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CHILDREN'S HOME—AUTHORITY OF TRUSTEES THEREOF TO EXCHANGE PRODUCTS RAISED ON HOME FARM FOR NEEDED PRODUCTS TO BE USED IN HOME.

SYLLABUS:

Section 3107 of the General Code authorizes the trustees of a county Children's Home to exchange products raised on the Home farm for other products needed for use in the Home.

COLUMBUS, OHIO, April 1, 1933.

HON. CHARLES D. HAYDEN, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—I have your letter of recent date which reads as follows:

“Section 3107 of the General Code provides that surplus products not needed to maintain a children's home and all receipts from other sources shall be placed in the county treasury and credited to the children's home fund to be paid out as the exigencies may require.

Question: Can the trustees of a children's home under the above provision of law exchange products raised on their farm for other food products to be consumed by the inmates?

Second: Could they legally send said wheat raised on their farm to a mill to be ground into flour to be used by the inmates?

Third: Could they exchange wheat for flour to be used by said inmates?”

Public officers and boards have those powers and duties expressly granted by statute, together with such implied powers as are necessary to carry into effect the express powers and duties. *State ex rel. vs. State Medical Board*, 107 O. S. 20.

Section 3082-1, General Code, provides that at their monthly meeting the trustees of a Children's Home shall examine all accounts presented for payment and order the payment of all such accounts as they may approve; and further, that they shall examine into the condition of the property and observe the care afforded to the wards.

Section 3084, General Code, provides that the board of trustees shall designate a suitable person to act as superintendent of the Children's Home who shall perform such duties as the trustees require.

Section 3085, provides in part:

“Subject to such rules and regulations as the trustees prescribe, the superintendent shall have entire charge and control of such home and the inmates therein.”

From these sections, it appears that the legislature has empowered the trustees to make such rules and regulations as they deem proper for the management of the property of the Home as well as for the care of the inmates.

Unless expressly limited by other statutory provisions, the powers of the trustees appear sufficiently broad to permit them to make rules empowering the superintendent to exchange food products raised on the farm for other products to be consumed by the wards.

Section 3107, General Code, provides:

"Under the rules and regulations adopted by the trustees, the superintendent *may* sell products not needed to maintain the home, and all receipts from this and other sources *shall* on the last day of each month be paid into the county treasury, and be placed to the credit of the children's home fund, to be paid out by the trustees as exigency may require."
(Italics the writer's.)

If the word "may" is here used in its ordinarily accepted meaning, i. e., in the permissive rather than in the imperative sense, the trustees are empowered to authorize the superintendent to exchange products raised for other products needed.

In ascertaining in which sense the legislature intended to use the word "may" in section 3107, several principles of statutory construction may be helpful. In the case of *Stanton vs. Realty Co.*, 117 O. S. 345, 355, the court said:

"It is urged in this case that it was discretionary on the part of the court of common pleas whether it would call witnesses and consider other evidence. With this argument we cannot agree. It is a settled rule of law that the word 'may' will be construed as 'shall' in a certain class of cases. In *Lessee of Swazey's Heirs vs. Blackman*, 8 Ohio 5, it was held, at page 18:

'"May" means "must" in all those cases where the public are interested, or where a matter of public policy, and not merely of private right, is involved.'

In *Columbus, Springfield & Cincinnati Rd. Co. vs. Mowatt*, 35 Ohio St., 284, it was declared:

'Where authority is conferred to perform an act which the public interest demands, *may* is generally regarded as imperative. Whether it is to be so read in another case depends upon a fair construction of the statute.'

The rule thus stated in the former decisions of this court should be declared *a fortiori* when interpreting a statute providing an appeal from an administrative board to a court of justice."

It will be noted that "may" and "shall" are both used in section 3107. The following statement appears in 2 Lewis' Sutherland Statutory Construction 2nd Edition, at page 1154:

"The use of both words *may* and *shall* in the same provision may afford a very forcible indication of the intention. Thus the use of words that are plainly compulsory in the one aspect, and the use of others which literally are permissive in another, necessarily leads to an inference that the primary meaning is to be retained."

Used in its primary meaning, "may" is permissive.

It thus appears that there are two rules of construction which if applied here would lead to opposite conclusions. Since the section in question is part of a public statute and involves not merely a private right, if the "public interest" demands that "may" be read in the imperative sense, the "inference that the primary meaning is to be retained," raised by the use of "may" and "shall" in the same provision, will be rebutted.

The purpose for which a statute was enacted may always properly be considered in arriving at the legislative intent when not clearly expressed. After ascertaining the mischief intended to be remedied by section 3107, it should be clear which of the two rules of construction mentioned is applicable. It appears to me that the purpose of the section is to make it clear that the trustees have power to provide for the disposal of surplus products in order that they may not be wasted. This purpose may be achieved by barter or exchange of those products for others needed for use at the Home as well as by sale. To require sale, deposit of proceeds with the treasurer and purchase therewith of needed products, would seem to be an unnecessarily circuitous process when the same result can be reached by direct exchange of surplus products for articles needed but not produced at the Home. In either case the entire transaction is under the direction of the trustees, so that there is no more opportunity for fraud in the one case than in the other. The prevention of fraud then does not seem to be the purpose behind the statute.

It thus appears that the purpose of section 3107 is fully met by reading "may" in its permissive sense. The public interest does not require the mandatory meaning to be given. It follows that there is nothing to rebut the inference that when both "may" and "shall" are used in the same provision "may" should be read in the permissive sense.

It may be argued that this construction renders section 3107 meaningless. Such an argument is to the effect that since the trustees could either barter or sell, in the absence of that section, the provision was inserted to limit the power of disposal of products to sales. Since the power of sale is granted expressly, all other methods of disposal of surplus are excluded. To me this argument appears unsound. I believe that the authorization to sell was inserted out of an abundant caution, i. e., to make it clear that the trustees might avoid wasting surplus products by selling them as well as by exchanging them or making them useful by processing. There is a sufficient reason for a special provision relating to sales. The ordinary form of sale involves the receipt of money, and the legislature deemed it advisable to provide for the handling of money received from sales of surplus products by the county treasurer.

It appears from the foregoing that section 3107 authorizes the trustees to exchange products raised on the farm of the Children's Home for other food products to be used in the Home. This answers your first and third questions.

Sending wheat to a mill under an agreement to return flour may constitute either a sale or a bailment, depending upon the agreement. If it is a sale, section 3107, in terms, authorizes the transaction. Since the reasoning behind my conclusion as to barter or exchange applies as well to a bailment of this type, my conclusion as to your first and third questions is applicable to your second inquiry.

In answering your inquiry, I have assumed that the surplus was created merely as an incident to the operation of the Home. The statute does not authorize the Home farm to be operated for the purpose of producing large quantities of

produce to be placed upon the market in competition with private agricultural enterprises.

Respectfully,
JOHN W. BRICKER,
Attorney General.

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APPROVAL, NOTES OF MILL TOWNSHIP RURAL SCHOOL DISTRICT,
TUSCARAWAS COUNTY, OHIO, \$626.00.

COLUMBUS, OHIO, April 1, 1933.

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

434.

APPROVAL, NOTES OF BUCKSKIN RURAL SCHOOL DISTRICT, ROSS
COUNTY, OHIO, \$2,507.00.

COLUMBUS, OHIO, April 1, 1933.

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

435.

APPROVAL, NOTES OF JACKSON CITY SCHOOL DISTRICT, JACKSON
COUNTY, OHIO, \$22,329.00.

COLUMBUS, OHIO, April 1, 1933.

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

436.

APPROVAL, NOTES OF GUSTAVUS TOWNSHIP RURAL SCHOOL DIS-
TRICT, TRUMBULL COUNTY, OHIO, \$2,357.00.

COLUMBUS, OHIO, April 1, 1933.

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