

519.

APPROVAL, NOTE OF BYRD TOWNSHIP RURAL SCHOOL DISTRICT,
BROWN COUNTY, \$3,840.00.

COLUMBUS, OHIO, May 21, 1927.

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

520.

COUNTY COMMISSIONERS—NO AUTHORITY TO APPROPRIATE
MONEY OUT OF DOG AND KENNEL FUND OR ANY OTHER FUND
TO SECURE COSTS IN CASES FILED UNDER SECTION 5652, GEN-
ERAL CODE.

SYLLABUS:

A board of county commissioners has no authority in law to appropriate money out of the dog and kennel fund or any other fund to secure costs in cases filed under Section 5652-14, General Code.

COLUMBUS, OHIO, May 21, 1927.

HON. C. O. TURNER, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date which reads as follows:

“Will you kindly give me information on the following questions:

1. Whether a justice of the peace has a right under the recent rulings of the U. S. Supreme Court and Court of Appeals to try a person charged with violation of Section 5652, G.C., when he pleads not guilty and there is no waiver of a trial by jury.
2. If the justice has not jurisdiction to try the defendant under the state of facts as given above, should the defendant be bound over to the common pleas court?
3. If the justice has not jurisdiction to try a defendant charged with violation of Section 5652, G. C., when there is a plea of not guilty and no waiver of a trial by jury, would the justice have jurisdiction to try the defendant if costs were secured by the county commissioners?
4. Would the county commissioners have authority to appropriate money out of the dog and kennel fund or any other fund to secure costs in cases filed by the sheriff against persons charged with violation of Section 5652 of the General Code?”

I assume that although throughout your letter you refer to Section 5652, General Code, you mean Section 5652-14, General Code, which provides:

“Whoever, being the owner, keeper or harbinger of a dog more than three months of age or being the owner of a dog kennel fails to file the

application for registration required by law, or to pay the legal fee therefor, shall be fined not more than twenty-five dollars, and the costs of prosecution. The fine recovered shall be paid by the justice of the peace, mayor or judge of municipal court to the county auditor, who shall immediately pay the same into the county treasury to the credit of the dog and kennel fund."

I am enclosing herewith a recent opinion of this office, viz., No. 511, dated May 19, 1927, Opinions, Attorney General, 1927, which is pertinent to most of the inquiries contained in your letter.

1 and 2. Answering your first and second questions specifically, as stated in Opinion No. 511 enclosed herewith, when a plea of not guilty is entered to a charge of violating Section 5652-14, and there is no waiver filed as provided in Section 13511, General Code, the justice can only act as an examining court and if it appears that there is probable cause to believe the accused guilty, order him to enter into a recognizance to appear before the proper court.

The eligibility of a justice of the peace to act as an examining magistrate is in no wise affected by the decision of the Supreme Court of the United States in the case of *Tumey vs. State of Ohio*, decided March 7, 1927, and reported in The Ohio Law Bulletin and Reporter, Vol. XXV, March 14, 1927. In this regard your attention is directed to Opinion No. 174, dated March 11, 1927, Opinions, Attorney General, 1927, the syllabus of which reads:

"Recent decisions of the United States Supreme Court (*Tumey vs. State of Ohio*) does not affect jurisdiction or eligibility of justice of the peace as an examining magistrate."

3. In answer to your third inquiry your attention is again directed to Opinion No. 511, enclosed herewith. As therein pointed out a justice of the peace, in a prosecution instituted under Section 5652-14, General Code, when there is no plea of guilty entered and no waiver filed as provided in Section 13511, General Code, can only act as an examining court and if it appear that an offense has been committed and there is probable cause to believe the accused guilty, order the accused to enter into a recognizance to appear before the proper court. In such a case the question as to whether the costs were secured or not is not material.

There is no authority of law for a board of county commissioners to secure costs in cases of this nature or in any other criminal cause before a justice of the peace.

It is fundamental that a board of county commissioners, being a creature of statute, can exercise only such powers 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; *State ex rel. vs. Yeatman*, 22 O. S. 546; *Ireton vs. State ex rel.* 12 O. C. C. (N. S.) 202, (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 commissioners 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. 48.

These rules are especially applicable with reference to the county's financial affairs. Such board represents the county, in respect to its financial affairs, only so far as authority is given to it by statute. Public moneys and public property, whether in the custody of public officers or otherwise, constitute a public trust fund which can only be disbursed by clear authority of law. To this effect see *State ex rel. Smith vs. Maharry*, 97 O. S. 272.

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 O. S. 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.)

The Constitution of Ohio, Article X, Section 5, provides: "No money shall be drawn from any county or township treasury, except by authority of law." And as stated in the third paragraph of the syllabus in the case of *State ex rel. vs. Pierce*, 97 O. S. 44:

"In case of doubt as to 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."

It is therefore my opinion that there being no statute authorizing such expenditure a board of county commissioners has no authority in law to appropriate money to secure costs in a prosecution instituted under Section 5652-14, General Code.

4. The answer to your third question answers your fourth inquiry. In addition your attention is directed to Section 5652-13, General Code, which relates to the uses and purposes of the dog and kennel fund and provides:

"The registration fees provided for in this act (G. C. Sections 5652 et seq.) shall constitute a special fund known as the dog and kennel fund which shall be deposited by the county auditor in the county treasury daily as collected and be used for the purpose of defraying the cost of furnishing all blanks, records, tags, nets and other equipment necessary to carry out and enforce the provisions of the laws relating to the registration of dogs, and for the payment of animal claims as provided in Sections 5840 to 5849, both inclusive, of the General Code, and in accordance with the provisions of Section 5653 of the General Code. Provided, however, that the county commissioners by resolution shall appropriate sufficient funds out of the dog and kennel fund said funds so appropriated not to exceed 35 per cent of the gross receipts of said dog and kennel fund in any calendar year, for the purpose of defraying the necessary expenses of registering, seizing, impounding and destroying dogs in accordance with the provisions of Section 5652 and supplemental sections of the General Code."

Section 5653, General Code, has to do with the distribution of the surplus of such fund and provides:

"After paying all horse, sheep, cattle, swine, mule and goat claims at the December session of the county commissioners, if there remain more than one thousand dollars of the dog and kennel fund arising from the registration of dogs and dog kennels for such year the excess at such December session shall be transferred and disposed of as follows: In a county in which there is a society for the prevention of cruelty to children and animals, incorporated and organized as provided by law, which has one or more agents appointed in pursuance of law, or any other society organized as provided by Sections 10062 to 10067, inclusive, of the General Code, that owns or controls a suitable dog kennel or place for the keeping and destroying of dogs which has one or more agents appointed and employed in pursuance of law, all such excess as the county commissioners deem necessary for the uses and purposes of such society by order of the commissioners and upon the warrant of the county auditor shall be paid to the treasurer of such society, and any surplus not so transferred shall be transferred to the county board of education fund at the direction of the county commissioners."

An examination of the above quoted sections discloses that no authority is therein given to a board of county commissioners to appropriate any portion of such fund to secure costs in a prosecution instituted under Section 5652-14, General Code.

It is my opinion that a board of county commissioners has no authority in law to appropriate money out of the dog and kennel fund or any other fund to secure costs in cases filed under Section 5652-14, General Code.

Respectfully,

EDWARD C. TURNER,
Attorney General.

521.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND THE WORTHINGTON PUMP & MACHINERY CORPORATION OF CLEVELAND, OHIO, TO CONSTRUCT AIR COMPRESSORS AND LIFTS FOR THE INSTITUTION FOR FEEBLE-MINDED, COLUMBUS, OHIO, AT AN EXPENDITURE OF \$4,296.00—SURETY BOND EXECUTED BY THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

COLUMBUS, OHIO, May 21, 1927.

HON. JOHN E. HARPER, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio acting by the Department of Public Welfare and the Worthington Pump and Machinery Corporation of Cleveland, Ohio. This contract covers the construction and completion of two (2) air compressors and lifts complete for the Institution for Feeble Minded, Columbus, Ohio, and calls for an expenditure of four thousand, two hundred and ninety-six dollars (\$4,296.00).

You have submitted the certificate of the Director of Finance to the effect