

1. The costs incurred in an action to contest an election shall, if the results of such election be set aside, or if ordered by the court to be paid by the county as other election expenses are paid, be paid from the county treasury.

.2 If such election is only within and for a subdivision of the county, the amount of costs so paid from the county treasury shall be withheld by the county auditor from the moneys payable to such subdivision at the time of the next tax settlement.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

816.

COUNTY COMMISSIONERS—DO NOT HAVE AUTHORITY TO DO REPAIR WORK ON COUNTY BUILDING BY “FORCE ACCOUNT” — WITHOUT CONTRACT — WHERE REPAIRS MADE AND INDIVIDUAL PAID PERCENTAGE OF TOTAL PAYROLL—PAYMENT ILLEGAL—FINDING SHOULD BE MADE.

SYLLABUS:

1. *The term “force account” implies that the department officer or board having work to do, instead of entering into a contract for the performance of the work, assumes a direct oversight of the same, employing men with teams, purchasing material and paying for the same without reference to any contract whatever. (Opinion No. 857 of the Opinions of the Attorney General for 1917 approved and followed.)*

2. *The county commissioners do not have authority to do repair work on a county building by force account.*

3. *Where the county commissioners repair a county building by force account and pay to an individual for supervision of such repair work ten per cent of the total payroll expended, such percentage payment is illegal and a finding should be made against the individual who received same.*

COLUMBUS, OHIO, June 27, 1939.

Bureau of Inspection and Supervision of Public Offices, State House Annex, Columbus, Ohio.

GENTLEMEN: I have your request of recent date for my opinion which reads as follows:

“In a certain county, the county commissioners advertised for bids for repointing, caulking, and patching the stone court house building.

Two bids were received, one in the amount of \$2,300.00, and the other \$4,731.00; but both were rejected. The stated reason for the rejection, as shown by the minute record was: 'Whereas, the board has now decided that said repair work should not be done by contract, but that the material should be purchased by said board and the necessary labor and equipment be employed under the supervision of the county engineer.'

At a later date, the following resolution was passed: "Be It Resolved, That the board of commissioners authorize the county engineer to employ the necessary labor and purchase the necessary material for repairing the exterior of the court house by repointing all joints and cracks in the masonry, and caulking all windows and projecting ledges, the rate of wages to be as follows: For supervision, 10% of payroll on labor; superintendent, \$1.50 per hour; bricklayer, \$1.375 per hour; rigger, \$1.50 per hour; and renting of scaffolds, \$4.00 per day.'

In checking the payments made on this work, it develops that the same party was paid at the rate of \$1.50 per hour as superintendent, and 10% of the total payroll, including his own, for supervision. The total cost, exclusive of materials was:

Labor Payroll	\$3,218.24
Superintendent	456.75
10% supervision	365.64
Rent of scaffolds.....	236.00
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Total	\$4,276.63

We respectfully request your opinion upon the following questions:

1. Do county commissioners have authority to do repair work on a county building by force account?

2. Should finding for recovery be made for the 10% paid for supervision; and if so, who should be held liable for such payment?"

The term "force account" does not appear ever to have been defined in any of the reported decisions of the courts of this state, nor do I find any definition of the term in any of the standard works compiled by the lexicographers. However, in Opinions of the Attorney General for the year 1917, Vol III at page 2332, the then attorney general defined the term as follows in the fourth paragraph of the syllabus of said opinion:

"The term 'force account' implies that the department officer or board having work to do, instead of entering into a contract

for the performance of the work, assumes a direct oversight of the same, employing men with teams, purchasing material and paying for the same without reference to any contract whatever."

The county commissioners are given express power to maintain the court house of the county by Section 2433, General Code, which is quoted as follows:

"The taxing authority of any county in addition to other powers conferred by law shall have power to purchase, for cash or by installment payments, lease with option to purchase, lease, appropriate, construct, enlarge, improve, rebuild, equip and furnish a court house, county offices, jail, county home, juvenile court building, detention home, public market houses, county children's home and other necessary buildings, and sites therefor; also, such real estate adjoining an existing site as such taxing authority may deem necessary for any of the purposes aforesaid, including real estate necessary to afford light, air, protection from fire, suitable surroundings, ingress and egress."

Standing alone this section probably would be sufficient authority for the county commissioners to proceed to maintain and repair the court house by force account. However, there are several other sections of the General Code which materially modify and limit the manner of executing the power granted to the county commissioners in the above quoted section. It must constantly be kept in mind that a county has only such powers as are expressly granted to it by statute or arise by necessary implication from powers so expressly granted. In *Board of County Commissioners vs. Gates*, 83 O. S. 19 at page 30, it was said in the opinion of the court by Spear, J.:

"Now a county is not a body corporate but rather a subordinate political division, an instrumentality of government *clothed with such powers and such only as are given by statute*, and liable to such extent and such only as the statutes prescribe."
(Emphasis the writer's.)

In 11 O. J., Section 86, pages 333 and 334, we find the rule stated as follows:

"Statutes which confer authority upon county commissioners are delegations of power by the state, which reserves to itself all power not thus delegated, and are, therefore, to be strictly construed in favor of the state and against the board. More-

over, in the exercise of their powers, county commissioners must follow the terms of the law and proceed in the manner prescribed thereby. *When acting under a special power, they must act strictly on the conditions under which it is given. If no power is given by statute to act except in a certain manner, and that manner is not followed, the act of the board is illegal and void.*" (Emphasis the writer's.)

Section 2343, General Code, is quoted as follows:

"When it becomes necessary for the commissioners of a county to erect or cause to be erected a public building, or substructure for a bridge, or an addition to or alteration thereof, before entering into any contract therefor or repair thereof or for the supply of any materials therefor, they shall cause to be made by a competent architect or civil engineer the following: full and accurate plans showing all necessary details of the work and materials required with working plans suitable for the use of mechanics or other builders in the construction thereof, so drawn as to be easily understood; accurate bills, showing the exact amount of the different kinds of material, necessary to the construction, to accompany the plans; full and complete specifications of the work to be performed showing the manner and style required to be done, with such directions as will enable a competent builder to carry them out, and afford to bidders all needful information; a full and accurate estimate of each item of expense, and of the aggregate cost thereof.

Nothing in this section shall prevent the commissioners from receiving from bidders on iron or reinforced concrete substructures for bridges the necessary plans and specifications therefor."

Section 2348, General Code, provides that where the plans, bills of material and specifications relate to the alteration, repair or improvement of a court house or jail, they shall be submitted to the commissioners, the clerk of the court, the sheriff, the probate judge and one person to be appointed by the judge of the court of common pleas, for their approval and if so approved, the section provides that they shall be deposited with the county auditor and kept in his office.

Section 2352, General Code, provides that after the plans, specifications, etc., are so made and approved, the county commissioners shall give public notice in two of the principal newspapers in the county having the largest circulation therein of the time when and the place where sealed proposals will be received for the erection or alteration of such building and provides that such notice shall be published weekly for four consecutive weeks next preceding the day named for making the contract, and

state when and where plans, specifications, etc., may be found. If there is only one paper published in the county, such notice shall be published in such paper. Further provisions are made in Section 2353, General Code, for notice being posted on a blackboard in the commissioners' office where the estimated cost of such improvement, addition or repair does not exceed one thousand dollars; and where the estimated cost thereof does not exceed two hundred dollars, Section 2354, General Code, provides that such contract may be let at private contract without publication or notice.

Other sections provide for the adjournment of the letting of such contracts from day to day, further submission to the prosecuting attorney for his approval, for the annulment of such contract and the making of a new one where the contractor fails or refuses to proceed with the work, the contract shall not be let for a price exceeding the estimate thereof and for payment to the contractor as the work progresses.

These elaborate provisions indicate a legislative intent that repairs or improvements to the county buildings named therein shall be made only in a manner provided thereby. While it is true that Section 2433, supra, gives the taxing authority of the county the power to acquire and maintain county buildings, this general power must be regarded as limited by the other statutes which I have quoted and to which I have referred. In other words, while the county commissioners have the undoubted power to repair the court house of the county, they must follow the terms of the law and proceed in the manner prescribed by the statutes for making such repairs. A diligent search has failed to reveal any statute which would authorize the county commissioners to repair the court house by force account and I am, therefore, of the opinion that they have no power or authority so to do.

This conclusion is strengthened when the provisions of Sections 6948-1 and 7198, General Code, are examined. These sections respectively provide that the county commissioners and the county surveyor, when authorized by the county commissioners, may improve highways by force account. If it were necessary for the Legislature to grant to the county commissioners specific power to improve and maintain highways by force account, they must be regarded as not having such power with respect to court houses in the absence of a specific grant thereof by the Legislature. In other words, the Legislature must have regarded the power of the county commissioners to make repairs to county highways by force account as being non-existing; otherwise it would not have granted this power by express enactment. Since it has not seen fit to grant to the county commissioners the power to repair court houses by this method, it must be regarded as withheld and the county commissioners are not authorized to repair the court house in this manner.

The other question asked in your communication concerns the right of the commissioners to pay a percentage of the total payroll to the super-

intendent for supervision of the work. The conclusion I have reached with respect to the right of the commissioners to make such repairs by force account probably answers this question for if there be no power to make repairs in this manner, then there is no power to pay a percentage of the total payroll for supervision of the work. Moreover, in the opinion of the attorney general above referred to found in Vol. III of the Opinions of the Attorney General for 1917 at page 232, it was held in the fifth paragraph of the syllabus:

“The authority to perform work under what is termed force account would not include authority to a department, board or officer to enter into a contract with another, giving him as consideration a certain percentage of the entire cost of the work.”

It, therefore, appears to be the rule that even if the commissioners were authorized to make these repairs by force account, they could not pay ten percent of the total payroll for supervision of the work. It follows, therefore, that a finding should be made against the person receiving the ten per cent of the total payroll in the amount which he received for such supervision.

I am, therefore, of the opinion, in specific answer to your questions, that: (1) The county commissioners do not have authority to do repair work on a county building by force account; (2) where the county commissioners repair a county building by force account and pay to an individual for supervision of such repair work ten per cent of the total payroll expended, such percentage payment is illegal and a finding should be made against the individual who received same.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

817.

BONDS—CANAL WINCHESTER VILLAGE SCHOOL DISTRICT,
FRANKLIN COUNTY, \$2500.00.

COLUMBUS, OHIO, June 27, 1939.

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

GENTLEMEN:

RE: Bonds of Canal Winchester Village School District,
Franklin County, Ohio, \$2500.00. (Unlimited).

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise all of an issue of school