

(No. 138—November 16, 1961)

**COUNTIES AND COUNTY BOARDS—Lease of Property to a District Highway Commissioner.** A lease of county property to the Road District Highway Commissioner for road district purposes would be for a public purpose and authorized by statute.

**OFFICERS—Road District Highway Commissioner.** A Road District Highway Commissioner is a quasi corporation and if a lease is entered into it should be with the Highway Commissioner and not the township.

**OFFICERS—Road District Highway Commissioner—Power to Lease Property.** A Road District Highway Commissioner can only lease or rent property for the fiscal year period for which taxes have been levied.

**COUNTIES AND COUNTY BOARDS—Liability for Torts.** By statute a county is not liable for the torts of its agents, servants, officers or employees.

**STATUTES CONSTRUED—Illinois Revised Statutes, 1961, Chapter 34, Paragraph 301.1; Illinois Revised Statutes 1961, Chapter 121, Paragraph 6-201.9.**

Hon. Frank H. Masters, Jr., State's Attorney, Will County, Joliet.

I have your communication of November 4, 1961, wherein you state as follows:

"There has been submitted to me for my opinion thereon a proposed lease wherein the Township of Monée Road District, County of Will, State of Illinois, will lease from the County of Will, a parcel of land 100' by 302.87' owned by the County and located in Monée Township. The proposed lease is for a period of ten years with an option of renewal for another ten year period and provides for a rental of \$200.00 per year.

"The proposed lease further contains the following provisions:

"That the Lessee intends to construct a building for storage of highway equipment and supplies and for general office use. Said building shall be constructed in such a manner as to have a useful life of approximately 30 years. Upon termination of this lease as provided herein Lessor shall purchase the building of the actual original cost thereof less accrued annual depreciation calculated on the basis of 30 years useful life of the building.

"Lessee shall save lessor harmless from any and all claims against Lessor for injuries sustained by agents or employees or business invitees of Lessee which may occur on the premises herein leased.

"I would appreciate receiving your opinion with respect to the following questions:

"1. Does the proposed use, namely the construction of a building for storage of highway equipment and supplies and for general office use by the Road District or Township, constitute such a general public use as will authorize the leasing of such land by the County?

"2. Is the proposed Lessee Township of Monée Road District, County of Will, State of Illinois, a legal entity which can enter into such a lease or must the lease be authorized at the annual town meeting or a special town meeting and executed on behalf of the township by its proper officers?

"3. Does the County have authority to enter into a lease with option of renewal on the same original terms?

"4. Is the provision above recited to the effect that the lessee shall save lessor harmless for any claims that may be sustained by agents, employees or business invitees of lessee sufficient protection for a county or should a bond be required by the County?"

1. Pursuant to Illinois Revised Statutes 1959, Chapter 34, Paragraph 303, a county has the power to lease any real or personal estate which it owns. A lease of county property to the road district highway commissioner for road district purposes would be for a public purpose and authorized by the statute.

2. The road district highway commissioner is a quasi corporation and if a lease is concluded it should be with the highway commissioner and not with the township. *Western Sand Co. v. Town of Cornwall*, 2 Ill. 2d 560.

There is no specific statute which authorizes the road district highway commissioner to lease property. However, under Illinois Revised Statutes 1959, Chapter 121, Paragraph 6-201.9, which was not amended by the Seventy-second General Assembly, the highway commissioner is authorized to take possession of and keep under shelter when not in use all machinery, equipment and other property belonging to the district wherever the same may be found and not allow the same to go to waste.

In the case of *Euziere v. Highway Commissioner*, 346 Ill. 131, the Supreme Court in passing upon the powers of a highway commissioner said:

"A highway commissioner is a statutory officer and can exercise only such powers as are conferred upon him by statute. (*People v. Hedges*, 289 Ill. 378; *Ohio and Mississippi Railway Co. v. People*, 123 id. 648; *Townsend v. Cash*, 267 id. 578). Yet a legislative grant carries with it, by implication, the powers necessary to make the grant effective. *People v. Drainage Comrs.* 143 Ill. 417; *City of Chicago v. Stratton*, 162 id. 494; *Townsend v. Cash*, supra). A quasi-public corporation has the implied power to make the contracts necessary to enable it to exercise the powers conferred and to perform the duties enjoined upon it by law. (*People v. Spring Lake Drainage and Levee District*, 253 Ill. 479)."

As the road district highway commissioner has the power to keep the machinery and other property of the district under shelter, he would, under the above holding of the Supreme Court have the implied power to rent or lease property for such purposes.

In this case the court in relation to expenditures made by a highway commissioner held as follows:

"A commissioner of highways is powerless to incur an indebtedness in excess of the money in the treasury or the taxes levied to discharge it. (*Commissioners of Highways v. Newell*, 89 Ill. 587; *Brauns v. Town of Peoria*, 82 id. 11; *County of Hardin v. McFarlan*, 82 id. 138; *Sullivan v. Commissioners of Highways*, 114 id. 262.)"

A lease for a 10 year period creates a present indebtedness. *People ex rel. Adamowski v. Public Building Commission of Chicago*, 11 Ill. 2d 125.

Inasmuch as the statute does not expressly authorize a road district highway commissioner to lease property for a 10 year period, I am of the opinion that he can only lease or rent property for the fiscal year period for which taxes have been levied.

It is a rule of statutory construction that if there is any doubt as to the power of a governmental body, the doubt is resolved against the government and the power is denied. *Osborn v. Village of River Forest*, 21 Ill. 2d 246.

I find no power which would authorize a road district highway commissioner to expend district funds for the construction of a building

on leased property and consequently under the foregoing rule of construction, I conclude that he does not have such power.

3. Under the general power of a county to lease property owned by it, the county would have the authority to enter into a lease with option of renewal on the original terms.

4. In connection with the tort liability of a county, I direct your attention to Smith-Hurd Illinois Annotated Statutes 1961, Supplement No. 6, Chapter 34, Paragraph 301.1 which provides in part as follows:

"No county shall be liable for any injuries to the person or to the property or for the death of any person heretofore or hereafter caused by or resulting from the negligence of its agents, servants, officers or employees in the operation or maintenance of any property, equipment or facility under the jurisdiction, control or custody of the county or otherwise occasioned by the acts or conduct of such agents, servants, officers or employees."

In view of the foregoing provision, it would appear that a county would not have to require a bond from the township if a lease was concluded.

(No. 139—November 16, 1961)

**OFFICERS—Compatibility between Offices of County Commissioner and (1) Road District Clerk and (2) Village Treasurer.** The offices of County Commissioner and (1) Road District Clerk and (2) Village Treasurer are compatible if the individual has sufficient time to faithfully perform the duties of all of said offices.

Hon. Ralph J. Moses, State's Attorney, Calhoun County, Hardin:

I have your communication of November 13, 1961, wherein you state as follows:

"Mr. William Harman of Brussels, Illinois, has requested that I obtain from you an opinion as to whether or not he may lawfully continue to hold (1) the Office of Treasurer of the Village of Brussels and (2) the Office of District Clerk and Ex-Officio Treasurer of Road District #5, Calhoun County, Illinois, after he assumes the duties of the Office of County Commissioner of Calhoun County, Illinois, (he having been elected to the Office of County Commissioner on November 7, 1961).

"I can find no conflict between the Office of Village Treasurer and the Office of County Commissioner, but on the other hand it would appear that the Office of County Commissioner and the Office of District Clerk and Ex-officio Treasurer of Road District #5 may be incompatible since (1) the Board of County Commissioners by Section 6-121 of Chapter 121, Illinois Revised Statutes, have been given power to fill vacancies in Road District Offices in Counties not in Township Organization, and (2) the Board of County Commissioners by Section 6-701.1 of Chapter 121 of Illinois Revised Statutes are required to advertise and let contracts for the expenditure of motor fuel tax funds for Road Districts."

From the general rules laid down in *People v. Haas*, 145 Ill. App. 283, it appears that incompatibility between offices arises where the Constitution, or a statute, specifically prohibits the occupant of either one of the offices from holding the other, or where, because of the duties of either office a conflict in interest may arise, or where the duties of either office are such that the holder of one cannot, in every instance, properly and faithfully perform all the duties of the other.

Where a person holding one office assumes another office incompatible with the first, he thereby *ipso facto* vacates the first. *People v. Bott*, 261 Ill. App. 261.

There does not appear to be any express constitutional or statutory provision which makes said offices incompatible.

The duties of a Village Treasurer as well as a District Road Clerk are ministerial.

The fact that the County Board fills vacancies in Road District offices and lets contracts for the expenditure of motor fuel tax funds for Road Districts does not appear to create any conflict in interest as the Road District Clerk's duties are purely ministerial. The contracts are let to the lowest bidder and are subject to the approval of the County Superintendent of Highways.

For the latest expression of our Supreme Court on the question of compatibility between offices, I direct your attention to the case of the *People v. Capuzi*, 20 Ill. 2d 486.

The only remaining question is whether the individual would have sufficient time to properly and faithfully perform the duties of all of said offices.

This is a question of fact which you are in a better position to determine than I.

(No. 140—November 16, 1961)

**TAXATION—Statutory Requirement for Refund of Personal Property Taxes.** In order to obtain a refund of personal property taxes, the taxes must be paid and a formal protest made.

Hon. Wayne R. Bettner, State's Attorney, Ogle County, Oregon:

I have your communication of November 9, 1961, wherein you state as follows:

"The County Judge has asked me for a ruling on the following question:

"Does the language of Section 676, of Chapter 120 allow a taxpayer to get a refund of Personal property taxes without first paying under protest?"

"The language I refer to is the following: Any person desiring to contest personal property taxes because of illegal tax rates may, but shall not be required to, pay the same under protest."

In connection with the question presented, I direct your attention to the case of *Central Illinois Public Service Co. v. Thompson*, 1 Ill. 2d 468, where our Supreme Court construed Illinois Revised Statutes 1959, Chapter 120, Paragraph 676 and held as follows:

"Following the opinion in the *Orrington case*, the legislature, in 1937, further amended the Revenue Act by adding thereto section 162a, which makes a formal protest and payment of all personal property taxes a condition precedent to the recovery of taxes paid under protest, provides for petition and hearing in the county court, and directs that the court shall pronounce judgment as the right of the case may be, and if the court finds for the petitioner, it shall enter judgment directing the County Collector to return to the petitioner all or a proper part of the personal property taxes paid under protest." (Laws of 1937, p. 1049.) It is this section upon which appellant's petition for refund is based. Ill. Rev. Stat. 1949, chap. 120, par. 676."