

ninety days before a regular municipal election. If in any municipality, a sufficient petition is filed, requiring that the question of choosing a commission to frame a charter be submitted to the electors thereof, the proposition to adopt a plan of government provided in this act shall not be submitted in that municipality as long as the question of choosing such commission or adopting a charter framed thereby is pending therein. In any municipality while the proposition of adopting any one of the three forms of government herein provided for is pending, then no other proposition herein provided for shall be submitted until said pending proposition is adopted or rejected."

In my view, the provision that such proposition "shall not be submitted to the electors of any municipality less than ninety days before a regular municipal election is perfectly clear and not subject to construction. I find nothing in the act to authorize any attempted interpretation of the word "shall" in other than its generally accepted sense and under these circumstances the authorities are uniform that the term is mandatory. The third branch of the syllabus of the case of *Maxfield v. Brooks*, 110 O. S. 566, reads:

"Where the Legislature's language is clear there is nothing for the judiciary to construe. It is solely the duty of the courts to reasonably apply the statute so as to effect its obvious purpose. * * *."

Since Section 2 of Article XVIII of the Constitution has expressly conferred upon the legislature the power to establish regulations for the adoption of various plans of government and finding the provisions of Section 3515-2, General Code, mandatory, it is my opinion that the question of whether or not one of the plans of government provided by the act of the General Assembly passed April 28, 1913 (103 O. L. 767), being Sections 3515-1, et seq., General Code, shall be adopted, may not be submitted to the electors of a municipality less than ninety days before a regular municipal election.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3408.

COUNTY COMMISSIONERS—ORDERING MATERIALS WITHOUT COMPLYING WITH PROVISIONS OF SECTIONS 2414, 2445 AND 5625-33, GENERAL CODE—UNAUTHORIZED TO MAKE PAYMENT AT LATER DATE FOR SUCH MATERIALS.

SYLLABUS:

Where through non-compliance with the statutory provisions concerning the making of contracts with a county, no valid contract exists between the county and a company for furnishing materials to the county, the county commissioners may not at a later date authorize the payment of the bills for materials furnished under such invalid contract.

COLUMBUS, OHIO, July 7, 1931.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is hereby made of your recent request for my opinion which reads:

“Under date of October 6th, 1930, the three Commissioners of a certain county signed an order to a certain company for the purchase of culvert pipe to the extent of \$1597.50 and under date of December 15th, 1930, the same three county commissioners signed an order to the same company for a motor grader, the cost of which was \$2000.00. No evidence of the order is of record in the county. The Company furnished our examiner with copies of the order. The order was evidently given in violation of the provisions of sections 2414, 2445 and 5625-33, G. C., as no record of any kind is made upon the county commissioners journal and no certificate of the county auditor was ever given.

Question: If it is determined at this time that there was money in the proper fund at the time these orders were given from which they could be paid and that there is money now in the fund, may the county auditor under the provisions of section 5625-33, G. C., now make such a certificate and may the county commissioners legally pay the Company for the culvert pipe and machinery furnished, this being the next fiscal year after the orders were given?”

Section 2414, General Code, reads as follows:

“No proposition involving an expenditure of one thousand dollars or more shall be agreed to by the board unless twenty days have elapsed since the introduction of the proposition, unless by the unanimous consent of all the members present of the board, which consent shall be taken by yeas and nays, and entered on the record.”

Section 2445, General Code, reads as follows:

“No contract entered into by the county commissioners, or order made by them, shall be valid unless it has been assented to at a regular or special session thereof, and entered in the minutes of their proceedings by the auditor.”

The statutory formalities set forth in the preceding sections are necessary to the validity of a contract falling within the terms of such sections.

Buchanan Bridge Co. v. Campbell, et al., 60 O. S. 406. *Hommel & Co. v. Woodsfield*, 122 O. S. 148.

See also

State v. Hahn Const. Co., 19 Ohio App. 255.

The syllabus of *North v. Commissioners*, 10 O. C. C. (n. s.) 462, reads:

“A contract between county commissioners and one who undertakes to pike a county highway is invalid, where no record of the meeting of the commissioners was made, and no auditor’s certificate was filed or recorded as required by Section 2834b, Revised Statutes; such a contract cannot be enforced against the county; nor can an equitable accounting be granted for the labor and materials expended in improving the road.”

In the Hommel case, *supra*, the court stated at page 154:

"The statutes limiting the powers of public boards to contract or purchase supplies and materials without public and competitive bidding are enacted for the benefit of the public, to protect the funds derived from public taxation from the possible extravagance and carelessness of those entrusted with supervision of such funds. This court will not relax the protection which such statutes throw around the public treasury. It is true that a modification in the strictness of this doctrine was made in *State, ex rel. Hunt, Pros. Atty., v. Fronizer*, 77 Ohio St., 7, 82 N. E., 518. In that case, it was held that there could be no recovery back of money paid upon a county commissioners' bridge contract, fully executed, but rendered void because of the lack of the necessary statutory certificate by the county auditor, where there was no claim of unfairness, fraud or extortion, and no claim of effort to put the contractor in status quo by return of the bridge, or otherwise. The court said that this rule rested upon the principle of common honesty, and that the county should not be permitted to retain both the consideration and the bridge. However, the *Fronizer* case, which is still the law in this state cannot be extended beyond the specific doctrine which it announces. It is not authority for the theory that there can be a money judgment or recovery for articles delivered to a municipality under a void contract."

And since no legal claim exists, the county commissioners have no authority to pay out county funds in the instant case because no appropriation may be drawn from the county treasury except by authority of law. *Article X, Section 5, Ohio Constitution.*

In view of this conclusion, a consideration of the authority of an auditor of a county to issue his certificate as to the availability of funds for contracts consummated during the prior fiscal year need not here be made.

In view of the foregoing, I am of the opinion that where through non-compliance with the statutory provisions concerning the making of contracts with a county, no valid contract exists between the county and a company for furnishing materials to the county, the county commissioners may not at a later date authorize the payment of the bills for materials furnished under such invalid contract.

Respectfully,

GILBERT BETTMAN,

Attorney General.

3409.

MUNICIPALITY—POWER TO USE MONEYS FROM MOTOR VEHICLE LICENSE AND GASOLINE TAX FUNDS FOR PENSIONS FOR EMPLOYEES WHOSE COMPENSATION BEFORE RETIREMENT WAS LEGALLY PAYABLE FROM SUCH FUNDS.

SYLLABUS:

A municipality which inaugurates a pension system for the purpose of providing pensions for its officers and employes, may lawfully make provision therein for the payment from the automobile license and gasoline tax funds, of the pensions