OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN, 11

GROVER SELLERS
ATTORNEY GENERAL

Honorable R. A. McAlrath
County Auditor
Cooke County
Gainesville, Texas

Dear Sir:

Opinion Number O-5450
Re: Under the facts submitted are the Road District No. 2, Cooke County, Texas, Road Improvement Bonds in question, eligible for refunding?

Your letter of October 30 is as follows:

"Under date of April 10, 1920, Road District No. 2, Cooke County, Texas, issued certain road improvement bonds described as follows, said description being taken from the face of Bond No. 162 which was canceled April 10, 1943:

"'This bond is one of a series of two hundred and twenty-five (225) bonds, numbered consecutively from one (1) to two hundred and twenty-five (225), inclusive, of the denomination of One Thousand Dollars ($1000.00) each, aggregating Two Hundred and Twenty-five Thousand Dollars ($225,000.00), issued for the purpose of constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof, under and in strict conformity with the Constitution and laws

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of the state of Texas, including Articles 627 to 641, inclusive, of Chapter 2, Title 18, Revised Statutes of 1911, as amended by Section 1, Chapter 203, Acts of 1917, Regular Session, and pursuant to an order passed by the Commissioners Court of Cooke County, Texas, on the 13th day of September, A. D. 1920, which order is of record in Book 9, pages 338 to 346, inclusive, of the Minutes of said court.'

"The bonds were set up to mature serially over a period of 30 years, seven maturing on April 10th the first 15 years, and eight maturing on April 10th the second 15 years. All bonds have been paid at maturity, there remaining unpaid 56 bonds amounting to $56000.00. The interest on these remaining bonds at 5½% will amount to $12320.00.

"With the set-up shown above your opinion is requested as to whether these bonds are eligible for refunding the same as the Court House Bonds mentioned in the Cochran County Case reported in 172 S. W. 2nd 689."

The bonds of Road District No. 2 of Cooke County, Texas, were issued in 1920 under statutory provisions which were declared unconstitutional and invalid in the case of Browning v. Hooper, 269 U. S. 396, 46 Sup. Ct. 141, 70 L. Ed., 330. As issued, the bonds provided for no option of redemption prior to their respective maturities. In 1926 the Legislature validated the creation of Road District No. 2 of Cooke County, validated the orders and preelection proceedings relative to the issuance of the $225,000 in bonds and sale thereof; by Section 4 of said Act (Chapter 187, Special Laws, First Called Session, 39th Leg.) it is expressly provided that:

"That the order or orders thereafter adopted by the county commissioners' court of said county authorizing the issuance of said bonds of said road district, prescribing the date and maturity

> thereof, rate of interest borne by the bonds and place of payment of principal and interest, and fixing form of bond and coupon, and providing for the levy of an ad valorem tax upon the taxable property in said road district sufficient to pay the interest on such bonds and to produce a sinking fund for the redemption of the principal thereof at maturity, are hereby legalized, approved and validated."

In view of the validation of the bonds in the form in which they were issued, and in accordance with the orders under which they were issued, the bonds may not be redeemed before maturity. Road District No. 2, Colorado County v. Gregory (Tex. Civ. App.) 120 S. W. (2d) 859. The case cited is determinative of the point; there, the bonds were issued with the provision that certain bonds should be optional on a certain date, although the order of election had provided that the bonds should be optional on any interest paying date after five years. The county contended in that case that inasmuch as the provision in the bonds that the same should be optional only on a date certain was at variance with the preelection proceedings, the provision was invalid and inoperative to the extent to which it conflicted with the preelection proceedings. The court pointed out that the bonds were issued prior to the decision of Browning v. Hooper, supra, and that the issuance of the bonds had been validated by the First Called Session of the 39th Legislature. It was, therefore, held that the bonds were not optional, save and except upon the one date fixed for their redemption before maturity.

The case of Cochran County v. Mann is not applicable to the bonds here under consideration. That decision relates only to county bonds ussued under Chapter 2 of Title 22, Revised Civil Statutes, 1925, and to bonds issued under the statutory provisions which were the ancestors of Chapter 2; namely, Chapter 1 of Title 18 of the Revised Civil Statutes

of 1911. Our opinion No. O-5493 construes the applicability of the Cochran County case to county bonds. A copy of it is enclosed herewith for your information.

Very truly yours

APPROVED NOV. 13, 1943

ATTORNEY GENERAL OF TEXAS

/s/ R. W. Fairchild

ACTING ATTORNEY GENERAL OF TEXAS

By /s/ Gaynor Kendall
Assistant

GK-s
pw

Encl.

APPROVED OPINION COMMITTEE BY B.W.B. CHAIRMAN

O.K.
C.C.R.