COLLECTORS: BONDS: Drainage district bonds are payable in the order of their presentation, absent showing that the taxing power has been exhausted.

3-2

January 29, 1937

FILED
76

Hon. J. K. Robbins,
Collector of Revenue,
New Madrid County,
New Madrid, Missouri.

Dear Sir:

We acknowledge receipt from you of the following inquiry:

> "Since taking over the Treasurer's Office of New Madrid County a situation has developed that I do not know how to handle.
>
> "We have here in our county a county court drainage dist. number 31. This district is in default and has tried to get a R.F.C. Loan but due to the other overlaps and the large amount of unimproved land has been unable to do so.
>
> "At the present we have some funds on hand in the above mentioned district and several people have presented bonds for payment.
>
> "It is not just quite clear in my mind as to how these bonds that are past due should be retired. Should I pay off the first past due bond that is presented or should the monies be pro-rated to the various past due bonds?
>
> "A reply by return mail would be greatly appreciated as some of the boys holding these bonds are demanding their money."

Replying thereto, we do not find any statutory direction covering your question, but resorting to the case law we refer you to the case of McCune's Estate v. Daniel, 76 S. W. (2d) 403, where the Supreme Court of this state in 1934 had before it this same question of a series of notes or debts secured by the same deed of trust, the security in the deed of trust being of insufficient value to pay in full all of the notes secured thereby. The guardian of the estate, on behalf of his ward, had purchased four $500 notes, said notes, along with a $4000 note, being secured by a deed of trust on certain lands. The $500 notes were payable in one, two, three and four years respectively, and the $4000 note was payable in five years. On exceptions to the final report of the guardian the exceptors contended that the guardian should be held personally liable for these four $500 notes because the land was not worth the full $6000 secured. The court in passing on this question, said (l. c. 408):

> " * * * the law is that, if a loss accrues on a foreclosure of this deed of trust, the loss must be charged in the first instance to the note held by Mary L. McCune, the last one due. When a deed of trust is given to secure several notes due at different times, then on a foreclosure the proceeds of the land must be applied in payment of the notes in the order in which they became due. McPike v. Hufty (Mo. App.) 227 S. W. 916; Stewart v. Trust Co., 283 Mo. 364, 222 S. W. 808. There can, therefore, be no question but that the four $500 notes which defendant took over for his wards, being the first ones payable, are amply secured."

However, in the case of State ex rel. v. Grand River Drainage District, 49 S. W. (2d) 121, decided in 1932 by the Supreme Court of Missouri in Banc, the facts were that the Grand River Drainage District had a bond issue of $582,000, with interest thereon, payable semi-annually on the first days of March and September of each year. The first maturing bonds matured on March 1, 1927, and the last ones maturing in 1942, and the semi-annual interest on each of said bonds, as evidenced by coupons, fell due on the first of September and first of March in each year until maturity. The district had $25,988.33 cash on hand at the time the mandamus suit was filed, and thereupon certain of the bondholders presented for payment the following bonds of said issue:

"36 coupons, No. 15, due Sept. 1, 1929, at $13.75 each	$ 495.00
240 coupons, No. 15, due Sept. 1, 1929, at $27.50 each	6,600.00
14 bonds, due March 1, 1930, at $500.00 each	7,000.00
14 interest coupons, No. 16, due March 1, 1930, attached to said $500.00 bonds, at $13.75 each	192.00
5 bonds, due March 1, 1930, at $1,000.00	5,000.00
5 interest coupons, No. 16, due March 1, 1930, attached to said $1,000.00 bonds, at $27.50 each	137.50
	$19,425.00 "

being payment in full of relators' bonds. The district declined to pay them the full amount on the ground that by so doing there would be $93,345.00 worth of other bonds due and interest due that should, "in justice and equity, share equally and in proportion with the amount claimed to be owned by the relators." There was no showing that the taxing power of the district had been exhausted. The court awarded a peremptory writ of mandamus and required the payment in full of the $19,425.00 of bonds, saying,(l. c. 124):

> " * * * relators have a clear and undoubted right to have their coupons and bonds paid in full out of the fund in the hands of respondents, unless past due and unpaid coupons and bonds of unknown owners 'should in justice and equity share equally and in proportion with the amount claimed to be owned by the relators.' If relators are entitled to only such proportion of the fund as the amount of their coupons and bonds bear to the whole amount of all past due and unpaid coupons and bonds, they must fail in this action. * * * If the respondent drainage district were a private corporation,with definite ascertainable assets, and those assets insufficient when liquidated to meet its obligations to creditors, principles of equitable adjustment could properly be invoked. But the district is

> a municipal corporation; its general assets, if any, are not liable for its bonded indebtedness; such indebtedness is payable solely from a special fund to be derived from the taxation of the lands lying within its boundaries."

Then the court quotes extensively from Section 10759, R. S. Mo. 1929, and states:

> "This statute clearly contemplates that the taxing power with which a drainage district is vested shall be so exercised as to make provision for the payment in full of all bonds which it authorizes. It does not appear from the record here that the power with which respondent drainage district is armed to assess, levy, and collect taxes for the purpose of paying its bonds and the interest thereon has been exhausted, nor that the future exercise of that power will not be fruitful in obtaining the necessary funds. On the contrary, it is admitted 'that the proper officers of said district and of said Livingston and Linn Counties are now engaged in collecting said taxes levied and assessed as aforesaid.' In these circumstances the equitable doctrine of equality as applied in the apportionment among creditors of the funds and assets of an insolvent debtor is without application."

It does not appear from your inquiry that the taxing power of your drainage district has been exhausted, and on the assumption that such taxing power has not been exhausted, it would seem that the case last quoted from is authority, the highest in this state, that it is the duty of the district to pay in full the bonds which are past due and are presented to you in the order of their presentation. It will be noted that in the above case the coupons matured September 1, 1929, and the bonds and other coupons matured March 1, 1930.

If the facts were that your district had exhausted its taxing power and had on hand a given amount of money, and the same was not sufficient to pay in full the bonds which were outstanding, we think the equitable principle of apportionment might apply according to the principle announced in the case of McCune's Estate v. Daniel, 76 S. W. (2d) 403.

CONCLUSION

It is our opinion that if your drainage district has bonds outstanding that have matured and has collected cash on hand sufficient to pay in full one or more of said bonds, and not enough to pay all of the bonds, and your drainage district has not exhausted its power of taxation for the payment of such bonds, that it is the duty of the district to pay in full each of said bonds in the order of their presentation insofar as the cash on hand will pay them. We write this opinion on the assumption that your district still has authority to levy and collect taxes for the purpose of paying the bonds here considered. If the taxing power therefor were exhausted, another conclusion might be reached.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:HR