

observed, the orders and instructions issued by it to be obeyed and the forms prescribed by it to be observed and used."

It is therefore my opinion that the Tax Commission of Ohio is authorized to order the county auditor to proceed to correct his tax list and duplicate in accordance with the appraisal made under the provisions of Section 5548, General Code, and to assess and collect taxes for the last half of the year 1926 thereon, and to make all proper adjustment so that against each taxpayer in any taxing district there shall be charged his proper taxes when computed on the original appraisal as made by said auditor and approved by the Commission.

The County Board of Revision is unauthorized to decrease the valuation of property appraised under the provisions of Section 5548, General Code, by the county auditor, and approved by the Tax Commission of Ohio, unless the party affected thereby, or his agent, or the county commissioners, prosecuting attorney, county treasurer, any board of township trustees, board of education, mayor or council of any municipal corporation in the county, makes and files with the Board a written application therefor, verified by oath showing the facts upon which it is claimed such decrease or reduction should be made.

Respectfully,
EDWARD C. TURNER,
Attorney General.

310.

COUNTY COMMISSIONERS—UNAUTHORIZED TO EXPEND PUBLIC MON-
EYS FOR OLD LADIES HOME WITHIN COUNTY WHEN A COUNTY
HOME ALREADY EXISTS, THE FULL CAPACITY OF WHICH IS NOT
BEING UTILIZED.

SYLLABUS:

Where real estate is devised to a county for one or more of several purposes, including the maintenance and operation of an Old Ladies' Home, the county commissioners are without authority to expend public moneys derived from taxation for the improvement, maintenance and operation of such property as an Old Ladies' Home where there already exists within such county a county home, the full capacity of which is now not being utilized.

COLUMBUS, OHIO, April 12, 1927.

HON. DEANE M. RICHMOND, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—I acknowledge receipt of your request for an opinion reading as follows:

"In 1915 one Bertha Coover died leaving a will, Item 4 of which reads as follows:

"I give and devise to Madison county, Ohio, for the uses and purposes hereinafter stated the following described real estate to-wit: Being all that parcel of land composed of several contiguous tracts and containing in all about 12 acres situated in the village of London, Madison county, Ohio, and fronting on the east side of North Main street and being all the lands owned by me in that part of said village. The same to be managed and controlled by the county commissioners of said county and to be held and occupied by the

county for the following public uses and purposes: Primarily as a site for a county hospital but if the county should decide that it would be for the best interest and public welfare of the county to use a part or all of said premises as a site for an Old Ladies' Home or for a Sanitarium or other similar benevolent institutions then in that event it may be used by the county for any or all of such purposes.

This devise is made upon the condition that the commissioners of Madison county shall by resolution of their board duly passed and recorded on their journal within three years from the time this will is probated, accept said premises so devised for the uses and purposes above stated; and if the said commissioners fail to so accept said premises, then in that event I hereby authorize and empower and direct my executor hereinafter named to sell said real estate as soon as convenient after the expiration of said three years, either at public or private sale and on such terms as in his judgment will be to the best interest of my estate, and a good and sufficient deed or deeds therefor to make, execute and deliver to the purchaser or purchasers thereof without the intervention in any way of any court; and the net proceeds from such sale after paying the expenses thereof, I give and bequeath, etc.'

The county commissioners of Madison county, Ohio, within the three year period by resolution duly accepted such property. Located on said land are two houses and the county commissioners proposed to expend public money from the county fund in the repair and reconstruction of said buildings. Said commissioners expect to use further sums of the county fund in the maintenance and upkeep of said buildings as an Old Ladies Home.

It is proposed:

First: That the old ladies residing in this home shall be charged a fixed entrance fee, or

Second: That the old ladies will be admitted without this entrance fee.

In case the entrance fee is demanded it is not expected that this will pay the total running expenses of the home and there will be a deficit every year. Madison county now has a county home which is now capable of handling a greater number of inmates than are now in said institution.

Question: Can public money be spent by the county commissioners for either of the above outlined causes?"

Your question is, whether there is any authority in law for the county commissioners of Madison county to expend public moneys to reconstruct and repair the buildings on the lands devised to the county by Item 4 of the will above set forth, and to maintain said buildings and conduct and operate therein an Old Ladies' Home.

While you state that two plans have been proposed, the first that "the old ladies residing in this home shall be charged a fixed entrance fee" and second "that the old ladies be admitted without this entrance fee," in view of the conclusions reached herein, it is unnecessary further to mention these plans.

Public officials, such as county commissioners, have no powers except such as are expressly given by statute or necessarily implied from the powers so expressly given. See *State, ex rel., vs. Commissioners*, 8 O. N. P. (N. S.) 281; 20 O. D. (N. P.) 679 (affirmed, *Ireton vs. State, ex rel.*, 12 O. C. C. (N. S.) 202; 21 O. C. D. 412, which was affirmed without opinion, *Ireton vs. State*, 81 O. S. 562).

As stated by the Supreme Court in the opinion in the case of *Elder vs. Smith, Auditor, et al.*, 103 O. S. 369, 370:

"It has long been settled in this state that the board of county com-

missioners has such powers and jurisdiction, and only such as are conferred by statute."

It is equally well settled that the powers granted to the board of county commissioners must be construed strictly. *State, ex rel., vs. Commissioners*, 11 O. S. 183; *Commissioners vs. Andrews*, 18 O. S. 49.

These rules are especially applicable with reference to the county's financial affairs. In the opinion of the Supreme Court in the case of *Peter vs. Parkinson, Treas.*, 83 O. S. 36, 49, it was said as follows:

"While in a sense the board of commissioners is the representative and financial agent of the county, *its authority is limited to the exercise of such powers only as are conferred upon it by law*. As said by this court in the first paragraph of the syllabus in *Jones, Auditor vs. Commissioners of Lucas County*, 57 Ohio St., 189; 'The board of county commissioners represents the county in respect to its financial affairs, *only so far as authority is given to it by statute.*'" (Italics the writer's.)

It has also been held by the Supreme Court of Ohio that:

"In case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power."

State, ex rel., vs. Pierce, Auditor,
96 O. S. 44, Syllabus 3.

Two facts are disclosed in your communication, which to my mind are dispositive of the question presented. It is shown that public money is to be expended, not only for the repair and reconstruction of buildings now on the property devised as above stated, but also for the maintenance and upkeep of such buildings, and the expense generally of maintaining the proposed Old Ladies' Home. It is further shown that Madison county now has a county home, which is capable of handling a greater number of inmates than are now in said institution.

Having in mind the principle that boards of county commissioners are limited to authority conferred upon them by statute, the logical procedure is to ascertain whether there is authority for the county commissioners to construct or maintain an Old Ladies' Home by the expenditure of public funds.

An examination of the General Code discloses that there is no statutory grant of such power. While it is true that by virtue of Section 18 of the General Code, the county is authorized to receive "by gift, devise or bequest, moneys, lands or other properties, for their benefit or the benefit of any of those under their charge," and hold and apply the same according to the terms and conditions of the gift, devise or bequest, this section is not authority for the expenditure of public money derived from taxation. It is authority for the receipt and administration of property as a public charitable trust rather than authority for the expenditure of public funds.

The closest approach to a similar enterprise conducted by the county from funds derived from taxation is the County Home. The statute grants specific authority to county commissioners to establish and maintain such an institution, the purpose of which is to provide a place for the care of the public charges of the county. Thus in section 2419 of the General Code authority is given to the commissioners to provide for an infirmary, now called the County Home, by virtue of Section 2419-3, General Code.

The general powers with relation to the management and control of the County

Home are contained in Sections 2522, et seq., of the General Code. These sections seem to contemplate the construction and maintenance of but *one institution*, in a physical sense as well as for the purpose of organization. Section 2419, supra, reads in part:

"A court house, jail, public comfort station, offices for county officers and *an infirmary* shall be provided by the commissioners when in their judgment they or any of them are needed. * * *"

Section 2433 speaks of "land for *an infirmary*," and of "additional land for *an infirmary*." Section 2436 makes provision for rebuilding "an infirmary" destroyed by fire. Section 2523 provides, *inter alia*, that "the county commissioners shall appoint a superintendent who shall reside *in some apartment of the infirmary* or other buildings contiguous thereto." Section 2529 and other sections speak of "the infirmary." Section 2544 provides for the admission of county charges to the County Home in the following language:

"In any county having an infirmary, when the trustees of a township or the proper officers of a corporation, after making the inquiry provided by law, are of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the superintendent of the infirmary, and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the superintendent of the infirmary is satisfied that such person should become a county charge he shall account such person as a county charge and shall receive and provide for him in such institution forthwith or as soon as his physical condition will so permit. The county shall not be liable for any relief furnished, or expenses incurred by the township trustees."

Section 2548 makes provision with reference to the sale of the property of a county charge and the use of the funds derived therefrom for the maintenance of such person.

From an examination of the above mentioned sections of the General Code and the other sections relating to the County Home, it is at least doubtful if the county commissioners would have the power to operate and maintain the contemplated Old Ladies' Home as a part of the County Infirmary, and if it should be decided that the county commissioners do have such authority, it is equally doubtful if such an operation of an Old Ladies' Home as a part of the County Infirmary would be a compliance with the provisions of Item 4 of the will above set forth.

While it might be urged that the doctrine of *cy pres* would apply, and that the inclusion of the proposed Old Ladies' Home as a part of the County Home would be an administration of the trust created by the will of the testatrix in such a manner as would accomplish her intention as nearly as possible, the answer is that the testatrix devised the property primarily as a site for, first, a County Hospital, second, an Old Ladies' Home, third, a Sanitarium, fourth, or other similar benevolent institutions or any or all of such purposes, and fifth, upon the failure of the commissioners to accept the premises for the uses and purposes stated, the testatrix directed that the real estate be sold and the proceeds derived from such sale to be given and bequeathed as in the will provided.

Since there are alternative devises, the doctrine of *cy pres* would not be applicable. As stated in Section 77 of 11 C. J., 362:

"Of course, the doctrine of *cy pres* can have no existence when the donor himself provides for the application of the fund in the event of the failure of the charitable use to which he in the first instance directed that it should be devoted."

However, in view of the conclusions hereinafter reached, it is unnecessary to determine whether or not the establishment of an Old Ladies' Home as a part of the County Home would be a compliance with the terms of Item 4 of the will under consideration.

By the provisions of Sections 5627 and 5630 of the General Code, the commissioners of any county are authorized to levy for general purposes including the support of the poor. These levies are of course subject to action of the budget commission under the provisions of Sections 5649-3b, et seq., of the General Code.

I do not believe that the maintenance of an Old Ladies' Home as a separate institution is within the conferred power to levy taxes for the support of the poor. If such levy could be sustained, I am of the opinion that it must be upon the theory that such a home is at least a partial fulfillment of the obligation of the county to take care of its poor through the establishment and maintenance of a County Home.

If this theory were to be adopted, however, we encounter what to my mind is an insuperable obstacle. You state that the county already has established and is maintaining a County Home, which from your statement of fact, is capable of handling a much larger number of occupants than are now residing there. This being a fact, the maintenance of an additional home for the sole and express purpose of providing a home for aged and destitute women would in effect and reality be a duplication of effort and expenditure.

The one institution is admittedly entirely adequate to serve all of the purposes which the new institution intends to serve. Under such circumstances I cannot escape the conclusion that the added expenditure for the maintenance of another institution would be such an unwarranted use of public funds as to entitle any taxpayer to object thereto. The reasonable necessity of any public expenditure must in all instances be the justification for a tax levy. Under the facts and circumstances that you recite such a justification does not exist.

In answer to your question therefore, I am of the opinion that the county commissioners of Madison county are without authority to expend public funds for the improvement and maintenance of an Old Ladies' Home upon land devised to it for that or for other specified purposes, where there already exists in such county a County Home, the full capacity of which is now not being used.

Nothing in this opinion should be construed as holding that the county commissioners are unauthorized to accept the property devised in the will under consideration and operate the same without expense to the county as an Old Ladies' Home. Section 18 of the General Code clearly authorizes the acceptance by the county commissioners of such a devise and the administration of a public charitable trust for the benefit of the county or any of those under the county's charge. In this connection your attention is directed to the case of *Gearheart vs. Richardson*, 109 O. S. 418.

It is the holding of this opinion only that because of the absence of statutory authority, under the facts and circumstances set forth in your request, the county commissioners are unauthorized to expend public funds derived from taxation for the purpose of reconstructing the buildings on the property devised, and maintaining the proposed Old Ladies' Home. If the necessary buildings can be reconstructed and repaired and the Old Ladies' Home maintained without the expenditure of public funds, or if the county commissioners determine to use the property devised for a purpose for which they are authorized by law to expend public moneys, they have ample authority by virtue of Section 18, supra, to administer the trust created in Item 4 of the will under consideration.

Respectfully,
 EDWARD C. TURNER,
Attorney General.