

The Supreme Court has overruled a motion to certify to it the record in this case.

I know of no other ways by which the indebtedness referred to in your communication may be paid than those pointed out in this opinion.

I am of the opinion therefore that:

1. The indebtedness of a county agricultural society may be paid by the county commissioners by appropriating a sufficient amount therefor from the general fund, except that where such indebtedness exceeds \$10,000.00 in any one year the question of levying a tax therefor must be submitted to a vote of the electors or if the indebtedness is \$15,000.00 or more the question of issuing bonds to pay the same may be submitted to a vote of the electors upon the presentation of a petition therefor signed by not less than five hundred resident electors of the county.

2. The county commissioners have the authority to purchase the fair grounds from the county agricultural society, and such society has the authority to sell its fair grounds to the county, whereon to hold fairs under the management and control of the society, for the purpose of using the proceeds of said sale to pay the indebtedness of such society.

Respectfully,

JOHN W. BRICKER,

Attorney General.

4139.

COUNTY COMMISSIONERS—RESOLUTION AUTHORIZING SURVEYOR TO PROCEED WITH ROAD AND BRIDGE PROGRAM BY FORCE ACCOUNT NOT AUTHORITY FOR SURVEYOR TO PURCHASE MACHINERY.

SYLLABUS:

1. *Where county commissioners of a county have adopted a resolution authorizing the county surveyor to proceed with a road and bridge program by force account under authority of section 7198, General Code, such county commissioners reserving the right to purchase all materials necessary to effectuate such program, said commissioners have not by such resolution given the authority to the county surveyor to purchase machinery, including road maintainers, necessary in connection with such program, but have reserved such right to themselves.*

2. *Where road maintainers have been purchased by the county commissioners at the request of the county surveyor for use in connection with such road and bridge program, the county surveyor may not refuse permission to have such maintainers stored in the county barn.*

3. *County commissioners may rescind a resolution adopting a road and bridge program and appropriating the fund after approval and certification to the county auditor, providing such action does not affect obligations already incurred under the original legislation.*

4. *County commissioners after adopting a road program as set forth in syllabus 1, may purchase machinery and pay for it out of the fund against which the appropriation made by the resolution is drawn.*

COLUMBUS, OHIO, APRIL 10, 1935.

HON. JOHN E. SILBAUGH, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—Your communication of recent date reads:

"I am enclosing herewith statement of facts and questions on which I desire your opinion relative thereto."

The matter attached to your communication is as follows:

"The county commissioners of this county in regular session passed a resolution adopting and approving the road program for the county surveyor for the year 1935 in the amount of \$97,000.00, and he to proceed by force account under Sec. 7198 of the General Code, conditioned as follows: 'Except that this board of county commissioners reserves the right and power to purchase all the material used in construction and maintenance, thereby conforming, etc.' (See copy attached for entire Resolution) (See also copy of Resolution for centralized buying thereto)

Under the Resolution as adopted with the reservation as herein stated, the commissioners purchased, on February 18th, after duly advertising for bids on January 25th, 1935, on a split vote of two to one and after receiving bids, two power road maintainers out of the road funds, which maintainers were requested by the surveyor.

The surveyor at this time refuses the commissioners permission to put or store the machinery or the road maintainers in the county barns and threatens to enjoin payment for maintainers.

I would like to have your opinion on the following questions on the facts as given above:

1. Do the county commissioners, after approving and adopting the Road Fund under 7198, possess the power to reserve the right to purchase all material used in construction and maintenance?
2. Can the county surveyor refuse permission to put or store the machinery in the county barn?
3. Will an injunction lie under the facts stated relative to the holding up of the payment for the maintainers?
4. Do the county commissioners have any power or right to rescind the Resolution adopting the road program and appropriating the fund after it has once been approved and certified to the county auditor?
5. Can the county commissioners, after adopting the road program, purchase machinery and pay for it out of the road program fund?"

The copy of the Resolution which was enclosed entitled "Amended Road and Bridge Program for the Year 1935" reads:

"AMENDED ROAD AND BRIDGE PROGRAM FOR THE YEAR 1935.

Mr. Ridenour offered the following Resolution and moved its adoption:

Whereas, the county surveyor, Ralph D. Matheny, has submitted to this board of county commissioners of Fairfield County, Ohio, his Road and Bridge Program for the year 1935, in the following amounts:

Road	
Labor and materials for the maintenance of 365.8 miles of road.....	\$37,700.00
Miscellaneous (other expenses).....	20,000.00
New equipment	12,300.00
	Total \$70,000.00
Bridge	
Labor.....	\$12,000.00
Materials and other expenses.....	15,000.00
	\$27,000.00
	Grand Total \$97,000.00

and

Whereas, said amount is not more than the amount appropriated for said purpose in said county; therefore be it

Resolved, that the said Road and Bridge Program be approved to the sum of Ninety-five Thousand (\$95,000.00) Dollars and that the county surveyor be and he is hereby directed to proceed with the said program by force account under the provisions of Section 7198, General Code of Ohio, except that this board reserves the right and power to purchase all of the material used in the construction and maintenance of county roads and bridges, thereby conforming to the Resolution of Centralized Buying as adopted by this Board of county commissioners on the 7th day of January, 1935, and recorded in the Commissioners' Journal Vol. 14, page 242;

and be it further

Resolved, that there be and there is hereby appropriated the sum of Two Thousand (\$2,000.00) Dollars, under the provisions of Section 2792-1, General Code of the State of Ohio, this sum to constitute the county surveyor's 'Emergency Repair Fund'. 'All expenses incurred in employing extra help or in purchasing extra material used in such repairs shall be paid from such fund on vouchers signed by the County Surveyor.'

'Upon report to the County Surveyor, of any such needed immediate repairs, the County Surveyor shall, if he deems it an emergency repair, proceed at once to make such repair by force account without preparing plans, specifications, estimates of cost of forms of contract'.

Mr. Hunter seconded the motion to adopt the Resolution and upon a call of the roll, the members present voted as follows:

ROLL CALL: White: Aye. Ridenour: Aye. Hunter: Aye.

AUDITOR'S CERTIFICATE

I hereby certify that the money required for the payment of the cost of the above Road and Bridge Program is in the Treasury to the credit of the fund from which it is to be drawn or has been placed upon the duplicate and is in process of collection and has not been appropriated for any other purpose.

Irvin A. Miller,
County Auditor, Fairfield County, Ohio.

Dated, March 1st, 1935.

John W. White, Pres. of Board.

Edson Kindler,
Clerk, Board of
County Commissioners

Daniel Ridenour.

Hocking Hunter."

The enclosed Resolution for Centralized Buying is as follows:

"The Board of County Commissioners of Fairfield County, Ohio, met in regular session, on the 14th day of January, 1935, at the office of said Board, with the following members present: John W. White, Daniel Ridenour and Hocking Hunter.

Mr. Hunter offered the following resolution and moved its adoption:

Whereas, the cost of office supplies used in the offices of county officials has increased to such extent that it demands attention; and,

Whereas, other political subdivisions have adopted a system of centralized buying which has proved to be successful in reducing costs to the public.

Therefore, be it

Resolved by the Board of County Commissioners of Fairfield County, Ohio, that each county public official be directed to furnish on or before the 15th day of each month, a complete list of all supplies costing \$10.00 or more, to be needed the following month, that the clerk of this board compile a complete list of needed supplies for all offices and that copies of this list be prepared and mailed to all interested printing companies asking bids, and that from these bids the lowest consistent with quality of the product to be furnished be accepted.

And be it further

Resolved that each printing company furnishing material for the county offices be required to furnish a signed certificate guaranteeing the quality of the material to be furnished.

And be it further

Resolved, that the clerk of this board be directed to file with each county official a copy of this resolution.

Mr. Ridenour seconded the resolution and roll being called the members present voted as follows:

Roll Call—

White: Aye. Ridenour: Aye. Hunter: Aye.

Dated this 14th day of January, 1935.

Edson Kindler,
Clerk, Board of County Commissioners,
Fairfield County, Ohio."

At the outset, I assume that no question is raised as to the certificate of the county auditor.

Sections 7198, 7200, 7203 and 7214, General Code, are pertinent in the consideration of your questions. Such sections read as follows:

"Sec. 7198. The county surveyor may when authorized by the county commissioners employ such laborers and teams, lease such implements and tools and purchase such material as may be necessary in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account."

"Sec. 7200. The county commissioners may purchase such machinery, tools or other equipment for the construction, improvement, maintenance or repair of the highway, bridges and culverts under their jurisdiction as they may deem necessary. The county commissioners may also at their discretion pur-

chase, hire or lease automobiles, motorcycles or other conveyances and maintain the same for the use of the county surveyor and his assistants when on official business. All such machinery, tools, equipment and conveyances belonging to the county shall be under the care and custody of the county surveyor. All such machinery, tools, equipment and conveyances owned by the county shall be plainly and conspicuously marked as the property of the county. The county surveyor shall annually on the fifteenth day of November make, or cause to be made, a written inventory of all such machinery, tools, equipment and conveyances indicating each article and stating the value thereof and the estimated cost of all necessary repairs thereto and deliver the same to the county commissioners, who shall cause the same to be placed on file. At the same time he shall file with the county commissioners his written recommendations as to what machinery, tools, equipment and conveyances should be purchased for the use of the county during the ensuing year and the probable cost thereof. The county commissioners shall provide a suitable place or places for housing and storing machinery, tools, equipment, materials and conveyances owned by the county, and may purchase the necessary material and construct, or enter into an agreement with a railroad company to construct, one switch or spur track from the right of way of such railroad company to land or storage house owned by the county. All expenditures authorized by the provisions of this section shall be paid out of any available road funds of the county."

"Sec. 7203. The county commissioners or the county surveyor, when authorized by the county commissioners, or the trustees of any township, may purchase from any public institution within the state any road material, machinery, tools or equipment, quarried, mined, prepared or manufactured by said institution."

"Sec. 7214. The county commissioners or township trustees may contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, bridges or culverts within the county, and also appropriate additional land necessary for cuts and fills together with a right of way to or from the same for the removal of material. If the county commissioners or township trustees, and the owner of such material or land, cannot agree on the price therefor, the county commissioners or township trustees may apply to the probate court or common pleas court of the county in which the same is located, and on receipt of such application, the court shall proceed to assess the value of the material or right to be appropriated in the manner hereinafter provided."

Under the wording of the resolution set forth in your letter, quoted supra, it seems clear that the county surveyor was directed to proceed with the road and bridge program by force account pursuant to the provisions of section 7198, General Code, also quoted above, with the exception that the county commissioners reserved the right to purchase all of the *material* used in the construction and maintenance of the county roads and bridges.

It will likewise be observed from the provisions of section 7198, General Code, that the county surveyor is given no authority to *purchase* implements and tools, but only authority to *lease* such implements and tools when given authority by the county commissioners. Such section 7198, also permits the county surveyor to purchase materials necessary in the construction and maintenance of roads and bridges, when authorized by the county commissioners. The road maintainers mentioned in your communi-

cation are not "materials" within the meaning of that word as used in the foregoing sections of the General Code, but rather machinery.

Thus, when the county commissioners passed the resolution, set forth above, authorizing the county surveyor to proceed under section 7198, General Code, and only reserving the right to purchase *materials* (as such commissioners possessed the right to do under sections 7203 and 7214, General Code), such commissioners only gave authority for the county surveyor to employ laborers and teams and to *lease* implements and tools necessary in the construction and repair of county roads and bridges. No authority was given the county surveyor to *purchase* implements and tools, as section 7198, General Code, does not authorize the commissioners to grant the county surveyor such a right.

Hence, the county commissioners possessed the right to *purchase* implements, machinery and tools (including the road maintainers) after the resolution creating the road program was passed, under sections 7200 and 7203, General Code, and the right to purchase all materials by reason of the reservation set forth in the resolution, under authority of sections 7203 and 7214, General Code.

Having the foregoing in mind, your specific questions may now be discussed. Taking up your first specific question, attention is directed to the language found in an opinion of the Attorney General for 1927, Vol. III, page 2253, after the Attorney General rendering such opinion had quoted sections 7198, 7200 and 7214, General Code:

"It follows, then, that in the first instance the commissioners may exercise their discretion as to whether in proceeding under the provisions of section 7198, G. C., supra, they will permit the county surveyor to purchase materials and lease equipment and tools or whether they themselves will purchase such materials and the machinery, equipment and tools that may be necessary in carrying on work by force account."

In Opinions of the Attorney General for 1933, Vol. I, page 311, it was held, as disclosed by the syllabus:

"1. The county commissioners are authorized by section 7214, General Code, to purchase materials for road repairs and construction, and in making such purchases, they are not required to let the contract therefor by competitive bidding.

2. The county surveyor has nothing to do with the kind of such materials so determined to be purchased, except where the county commissioners have authorized the surveyor to make the purchases for work that is to be done by force account."

After quoting the provisions of sections 7198 and 7214, General Code, it was stated at page 313:

"From these statutes it appears that county commissioners have the authority to purchase materials to be used in the construction of roads as well as the maintenance and repair thereof; that in work which they determine to do by force account, they either may purchase the materials themselves or may authorize the surveyor to make such purchases; and in making purchases of such materials, there is no requirement that they let the contract for such purchases by competitive bidding. This has been the consistent holding of this office."

Opinions of the Attorney General for 1916, Vol. I, page 882, and 1927, Vol. III, page 2250, were cited in support thereof.

Hence, inasmuch as the county commissioners possess discretion as to whether or not they or the county surveyor shall purchase materials in proceeding under section 7198, General Code, it follows, in specific answer to your first question that the county commissioners after approving and adopting the road fund under section 7198, possessed the power to reserve the right to purchase all material used in construction and maintenance of the county roads and bridges.

As for your second question, it has already been stated that the county commissioners possessed the power after adopting the road program *to purchase* road machinery, as no power was or could lawfully be conferred on the county surveyor, by reason of the resolution, *to purchase* road machinery. Section 7200, General Code, quoted above, states, after giving authority to the county commissioners to purchase road machinery, that "all such machinery, tools, equipment * * * belonging to the county *shall be under the care and custody of the county surveyor.*"

Since the county commissioners, as already pointed out, possessed the legal right to purchase the road maintainers, the county surveyor having no power under the resolution or laws (see Opinions of the Attorney General for 1929, Vol. I, page 665, herein-after set forth) to question such legal purchase, it appears to me that it is the said surveyor's duty under section 7200, General Code, to assume the care and custody of such maintainers. Hence, in specific answer to your second question, I am of the view that the county surveyor may not refuse permission to put or *store* the machinery in the county barn.

Coming to your third question, I may say that there does not appear to be any statutory requirement for the county surveyor to approve the purchase of road machinery by county commissioners. It is true that section 7187, General Code, requires the county surveyor to "approve all estimates which are paid from county funds for the construction, improvement, maintenance and repair of roads and bridges by the county." However, it is believed that the word "estimates" does not include the bill for the purchase of road machinery by county commissioners, under section 7200, General Code.

In Opinions of the Attorney General for 1929, Vol. I, page 665, the question was presented to the then Attorney General as to whether, in the case of the purchase of trucks or road machinery by the county commissioners, the county surveyor may refuse to requisition for the amount on the ground that he does not agree with the county commissioners as to the make of the equipment or trucks to be purchased. It was held in such opinion, as disclosed by the syllabus:

"Under the provisions of section 7200 of the General Code, county commissioners in the purchase of road machinery, tools and equipment, may use their discretion as to the make thereof, even though such make does not meet the approval of the county surveyor."

Hence, it appears, in specific answer to your third question that, since the county commissioners may lawfully purchase the road maintainers and the county surveyor is not required to approve such purchase, an injunction suit to enjoin payment for the maintainers would not lie.

Relative to your fourth question, I may call your attention to an opinion of the Attorney General reported in Opinions of the Attorney General for 1927, Vol. III, page 2250, which opinion was rendered on November 14, 1927. The first and third paragraphs of the syllabus are pertinent and read as follows:

"(1) Under the provisions of Sections 7200 and 7214 of the General Code, county commissioners are authorized to purchase such machinery, tools, equipment, automobiles and materials as may be necessary to construct, reconstruct, improve, maintain or repair county roads, and the bridges and culverts thereon, by force account, and such board of county commissioners may rescind legislation authorizing the county surveyor to lease equipment and tools and to purchase such material as may be necessary to carry on work by force account, as provided in Section 7198 of the General Code, provided, however, that such action in rescinding such legislation shall not affect leases already entered into or obligations already created by the county surveyor under the provisions of said section.

(3) Pursuant to the provisions of Sections 5660, General Code, and 5625-33, General Code (112 O. L., 391), it is necessary, previous to the incurring of obligations or the entering into of contracts under the provisions of Sections 7198, 7200 and 7214 of the General Code, that a certificate from the proper fiscal officer be obtained to the effect that the amount required to meet such obligations or to carry out the terms of such contracts, (except in case of continuing contracts, to be performed in whole or in part in an ensuing fiscal year, it is necessary only to certify the amount required to meet the same in the fiscal year in which such contracts are made), is in the treasury or is in process of collection to the credit of an appropriate fund, free from any previous encumbrances."

From the facts of such opinion appearing in the request of the then prosecuting attorney of Williams County, it appears that the county commissioners of Williams County passed a resolution on April 11, 1927, reading as follows:

"Whereas, the county surveyor, pursuant to the provisions of Sec. 7187, General Code of Ohio, has submitted his estimate covering the probable cost of reconstructing, maintaining and repairing the county roads, bridges and culverts of the county for the year beginning April 1st, 1927.

Therefore be it resolved that the county surveyor is hereby authorized under Section 7198 of the General Code of Ohio to construct, reconstruct, maintain and repair the county bridges and culverts; and to reconstruct, resurface, surface treat, maintain and repair the county roads of the county, the total amount to be expended in either case not to exceed the total estimated cost as shown by the above mentioned report to the county commissioners."

The county surveyor expended money in purchasing material, supplies, etc., pursuant to such resolution. The question arose as to whether the county commissioners could some months later rescind the legislation. The then Attorney General, after quoting the provisions of sections 7198, 7200 and 7214, General Code, stated at pages 2253 and 2254:

"It follows, then, that in the first instance the commissioners may exercise their discretion as to whether in proceeding under the provisions of Section 7198, supra, they will permit the county surveyor to purchase materials and lease equipment and tools or whether they themselves will purchase such materials and the machinery, equipment and tools that may be necessary in carrying on work by force account.

The question then arises whether after the commissioners have once au-

thorized the county surveyor to purchase materials and to lease equipment and tools necessary to carry on certain work by force account, the commissioners may revoke such authority by rescinding the legislation conveying such authority to the county surveyor and provide by legislation that the commissioners, acting as a board, will make the necessary purchases.

Of course, at the outset, it must be conceded that the commissioners may not by action of theirs affect the legality of obligations created by the county surveyor for purchase of materials already made or leases already entered into for equipment and tools.

However, the commissioners having the right to amend or repeal legislation which will not affect or impair the obligation of contracts or leases made pursuant to their legislation, and further, having authority to purchase machinery, tools and equipment under the provisions of Section 7200, *supra*, and materials under the provisions of Section 7214, *supra*, and it being discretionary in the first instance as to their authorizing the county surveyor to purchase materials and lease equipment and tools as provided by Section 7198, *supra*, it is my opinion that the county commissioners may rescind the legislation authorizing the county surveyor to purchase materials and lease equipment and tools so long as such action does not impair the obligations of any contract or lease already entered into and still in effect."

In the foregoing opinion, the situation was the reverse of that before us in the present instance. In the 1927 opinion the county surveyor was authorized by the resolution to purchase the materials, while under the present facts, the county commissioners possess the right to purchase materials. However, such opinion illustrates the principle that county commissioners may rescind a resolution of a nature such as was passed in this instance, providing such action does not affect obligations already incurred under the original resolution.

Hence, I am of the view, in specific answer to your fourth question that county commissioners have power to rescind a resolution adopting a road program and appropriating the fund after it has been approved and certified to the county auditor, providing such action does not affect obligations already incurred under the original resolution.

Coming now to your fifth and last question, I may say that it has been heretofore shown that the county commissioners in adopting the resolution set forth herein, did not and could not confer any legal right on the county surveyor to *purchase* machinery. Such being the case, the county commissioners, although not so stating in the resolution, have the power by virtue of sections 7200 and 7203, General Code, to purchase road machinery and pay for it out of the fund against which the appropriation made by the resolution is drawn.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4140.

APPROVAL, BONDS OF CITY OF AKRON, OHIO, \$8,000.00.

COLUMBUS, OHIO, APRIL 10, 1935.

State Employees Retirement Board, Columbus, Ohio.