharf, pier, public road or place by grading, draining, curbing, pav-

ing, constructing sidewalks, retaining walls, drains, watermains, or the laying of water pipe.

No exception is made by this statute or any other statute in Ohio, in favor of school districts or boards of education so far as the power of municipal authorities to levy and collect special assessments for the purposes mentioned in the statute is concerned. The power extends to the levy of assessments upon any and all lots or lands in the corporation abutting on or adjacent or contiguous to or specially benefited by the improvement for the cost and expense of which the assessments are made.

Other pertinent statutes provide for the method of making such assessments, the giving of notice to lot and land owners whose property is assessed and fixing of the time when such assessments shall be paid. Section 3897, General Code, provides in part as follows:

“Special assessments shall be payable by the owners of the property assessed personally, by the time stipulated in the ordinance providing therefor, and shall be a lien from the date of the assessment upon the respective lots or parcels of land assessed.”

Section 3898, General Code, provides:

“If payment is not made by the time stipulated, the amount assessed, together with interest, and a penalty of five per cent thereon, may be recovered by suit before a justice of the peace, or other court of competent jurisdiction, in the name of the corporation, against the owner or owners, but the owner shall not be liable, under any circumstances, beyond his interest, in the property assessed, at the time of the passage of the ordinance or resolution to improve.”

Because of the terms of Section 4759, General Code, where it is provided that real property vested in a board of education shall be exempted from sale on execution or other writ or order in the nature of an execution, the provisions of Section 3897, General Code, making the assessment a lien on the property assessed are rendered ineffectual as to lands vested in a board of education so long at least as the property remains vested in the board of education but this exception does not extend to the personal liability of the owner as fixed by said section 3897, General Code.

From your inquiry, wherein you state that due to a shortage of funds in some particular year, the school board was unable to pay an installment of the assessment until the county treasurer's books had been closed for the February settlement and that by reason of this delinquency the treasurer has added a penalty of ten per cent, I judge that the municipality did not attempt to collect the assessment against the school board by suit,

as provided by Section 3898, General Code, *supra*, but that the assessment was certified to the county auditor in pursuance of Section 3905, General Code and placed by him on the tax list for collection, and that because of the delinquency mentioned, the county treasurer has added a penalty of ten per cent by authority of Section 5678, General Code. That action by the municipality, therefore rendered Section 3898 inapplicable in the present instance.

Since the decision of the Supreme Court of Ohio, in the case of *Jackson, Treas. v. Board of Education*, 115 O. S. 368, the power of a municipal corporation to levy and collect special assessments covering the cost of municipal improvements, upon lands vested in boards of education, the same as those owned by private individuals or other owners of property, has not been questioned. In that case it was held as stated in the syllabus:

“1. Section 3812, General Code, confers upon a municipality general authority to levy assessments for street improvements against property within such corporation belonging to a board of education and being used for school purposes, and no provision exists in the General Code of Ohio exempting such property from that general authority.

2. In the event of failure of such board of education to pay the assessment so levied, an action may be brought by the municipal corporation against such board of education to recover the amount of such assessment.”

In the course of the court's opinion, written by the Chief Justice, it is said on page 375:

“We have not, however, reached our conclusions upon considerations of justice or injustice, but we find ample general authority in Section 3812 for making the assessment, and nowhere do we find any exemption of boards of education from the operation of that general authority.”

By a parity of reasoning, the same may be said with respect to the terms of Sections 3898, 3905 and 5678, General Code, *supra*. These statutes provide for the exaction of penalties under some circumstances, and no statutory authority exists for the exemption of boards of education from the operation of the authority there extended to exact the penalties.

See also, *McKeehan v. Board of Education*, 26 O. N. P., (N. S.) 173; *Cincinnati v. Board of Education*, 7 O. D. Rep., 362, 2 B., 184, and see generally, *Ohio Jurisprudence*, Volume 36, page 943, Section 25.

You suggest in your inquiry that because of the fact that real and personal property of a board of education is exempt from taxation and

from sale on execution or other writ or order in the nature of execution, it might be difficult for the treasurer to collect a judgment for said penalty even if such judgment were obtained. It seems clear that no more difficulty would be experienced in collecting a judgment for a penalty than there would be in collecting a judgment for the amount of the assessment or for any other debt of the board of education, and the courts of Ohio have consistently held that even though the property of a board of education is exempt from execution and sale on execution other means are provided for the collection of judgments against such board. With respect to this matter, the Supreme Court, in the Jackson case, *supra*, said on page 375 :

“We find further that the statutes now make ample provision for levies of taxes for payment of improvements upon school property and for payment of assessments levied by other taxing authorities, under the provisions of Section 3812. The levy of the assessment upon the abutting property belonging to the rural school district created a *debt* against the board of education, in every respect as valid as if a contract had been made for the same improvement by the board of education itself. If the board of education should not voluntarily make a levy to pay the assessment, the board could be compelled to do so by a writ of mandamus. We have therefore reached the conclusion that the assessment is valid and that the county treasurer may maintain an action to recover the amount of the assessment so levied.” (Italics, the writer’s.)

In an opinion of a former Attorney General, which will be found in the reported Opinions of the Attorney General for 1934, at page 1416, the question of the collection of judgments against boards of education was considered quite exhaustively and the opinion concludes :

“Mandamus will lie to compel a board of education to appropriate funds in its possession and available for the purpose to payment of final judgments rendered against the board or to levy a tax within constitutional limitations as provided by Section 5625-5, of the General Code of Ohio, to pay such judgments.”

There has been no change in the statute law or the case law of Ohio with reference to this subject since the rendition of the said opinion. In the course of the said opinion it is said :

“There are no specific statutory provisions in this state as to the enforcement and payment of judgments against school districts as distinguished from other political subdivisions as there appear to be in some states. (Corpus Juris, Vol. 56, page 802).”

Provision is made in Sections 5625-3, 5625-4 and 5625-5 of the General Code, for the levying of a tax for the payment of final judgments against political subdivisions. In Section 5625-3, General Code, authority is extended to the taxing authority of a subdivision to levy taxes for current operating expenses and the acquisition and construction of permanent improvements. Section 5625-4, General Code, provides that one of the separate and distinct levies that may be made by the taxing authority of a subdivision is the 'general levy for current expenses.' Section 5625-5, General Code, provides that one of the purposes of the general levy for current expenses is for the payment of judgments.

Without a doubt, a board of education could by mandamus be required to provide by a levy for current expenses for the payment of judgments. (Corpus Juris, Vol. 56, page 803.) But the issuance of such a writ is undoubtedly subject to some limitations at least. In the first place the levy which the taxing authority of a subdivision may make for current expenses is limited by the ten mill limitation and by the action of the budget commission in making adjustments of tax levies as required by Section 5625-24, General Code, and made necessary by reason of statutory limitations and the requirements of mandatory levies provided for by Section 5625-23, General Code."

There is some force to the contention that the method provided by the legislature for the payment of judgments by the inclusion within the tax levy for current expenses by the taxing authority of a subdivision, is exclusive as to judgments rendered against a subdivision based on obligations other than non-contractual. As to judgments rendered for non-contractual obligations, bonds may be issued. (Sec. 2293-3, G. C.) The courts, however, have not held that the method provided by statute for the payment of judgments is exclusive. I do not know that the question has ever been directly raised. At any rate, courts appear to have enforced other methods of collecting judgments. *State ex rel. vs. Bremen*, 117 O. S., 186; *State ex rel. Hagemeyer vs. Village of Pemberville, et al.*, 38 O. App., 162. See also *State ex rel. v. City of Alliance*, 52 O. App., 253, 6 O. O., 328.

In conclusion, therefore, I am of the opinion that lands vested in a board of education may be assessed by municipal authorities for public improvements under and by authority of Section 3812, General Code, the same as property otherwise owned and that if the assessment is not paid at the proper time as fixed by the municipal authorities making the assessment the amount assessed, together with interest and the penalty as provided by statute may be collected by suit in an action against the board

of education as provided by law for the collection of such assessments, interest and penalty.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

938.

ARTICLES OF INCORPORATION — DENTAL ASSISTANTS
TRAINING INSTITUTE, INC.

COLUMBUS, OHIO, July 26, 1939.

HON. EARL GRIFFITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR: You have submitted for my approval articles of incorporation of Dental Assistants Training Institute, Inc.

Finding said articles to be in proper legal form under existing law, I am returning same with my approval endorsed thereon.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

939.

BONDS—CITY OF SHAKER HEIGHTS, CUYAHOGA COUNTY,
\$15,000.00.

COLUMBUS, OHIO, July 26, 1939.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of the City of Shaker Heights, Cuyahoga
County, Ohio, \$15,000.00.

The above purchase of bonds appears to be part of one or two issues of refunding bonds of the above city dated July 1, 1939. The transcript relative of these issues was approved by this office in an opinion rendered to the Public Employes Retirement Board under date of July 14, 1939, being Opinion No. 886.