

School District Bonds—Power to Issue When Vote in Excess of Legal Limit.

Trustees of a school district cannot issue bonds up to the amount of the constitutional limit of indebtedness, when the electors have voted favorably upon a bond issue in excess of such limit, the part within the limit not being separable from that without.

January 20, 1917.

Hon. William E. Keeley,
County Attorney,
Deer Lodge, Montana.

Dear Sir:

I have your letter of January 16th, enclosing transcript of record of proceedings in connection with the issuance of coupon bonds to the amount of \$800.00 for School District No. 22, Powell County, Montana. It appears from this transcript that the resolution passed at the meeting of the trustees for submitting to the electors of said district the question of issuing bonds for the purpose of building a school house provided for an issue of \$800.00; also that the notice of election contained the proposition: "Shall coupon bonds be issued and sold to the amount of \$800.00 * * * ", and the resolution passed by the directors at their meeting after the election authorized the issuance of coupon bonds in the amount of \$800.00. It

appears from your letter that three per cent of the value of the taxable property in this district amounts to \$743.76.

You have submitted to me the following question:

"Can the trustees of this school district, upon the foregoing record of proceedings, issue bonds up to the amount of the constitutional limit?"

Article XIII, Section 6, of the Constitution provides that no school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three percent, of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and **all bonds or obligations in excess of such amount given by or on behalf of such school district shall be void.** This restriction is also contained in Section 2015 of the school laws, Chapter 76 of the Session Laws of the Thirteenth Legislative Assembly.

There seems to be some conflict of authority upon the proposition of whether a school district may issue bonds up to the legal limit where a vote authorizing such issue is in excess of such legal limit. It was held in *Turner v. Commissioners*, 27 Kan. at 317, that a grant of excessive authority is good up to the legal limit, and an authorization to do more than can legally be done is void only as to the excess. And to the same effect is the case of *Schmitz v. Zeh*, 91 Minn. 290; 97 N. W. 1049, in which case bonds were issued by a municipality to aid in the construction of a railroad in excess of the amount prescribed by the statutes. The following authorities seem to hold that where bonds are issued in excess of the amount limited by constitutional or statutory provisions, so much of the issue as is excessive is absolutely void, but that part of the bonds which are not in excess of the constitutional or statutory limit are valid.

11 Cyc. 553, as to counties.

28 Cyc. 1584, as to municipal corporations.

35 Cyc. 990, as to school districts.

Stockdale v. Wayland School District, 47 Mich. 226, 10 N. W. 349.

Vaughn v. School District, 27 Ore. 57; 39 Pac. 393.

The former Attorney General, in his opinion dated November 3, 1915, *Opinions of Attorney General*, Vol. 6, p. 268, held in accordance with this view. But I am unable to agree with the conclusion reached by my predecessor.

It was held in *McPherson v. Foster Brothers*, 43 Iowa, at 56, that if the indebtedness would be invalid in case no part of it is within the limit, it appears plain that if a part of it be within, the part without is not cured of illegality. The Supreme Court of Missouri, under a constitutional restriction somewhat the same as our own, in the case of *Thornburg v. School District No. 3*, 175 Mo. page 31, uses the following language:

"It is contended, however, that in case the amount of the bonds is found to be in excess of the constitutional limit, the court should scale them down to the amount that was lawful

and give plaintiff judgment for his proportion of the reduced amount. That course would be equivalent to the making of a new contract for the parties, not only a contract which the parties themselves did not make, but one which we have no means of knowing they would have made. The voters of the district who were to be first consulted might be very willing to build a new school house of a style to cost \$3500.00 but unwilling to build one of a style to cost only \$1900.00. We can gather from the meager record of the school board in evidence that the proposition involved the selling of an old school house and the building of a new one. How can we assume in such case that the voters would not have preferred to keep the old school house in preference to building such a new one as \$1900.00 would pay for? But we need not conjecture on such a subject; the school directors essayed to make a contract that they were expressly forbidden by the Constitution to make, and it is therefore wholly invalid."

Our own Supreme Court, in the case of *Jordon v. Andrus*, 27 Mont. 22; 69 Pac. 118, which was an action brought to restrain the Mayor, Aldermen and Clerk of Miles City, from issuing and delivering certain City Hall Bonds for \$8000.00, voted at an election, used the following language on page 27:

"Not all the \$8000.00 indebtedness proposed to be incurred would be without the three percentum limit. But the object for which the bonds were voted is single. The debt would be indivisible, and the part within the limit is not separable from that without."

This case was cited and followed in *Butler v. Andrus*, 35 Mont. at 583. In this case the margin between the amount that could be raised upon the assessed valuation of the property in the city at three per cent and the amount of its indebtedness was \$9,498.30; it was held that the proposed bond issue of \$10,000.00 could not be made.

In view of the foregoing, I am of the opinion that a school district would have no right to issue any bonds upon the record of the proceedings which you have submitted. It would therefore be necessary for the school trustees to have a special meeting, and have entirely new proceedings for this bond issue. And their resolution to submit to the electors of the school district the question of issuing bonds, should be for an amount not in excess of three per cent of the taxable property of the district, to be ascertained by the assessment for the year 1916.

Respectfully,

S. C. FORD,
Attorney General.