

Opinion No. [30-92]

August 7, 1930

BY: J. A. MILLER, Assistant Attorney General

TO: Mr. Herbert H. Cowan, County School Superintendent, Reserve, New Mexico.

SCHOOLS -- Bonds of not to be issued after July 1st in any calendar year. § 120-715, Code 1929.

OPINION

Reference is made to yours of the 5th inst. in which you submit, on behalf of the Catron County Board of Education, a question as to whether or not bonds, authorized by vote of the electors of certain school districts in Catron County, duly advertised, sold and prepared for delivery prior to the first day of July, 1930 but not delivered because of failure on the part of the bidder to tender payment may now be delivered, the purchase price being made available.

The procedure and statutory requirements as to school bonds the issue and sale thereof is covered by sections 120-701 and 120-719, inclusive, Codification of 1929. The right to issue bonds is initiated by the filing of a petition as provided in section 120-702 and the several steps in the procedure are outlined in succeeding sections. By section 120-715 it is made the duty of the Attorney General to approve or reject a transcript of proceedings submitted to him setting forth the successive steps. When the Attorney General shall approve such transcript the authority to issue bonds shall mature. In the case of Catron County Bonds, to which reference is made in your communication, it appears that all proceedings required by statute were taken and the transcripts were approved by the Attorney General the authority to issue the bonds being thereby matured. This authority, however, cannot be extended beyond that granted by statute and the statute specifically provides that such bonds "shall not be issued or sold" after July 1st in any calendar year. Your bonds, it appears, were advertised and sold prior to July 1. We direct our inquiries next as to whether or not the actual printing and signing of the bonds but without delivery constituted such an issuing as to meet the requirements of the statute.

In Words and Phrases Judicially Defined, Volume IV, page 3778, and following, we find a collection of cases in which the word "issue" has been defined by the courts. As there appears to be a unanimity of holdings in reference to this word it will suffice to quote but a few.

"The term 'issue,' as used in the negotiable instrument law, means the first delivery of the instrument, complete in form, to a person who takes it as a holder."

"'Issue', as applied to negotiable paper, means its delivery for use and circulation, so that bonds stolen are never issued."

"In an action against a town to recover on bonds 'issued' by it, the court said the bonds were presumed to have been executed at the time they bear date; but executing is not issuing, for they might be fully executed, but never issued. The bonds had no legal conception, and could not become valid obligations until actually delivered for a valuable consideration, and the delivery of the bonds determines the date when the bonds were issued."

"The word 'issued,' as applied to bonds, usually includes delivery, but it does not invariably do so. 'Issued' the participle of the verb 'to issue,' has several meanings; among them, 'to go forth as authoritative or binding,' 'to proceed as from a source,' 'to send out officially.' The word 'issued,' as applied to bonds, may mean disposed of for value. . . ."

Potter v. Lainhard, 33 South. 251.

From the holdings of the courts as indicated in the foregoing quotations it would appear that issuing and delivering are usually synonymous.

Section 120-715, Codification of 1929, in which occurs the proviso that "bonds hereunder shall not be issued or sold after July 1 in any calendar year" was before the Supreme Court in Fisherdick et al vs. San Juan County Board of Education, 30 N.M. 454, although on a somewhat different question. The court after reviewing the requirements of the statute as to procedure and discussing somewhat the reasons for the several limitations as to the time of sale of bonds in order to harmonize with the requirements as to budgets and tax levies, proceeds as follows:

"It is our conclusion that school bonds may not be issued after July 1 and before January 1 of the succeeding year; that the several statutory provisions referred to are intended to expedite the procedure so that they may be ready for issuance the same year in which voted, but that, if not so issued, in the absence of any other objection they may be issued the succeeding year . . ."

From the decisions, to which reference has been made in that which precedes, we fear that the courts would hold that to "deliver" these bonds at this time, under the circumstances recited by you in your letter and in conversation, would be held to be an "issuing" of the bonds and hence an act not authorized by the statute. I confess myself to be undecided as to whether or not bonds so issued, even though provision were made for the payment of interest and the creating of a sinking fund in the school budgets of these districts and in the tax levies approved by the State Tax Commission, could be held to be the valid, binding obligations of such school districts. I, however, lean strongly to the opinion that such issuing being an act not only not authorized by statute but specifically prohibited by statute would be held to be not binding upon the school districts involved.