

County Commissioners, Authority of. Jails, Repairs to, and Improvements of.

Under Section 4230 of the Political Code and 3040 of the Penal Code, the authority to repair and improve county jails is vested in the board of county commissioners. The sheriff's duty is to take charge of and keep whatever jail is furnished him by the board. If the sheriff objects to the board or their agent entering the jail for the purpose of making improvements or repairs, he could be mandamusd to compel him to permit them so to do.

Helena, Montana, March 20th, 1906.

Board of County Commissioners, Cascade County, Montana.

Gentlemen:—We are in receipt of your letter of the 13th inst., requesting opinion of this office with reference to your power and authority

to make necessary repairs and improvements at the county jail, inclosing copy of opinion from H. S. Green, the county attorney of your county, addressed to your Board upon the subject. The questions submitted are as follows:

1. "Has the board of county commissioners the authority to install in the county jail, a plant for heating water for sanitary purposes when it has been recommended by the Secretary of the Board of Health and such recommendation has been approved by the Board?"

2. "Where the sheriff objects to the installing of such plant, what redress has the Board?"

The authority to provide, construct, improve, maintain and repair county jails is, by the law of this state, expressly and exclusively vested in the board of county commissioners. See divisions 9 and 22 of Section 4230 of the Political Code. Also Section 3040 of the Penal Code, which reads as follows:

"The county commissioners have the care of building, inspecting and repairing the jail, and must, once every three months inquire into its state, as respects the security thereof, and the treatment and condition of prisoners, and must take all necessary precautions against escape, sickness or infection."

The authority of the board of county commissioners over county property, where the same is vested in such board by statute, is defined by Cyc. Vol. II, page 460, as follows:

"The authority to provide, construct, improve, maintain, and repair court-houses, jails, and other public county buildings is usually vested in the county board of commissioners of each county, or the county court, or a judge thereof, and under such authority the question as to the necessity for the erection or repair of a county building, the amounts necessary, whether or not such buildings are sufficiently constructed, etc., are usually left to the discretion of the board or county court, and their decision is final in the absence of an abuse of discretion amounting to fraud."

It is, therefore, perfectly apparent, that the board of county commissioners have absolute authority, whenever in their discretion they find it necessary, to repair or enlarge the county jail so as to better guard against escape of prisoners, or to provide for the better protection of prisoners from sickness or infectious diseases, and whenever in the exercise of their judgment and discretion they make an order upon their minutes to the effect that it is necessary to provide better sanitary conditions in the county jail of their county, their decision is final, and they have authority to immediately proceed with the necessary improvements or repairs, without regard to the views of the sheriff.

It is true that Sub-division 6 of Section 4361 of the Political Code provides that the sheriff must "take charge of and keep the county jail and the prisoners therein." This simply means that it is the duty of the sheriff to take charge of and keep whatever county jail is provided for him by the county commissioners, as custodian. It has no reference to the repairing or improving of such county jail, and the sheriff is given no power, authority or discretion with reference thereto. If the commissioners furnish the sheriff with a poorly lighted and ventilated jail,

all that he is expected to do is to take charge of and keep such jail as best he can, but, when the commissioners, in the exercise of the judgment and discretion vested in them, decide to furnish the sheriff with a better lighted and ventilated jail, the sheriff's duty, under the law, goes no further than to take charge of and keep the improved jail so furnished him by the board. If it becomes necessary while making the repairs or improvements in the jail, to remove the prisoners from the steel cells and thereby the danger of their escaping is increased, it would be the duty of the board of county commissioners to allow the sheriff such necessary special assistance as he may need, as, under said Section 3040, the commissioners "must take all necessary precautions against escape." If the sheriff refuses to permit the county commissioners, or the workmen whom they employ to repair or improve the jail, to enter the same for the purpose of making the necessary repairs or improvements ordered by the board, they have the right and authority to compel him by Writ of Mandate to permit them to enter the jail for the purpose of making such necessary repairs and improvements.

However, as the authority of the commissioners upon a matter of this kind is so clearly defined by our statutes, I do not apprehend that the sheriff will for one moment attempt to resist your authority by refusing to allow you to enter the jail for the purpose of repairing or improving the same, and that therefore, no resort to the courts will become necessary.

Very truly yours,

ALBERT J. GALEN,

Attorney General.