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DISAPPROVAL, BONDS OF BOARD OF PARK COMMISSIONERS, LIBERTY TOWNSHIP, TRUMBULL COUNTY, \$40,000.00.

COLUMBUS, OHIO, March 15, 1927.

Re: Bonds of Board of Park Commissioners, Liberty Township, Trumbull County, \$40,000.00.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The transcript for the bond issue above referred to shows that these bonds are being issued by the Board of Park Commissioners of Liberty township, which is a board existing by virtue of the provisions of Sections 3415 to 3427-3 of the General Code.

In a former opinion of this department found in the Annual Report of the Attorney General for 1911-1912 at page 1350 the following language is used:

“There is another point, however, which is conclusive of the whole matter. I have hesitated to mention this point, but on careful consideration of the question, as you present it, I am satisfied that it is fairly before me, and that I cannot escape from expressing my opinion thereon.

Section 3415 of the General Code provides that the Board of Park Commissioners shall be appointed by the Court of Common Pleas.

Section 3420 provides that when the vote of the people is in favor of establishing a free public park the commissioners shall constitute a board, with power to locate, establish, improve and maintain a free public park.

These commissioners are also to have power, under Section 3421, to award contracts, to appoint officers and employ persons necessary to care for the parks, to pass ordinances prohibiting the selling, giving away or using intoxicating liquors as a beverage in the park, to pass by-laws, rules and regulations for the government of the park and to impose fines and penalties for violation thereof.

Section 3422 seeks to authorize the commissioners to exercise the right of eminent domain; while Section 3423, as we have already seen, seeks to authorize this board to levy a tax without the interposition of any other public authority.

It is difficult to conceive of a more complete vesting of powers of government in any public officer or board than that which these statutes seek to make in the Board of Park Commissioners with respect to the management and control of public parks.

Article X, Section 4 of the constitution, provides that:

‘Township officers shall be elected by the electors of each township

* * *

This is quite like the second section of the same article, which provides that:

‘County officers shall be elected * * * by the electors of each county. * * *

Under this section it has been held repeatedly that an act providing for the exercise of official powers for and on behalf of a county by appointive officers is unconstitutional.

State vs. Brennan, 49 O. S., 39.

State vs. Halliday, 61 O. S., 171.

State vs. Thrall, 59 O. S., 369.

There are numerous decisions of circuit courts to the same effect.

That the board of park commissioners are township officers is too plain for argument. Their powers are continuing, not temporary. They are exercised with respect to the whole township, and are highly governmental in their nature, including as they do the exercise of the right of eminent domain and the power to levy taxes.

For this reason the whole act relating to township parks is unconstitutional, and clearly so; and while I have made it a rule of this office not to express an opinion upon the constitutionality of an act, and particularly against the constitutionality of a given act, unless the matter is clear and unless my opinion is solicited, yet, what I may term, the glaring unconstitutionality of these provisions has constrained me to make an exception to the rule in this case."

This opinion is referred to in a subsequent opinion found in Opinions of Attorney General, 1920, at page 1079, where it is stated:

"This opinion holds that Sections 3415-3427 G. C., inclusive, are unconstitutional.

After diligent search no action of a court of record has been found which has expressed an opinion on or under any of the sections so held to be unconstitutional."

This statement is true today since I am unable to find any reported case in which any reference is made to these sections. I am of the opinion, however, that the reasoning of the opinion first referred to is still applicable and that these sections are unconstitutional, unless the subsequent changes made therein have altered the situation.

In 111 O. L., commencing at page 504, certain of these sections have been amended, the obvious purpose of the amendments being to meet the objection of unconstitutionality by making the Board of Park Commissioners a separate body politic and hence making the offices of the commissioners not township offices.

Thus, in Section 3415, General Code, where the organization is first referred to, it is stated that the petition filed with the township trustees shall be "to organize a park district and to establish a free public park within such township." The old section used this language: "to establish a free public park for such township."

A new Section 3415-1, General Code, was enacted in the following language:

"It is hereby declared that the proper construction and meaning of Sections 3415 to 3427 inclusive, of the General Code, heretofore, has been that the said boards of township park commissioners therein provided for, were officers of park districts coterminus with the geographic township, wherein they existed, that said Boards of Park Commissioners constituted bodies politic and corporate, and that the offices of said Park Commissioners were not township offices, within the meaning of that term in Section 3512 of the General Code."

Section 3418, General Code, which provides for the submission of the question to an election is similarly changed so that at present it refers to a free public park "within the township" instead of "for the township." Certain of the succeeding sections are changed in like manner.

The legislature has, in this manner, clearly tried to make the park district a separate taxing subdivision. At the same time there has been no substantive change

at all as to the method of selection of the park commissioners, their powers or their duties. Their jurisdiction is coterminous with the boundaries of the township and the levy authorized by Section 3423 of the General Code is actually a levy upon all the property in the township.

This is evident from the fact that the language of that section with reference to an increased levy provides that it shall not be made "unless the question of increasing such levy is submitted to and approved by a vote of the electors of such township, at a general or township election."

In view of the foregoing, I am of the opinion that the constitutional objection raised by my predecessor still holds good and that these commissioners are in reality township officers required by the constitution to be elected in spite of the amendments herein above mentioned.

I further call your attention to the fact that the only authority for the issuance of bonds of the park district is contained in the following language of Section 3425, General Code:

"For the purpose of raising money to pay for and improve such park, the commissioners may issue the bonds of said park district, in any sum not in excess of the taxes herein authorized to be levied, to be denominated convert it into a public utility, * * * ."

No procedure to be followed in the sale of the bonds is given and no restrictions or qualifications other than the limitations on the amount are set forth. We are left entirely in the dark as to the proper method to follow. If recourse is had to Sections 2294, et seq., of the General Code, which provide the procedure in the case of the sale of bonds of township trustees, among others, a satisfactory procedure may be adopted, but it seems to me that the application of this procedure to the present bond issue would be in the nature of a confession that these bonds are in reality township bonds.

I am accordingly at a loss to determine just what sections of the General Code limit and restrict the authority attempted to be conferred by Section 3425, General Code.

In view of the foregoing, and especially the substantial doubt as to the constitutionality of the sections applicable, I do not feel justified in approving the present bond issue. If objections were raised and sustained by a competent court, the bonds themselves and the levy to pay them would be void. You are accordingly advised to reject the issue.

Respectfully,
EDWARD C. TURNER,
Attorney General.

189.

GAS—WHEN PRODUCER OF NATURAL GAS IS NOT A PUBLIC UTILITY.

SYLLABUS:

1. *A producer of natural gas who sells his or its gas in bulk, either at the well or at the end of a pipe line constructed by him or it, and used solely for the delivery of his or its own gas to the line of a pipe line company where he or it sells it outright, and who is not interested, directly or indirectly, in the further transportation or distribution of the gas to consumers, is not a public utility, and not within the definition of a natural gas company contained in Section 614-2, General Code, as proposed to be amended by House Bill No. 72.*