

ROADS: The proper remedy to question the validity of the organization of a special road district under Section 8024, R. S. Mo. 1929, is quo warranto by the prosecuting attorney of the county.

December 6, 1938

12-12



Honorable L. I. Morris
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Sir:

We have received your letter of December 5, 1938, which reads as follows:

"At the request of the Lafayette County Court an opinion is requested upon the following set of facts.

"Referring to your opinion of Aug. 5, 1938 concerning the Odessa Special Road District at which time the opinion was that District No. 2 was not incorporated properly under the provisions of Section 8025 R. S. Mo. 1929.

"This district having been improperly organized the question arises as to the proper method of dissolution. I refer you to Section 8057 R. S. Mo. 1929 which provides for a petition notice and election.

"The question before the court is whether such an election is necessary in the preceding case or whether a failure of the County Court to further recognize this decision is sufficient."

The opinion mentioned in your request, I assume, is the opinion written by Harry H. Kay, Assistant Attorney General, on August 5, 1938, in which he held that the territory embracing only part of a town can not be incorporated under Section 8024, R. S. Mo. 1929. You also ask in your request if an election would be necessary to dissolve the Odessa Special Road District, in view of the above opinion and which you designate as a decision. Opinions given by the Attorney General's office are merely advisory holdings and should not be considered as adjudications in any manner.

If the county court should ignore the organization of the special road district for the reason that it is void and invalid according to the opinion above set out, and proceed to incorporate another road district in the proper manner, there would still be the objection that the first incorporation of the road district which was properly held invalid by this office may possibly be in effect. If such would be the case, there would be two road districts--the first one which would be questionable, and the second one, if the proper procedure was followed, which would be valid. In case a bond election was held on the second incorporation of a special road district, it is very probable that the buyers of the bonds or the state auditor, who registers the bonds, may set up the fact that the incorporation of the road district as it now stands might have been valid, and the second incorporation, which I presume you intend to incorporate, would then be subject to the same criticism as your present road district.

The incorporation of your present road district did not follow Section 8024, R. S. Mo. 1929, for the reason that it did not include any city, town or village, but only included a part of the city of Odessa. This statute must be strictly construed, and in the case of State, at Inf. of Gentry, Atty. Gen. v. Hughesville Special Road Dist. No. 11, 6 S. W. (2d) 594, 1. c. 596, the court said:

"The special road district contemplated by article 8, c. 98, R. S. 1919, is 'a political subdivision of the state for governmental purposes'--a municipal corpora-

tion. Section 10834. It is brought into existence through the exercise of legislative power. State v. Thompson, 315 Mo. 56, 285 S. W. 57. The proceedings prescribed by statute for its organization must be scrupulously followed. State v. Colbert, 273 Mo. 198, 201 S. W. 52."

In your request you ask if it would be proper to dissolve the incorporation as set out in Section 8057, R. S. Mo. 1929. This section has been amended by Section 8057, Session Laws, 1935, page 343, and reads as follows:

"If any district shall have adopted the provisions of this article the question may be resubmitted after the expiration of four years upon the petition of fifty resident taxpayers of said district at the next general election, or at a special election to be held for that purpose at such time as the County Court may order. The County Court shall give notice of such election and of such submission by publishing the same in some newspaper published in the County--such notice to be published for two consecutive weeks, the last insertion to be within five days next before such election; and such other notice may be given as the Court may think proper. The County Court shall have the ballots for such election printed and shall have printed on such ballots 'For the disorganization of the Special Road District', 'Against the disorganization of the Special Road District', with the direction 'Erase the clause you do not favor.' If a majority of the votes upon such proposition be cast against it said district shall be disincorporated and the operation of the law shall cease in said district. In all other respect said election, and the result thereof, shall be governed by the provisions of Article 9, Chapter 42, Revised Statutes of Missouri, 1929."

The amendment merely sets out more specifically the mode and manner of holding the election for the dissolution.

In order to dissolve the incorporation of a special road district under Section 8057, supra, the county must stand on the proposition that it has adopted the provisions of Article 9, Chapter 42, R. S. Mo. 1929, but according to the opinion of this office as rendered on August 5, 1938, the road district had not adopted the provisions of Article 9 for the reason that the territory set out in the petition for organization of the special road district did not contain any city, town or village. A further reason for not following the provisions of Section 8057 for the dissolution of a special road district would be that in case the voters voted against the dissolution of the special road district, the present road district would be in the same situation as at the present time. This Section 8057 also provides that in order to use this method of dissolution, the road district must have been in operation for a period of not less than four years, and since the opinion as heretofore mentioned holds that the organization of the special road district was invalid, it could not have been in operation for a period of four years. Another reason why Section 8057 should not be used for the purpose of the dissolution of the special road district would be that it would be more expensive than the proper legal procedure for the determination of the legality of the special road district as it now is situated at the present time.

The proper remedy to obtain a final and quick adjudication as to the legality of the organization or incorporation of the special road district would be by quo warranto, for the reason that the record proper in the case, without the use of intrinsic evidence, would show on its face that the territory mentioned in the petition for a special road district did not include wholly any city, town or village. This quo warranto proceeding could be filed in the Circuit Court of Lafayette County, and it would not be necessary that it be filed in the Supreme Court. This was the holding in the case of State, on Inf. of Killam, Pros. Atty., et al. v. Colbert et al., 201 S. W. 52, 1. c. 54, 273 Mo. 198, where the court said:

"It is argued by respondents that the county court had authority to pass upon the facts showing whether or not it had jurisdiction, and, having found the facts in favor of its jurisdiction, the finding is conclusive. This finding of the court was a mere conclusion from the finding that a proper petition was filed and proper notice served. And it may be conceded that the county court did have jurisdiction of the subject-matter and of the parties interested, authorizing it to incorporate a road district. But, under the authorities, it must not only have acquired jurisdiction, but must act within the limits of the jurisdiction so acquired. If, having jurisdiction of the subject-matter, it proceeded to render a judgment in excess of its jurisdiction, then the judgment is a nullity.
* * * *

"Respondents cite several cases in support of their position. All these are cases where the facts found by the court to give it jurisdiction are either specifically found in every respect, or else there is a finding in general terms from which the specific facts necessary to confer jurisdiction are presumed to have been found, and in all the cases cited there were collateral attacks upon the judgments. A quo warranto proceeding is a direct attack upon, and in fact the appropriate direct proceeding by which to attack, the validity of the county court's order incorporating the district. State ex rel. v. Wilson, 216 Mo. loc. cit. 275, 115 S. W. 549; State ex inf. Fleming, 158 Mo. loc. cit. 561, 59 S. W. 118; State ex rel. v. Mining Co., 262 Mo. 503, 171 S. W. 356."

Dec. 6, 1938

The above case should be distinguished from the case of State ex inf. Mayfield, Pros. Atty., ex rel. D. M. Cook v. Dougan, 264 S. W. 997, 305 Mo. 383, in which case the record proper did not show want of jurisdiction of the county court to make an order in compliance with the organization of a special road district without the showing of intrinsic evidence outside of the record.

CONCLUSION

In view of the above authorities, it is the opinion of this department that if the county court should rely upon the opinion of this office dated August 5, 1938, concerning the Odessa Special Road District and proceed to properly incorporate another special road district which would include the whole city of Odessa, it might result in the same situation as the present road district and thereby make the bonds, if issued, non-saleable.

It is further the opinion of this department that by following the opinion of this office as written August 5, 1938, concerning the Odessa Special Road District, if an election for the dissolution of the special road district under Section 8057, Session Laws, 1935, page 343, was held and defeated, the same situation would remain as now exists in reference to the sale of bonds, if issued for the improvement of roads in the special road district as now situated.

It is further the opinion of this department that a writ of quo warranto filed in the Circuit Court by the Prosecuting Attorney of Lafayette County attacking the orders of the County Court made by reason of said organization of the special road district is the proper, speediest and less expensive procedure for testing and obtaining a final adjudication of the organization of the Odessa Special Road District under Section 8024, R. S. Mo. 1929.

Respectfully submitted

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APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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