

It seems evident, that the credits of said corporation are not subject to taxation in Ohio. Said credits grow out of the solicitation at the City of Cleveland, by a local agent, the order is to be approved by the officers of a corporation situated outside the state, shipment of the goods is to be made from outside the state, invoices are rendered and payments made to the corporation outside the state. In such case it can not be said that the credits are "localized."

Your other questions can not be answered categorically for the reason that insufficient facts are submitted in the several cases mentioned.

Whether or not credits of a non-resident corporation have become localized so as to be subject to taxation in Ohio will depend upon the facts and circumstances of each particular case. Therefore, instead of attempting specific answers to your questions, I have stated general principles which may be applied to each case as it arises in accordance with the particular facts therein.

Respectfully,

EDWARD C. TURNER,
Attorney General.

1488.

COUNTY COMMISSIONERS—DITCH IMPROVEMENT—WORK BEGUN
WITHOUT CONTRACT—NO AUTHORITY TO PAY LABORERS.

SYLLABUS:

A Board of County Commissioners is without authority to pay the wages of day laborers employed by a third person, who, without first entering into a contract therefor as provided by law, (Sections 6442 et seq., General Code), begins the construction of a ditch improvement.

COLUMBUS, OHIO, December 30, 1927.

HON. W. S. PAXSON, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter dated December 24, 1927, which reads:

"Several months ago a petition for construction of a county ditch was filed with our county auditor and the county commissioners, upon view, found that the improvement was necessary and ordered the surveyor to prepare plans and profiles, which he did. He was later ordered to let the contract and after advertising for bids he accepted a bid from a party who, without signing a contract or furnishing a bond as provided by statute, began work on the ditch. He employed several men who performed labor in excavating the ditch for a period of about two weeks. He presented an estimate for the labor performed, but because of the fact that he did not have any contract and had not furnished bond, the auditor of course refused to pay anything on the estimate. He then discontinued work on the job and his tools were sold recently by the sheriff on an execution against him from Ross County. The men performing labor on the ditch were not paid and they are all day laborers and need their money. The county commissioners desire to know if they can pay these laborers out of the county ditch fund."

I assume that the Board of County Commissioners purported to act in compliance with Sections 6442 et seq., General Code, in the construction of the improvement in question. Sections 6481, 6482 and 6483, General Code, relate to bids and contracts for such improvements and provide:

Sec. 6481. "When the estimated total cost for labor and material in any improvement is less than one thousand dollars, a contract for the entire improvement, or for any part thereof, may be let at competitive bidding at public outcry by the surveyor, and in improvements where the estimated total cost for labor and material exceeds one thousand dollars, the commissioners, by order entered on their journal, may order the surveyor to let the contract at competitive bidding at public outcry, instead of sealed bids; but such bids shall be taken separately for work and for material; a deposit shall be made by the lowest bidder, the same as in sealed bids, or the contract shall be entered into forthwith. Bids taken and contracts let at public outcry shall be subject to the provisions governing sealed bids in so far as they are applicable thereto. The letting of the contract at public outcry may be at the improvement, or at a convenient place near the improvement, or at the office of the surveyor, and the notice shall state the place at which the bids will be received."

Sec. 6482. "When the time has passed for the receiving of bids, the surveyor shall, as soon as is practicable, open, canvass and tabulate the bids and report the same to the commissioners, or report to the commissioners bids received at public outcry, with his recommendation of which bid, or combination of bids, in all respects is the best. The commissioners shall accept the bid or bids of the lowest responsible bidder or bidders that they deem best but may accept any combination of bids of different bidders for different parts of the work or for furnishing different materials that they find will be more economical or advantageous than the aggregate bid of a single bidder, but no bid shall be accepted for any part or thing that exceeds the estimate of the surveyor, unless only by such acceptance can a contract for the completion of an entire improvement be let for less than the aggregate estimate of the total improvement.

Should it be found that all bids for work and material, or all bids for any separate part or parts of work and material are in excess of the estimates reported by the surveyor, the commissioners shall order the readvertisement of the same, or any part thereof, for which the bids are in excess, and they may direct the surveyor to re-estimate the same for bids on such new estimate."

Sec. 6483. "The acceptance of said bids shall be approved by the commissioners; upon the acceptance of any bid for the whole or any part of an improvement, the bidder shall within ten days enter into a contract in writing to perform the work or furnish the material bid for as prepared by the surveyor; and the commissioners by an order entered on their journal, shall determine the time within which such work shall be completed and material furnished, but if an improvement requires both labor and material and contracts therefor be given to different persons, the time of furnishing such material and completing such labor shall correspond with the time provided for its use in the progress of the work; an upper contractor shall not be required to complete his contract until an outlet is furnished by the work done by a lower contractor."

Inasmuch as the laborers in question were employed by a third person and not by the county, there is no liability on the county for the payment of their wages.

As stated by Judge Burket in the case of *Buchanan Bridge Co. vs. Campbell*, 60 O. S. 406, at page 419:

"Whatever the rule may be elsewhere, in this state the public policy, as indicated by our constitution, statutes and decided cases, is, that to bind the state, a county or city for supplies of any kind, the purchase must be substantially in conformity to the statute on that subject, and that contracts made in violation or disregard of such statute are void, not merely voidable, and that courts will not lend their aid to enforce such a contract directly or indirectly, but will leave the parties where they have placed themselves. If the contract is executory, no action can be maintained to enforce it, and if executed on one side, no recovery can be had against the party of the other side."

and at page 425:

"The statutes are notice to the world as to the extent of the powers of the commissioners * * *. If such statutes could be evaded, there would always be found some public servants who would be ready and willing to join in transactions detrimental to the public, but favorable to themselves or some favored friend * * *."

In the case of *Board of County Commissioners vs. Gates*, 83 O. S. 19, Judge Spear at page 34, quotes with approval the language of Judge Price in the case of *Smith vs. Griffin*, 6 O. C. D., 232, as follows:

"The entire system of ditch legislation as we now have it proceeds on the theory that those who are to be benefited in some substantial way, and those above shall bear the burden of providing the drainage. It is true that under the provisions of the statute the enforcement of proper and sufficient drainage of lands in localities requiring it, is worked out through application to the board of commissioners, who, together with the engineer and other instrumentalities provided, have charge of the work; yet in the performance of such official duties they are not acting as agents of the county at large; nor can they bind the county at large by any neglect or wrongful act while conducting and managing the execution of ditch work. If any relationship of agency exists in such a case, they would seem to be more the agents of the parties interested in the drainage, who by petition have invoked the action of the commissioners, than of the taxpayers and people of the county."

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."

This rule is 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 monies 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. 26, 29, 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 case of *State ex rel. Locher vs. Menning et al.*, 95 O. S. 97, at page 99:

"The legal principal is settled in this state that county commissioners, in their financial transactions, are invested only with limited powers, and that they represent the county only in such transactions as they may be expressly authorized so to do by statute. The authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county."

In view of the foregoing I have no hesitancy in concluding that the Board of County Commissioners of Fayette County, Ohio, is without authority to make the expenditure in question. The manner of entering into contracts for ditch improvements is regulated and controlled by law and nothing is left to inference. The Board of County Commissioners did not approve the acceptance of the bid for such improvement, nor was any contract entered into as provided by law. A person furnishing supplies and labor to a county in the absence of a valid contract therefor is a mere volunteer and neither he nor those employed by him can recover for property or labor so furnished or the reasonable value thereof on *quantum meruit*.

Answering your question specifically, it is my opinion that a Board of County Commissioners is without authority to pay the wages of day laborers employed by a third person, who, without first entering into a contract therefor as provided by law (Sections 6442, et seq. General Code), begins the construction of a ditch improvement.

Respectfully,

EDWARD C. TURNER,
Attorney General.