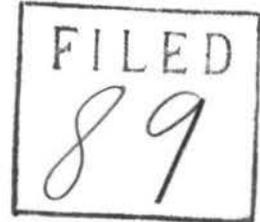


ROADS AND BRIDGES: Township board cannot lease road machinery belonging to road district to be used outside of the road district in the township, under township organization.

January 5, 1943

Honorable D. D. Thomas, Jr.
Prosecuting Attorney
Carroll County
Carrollton, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of January 2, 1943, which reads as follows:

"Your opinion is requested upon the following:

"Does a Township Board have the right to lease its road machinery (in this case a caterpillar tractor) to an individual, who proposes to use it on some construction project, in which the Township is not even remotely connected or interested?

"The facts briefly are as follows: two members of a Township Board in this County, without even consulting the other member lease a valuable tractor to an individual, who has taken it to some place in South Missouri, for use on a road project. There was no written contract entered into between the Township and lessee, and no record of the transaction was made in any minutes.

"I have given it as my opinion, that the Board members acted wholly without authority. The statute (Section 8818, R. S. Mo. 1939) provides that the tools of a district should not be loaned to any one except persons doing free work upon the roads of the district. I can find no authority, statutory or otherwise, for the action of the Board.

"If it is your opinion that the leasing of the equipment was improper, I then ask that you advise me who should institute an action to recover the machinery, provided the lessee refuses to surrender it and the Township Board refuses to attempt to get it back until the alleged rental period has expired. Also, what form of action should be instituted."

In answering the above request, and since you use Section 8818 R. S. Missouri, 1939, therein, we are presuming that the road district is a road district provided for under Article 17, Chapter 46, R. S. Missouri, 1939, which applies to common road districts, in counties under township organization, and not to Article 18, Chapter 46, R. S. Missouri, 1939, which applies to special road districts and benefit assessments in counties under township organization.

Section 8813 R. S. Missouri, 1939, reads as follows:

"All road laws of this state shall apply to counties under township organization, unless by their terms limited to counties not under township organization, or in conflict with the provisions of this law."

Under this section the general road law of all counties applies, unless the counties are limited to counties under township organization, or are in conflict with the provisions applicable to road districts under township organization.

Under Section 8814 R. S. Missouri, 1939, the township board of directors form road districts and appoint road overseers, where, under the general road law, which applies to counties not under township organization, the county court defines the road districts and appoints the road overseers.

Section 8818, supra, to which you refer in your request, reads as follows:

"The overseer shall not employ any member of the township board nor enter into any contract for road work, material, tools, teams, nor purchase any machinery or material for the use of the road district from any member of the board or a member of his own family, either directly or indirectly, nor in any way use the funds of the district so as to become the beneficiary in the disbursement of the same. The tools of the district shall not be loaned to any person, except persons doing free work upon the roads of the district."

Under the above section the overseer is empowered to loan the tools of the district, but nothing is said in regard to the machinery. This section provides that

the overseer shall not enter into any contract for road work, material, tools, teams, or purchase any machinery or materials either from members of the township board or a member of his family, directly or indirectly. It mentions therein machinery and tools as a different class of property, but only mentions that the tools shall not be loaned to any person except to persons doing free work upon the roads of the district. This is an express prohibition, and impliedly by act of law, as hereinafter set out, prohibits the loaning or leasing of machinery such as a tractor.

The powers of township boards are set out in Section 13933 R. S. Missouri, 1939, which reads as follows:

"Each township, as a body corporate, shall have power and capacity: First, to sue and be sued, in the manner provided by the laws of this state; second, to purchase and hold real estate within its own limits for the use of its inhabitants, subject to the power of the general assembly; third, to make such contracts, purchase and hold personal property, and so much thereof as may be necessary to the exercise of its corporate or administrative powers; fourth, to make such orders for the disposition, regulation or use of its corporate property as may be conducive to the interest of the inhabitants thereof; fifth, to purchase at any public sale, for the use of said township, any real estate which may be necessary to secure any debt to said township, or the inhabitants thereof, in their corporate capacity, and to dispose of the same."

Also, Section 13934 R. S. Missouri, 1939, specifically forbids any other act, except those that are set out in Section 13933, supra. Section 13934, supra, reads as follows:

"No township shall possess any corporate powers, except such as are enumerated or granted by this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or granted."

In a careful research of Section 13933, supra, we fail to find any authority for the township board to loan machinery to be used by a person outside of the road district. Township boards can only perform those duties authorized by statute in the same manner as duties authorized by members of the county court.

In the case of Jensen v. Wilson Tp., Gentry County, 145 S. W. 2d 372, the court, in stating this rule, said, in pars. 3-5:

" * * * A township board functions not as a court of broad jurisdiction but as the agent of the township with limited authority. Consequently, it is even more essential that its authority be exercised in strict compliance with the powers granted to it. Such a board comes under the same rule as a county court. A county court is only the agent of the county with no powers except those granted and limited by law, and like all other agents, it must pursue its authority and act within the scope of its powers. State ex rel. Quincy, etc., Ry. Co. v. Harris, 96 Mo. 29, 8 S. W. 794. * * * * * "

In your request you also ask what form of action should be instituted. You also state that the township board may refuse to get the tractor back until the alleged rental period has expired. If such is the case, the taxpayers of the district may, after proper demand upon the township board, bring an action in replevin to recover the tractor and set up in the petition their special interest as taxpayers in the ownership of the tractor. It was so held in the case of *Smith v. Hendricks*, 136 S. W. (2d) 449, pars. 4-5, where the court said:

"It is a familiar principle of equity that if A. has a cause of action at law, which he alone can assert, but in which B. has an interest, and A. refuses to bring the suit at law, B., by alleging a proper demand and a refusal of A. to bring the suit, can successfully maintain an action in equity to recover for A., because B. is interested in the recovery and it is A.'s duty to bring the suit.

"There are a number of such cases in this and other states relating to corporate actions where the directors of a corporation have wasted the assets and refused to sue in the name of and for the corporation. Any stockholder in the corporation, on behalf of himself and the other stockholders, can maintain the suit for the benefit of the corporation. *Hannerty v. Standard Theater Co.*, 109 Mo. 297, 19 S. W. 82, and numerous cases following it. On the same principle, a taxpayer in a public corporation can, in

a proper case, bring such a suit on behalf of himself and other taxpayers to recover on behalf of the corporation. This has been repeatedly decided by the Missouri courts."

Section 4483 R. S. Missouri, 1939, partially reads as follows:

"If any member of any town or city council, or of any county court or commission or body charged with the administration or management of the affairs of any county, or any executive officer or member of any executive department of any city, town or county in this state, or any member of any board or commission charged with the administration or management of any charity or fund of a public nature, by whatever name the same may be called, shall knowingly and without authority of law vote for the appropriation, disposition or disbursement of any money or property belonging to any such city, town, county, charity or fund, or any subdivision of any such city, town or county, to any use or purpose other than the specific use or purpose for which the same was devised, appropriated and collected, or authorized to be collected by law, or shall knowingly aid, advise or promote the appropriation, disbursement or disposition of any such money or property, for any purpose not directed and warranted by law, and such illegal ap-

appropriation, disbursement or disposition be in fact effected, every person so offending against the provisions of this section shall be deemed and taken to have feloniously embezzled and converted to his own use such money or property; * * * * ."
(Underscoring ours.)

This section specifically states:

" * * * any executive officer or member of any executive department of any city, town or county in this state, * * * * or any subdivision of any such city, town or county, to any use or purpose other than the specific use or purpose for which the same was devised, * * shall knowingly aid, advise or promote the appropriation, disbursement or disposition of any such money or property, for any purpose not directed and warranted by law, * * * shall be deemed and taken to have feloniously embezzled and converted to his own use such money or property; * * * * * * * * ."

Under the above partial section, 4483, supra, a criminal action may be commenced for the unlawful unauthorized disbursement and disposition of the tractor.

January 5, 1943

CONCLUSION

It is, therefore, the opinion of this department that the township board of Carroll County, Missouri, is not authorized to lease a tractor belonging to the township to an individual who has taken it to some place in South Missouri on a road project.

It is further the opinion of this department that if the township board refuses to bring an action to recover the tractor, then the taxpayers may bring an action to replevin the tractor, in which they have a special interest, by first making a demand on the township board to so act, and upon refusal of the board, to bring an action in the name of one or more taxpayers.

Respectfully submitted

APPROVED:

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WJB:RW