

Opinion No. 35-866

January 23, 1935

BY: FRANK H. PATTON, Attorney General

TO: Mr. H. Vearle Payne, Attorney at Law, Lordsburg, New Mexico.

{*36} We are in receipt of your letter of January 19th, making inquiry as to the determination of the indebtedness of a school district for the purpose of issuing additional school district bonds.

I have carefully checked into the cases to which you refer in your letter and it seems to me that there is unquestionably a difference of opinion on this matter. I have read the Indiana case, *Angola Brick Co. vs. Millgrove School Tp.*, 73 Ind. 557, 127 N.E. 855. This case lays down the rule as follows:

"There is no allegation that the funds derived from the levy for 1908 were in the hands of the trustees at the time of the issuance of the warrant sued upon, and, even if they were in fact, it would make no difference, because the complaint alleges that the total of said bond issue was outstanding at the time of the issuance of the warrant, and the law is well settled that money on hand, with which to retire bonds, does not operate to reduce the indebtedness represented by such bonds, and that such bonded indebtedness can only be considered as reduced when the bonds have actually been retired."

A very recent Wyoming case, *Hendricks, et al vs. School District No. 1*, 44 Wyo. 204, 10 P. (2d) 970, discusses the Indiana case, as well as a number of other cases on this point, and lays down the following rule:

"It is urged by appellants that the money in the sinking fund, for the retirement of bonds should not be taken into consideration in determining {*37} the amount of the existing indebtedness against the district. The case of *Angola, etc. Co. vs. School Board*, 73, Ind. App. 557, 127 N.E. 855, is relied upon. That case does not seem to be in point since it does not, apparently, refer to money in a sinking fund for bonds. Section 99-1006 Revsd. Stats. 1931, provides that an annual tax shall be levied by the board of county commissioners of the proper county for the purpose of paying interest and creating a sinking fund to retire the bonds issued by a school district, and in Section 99-1011, the county treasurer is made the custodian of such bonds, and the rule seems to be uniform that money in a sinking fund is a proper set-off as against existing bonds in payment of which such money is pledged. 6 *McQuillin Mun. Corp.* 2nd. Ed., Sec. 23, p. 97; *Williamson v. Aldrich*, 21 S.D. 13, 108 N.W. 1063; *First National Bank vs. Jackson*, 199 Ky. 94, 250 S.W. 795; *Briggs vs. County*, 137 S.C. 288, 135 S.E. 153, 161; *Reynolds vs. School District*, 90 Okla. 261, 217 P. 166 and cases cited; 56 C.J. 539."

The Oklahoma case, to which you refer in your letter and which is also cited by the Wyoming case, lists an imposing number of cases in support of the rule there laid down, to the effect that, in computing the existing indebtedness of the district, there should be deducted therefrom the total cash and securities in the sinking fund for said bond issue. Although the Wyoming case does not discuss the Indiana case and merely states that it is not in point, I cannot agree with that observation, and it seems to me that the Indiana case lays down the opposite rule from that supported by the other cases.

There seems to be no question but what the great weight of authority supports the rule laid down by the Oklahoma and Wyoming courts, but, since the New Mexico Court has not passed upon this question, we feel hesitant in advising you that it would adopt the majority rule. Since our Supreme Court might see fit to construe strictly our Constitutional and Statutory provisions limiting the school district debt to six percent (6%) and hold that the school district is still indebted to the full amount of the unretired bonds, even with cash in the sinking fund to be applied on the bonds, we believe that the safest course for you to pursue is to deduct the entire indebtedness from the maximum amount authorized by law. In your case this would limit your new bond issue to \$ 3,800.00.

We do not believe that it would be safe to assume that our Supreme Court would adopt the rule that the taxes already levied for the sinking fund of an existing bond issue can be deducted from the amount of indebtedness, and we do not agree with this rule, even those supported by several decisions.

You will note that in 56 C.J. on page 539 the rule is stated that the mere voting of bonds does not create an indebtedness to be considered in computing existing indebtedness, unless and until the bonds are issued and sold. In your particular case, therefore, it might be that you could vote on a \$ 4,800.00 bond issue and, in the event a thousand dollars of the old issue is paid off prior to the time that your new bonds are actually issued and sold, you could sell the entire \$ 4,800.00. Otherwise, you could limit yourself to \$ 3,800.00.

By: J. R. MODRALL,

Asst. Attorney General