## AMERICAN EXCHANGE TRUST COMPANY *v.* TRUMANN SPECIAL SCHOOL DISTRICT.

Opinion delivered May 4, 1931.

1. SCHOOLS AND SCHOOL DISTRICTS—POWERS OF DISTRICTS.—School districts are not only authorized to exercise the powers that are expressly granted by statute, but also such powers as may be fairly implied therefrom and from the duties expressly imposed upon them, and such powers are implied when necessary to enable them to carry out and perform the duties legally imposed upon them.
2. SCHOOLS AND SCHOOL DISTRICTS—POWERS OF SPECIAL SCHOOL DISTRICTS.—All special school districts are authorized, for the purpose of raising funds for erection and equipment of necessary school buildings, to borrow money and mortgage the real property of the district, as provided by Crawford & Moses' Dig., §§ 8977, 8978.
3. SCHOOLS AND SCHOOL DISTRICTS—POWER TO BORROW MONEY.—Under Crawford & Moses' Dig., § 8978, single school districts are impowered to issue warrants on the treasurer payable in future as evidences of indebtedness for money borrowed and payable out of the building fund in the order of their date, as the building fund is collected.

4. SCHOOLS AND SCHOOL DISTRICTS—BONDS—LIABILITY OF DISTRICT.—A special school district, having issued bonds for building purposes, could not have limited the liability of the district to the payment of the bonds out of the revenues set aside for "the building fund," if one had been provided, since they were and are a charge against the entire revenue of the district.
5. SCHOOL AND SCHOOL DISTRICTS—BUILDING FUND.—It was not error to refuse to order a special school district to set aside revenues into a building fund for the payment of unmatured bonds since they are a charge against the entire revenues of the district.
6. MORTGAGES—ALLOWANCE OF ATTORNEY'S FEE.—A provision for an attorney's fee will not be allowed as costs in a suit to enforce a mortgage, the same being regarded as a provision for a penalty.

Appeal from Poinsett Chancery Court; *J. M. Futrell,* Chancellor; affirmed.

STATEMENT OF FACTS.

This action was brought by appellant, trustee in three different bond issues of appellee district, to recover judgment for the amount of the bonds due and interest coupons thereof, and praying a mandamus requiring appellee special school district to set aside of the revenues of the district a certain amount yearly sufficient to pay the maturing bonds as they became due, as well as a foreclosure of the lien of the mortgages.

The deeds of trust are virtually the same, except as to the dates and descriptions of the bonds secured thereby. Three issues of bonds are involved in the suit, one of April 1, 1920, in the amount of $38,000, the issue of May 1, 1920, in the amount of $8,000, and the issue of August 1, 1922, in the amount of $40.000. There is no dispute as to the validity of the bonds or about the issuance of the deeds of trust to secure the indebtedness.

It appears from the resolution adopted by the board of directors of the school district that a building fund was created to provide a sinking fund for the payment of the bond issue of April 1, 1920, setting aside certain amounts of the revenues of the district to pay a designated amount of the principal and interest of the debts for the years specified therein; and also that, if in any year the revenues are not sufficient to equal the amount

appropriated to the building fund of that year, the amount of the deficit should be set aside and paid into the building fund in the first years following until said deficit is made good or wiped out, and the building fund was pledged as security for the payment of the bonds and coupons set out in the deed of trust, and further provided that none of the building fund should be applied to any other purposes until the bonds and coupons were paid in full. In the deed of trust it was also agreed that upon the failure of the district to perform its obligations and undertakings when performance was due the trustee should be entitled to reasonable compensation for services rendered in connection with the trust in pursuance with the provisions of the trust, and that the district should pay compensation and all advances and expenses incurred by the trustee, which should have a lien therefor upon the premises and property conveyed and pledged or the proceeds thereof prior to the bonds and coupons secured by the deed. The trust deeds also contained a paragraph reciting the creation of a building fund from certain land and all the sources of revenue for the payment of the matured bonds and interest. In the deeds of trust securing the bond issues of May 1, 1920, and August 1, 1922, a paragraph recites that the building fund provided for "is hereby appropriated for the payment of the debts secured by this deed of trust, and no portion thereof shall be used for any other purpose until the debts secured by this deed of trust have been paid in full." These words were not included in the deed of trust securing the April 1, 1920, bond issue.

The original deeds of trust and resolution of the board referred to were exhibited to the chancellor and a decree was rendered without any testimony taken upon the pleadings or exhibits thereto.

The chancellor denied the prayer of appellant trustee for a mandatory order requiring the commissioners of the special school district to set up and maintain the building fund as it was claimed it had agreed to do in accordance with its pledge and refused to allow appellant

any compensation for its services or the services of its attorney and the appeal is prosecuted from that part of the decree denying the relief sought.

*Wallace Townsend,* for appellant.

*J. Brinkerhoff,* for appellee.

KIRBY, J., (after stating the facts). The law is well settled that school districts are not only authorized to exercise the powers that are expressly granted by statute, but also such powers as may be fairly implied therefrom, and from the duties which are expressly imposed upon them, and such powers are implied when the exercise thereof is clearly necessary to enable them to carry out and perform the duties legally imposed upon them. *Andrews Company* v. *Delight Special School District,* 95 Ark. 26, 128 S. W. 361.

It is also true that all special school districts in the State are authorized and impowered, for the purpose of raising funds for the erection and equipment of necessary school buildings, to borrow money and mortgage the real property of the district for the security thereof as provided by statute. Sections 8977 and 8978, Crawford & Moses' Digest. The later section provides the form for the evidences of indebtedness, either warrants or notes, the effect thereof, and that, if warrants are issued, "they may be drawn payable in the future and need not be registered with the county treasurer until the time for payment, but shall be drawn upon the building fund and paid out of it in the order of their date after the building fund is provided and collected by the successive levy and collection, and said special school district shall be allowed in law or equity no defense merely by reason of the fact that it is a school district." This statute also provides that, should any school district desire to borrow money or issue bonds or other evidences of indebtedness, etc., it shall be done after advertising for bids for sale of the bonds, etc. Under this statute the districts are given power to issue warrants on the treasurer payable in future as evidences of indebtedness for money borrowed and secured by mortgages upon the real property of the

district, but only such warrants as "shall be drawn upon the building fund and paid out of it in the order of their date, as the building fund is provided and collected by the successive levy and collection, etc."

There is no doubt but that the board of directors could provide a building fund for the payment of bond issues for money borrowed by the district, but the statute does not require that it shall be done, except when warrants payable in future are issued as evidences of indebtedness for the money borrowed. This court held, in construing a special act authorizing the borrowing of money by a special school district which provided that the evidences of indebtedness issued by the district shall be "paid out of the building fund in the order of their date after the building fund is provided and collected by successive levies," that it pledged in effect "the building fund" of the district, the bonds containing such recitals, to the payment thereof; but held also that the bonds were valid obligations of the district, and it was evidently the intention of the Legislature that they should be paid out of the revenues of the district "and are therefore a charge against such revenues." *Schmutz* v. *Special School District of Little Rock,* 78 Ark. 119, 95 S. W. 438. The board of directors could not have limited the liability of the district to the payment of the bonds out of the revenues set aside for "the building fund," if one had been provided, since they were and are a charge against the whole revenues of the district.

No error was committed, however, by the court in refusing a mandamus to compel the special district to set aside revenues into a building fund for the payment of the *unmatured* bonds, maturing, and as they matured. The trustee had no duties to perform, except in foreclosure of the mortgage, if it became necessary, and no error was committed in refusing to allow the trustee expenses including a reasonable attorney's fee. Attorney's fees cannot be allowed as costs in suits, except as provided by statute, the same being regarded as a provi-

sion for a penalty and not to be enforced in the State courts. *Boozer* v. *Anderson,* 42 Ark. 157; *Federal Land Bank of St. Louis* v. *Craig,* 176 Ark. 381, 3 S. W. (2d) 34; p. 345, Hughes on Arkansas Mortgages, § 114. The case is easily distinguished from *Williams* v. *Prioleau,* 123 Ark. 156, 184 S. W. 847, relied upon by appellant.

It follows that the chancellor's decree was correct, and it is in all things affirmed.

SMITH and BUTLER, JJ., dissent.