

Opinion No. 41-3923

October 17, 1941

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Chas. E. Emery Superintendent of Schools Gallup, New Mexico

{*108} In your letter of October 6, you request our opinion as to whether or not the bonds heretofore issued by the Town of Gallup, New Mexico, dated February 1, 1920, are at this time callable.

It is my understanding that bonds numbered 211 to 240, inclusive, bear due date of October 1, 1942; bonds numbered 241 to 270, inclusive, bear due date of August 1, 1943; and bonds numbered 271 to 300, inclusive, bear due date of August 1, 1944. It is my further understanding that all of the bonds in question bear a clause within them relative to when each of the said bonds shall be redeemable. This date for redemption set forth in the bonds is, so I understood, in excess of ten years from February 1, 1920, the date the bonds were issued.

The bonds in question were issued pursuant to the provisions of Chapter 105 of the laws passed by the Fourth State Legislature, the same being the Session Laws of 1919.

Section 3 of Chapter 105 of the Laws of 1919 sets forth a portion of the powers of a board of education of any municipal school district as it existed as of the date under which these bonds were issued. A portion of this said Section 3 reads as follows:

"* * * Said board shall issue bonds to the amount voted, in denominations of not less than \$ 25.00, nor exceeding \$ 500.00 **and redeemable at the pleasure of the board of education of such city, town or village at any time after ten years.**"

In view of the above quoted provision of Section 3, the question to now be determined is to ascertain whether or not the board of education of the Town of Gallup in 1920 had the authority to bind all subsequent boards of education of the City of Gallup in determining when the said bonds in question would be redeemable.

{*109} It is well settled that where a provision in a statute under which bonds are issued authorizes the calling of bonds before maturity at the option of the municipality or other governmental agency, that it becomes a part of the contract of the bonds and is binding upon the holders thereof, and the right to call the same may be exercised although there is no express provision in the bonds reserving that right. *National Bank v. St. Joseph*, 31 Fed. 216. Annotation 109 A. L. R. 990. This general rule of law, however, is not entirely applicable to the instant question for the reason that the board of education in the instant case set forth in the bonds when the same should be redeemable. Is this action on the part of the original board binding on all of its successors, and was the original board acting within its authority? This is the question to now be answered.

It is a well settled rule of law that all persons who deal with such a board as a municipal board of education are bound to take notice of all limitations of the board's authority. This being true then, it occurs to the writer that the board of education of 1920 was without any authority whatsoever to say February 1, 1920, the date the bonds were issued, when the same would be redeemable by reason of the provisions of Section 3 of Chapter 105 of the Laws of 1919 above quoted. If the 1920 board had such authority the provisions of Section 3 are wholly ineffective. I cannot lead myself to believe that it was the legislative intent to permit the 1920 board to bind all subsequent boards by declaring when the said bonds should be redeemable.

In the case of Catholic Order of Foresters v. State, 109 A. L. R. 979, the question was raised as to whether or not the State Industrial Commission of North Dakota could call certain bonds issued by it prior to the dates of their maturities. The statute under which the said bonds were issued by the Industrial Commission contain the following provision:

"Provided, however, that **at the option** of the Industrial Commission they (speaking of the bonds) **shall be payable at any time after five years** from the date of their issue."

It can be readily seen that this provision substantially follows the provisions of Section 3, Chapter 105, Laws of 1919, above quoted. In passing on this question, the Supreme Court of North Dakota said:

"The amounts that may thus be prepaid by the mortgagors cannot be ascertained in advance, so the statute does not require the Industrial Commission to exercise the option in advance of the issue, and since the statute must be considered as part of the bond, there can be no objection in requiring the Industrial Commission to recite in the bonds when issued that such bonds may be callable after the expiration of five years from date of their issue. **In short, the option cannot be exercised in advance.**" See *Bauernfeind v. Nestos*, 48 N. D. 1218, 189 N. W. 506."

Construing the language used in Section 3 of the 1919 Act, supra, and taking into consideration the authority above cited, I cannot escape the conclusion that the board of education of 1920 was without authority to say when the said bonds in question would be redeemable, and it is, therefore, my opinion that the instant bonds are redeemable and subject to call at this time notwithstanding the provisions in the bonds themselves.

In closing, I wish to advise that the Supreme Court of New Mexico has never passed on the instant question.

{*110} I return herewith canceled bonds No. 1 and 205.

By HOWARD F. HOUK,

Asst. Atty. General