

848.

APPROVAL—BONDS OF WASHINGTON TOWNSHIP RURAL SCHOOL DISTRICT, LAWRENCE COUNTY, OHIO, \$16,200.

COLUMBUS, OHIO, July 6, 1937.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN :

RE: Bonds of Washington Twp. Rural School Dist., Lawrence County, Ohio, \$16,200.00.

I have examined the partial transcript relative to the above bonds purchased by you. These bonds comprise part of an issue of school building bonds in the aggregate amount of \$45,000, dated March 15, 1921, bearing interest at the rate of 6% per annum.

From this examination and from a study of the affidavits of one J. L. Davis and Charles F. Druny as to the procedure followed and to the effect that the original transcript was destroyed by fire, I am of the opinion that the bonds issued under these proceedings constitute a valid and legal obligation of said school district.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

849.

DUTY OF COUNTY COMMISSIONER TO CREATE NEW TOWNSHIP—MANDATORY WHEN—PETITION OF FREEHOLDERS—SUBSCRIBER QUALIFICATIONS. FREEHOLDER AND ELECTOR—MAN AND WIFE OWNING LAND JOINTLY, BOTH FREEHOLDERS—WHERE TITLE TO LAND IS IN ONE SPOUSE ONLY, HE ALONE IS FREEHOLDER.

SYLLABUS:

1. *Section 3250-1, General Code, is a mandatory statute and when a majority of the freehold electors owning land in such township outside the city or cities therein located, petition the commissioners of the county*

in which such township is located for a new township, the county commissioners have but one duty and that is to enter an order creating such territory into a new township.

2. *It is not enough that a person be a freeholder in the affected territory to qualify him to sign the petition for a new township. He must be a freeholder elector. An elector under this section is one who is authorized and qualified to vote for township officers in the township in question.*

3. *If man and wife own land jointly in the territory in question, the estate of each amounts to a freehold and they are electors in the township, they each have full right to sign the petition for a new township.*

4. *If the title to the real estate is in one spouse only, no right is thereby conferred upon the other spouse to sign such petition because of the fact that while he or she as the case may be, may be an elector, he or she is not a freehold elector.*

COLUMBUS, OHIO, July 7, 1937.

HON. ROBERT C. CARPENTER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR: I am in receipt of your communication of recent date as follows:

"I would like your opinion upon the following questions, which involve the construction to be placed upon Ohio G. C. Sec. 3250-1:

1. If a person owns land in the portion of a township outside of said city limits, but resides elsewhere, and is an elector, should he be considered in determining the required number of signatures? Also, if a man and his wife residing in such district own real estate jointly, are both to be considered? If title to the real estate is in the name of the one spouse only, is the other spouse to be considered?
2. In case a petition be presented to the County Commissioners, containing the names of a 'majority of the free hold electors owning land' as defined by your answers to my previous questions, it is mandatory upon the Commissioners to create a new township?"

Your questions involve an interpretation of Section 3250-1, General Code, viz:

"When a township contains a city or cities, if a majority of the *freehold electors* owning land in the portion of such a

township outside of said city limits, petition with a map accurately setting forth such territory, praying to have such territory erected into a new township, excluding the territory within the city or cities, the commissioners of the county in which such township is situated, *shall enter an order erecting such territory into a new township*, the boundaries of which need not include twenty-two miles of territory. Upon the erection of such new township, the territory lying within the limits of the city or cities in the original township shall be considered as not being located in any township." (Italics ours.)

The italicizing is mine, made for the purpose of reference only.

The first logical question is whether or not this section is directory or mandatory. The section plainly states that if the geographical condition therein described obtains, the commissioners of the county *shall enter an order erecting such territory into a new township*. Does this language constitute a mandate, or is it a mere matter of direction?

The nature of language used in a statute is most persuasive in the determination of its character, but it is not necessarily conclusive. If, notwithstanding the mandatory language of the statute, the official, officials or administrative body at which the statute is aimed is vested with a choice or discretion, the statute is directory merely, in the face of the mandatory language used. A mandatory statute in its last analysis is a command and a command directed to a public official clothed with the legal right to ignore or obey, as such official sees fit, amounts to a feeble gesture. I find no delegation of choice or discretion to the county commissioners in this statute.

If, after applying these tests, doubt remains in the mind as to the character of the statute, it is well to consider its purpose. The purpose of the statute should be the natural, logical result of the legislative intent.

It is the purpose of all legislative enactment to conserve and amplify human rights or to minimize and cure human wrongs. Even this statement of law may be abridged. When human wrongs are minimized or cured human rights are necessarily conserved and amplified. A brief consideration of the rights involved in Section 3250-1, General Code, *supra*, should remove all doubt as to its character.

A township has a very definite existence under the laws of Ohio, as will be observed from the provisions of Section 3244, General Code:

"Each civil township lawfully laid off and designated, is declared to be and is hereby constituted, a body politic and corporate, for the purpose of enjoying and exercising the rights and privileges conferred upon it by law. * * *"

The function of a township is defined in 39 O. J. Section 7, page 275, viz. :

“Generally speaking the function of the township is to serve as an agency or instrumentality of the state for purposes of political organization and local administration.”

This text was gathered from *State, ex rel, Bates vs. Richland Township*, 20 O. S. 362 as amplified by other decisions of the Supreme Court of Ohio, to and including *State, ex rel. Godfrey vs. O'Brien*, 25 O. S. 166.

The township is a body corporate and the municipal corporation is a body corporate and both are political entities of the State. Surely it could not have been the policy of the state at any time that its political subdivisions should interlock. The legislature had nothing to do with the interlocking as such. It was the result of geographical conditions pure and simple, an elucidation of which would in no wise be helpful. Sufficient to say we have such condition. The General Assembly has recognized it and sought to cure it by the enactment of Section 3250-1, General Code, and cognate sections.

It is the undoubted policy of the State of Ohio to lend all possible encouragement to local self-government. A township located partially in a municipal corporation is, in effect deprived of this right and the elector within the township inside the municipality is accorded a right to which he is not entitled. Such an elector by the exercise of his right of suffrage helps shape the destinies of the city—a right to which he is entitled—likewise he votes to determine the political policies of the township, a right which he may exercise under the law as it exists—but a right which he should not be permitted to exercise under the state's policy of local self-government.

The voter in such township outside the limits of the city is not only confined to his vote in his township, but he may be tied to a township policy with which he is not in sympathy by electors residing within a city. The policies of the city and township are, as a rule, diametrically opposed. The one is largely urban, while the other is largely rural and it is not good government to permit urbanites to determine a rural policy. I assume that the General Assembly had all this in mind when it enacted Section 3250-1, General Code, supra, and in my opinion intended that it should be mandatory.

In such case as you state, the County Commissioners have no choice or discretion and when a proper petition is presented to them signed by a majority of the freehold electors owning land in such territory, they must create a new township. A freehold has practically the same meaning in Ohio as elsewhere. It is defined as follows in 10 R. C. I.. 647:

“Any estate of inheritance or for life in either a corporeal or incorporeal hereditament existing in or arising from real property of free tenure.”

“Free tenure” at common law was used to designate lands held by free service; that is, service which became a free man or soldier. 2 Blackstone’s Commentaries, 62, 89 and 90. We have no feudal tenures in Ohio—never have had—and I hope, never will have—but we are at times driven back to the common law for interpretive light.

In Ohio, estates as to duration and extent are divided into two general classes, estates of freehold and estates less than freehold. We are not concerned with estates less than freehold, so we will consider freehold estates in Ohio. Freehold estates are divided into freeholds of inheritance and freeholds not of inheritance. Freehold estates of inheritance are those estates which pass to the owners’ heirs and comprise fee simple estates, limited fees and estates tail. Freehold estates not of inheritance consist of life estates. For a discussion of these estates, consult 16 O. J. Section 7, pages 387 and 388.

Estates of freehold are likewise discussed in the case of *The Ralston Steel Car Co. vs. Ralston*, 112 O. S. 306. In the opinion in the above case, it was pointed out that a freehold estate was one which required actual possession of the land and is such an estate as is conveyed by livery of season, (another echo from the common law). It is further stated in the opinion that in the last analysis, the true test of a freehold is the indeterminate tenure.

As practically all lands in Ohio are held by deed it is not likely that the question of freehold estate will engender much trouble; however, should such question arise, I have endeavored to state enough of the law to enable a determination to be made.

It is not enough that the person to be entitled to sign the petition in question be a freeholder in the affected territory. He must be a *freehold elector* in such territory. An elector—tersely defined—is one who is authorized and qualified to vote at an election. A person might be an elector in New York State and own a freehold interest in land in the affected territory and still have no right to sign the petition for a new township. To be an elector within the purview of this section, the individual should have the right to vote for township officers in the township in which the territory in question is located. The policy to be adopted affects this territory and under the statute, no one, other than an elector of the territory in question has the right to participate in the formation of such policy.

If man and wife own land jointly in the territory in question, the estate of each amounts to a freehold and they are electors in the town-

ship—they have full right to sign the petition for a new township. If the title to the real estate is in one spouse only, the other has no right to sign the petition because of such fact as such other spouse, while he or she may be an elector, is not a freehold elector.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

850.

APPROVAL—BONDS OF VILLAGE OF UPPER ARLINGTON,
FRANKLIN COUNTY, OHIO, \$3,000.00.

COLUMBUS, OHIO, July 7, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

GENTLEMEN :

RE: Bonds of Village of Upper Arlington, Franklin
County, Ohio, \$3,000.00.

I have examined the transcript relative to the above bonds purchased by you. These bonds comprise part of an issue of water line, sanitary sewer and street improvement bonds in the aggregate amount of \$47,221.00, dated October 15, 1931, bearing interest at the rate of 6% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said village.

Respectfully,

HERBERT S. DUFFY,
Attorney General.