



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Ben J. Dean
District Attorney
Breckenridge, Texas

Dear Sir:

Opinion Number 0-1780
Re: Eligibility of certain
bonds of Stephens County to
participate under the terms
of H. B. #688, passed by the
Forty-sixth Legislature,
Regular Session, 1939

We are in receipt of your letter of December 15, in
which you request our opinion upon two questions, which are -

1. Are said three bonds so purchased by Stephens
County eligible to participate under the terms of
the above described Act and the amendment thereof?

2. Is Stephens County entitled to credit for
these bonds to the extent of raising the percent-
age of the State's participation in the payment
of that series of road bonds in proportion as
said three bonds may bear to the balance of the
unpaid bonds assumed by the State unpaid, or in
any other proportion?

Briefly, the facts underlying your questions are as
follows:

Stephens County has certain road bonds outstanding
besides their Series A bonds, payable serially, the proceeds
of which bonds were expended in constructing hard-surfaced
roads which are now and have been for many years constituting
a part of the State Highway System of Texas, and as such have
been maintained by the State of Texas as a part of its desig-
nated State Highway System. These bonds were on and after

Honorable Ben J. Dean, page #2

January 1, 1933, eligible to participate under the provisions of Chapter 13, page 15, Acts of the Third Called Session of the Forty-second Legislature, as amended.

On February 26, 1924, prior to the enactment of the above mentioned law, Stephens County, from the interest and sinking funds of Series A bonds on hand, purchased three Series A Road Bonds, Numbers 491, 492 and 493, which bonds were not due and payable until February 15, 1942.

No order of the Commissioners' Court of Stephens County has ever been made or entered cancelling said three road bonds.

The Board of County and District Road Indebtedness has refused to give Stephens County credit for the above three named bonds or any part thereof, basing their refusal on the opinion of the Attorney General's office of date January 18, 1937. We have reconsidered the opinion of the Attorney General's Department, dated January 18, 1937, addressed to Mr. W. H. Gordon, Chief Accountant, Board of County and District Road Indebtedness, Austin, Texas, written by the Honorable Victor W. Bouldin, Assistant Attorney General, and have concluded to agree with the principle announced therein. We think it immaterial that your bonds are serial bonds, as distinguished from the term bonds under consideration in that opinion; likewise, we think the optional feature contained in said bonds has no bearing on the proper answer to this question.

We are constrained to adopt the conclusions reached in that opinion irrespective of its failure to cite authorities. As a matter of law we conclude that the three bonds purchased with Series A sinking fund money were paid off and discharged and no longer existed on January 1, 1933. The question as to whether or not the bonds so purchased have been discharged appears to us to be academic. Said bonds were bought with funds accumulated for that very purpose and when said money has been used to purchase said bonds, we think the interests have merged. In the case of *Smith vs. Cooley*, 164 S. W. 1050, the court said:

"The possession by the maker of annote is prima facie evidence that said note has been paid."

Honorable Ben J. Dean, page #3

This pronouncement by the court was in line with earlier authorities. See case of Kneeland vs. Miles, 24 S. W. 1113 and Stephens vs. Moodie, 30 S. W. 490. Further, in the case of Close vs. Steel, 2 Tex. Rep. 237 and 13 Tex. Rep. 625, the court said:

"The delivery of a note by the owner to the maker, with intent to discharge the debt, discharges the debt."

Article 5939, Revised Civil Statutes of 1925, provides that a negotiable instrument is discharged "when the principal debtor becomes the holder of the instrument at or after maturity in his own right." We think there can be no argument but that the instrument itself, which merely evidences the obligation, becomes ineffectual under such circumstances. Such, we believe, is the meaning of this statute. However, if the principal debtor should come into possession of the instrument at or after maturity through fraud, we do not think this statute could effectively discharge the obligation which said instrument evidenced. Judging from the statement of facts set forth in your letter, we conclude that there was no fraud practiced by the county in obtaining these bonds, but rather, on the other hand, the county deliberately purchased said bonds prior to maturity with funds accumulated for the purpose of retiring that debt, and we believe it was the purpose of the owner of the bonds at the time of delivery to the county to discharge the county from its obligations. Accordingly, it is our opinion that said bonds were automatically cancelled by said purchase, and therefore do not come within the purview of Section 6, Subsection (a) of House Bill #688, which reads, in part, as follows:

"All bonds or other evidences of indebtedness heretofore issued by counties or defined road districts of this State, which mature on or after January 1, 1933 * * * "

It must be admitted that the face of the bonds so purchased and cancelled provided for a maturity date subsequent to January 1, 1933, but in view of the language used in Subsection (a), Section 6 of said Act, which reads as follows:

Honorable Ben J. Dean, page #4

"Whether said indebtedness is now evidenced by the obligations originally issued or by re-funding obligations or both * * *

it seems clear that the Legislature intended that only such indebtedness as was outstanding as of January 1, 1933, would be eligible to participate in the moneys allocated to the Board of County and District Road Indebtedness. Accordingly, we must answer question number one in the negative.

Having answered your first question in the negative, we deem it unnecessary to answer question number two.

Trusting that the foregoing satisfactorily answers your inquiry, we are

Very truly yours

ATTORNEY GENERAL OF TEXAS

By

Clarence El Crowe
Assistant

CEC-s

APR 10 1934

ATTORNEY GENERAL OF TEXAS

