

859.

APPROVAL, BONDS OF VILLAGE OF NEW BOSTON, SCIOTO COUNTY,
\$120,000.00.

COLUMBUS, OHIO, August 12, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

860.

APPROVAL, NOTE OF SUNSBURY RURAL SCHOOL DISTRICT, MONROE
COUNTY, \$3,456.00.

COLUMBUS, OHIO, August 12, 1927.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.

861.

APPROVAL, BONDS OF WOOD COUNTY, \$14,000.00.

COLUMBUS, OHIO, August 13, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

862.

CHILDREN'S HOME—FURNISHING OF HOME—DUTY OF COUNTY
COMMISSIONERS—DUTY OF BUILDING COMMISSION.

SYLLABUS:

Where a new county children's home is being erected and it is intended by the proper county authorities to use all or a part of the funds derived from the sale of

the old children's home to pay the cost of equipping the new children's home, the board of county commissioners should make the necessary appropriation from the funds to be so used in such amount as it deems proper, and the building commission, appointed by the judge of the Court of Common Pleas under Section 2333, General Code, should, after adopting plans, specifications and estimates, proceed to invite bids and award contracts for furnishing the home as prescribed by Section 2338 and related sections of the General Code.

COLUMBUS, OHIO, August 15, 1927.

HON. RALPH E. HOSKOT, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter requesting my opinion on the following statement of facts:

“Montgomery County is constructing a new Children's Home which is about completed. The bond issue for the erection of this home was in the sum of \$400,000.00 voted by the people. This amount is being used in the construction, including, of course, heating, lighting, ventilating, sewerage, and site improvement.

The old Children's Home located on Summit Street will be abandoned and sold. It has been the intention that the money derived from the sale of the old Children's Home should be used in furnishing and equipping a new Children's Home or at least so much of the proceeds thereof as is necessary for that purpose. The new home will soon be ready for the equipment. However, the question has arisen as to who has the authority to equip the home out of the proceeds of the sale of the old home and I am requesting your advice in this matter.

Section 2333, etc., G. C., provides for the appointment of a building commission, which has been done, and they are erecting the new Children's Home. The question has arisen as to whether or not this building commission or the County Commissioners should equip the home out of the proceeds of the sale of the old home.

Section 2338, G. C., provides that after adopting plans, etc., the Commissioners shall invite bids and award contracts for the building and for *furnishing*, etc. However, Section 2447, G. C., provides that the County Commissioners may sell real estate belonging to the county and not needed for public use and may place the proceeds of the sale of such county property in a separate fund to be used only for the construction, *equipment*, etc., of other county buildings.

Apparently the County Commissioners are the only body authorized to sell the old Children's home property and the proceeds thereof may be placed in separate fund for equipment. If the County Commissioners should place proceeds of such sale in a Children's Home equipment fund, would the building commission have authority to use the same in equipping the home or does that authority remain with the County Commissioners.

A further question has been made as to whether or not the trustees of the home by any of the provisions of Section 3077, etc., of the General Code, have the authority to expend the money for such equipment.”

In compliance with my request for additional information, you submit the following:

"The item of furnishing and equipping the new building was not considered a part of the resolution determining to erect a new children's home and submitted it to a vote of the people. In certifying the matter to the Auditor and his certificate back to the County Commissioners there was no provision made for estimated life of furnishings for the new children's home. The resolution and certificate simply certified an estimated amount of \$350,000.00 for erecting and constructing the buildings and \$50,000.00 for acquiring a site.

In answer to your second inquiry as to what was submitted to the voters, I am enclosing herewith a copy of the ballot which speaks for itself.

Answering your third question as to whether or not the county commissioners before the building commission let the contract for the erection of the new home appropriated any funds for the purpose of furnishing and equipping a new home, I must answer that no such appropriation was made at that time or at any time of the fund voted for the new children's home. There was the intention that the proceeds of the sale of the old home be used for furnishing and equipping purposes."

It appears from your letter and copy of ballot used that the county commissioners in taking the initial steps for the erection of a new children's home, intended to use the \$400,000.00 bond issue to acquire a site and to construct thereon a modern children's home and that the board proceeded to do so by operating through a building commission as prescribed by Section 2333, General Code, which reads:

"When the county commissioners have determined to erect a court house or other county building, at a cost to exceed twenty-five thousand dollars, they shall submit the question of issuing bonds of the county therefor to vote of the electors thereof. If determined in the affirmative, within thirty days thereafter, the county commissioners shall apply to the judge of a court of common pleas of the county who shall appoint four suitable and competent free holder electors of the county, who shall in connection with the county commissioners constitute a building commission and serve until its completion. Not more than two of such appointees shall be of the same political party."

The related sections following Section 2333, General Code, provide that the persons appointed to serve on the building commission shall take an oath of office and make provision for the payment of their compensation. Power is given to the commission to adopt plans, specifications and estimates, and to invite bids and award contracts for the erection, furnishing, lighting and ventilating county buildings.

Section 2447, General Code, reads as follows:

"If, in their opinion, the interests of the county so require, the commissioners may sell any real estate belonging to the county, and not needed for public use; and, in case of the sale of such real estate not used for county purposes, the proceeds of such sale or such parts thereof as the board of commissioners may designate may be placed by the commissioners in a separate fund to be used only for the construction, equipment, maintenance or repair of other county buildings, and the provisions of Section 5638 of the General Code shall not apply to appropriations or expenditures of said fund."

In an opinion of the Attorney General, reported in Opinions, Attorney General, 1917, Vol. 1, p. 536, the provisions of Section 2447, General Code, were construed in connection with the legality of a proposed sale of a children's home, and the use of the proceeds thereof to construct a new home, and among other things the following was held:

"It will be noted that under the provisions of this section the county commissioners may set aside all the proceeds realized from the sale, or any part thereof, in a separate fund. It further provides that the moneys in this fund shall be used only for the construction, equipment, maintenance or repair of other county buildings. And it further provides that the provisions of Section 5638, G. C., shall not apply to appropriations or expenditures of said fund.

From the provisions of this section the county commissioners can easily take care of the matter of providing for the construction, equipment, maintenance and repair of the necessary buildings to be erected for the county children's home. They will simply have to create a fund out of the proceeds of the sale of the present site and place a sufficient amount in said fund to take care of the construction and equipment of the necessary buildings. This money then can be appropriated by the county commissioners without any reference to the provisions of Section 5638, G. C., and therefore without any necessity of submitting the proposition, as to the wisdom of the expenditure, to the voters of the county."

Section 5638, referred to in the above opinion, is a limitation on the power of county commissioners to levy taxes, appropriate money or issue bonds for the purpose of building county buildings and reads as follows:

"The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expenses of which will exceed \$15,000.00, except in case of casualty, and as hereinafter provided; or for building a county bridge, the expense of which will exceed \$18,000.00, except in case of casualty, and as hereinafter provided; or enlarge, repair, improve or rebuild a public county building, the entire cost of which expenditure will exceed \$10,000.00; without first submitting to the voters of the county, the question as to the policy of making such expenditure."

You state that the intention of the county commissioners has been and is now to sell the old children's home, and from the proceeds of the sale thereof set apart such a sum as may be necessary to furnish and equip the new children's home. The question is, after selling the old home, should the county commissioners take charge of the furnishing and equipping of the new building and enter into the necessary contracts and pay out the money, or should the building commission do it? Or, in case neither can lawfully do so, may the trustees of the children's home lawfully do so? The answer to your question is found in the provisions of the statutes pertaining to the appointment of the building commission and designating the powers and duties of the commission.

Section 2338 of the General Code provides:

"After adopting plans, specifications and estimates, the commission shall invite bids and award contracts for the building and *furnishing*,

heating, lighting and ventilating it, and for the sewerage thereof. *Until the building is completed and accepted*, by the building commission, it may determine all questions connected therewith, and shall be governed by the provisions of this chapter relating to the erection of public buildings of the county." (Italics the writer's.)

It should be noted that Section 2333, *supra*, provides, among other things, that the four free holder electors appointed shall in connection with the county commissioners "constitute a building commission and *serve until its completion*", and that Section 2338, *supra*, contains the provision that "until the building is completed and accepted by the building commission, it may determine all questions connected therewith."

In the case of *Mackenzie et al., vs. The State*, 76 O. S. 369, in construing the sections of the statute here under consideration, the Supreme Court, speaking through Judge Davis, who wrote the opinion, at page 372, said as follows:

"It seems to cover, and to confer upon the building commission, in general terms, every phase of power and duty which is conferred upon the county commissioners, and more."

At page 374 of the opinion it is said:

"* * * the general assembly, perhaps believing that proceedings under the existing statutes had not always worked out the best results for the public, no doubt had it in mind to try a scheme of putting the whole matter within the control of a building commission of the highest attainable character and efficiency, whose experience and known integrity together with the usual requirements of an oath and a bond, and restrictions as to the payment of money, and as to full and accurate record of all proceedings, would sufficiently safeguard the public interests."

The object and purpose of the legislature in enacting the statutes authorizing and directing the appointment of a building commission is forcibly pointed out in the above case. The county commissioners have the duty imposed upon them by law to take the necessary and proper steps to provide the funds. The funds necessary to pay for the cost of the completed home may lawfully be obtained by the county commissioners from different sources and duly appropriated and set aside for use in constructing the new home. After they have done so, however, I am of the opinion that, save and except functioning as members of the building commission, they have no independent power or authority to expend the money in the building, furnishing and equipping of the new home. To do so would be in direct conflict with the express provisions of Section 2338, General Code, which says "the commission shall invite bids and award contracts for the building and furnishing, heating, lighting and ventilating it", and would manifestly defeat the purpose of having a "building commission".

You invite my attention to the provisions of Sections 3077, *et seq.*, General Code, and ask if the trustees of the children's home have authority to expend the money for such equipment. I find no authority given to the trustees of a children's home in any of the sections to do so.

In addition to what has heretofore been said, I desire to direct your attention to an opinion of my predecessor, in which I concur, reported in Opinions, Attorney General, 1926, page 215, in which it is held that while a building commission may use funds derived from sources other than taxation, such for

example as proceeds from the sale of county buildings by the county commissioners and may use funds transferred by the commissioners from other public funds, yet the members of the commission appointed by the Common Pleas Court may not lawfully be paid compensation computed on sums expended, which were not derived from sources of taxation, or from the sale of bonds for the purpose of constructing the building.

Specifically answering your question it is my opinion that where a new county children's home is being erected and it is intended by the proper county authorities to use all or a part of the funds derived from the sale of the old children's home, the board of county commissioners should make the necessary appropriation from the funds to be so used in such amount as it deems proper, and the building commission, appointed by the judge of the Court of Common Pleas under Section 2333, General Code, should, after adopting plans, specifications and estimates, proceed to invite bids and award contracts for furnishing the home as prescribed by Section 2338 and related sections of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

863.

DANCE—PUBLIC AND PRIVATE—LICENSE.

SYLLABUS:

1. *Whether or not dances given within or without municipalities are public dances is a mixed question of law and fact, and in the decision of such question, the fact of financial profit to an individual or group would be determinative in most cases. Upon prosecution for giving public dances without first securing a permit therefor (Sections 13393 and 13393-2, General Code), the question of whether or not the dance is a public one is one for the determination of the jury under proper instructions of the court. Whether or not prosecutions should be instituted for failure to secure permits before giving public dances is for the determination of the local authorities charged with the duty of enforcing the law and interested citizens, whose right and duty with respect to the institution of prosecutions for failure to secure permits before giving public dances, are the same as that with respect to prosecutions for other offenses.*

2. *In determining whether or not a dance is a public dance or a dance given under the auspices of a bona fide social club as a private dancing party consideration should be given to the organization of the club, the bona fide limitation on its membership, the attendants of the dance, who, if anyone, stands to profit or lose thereby, and in short, the good or bad faith of the promoters of the party in complying with or attempting to evade the law.*

COLUMBUS, OHIO, August 15, 1927.

HON. FRANK WIEDEMANN, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication as follows:

“The Crystal Lake Park Amusement Company owns among other amusement devices a dance pavilion. The dance pavilion is leased to a club