

## Opinion No. 17-1939

February 27, 1917

**BY:** MILTON J. HELMICK, Assistant Attorney General

**TO:** Hon. James A. French, State Engineer, Santa Fe, New Mexico.

Method of Selling Shares of Delinquent Stockholders in Water Company

### OPINION

I have the inquiry propounded to your office by M. B. Woodman, of Costilla, New Mexico, which you have requested this office to answer. The inquiry evidently refers to an incorporated water company and asks whether the following by-law of such company is valid:

"At failure of any stockholder to pay his or her proratum amount of indebtedness in 30 days from date of notice -- said notice being sent by registered mail to the share-holder -- the indebted share or shares or fractions of shares shall be advertised for sale as provided by the statutes of the State of New Mexico and sold to the highest bidder. Such auction to be held at the school house nearest the ditch. The surplus from such sale to be given to the last former owner."

Section 1034 of the Compilation of 1915 provides substantially for the procedure set forth in the above quoted by-law. The section is as follows:

"The directors shall have power to call in and demand from the stockholders the sum by them subscribed, at such times and in such payments as they may deem proper; notice of such assessment shall be given to the stockholders personally, or shall be published once a week for at least four weeks, in some newspaper published at the place designated as the principal place of business of the corporation, or if none be published there, then by posting such notice for that period, in at least six of the most public places in the county in which said principal place of business of the corporation is located. If, after such notice has been given, any stockholder shall make default in the payment of the assessment upon the shares held by him, so many of such shares may be sold as will be necessary for the payment of the assessment on all shares held by him. The sale of said shares shall be made as prescribed in the by-laws of the company, but all such sales shall be made at public auction, to the highest bidder, after notice thereof shall have been given as in this section provided for notice to stockholders of assessments; and the person who will agree to pay the assessment due, together with the expense of advertising, and other costs of such sale, for the smallest number of whole shares, shall be deemed the highest bidder. A complete record shall be kept of all assessments and sales of stock."

You will observe that the statute requires that notice of the assessment shall be given to the stockholder personally or by publication, and I am inclined to doubt whether the provision in the by-law for notice by registered mail, is a sufficient compliance with the statute. You will also observe that the statute provides that the highest bidder shall be deemed to be the person who will agree to pay the amount of the assessment and expense for the smallest number of shares, and consequently the statute does not contemplate that there should be any money surplus. The by-law, on the contrary, seems to contemplate a possible surplus to be returned to the shareholder. In other words, the "highest bidder" contemplated by the by-law is not the same as contemplated by the statute.

I do not think that the two inconsistencies in the by-laws above mentioned would invalidate a sale made in compliance with the statute. The statute seems to amply provide the procedure for the sale of shares of a delinquent stockholder, and I would suggest that the water company in question amend its by-laws and follow the wording of the statute as nearly as possible.