909.

ELECTIONS—WHEN INJUNCTION ISSUED IN A TAXPAYER'S ACTION TO ENJOIN PERFORMANCE OF CONTRACT BY BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS—COSTS PAYABLE FROM COUNTY TREASURY UPON ALLOWANCE OF COUNTY COMMISSIONERS.

In a taxpayer's action to enjoin the performance of a contract involving the expenditure of public funds by the board of deputy state supervisors of elections, the injunction was issued and a decree for costs rendered against the board, as such:

Held: The payment of such costs is to be regarded as an expense of the board of elections and as such payable from the county treasury upon the allowance of the county commissioners.

COLUMBUS, OHIO, January 2, 1920.

HON. HUGO N. SCHLESINGER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of recent date submitting for the opinion of this department the following question:

> "On the 30th day of April, 1919, the deputy state supervisors and inspectors of elections for Franklin county, Ohio, entered into a contract, a copy of which is herewith enclosed. Thereafter a taxpayer's suit was filed to enjoin the performance of any of the terms of the contract and to the petition the board of elections demurred. The court overruled the demurrer and the board indicating its desire not to plead further, the court thereupon entered a judgment, a copy of which is herewith enclosed. This judgment you will note provided for the payment by the board of elections of costs and $600.00 attorney's fees.
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> After this order was made, it seems the clerk of the board of elections had a conversation with Messrs. Halbedel and Blau of the state bureau of accounting in which it was agreed that the sums ordered paid by the judgment entry should be paid from city funds; and accordingly the board of elections prepared a voucher for said sums on the city in favor of the clerk of the common pleas court. The city auditor held up payment of the money, and upon advice of the city attorney the voucher was rejected as not a proper charge against the city funds.
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> Since the contract was entered into for the purpose of taking care of the duties prescribed in sections 5046 and 4819 G. C., the cost of which is to be paid from the city treasury as provided in section 4946 G. C., the suit therefore involving the expenditure of city funds, it seems to me that the costs of the suit would stand on the same basis as the contract and should be paid by the city. For your convenience, I refer you to opinions of the attorney-general rendered in 1912, found in volume 1, pages 200 and 301, and specifically schedule 'D' found on pages 304 and 305 of the latter opinion.
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> Will you please therefore favor me with an early opinion as to what taxing district should pay the cost of the suit in question and on what fund of that taxing district should the warrant be drawn?"

With your letter you submit a copy of the contract in litigation and the entry allowing the plaintiff his costs, including counsel fees and ordering and decreeing that "the defendant, the board of deputy state supervisors and inspectors of elections of Franklin county, Ohio, shall pay" such costs.

The litigation appears to have been by and between the state on the relation of Harry C. Arnold, plaintiff, and the board of deputy state supervisors of elections, among others, defendants. The action was brought under favor of sections 2921 et seq. of the General Code, which makes it the duty of the prosecuting attorney, among other things, to apply by civil action in the name of the state to a court of competent jurisdiction, to restrain any contemplated misapplication of funds or the completion of any contemplated illegal contract. The related sections empower any taxpayer of the county to request the prosecuting attorney to act, and upon his failure to act, to make such application in the name of the state himself.

So far the statute is probably merely declaratory of the principles of equity (Commissioners vs. Pargillis, 10 O. C. C. 376). However, an action under the statute is attended by the benefit to the taxpayer of having his attorney's fees allowed as costs in case the court is satisfied that he is entitled to the relief prayed for in his petition (section 2923 G. C.). The section last referred to provides in its present form that:

> "If the court hearing such case is satisfied that such taxpayer is entitled to the relief prayed for in his petition, and judgment is ordered in his favor, he shall be allowed his costs, including a reasonable compensation to his attorney."

The section does not say that the costs shall be paid from any public treasury. The case being one of equitable cognizance, the court would have authority to pronounce a decree for costs against any party to the case, and this has been done in the instant case by selecting the board of deputy state supervisors and inspectors of elections as the party which shall pay the costs.

In the first instance, then, the board of deputy state supervisors and inspectors of elections must pay the costs. If the members of the board had been sued as individuals, execution or attachment to enforce this decree could undoubtedly issue against the property of any one of the members. Such decree, being an injunction, operates primarily in personam; it becomes incumbent upon the defendant against whom costs have been decreed to pay the costs at peril of being in contempt of court; or, as intimated, execution might issue against any property of the defendant or proceedings in aid of execution might be taken to enforce the decree for costs which under our procedure has the effectiveness of a judgment in this respect.

But it is very much to be doubted that any effective steps could be taken to enforce this decree. The members of the board are not sued personally, as they might have been. The property of the board of deputy state supervisors and inspectors of elections, as such, is not subject to execution, nor have they credits or other interests belonging to them in any beneficial or proprietary sense which could be reached by proceedings in aid of execution. The board as such is held to be merely an agency of the state.

State ex rel. vs. Craig, 8 N. P., 148.

If it were otherwise, the election laws would be unconstitutional as they would have to be pronounced to be county officers and as such they could not be appointed but would have to be elected.

Article X, section 1 of the constitution:
State ex rel. vs. Brennan, 49 O. S. 33;
And numerous other cases which might be cited on this point.

In other words, the dilemma is this: Property and interests which might in any sense be held to belong to the members of the board in their official capacity must belong to them as agents of the state and, upon most familiar principles, must be regarded as exempt from seizure and sale on execution; property belonging to them in their individual capacity cannot be reached on execution because they are not sued in such capacity.

It is believed that no question can be made as to the capacity of the board of deputy state supervisors and inspectors of elections to sue and be sued. It is a general principle that implied capacity to sue and be sued results from the creation of an administrative tribunal acting as a "board." This department has been furnished by counsel with a number of citations of cases in which boards of deputy state supervisors of elections have been sued, as such. This implied capacity to sue and be sued seems to be recognized in section 2917-1 of the General Code, which need not be quoted.

Having the capacity to be sued, it would seem clear that the board of deputy state supervisors and inspectors of elections would thereby come under the potential liability for costs in any case in which judgment for costs against the board as a defendant would be appropriate. A decree for costs would therefore bind the board, and although the enforcement of the decree is embarrassed by the technical considerations to which reference has been made, such decree would at least impose a duty upon the board to pay the costs, if means are afforded by the statutes of the state for the board, as such, to make such expenditure.

No court, of course, has jurisdiction to order the payment of public moneys by a public officer save under authority of law. Thus, if the general assembly should authorize an action to be brought against the treasurer of state, without appropriating any money from the state treasury to pay the judgment, such judgment could not be paid from the state treasury in the teeth of article II, section 22 of the constitution, which provides that:

> "No money shall be drawn from the (state) treasury, except in pursuance of a specific appropriation, made by law."

The decree or judgment of the court ordering the state treasurer to pay out money which had not been appropriated would be without jurisdiction and void.

Now, there is a similar provision in article X, section 5 of the constitution, as follows:

> "No money shall be drawn from any county or township treasury, except by authority of law."

It is very clear that unless the decree of the court ordering the deputy state supervisors and inspectors of elections to pay the costs and attorney's fees in the case in question squares with the statutes authorizing such board to draw money from the county treasury, it must, by virtue of this provision of the constitution, be held to be void, if the sole authority of the board of deputy state supervisors and inspectors of elections to use public moneys for such purpose would have to be exercised by drawing on the county treasury.

The suggestion is made that the board should draw on the treasury of the city of Columbus for the purpose of securing the necessary money to satisfy the decree. The decree itself does not so specify; and if it did, its validity would have to be tested by principles closely analogous to those which have just been discussed. In the first place, the city of Columbus was not a party to the suit and nothing in the decree binds it. The decree as to costs is directed only to the board of deputy state supervisors and inspectors of elections. We must find a statute authorizing

that board to draw on the municipal treasury in order to justify the result contended for.

We must therefore turn to the statutes relative to the power of the board of deputy state supervisors and inspectors of elections to obtain money to pay expenses. You refer in this connection to section 4946 G. C. That section provides as follows:

> "Sec. 4946. The additional compensation of members of the board of deputy state supervisors and of its clerk in such city hereinbefore specified, the lawful compensation of all registrars of electors in such city, the necessary cost of the registers, books, blanks, forms, stationery and supplies provided by the board for the purposes herein authorized, including poll books for special elections, and the cost of the rent, furnishing and supplies for rooms hired by the board for its offices and as places for registration of electors and the holding of elections in such city shall be paid by such city from its general fund. Such expense shall be paid by the treasurer of such city upon vouchers of the board, certified by its chief deputy and clerk and the warrant of the city auditor. Each such voucher shall specify the actual services rendered, the items of supplies furnished and the price or rates charged in detail."

On the other hand, it is claimed that the payment should be made, in the first instance at least, out of the county treasury under section 5052 G. C., which provides as follows:

> "Sec. 5052. All expenses of printing and distributing ballots, cards of explanation to officers of the election and voters, blanks, and other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid from the county treasury, as other county expenses."

and that if the city treasury is ultimately to bear the expense that matter must be cared for under section 5053 G. C., which provides in part as follows:

> "Sec. 5053. In November elections held in odd numbered years, such compensation and expenses shall be a charge against the township, city, village or political division in which such election was held, and the amount so paid by the county shall be retained by the county auditor from funds due such township, city, village or political division, at the time of making the semi-annual distribution of taxes. The amount of such expenses shall be ascertained and apportioned by the deputy state supervisors to the several political divisions and certified to the county auditor. * * *"

This last controversy presents the question which apparently it is desired that this department should answer. Before it is even reached, however, we must determine whether or not payment of the costs in this litigation comes within either of these sections. It is claimed that it comes within section 4946 because the contract attempted to be entered into by the board and enjoined by the court at the suit of the taxpayer was one relative to the furnishings and supplies of rooms and places for the registration of electors and the holding of elections. It is true that the attempted contract did so provide, but it cannot, in the judgment of this department, be successfully contended that the costs of the suit about that contract constitute in any sense "the necessary cost of * * * supplies, * * * and the cost of rent, furnishing and supplies for rooms hired * * * as places for registration," etc.

This section is not susceptible to a liberal interpretation, as the last sentence of it provides that:

> "Each such voucher shall specify the actual services rendered, the items of supplies furnished and the price or rates charged in detail."

The court costs and attorneys' fees do not come within the category contemplated by this section, and it makes no difference, in the opinion of this department, that the suit had reference to a contract relating to such matters.

Turning now to section 5052, it is to be observed that that section simply provides that the proper and necessary expenses of any general election, some of which are enumerated, shall be paid from the county treasury. The costs decreed to be paid by a board of elections are not expenses of any general or special election and cannot be made such by any refinement of reason. Certain other sections, such as sections 4945 and 4991 G. C., are also referred to. It is sufficient to state that these provide that expenses of elections shall be paid in a certain manner. The satisfaction of this decree for costs would not be, in the judgment of this department, an expense of elections.

Reference is also made to the opinion of the attorney-general given to the bureau of inspection and supervision of public offices on July 8, 1912 (annual report of the attorney-general for that year, volume I, page 301). This is an exhaustive opinion specifying the sources from which various election expenses must be paid. The opinion is too lengthy to quote in full. It divides the various expenses into five schedules, classified as follows:

> (1) Expenses in counties having no registration cities, or city—to be paid by county in both even and odd numbered years, and not to be charged back.
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> (2) Expenses to be paid by county in even numbered years, and not to be charged back; but to be paid by county in odd numbered years, and charged back.
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> (3) Expenses to be paid by board and apportioned.
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> (4) Expenses to be paid by registration cities direct.
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> (5) Expenses to be paid by county in even numbered years, and not charged back; and to be paid by county in odd numbered years and charged back, other than those previously enumerated.

The subject-matter of the suit having been held immaterial, it remains to be discovered whether or not the opinion referred to and the statutes on which it was based afford any authority to pay expenses of the kind exemplified by the inquiry under consideration from any public treasury. The then attorney-general included in the second schedule above mentioned:

> "Any other proper and necessary expense provided by law and not specifically enumerated."

He included under the fourth schedule the following:

> "General office expenses of the board of deputy state supervisors of elections."

He included under the fifth schedule:

> "Any other proper and necessary expenses provided by law and not specifically enumerated under foregoing schedules."

He quoted in connection with his discussion sections 4821 G. C., which provides that:

> "Sec. 4821. All proper and necessary expenses of the board of deputy state supervisors shall be paid from the county treasury as other county expenses, and the county commissioners shall make the necessary levy to provide therefor. In counties containing annual general registration cities, such expenses shall include expenses duly authorized and incurred in the investigation and prosecution of offenses against laws relating to the registration of electors, the right of suffrage and the conduct of elections."

It seems to me that if any section authorizes the payment of these costs from any public treasury it is section 4821.

The payment of the costs is not an expense relating to an election as such; it rather constitutes an expense of the board as such, regardless of the subject-matter of the suit. If reference to the contract in suit is permissible at all, such reference shows that the contract had to do with the furnishing of certain facilities "at all elections, both regular and special," and was to extend from "the first day of May, 1919, to the thirtieth day of April, 1922," thus applying both to odd numbered years and even numbered years. It cannot be made referable to a particular election. If this section applies, the expense is a charge on the county treasury and cannot be charged back against the city treasury.

In the opinion of this department, section 4821 G. C. is applicable, although in a refined sense it might be argued that the decision of the court established the fact that the board was acting without jurisdiction, so that its defense of the case and its liability for costs as a result thereof would therefore not be attributable to official duty but rather to breach of it. Such an argument is too technical to be admitted. The board of deputy state supervisors and inspectors must be taken to have attempted to enter into the contract in the supposed discharge of its duty. That being the case, it was right and proper for the board to defend its position to the point of going into court, though it has turned out that the board was in error with respect to the scope of its duty to make the contract, it was certainly an official duty for it to defend its position in court. The litigation having given rise to costs, including the attorneys' fees in question, and it being the duty of the board of deputy state supervisors as a litigant to pay these costs under the decree, it seems to me that their payment constitutes a "proper and necessary expense of the board of deputy state supervisors" rather than a personal expense of the members of the board, as such.

For these reasons it is the opinion of this department that the costs in question may be allowed and paid from the county treasury as other county expenses. This means, of course, that the bill must be presented to and allowed by the county commissioners.

Respectfully,
JOHN G. PRICE,
Attorney-General.