

and carry out the legislative and administrative proceedings necessary to the conveyance of these lots to the State of Ohio, all of which proceedings together with the corrections in the abstract herein required should be set out in the abstract and made a part thereof; which abstract together with a properly executed deed of the City of Xenia should be again submitted to this department.

Respectfully,
GILBERT BETTMAN,
Attorney General.

753.

ROAD MACHINERY—CIRCUMSTANCES UNDER WHICH TOWNSHIP TRUSTEES AND MUNICIPALITY MAY RENT SAME DISCUSSED—WHAT FUNDS SHOULD BE USED.

SYLLABUS:

1. *Under the provisions of Section 3373 of the General Code of Ohio, township trustees may purchase or rent road machinery equipment, whether used or new, for the purpose of maintaining or repairing roads and culverts within the township, when such contract is made in good faith and the rentals to be paid thereunder are reasonable. In the payment of obligations under such contracts, the proceeds of the gasoline tax may not be used, but such payments should be made from the so-called township road fund.*

2. *Municipal corporations may purchase or rent such machinery and equipment for the purpose of maintaining and repairing their streets and the funds arising under the provisions of Sections 6309-2, 5537 and 5541-8 of the General Code may be used for such purpose. The funds arising under Sections 6309-2 and 5537 may not be expended to purchase or rent equipment for construction purposes alone. Whether the funds arising under Section 5541-8 may be expended for the purpose of purchasing or renting machinery for construction purposes alone is not decided.*

3. *A municipality or township may not use such procedure to circumvent the law by making a contract of sale under the guise of a lease. In all such contracts, where the agreement is a contract of purchase rather than a contract of lease, the law requires competitive bidding when the amount involved is in excess of five hundred dollars.*

COLUMBUS, OHIO, August 16, 1929.

HON. J. D. SEARS, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—Acknowledgment is made of your communication requesting my opinion upon a question propounded in a communication to you by a road machinery and equipment company, which is as follows :

“Is it permissible for a township or municipality to rent machinery or equipment used or new to maintain or reconstruct township roads or village streets?

It would seem to the writer that this would be comparable to hiring labor and would be within the legal limits of the law.

We have been very careful thus far in advising our salesmen as to when they might pass on to the different boards of trustees in townships as to this application. However a good many of the boards seem to think that

they could rent machinery for a stipulated sum payable each month out of gas tax revenues which would be comparable to hiring labor.”

You submit a copy of your reply to said communication in which you stated, in part :

“My own view is this: That the Boards representing the subdivisions have no right to circumvent the law by any subterfuge. In other words, they have no right to make a purchase of machinery and pay for it on a so-called lease basis with the idea of avoiding their legal duty to advertise for competitive bids, nor have they a right to use maintenance and repair funds for the purpose of purchasing equipment through the subterfuge of paying rental.

If, however, the transaction is bona fide, and a subdivision would need a particular piece of equipment for a special purpose where economy would not justify the purchase of the same, and where there would be no continued necessity for such equipment, I would then feel that a temporary lease of such equipment would be justified.”

In considering the statutes which relate to the power of renting such machinery and equipment in so far as townships are concerned, Section 3373 of the General Code obviously will govern. Said section, after providing that the township trustees, in the maintenance and repair of roads, may proceed either by contract or force account, and defining the method of procedure in each case, then provides :

“Township trustees are hereby authorized to purchase or lease such machinery and tools as may be deemed necessary for use in maintaining and repairing roads and culverts within the township.”

There appears to be in the section just quoted, in so far as townships are concerned, clear authority for the leasing of equipment when the township trustees, in good faith, determine that such a procedure is necessary. I concur in the conclusion reached by you that such procedure may not be used for the purpose of circumventing the law. That is to say, the trustees may not make contracts which would result in the townships paying more than the reasonable rental value of such equipment.

In an opinion of my immediate predecessor, reported in Opinions of the Attorney General for the year 1928, Vol. IV, page 2873, it was held, as disclosed by the first branch of the syllabus :

“1. Where a village enters into an arrangement with a company owning a fire truck and equipment, whereby the village agrees to pay \$300.00 cash on delivery and \$100.00 per month thereafter until the sum of \$5,700.00, with interest, is paid, at which time the lessor agrees to bargain and sell and transfer title to the equipment to the village, such an arrangement is a contract of sale.”

Said opinion cited with approval an opinion of the Attorney General, reported in Opinions of the Attorney General for the year 1922, Vol. I, page 449, which held, as disclosed by the syllabus :

“A contract purporting to have been entered into by a road machinery company with township trustees which is in form a lease, but which is in substance and practical operation a contract of sale, in that at the end of the third year of the lease the township trustees have the option of purchasing the

machinery for a trivial sum in addition to the three years rental which they already will have paid in yearly installments under the contract, is not authorized by the terms of Section 3373, G. C., or otherwise; and such purported contract because of its obvious tendency to destroy the principle of competitive bidding in the purchase of road machinery as required by said Section 3373 is void as being contrary to public policy."

It appears to be clear that if the action taken by the township trustees constitutes a purchase, the same must be made in pursuance of competitive bidding if the amount involved is more than five hundred dollars. This requirement is specifically stated in Section 3373, supra. It will further be observed that while Sections 5541-1, et seq., authorize the township trustees to use the proceeds of the gasoline tax "for the purpose of constructing, widening and reconstructing," Section 3373, above mentioned, only authorizes the purchase or leasing of such machinery for maintenance and repair. It would appear, therefore, that there is no authority for township trustees to use the gasoline tax for such purposes.

On the other hand, said section requires such payment to be made from the township road fund, which it is believed is to be distinguished from the fund arising from the levy on the use of gasoline.

It is believed the foregoing is dispositive of your inquiry in so far as township trustees are concerned.

Section 3615 of the General Code, which is a part of Chapter I of Division II and relates to the general powers of municipalities, among other things, in substance, authorizes each municipal corporation to "acquire property by purchase, gift, devise, appropriation, lease, or lease with the privilege of purchase, for any municipal purpose authorized by law, * * * ." While the section above mentioned authorizes a municipality to lease with the privilege of purchase, in any such contract the rentals provided must be reasonable, in view of all the circumstances, and cannot be made a subterfuge for the purpose of selling such equipment and circumventing the laws with reference to advertisement under Section 4221, in the case of villages, and Section 4328, in the case of cities. In other words, a contract of sale may not be made under the guise of a lease.

Considering the question as to whether or not the proceeds of the gasoline tax may be used for the purpose of purchasing or leasing such equipment, attention is directed to an opinion of my predecessor, found in Opinions of the Attorney General for the year 1928, page 84, in which it was held, as disclosed by the syllabus:

"Monies allotted to municipal corporations from the 'motor vehicle license tax' or the 'gasoline excise tax funds' may not be lawfully expended for the purpose of sweeping or cleaning streets since the sweeping and cleaning of streets is not included in the term, 'maintenance and repair,' as that term is defined in Section 6309-2, General Code, and used in Section 5537, General Code."

That opinion, of course, dealt with the gasoline tax arising by virtue of the provisions of Section 5537 of the General Code, as it existed before amendment by the 88th General Assembly in House Bill 104.

Section 6309-2, as amended in said House Bill 104, provides that the moneys arising under the motor vehicle license tax, in the treasuries of municipalities,

"shall be used for the maintenance, repair, construction and repaving of public streets, and for no other purpose and shall not be subject to transfer to any other fund, provided, however, that as to such municipal corporations, not

more than fifty per cent of the total funds available during any year from such source including the unexpended balance of such funds from any previous year, shall be used in such construction and repaving which shall be done by contract let after the taking of competitive bids as provided by law, or in the manner provided in the charter of any such municipal corporation."

Section 5537, as amended in House Bill 104, provides that the moneys arising from the gasoline tax, by reason of the provisions of Section 5527, et seq., in the treasuries of the municipalities, shall be expended in substantially the same manner as set forth in Section 6309-2, as above mentioned. In other words, it is clear that the Legislature intended to broaden the authority of municipalities to use said funds and that such fund is not limited alone to maintenance and repair. However, in both of the sections above mentioned, as last amended, there appears to be a clear inhibition against the use of more than fifty per cent of said fund for construction, and when used for such purpose it shall be expended upon contracts duly let in pursuance to competitive bids, which, of course, negatives the idea of purchasing or renting road building machinery for the purpose of construction.

Section 5541-8 of the General Code, as amended by the 88th General Assembly in House Bill 335, provides that moneys arising thereunder "shall be expended by each municipal corporation for the sole purpose of constructing, maintaining, widening and reconstructing public streets and roads within such corporation." There appears to be no specific direction as to what amount of said funds shall be used for maintenance and repair and what sum shall be used for constructing and widening public streets, neither does this section contain the same direction with reference to expending such moneys for the purpose of construction upon contracts. It is probable that the moneys arising under the section last mentioned could be used by the municipality for the purchasing or renting of equipment for construction purposes alone. However, it is believed unnecessary for the purpose of this opinion to decide this question in view of the impracticability of such a procedure. It is clear that all the funds hereinbefore mentioned may be used to purchase or rent equipment for the maintenance and repair of public streets. It is also clear that the funds arising under Sections 6309-2 and 5537 of the General Code may be expended only upon contracts when used for the purpose of construction. As hereinbefore indicated, it is believed unnecessary to decide whether the five per cent of the gasoline tax arising under Section 5541-8 may be used for purchasing or renting machinery for the purpose of construction.

In view of the foregoing, it is my opinion, and you are specifically advised that:

1. Under the provisions of Section 3373 of the General Code of Ohio, township trustees may purchase or rent road machinery or equipment, whether used or new, for the purpose of maintaining or repairing roads and culverts within the township, when such contract is made in good faith and the rentals to be paid thereunder are reasonable. In the payment of obligations under such contracts, the proceeds of the gasoline tax may not be used, but such payments should be made from the so-called township road fund.

2. Municipal corporations may purchase or rent such machinery and equipment for the purpose of maintaining and repairing their streets and the funds arising under the provisions of Sections 6309-2, 5537 and 5541-8 of the General Code, may be used for such purpose. The funds arising under Sections 6309-2 and 5537 may not be expended to purchase or rent equipment for construction purposes alone. Whether the funds arising under Section 5541-8 may be expended for the purpose of purchasing or renting machinery for construction purposes alone is not decided.

3. A municipality or township may not use such procedure to circumvent the law by making a contract of sale under the guise of a lease. In all such contracts,

where the agreement is a contract of purchase rather than a contract of lease, the law requires competitive bidding when the amount involved is in excess of five hundred dollars.

Respectfully,
GILBERT BETTMAN,
Attorney General.

754.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN
HURON COUNTY.

COLUMBUS, OHIO, August 16, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

755.

JUVENILE COURT—JURISDICTION OVER DEPENDENT CHILDREN
FOUND IN COUNTY—RESIDENCE OF SUCH CHILDREN OR THEIR
PARENTS IMMATERIAL.

SYLLABUS:

A juvenile court has jurisdiction to declare any child to be a dependent which is found within the county under facts and circumstances which constitute dependency. The legal residence of the child or its parents or those standing in loco parentis do not determine the jurisdiction of the court.

COLUMBUS, OHIO, August 17, 1929.

HON. H. H. GRISWOLD, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—In your recent communication you request my opinion on the following:

"1. An inmate of the Institution for Feeble-Minded was granted trial visit from the institution to a home in a county other than the county from which she was committed. During this trial visit she gave birth to an illegitimate child conceived during the period of trial visit, the father of the child presumably being a resident of the county in which the mother was living and in which the child was born. The parentage of the child, however, can not be definitely established. The mother is of age and had been absent from the institution for about three years although not discharged. The child is a dependent child, the mother being unable to support it. It is understood that although the mother is a ward of the State, this department has