

GENTLEMEN :

RE: Bonds of City of Portsmouth, Scioto County, Ohio,
\$41,000.00 (\$36,000 inside 10 mill; \$77,000 inside 15 mill).

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of an issue of refunding bonds in the aggregate amount of \$113,000.00, dated March 1, 1937, bearing interest at the rate of 4% 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 city.

Respectfully,

HERBERT S. DUFFY,
Attorney General

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TOWNSHIP TRUSTEES — LEASE OF ROAD MACHINERY —
AMOUNTS TO SALE—VIOLATION OF SECTION 3373, GEN-
ERAL CODE.

SYLLABUS:

1. *Where township trustees enter into a lease agreement of ten separate leases for road machinery, which in effect permit the township trustees to acquire ownership of the machinery at the expiration of the tenth lease, such an agreement operates as a contract of sale and is in violation of Section 3373, General Code*

COLUMBUS, OHIO, March 10, 1937.

HON. MARCUS SHOUP, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR: I acknowledge receipt of your communication which reads as follows:

"The Board of Trustees of Beavercreek Township, this county, have requested my opinion relative to a lease agreement with a manufacturing company for the leasing of a Hydraulic

Power Grading machine. Without setting forth the provisions of the lease agreement, I herein enclose a copy of the same for your convenience. You will note that the agreement purports to set forth a consecutive number of monthly leases whereby the Trustees are to pay each month the sum of \$427.20. While it is not stipulated, it is conceded that upon the expiration of the final monthly lease the machine equipment is to automatically become the property of the Trustees, and upon the termination of the same the Trustees will have paid the approximate sum of \$3100.00.

It seems evident to me that while this agreement purports to be a lease it remains in sum and substance a contract of purchase.

* * * * *

I am of the opinion that this lease is in effect a purchase and would be a violation of Section 3373 G. C. The Trustees contend that such agreements have heretofore been executed in other townships, but if this be the case it would seem that a proper compliance has not been had with the statutory provisions. If I am in error in this interpretation I would appreciate a ruling by you."

Enclosed with your letter is a lease agreement consisting of twelve separate leases. The first lease provides as follows:

"THIS LEASE made and entered into this *20th* day of *February*, 1937, by and between the HUBER MANUFACTURING COMPANY, Parties of the First Part and *Grover Wolf, Edwin Shoup, and Ralph Kindig*, as Township Trustees of *Beaver-creek Township, Greene County, Ohio*, as Parties of the Second Part, WITNESSETH:

That Parties of the First Part hereby agree to lease to Parties of the Second Part *One Huber Superior No. 4 Grader with Scarifier enclosed cab, 40x8 Rear Tires* until the 1st day of *April*, 1937, the same to be shipped to....., on or before *at once* 19....., and to furnish a competent man to help unload and start said Grader; For which the Parties of the Second Part agree to pay as a consideration for said Lease the sum of \$327.20 Dollars, payable at their first regular meeting *on last Saturday of Feb.* and are to issue their warrant for the same, said warrant to be made payable on the..... day of....., 19....."*

*Parts above in italics are written in ink.

Immediately following this lease is the following:

"Upon the expiration of this Lease, if Parties of the Second Part are desirous, the Parties of the First Part agree to lease the Grader to Parties of the Second Part until the 1st day of *May*, 1937, subject to the following conditions: Parties of the Second Part agree to pay as a consideration for said Lease, the sum of \$327.20 Dollars, payable on the *last Saturday of March*, of....., 19....., and shall be accompanied by Certificate over signature of Township Clerk as to the proper funds.

It is further agreed by and between the Parties of this *Lease, that Parties of the Second Part are to keep said Grader in good repair and upon the expiration of this second lease, the same is to be returned to Marion, Ohio, at the expense of the Parties of the Second Part, in as good condition as it was received by them, excepting the usual wear and tear."

*Parts above in italics are written in ink.

This same wording is used in each of ten leases immediately following the agreements hereinabove quoted, the only change being that the words "third," "fourth" and so on to "twelfth" are placed in the first sentence of the "return" paragraphs between the words "this" and "lease." (See star above.)

Ten of these leases are filled out with the proper dates and amounts; and crosses are drawn through the eleventh and twelfth leases. A line from one cross extends through the "return" paragraph of the tenth lease, so that the following words appear to be struck out or cancelled:

"It is further agreed by and between the Parties of this Lease, that Parties of the Second Part are to keep said Grader in good repair and upon the expiration of this tenth lease, the same is to be returned to Marion, Ohio, at the expense of the Parties of the Second Part, in as good condition as it was received by them excepting the usual wear and tear.

There are no other provisions in the lease and the proper signatures and certification are attached on a separate page.

General Code, Section 3373, provides in respect to purchases of machinery by Township Trustees as follows:

"In the maintenance and repair of roads the township trustees may proceed either by contract or force account. * * * All purchases of materials, machinery, and tools, shall, where the

amount involved exceeds five hundred dollars, be made from the lowest responsible bidder after advertisement made in the manner hereinbefore provided."

The interpretation of this code section with respect to leases which are in effect contracts of sale has been well set forth in the two opinions of this office cited by you, 1922 O. A. G., page 499, and 1929 O. A. G., page 1147. Also in point is 1928 O. A. G., page 2873.

The concensus of these opinions is that the requirements of the law as to competitive bidding may not be circumvented by subterfuge: In other words, a township or municipality have no right to purchase machinery and pay for it on a so called lease basis. The third syllabus in 1929 O. A. G., page 1147 referring to such leases reads as follows:

"3. A municipality or township may not use such a 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."

Coming now to the contract before us, it appears innocent on its surface, having no express provisions which provide that the machinery shall become the property of the township. However, from the statements in your letter there must be some agreement supporting this lease between the same parties on the same subject matter which together with this lease permits the title of ownership to pass at the end of the tenth lease. If this is the case, this lease and the supporting agreement constitute in reality a contract of sale and as such are in violation of Section 3373, *supra*.

In the absence of any agreement, if the "return" paragraph of the tenth and last lease is purposely cancelled by the line drawn through it so that the lease imposes no duty to return the machinery after the tenth lease agreement has been reached, what we have in effect is a "voice of Jacob and hand of Esau" procedure which enables a contract of sale to masquerade as a lease. Such a lease violates the purpose and provisions of the law requiring competitive bidding.

In view of these facts I am of the opinion that this lease as it stands between the parties permits them to do indirectly what they can not do directly and as such violates the statutory provisions of Section 3373, General Code.

Respectfully,

HERBERT S. DUFFY,
Attorney General