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## VOTING MACHINES—PURCHASE—BOND ISSUE—COUNTY COMMISSIONERS.

## SYLLABUS:

Purchase of voting machines and the issuance of bonds therefor discussed.

Columbus, Ohio, August 6, 1946

Hon. Mathias H. Heck, Prosecuting Attorney  
Dayton, Ohio

Dear Sir:

I have before me your request for my opinion which reads:

“At the general election held in Montgomery County in November, 1930 the following was submitted to the electors.

‘Shall the voting machine be adopted in Montgomery County.’

The majority of the electors voting on the question at said election, voted in the affirmative.

This election was held under the provisions of Section 4785-161, at seq. of the act to revise, recodify and supplement the election laws, 113 O. L. page 307. Section 4785-161 is on page 382. This act became effective on the first day of January, 1930.

Sub-section ‘A’ of Section 4785-161, after providing for the submission of the question to the electors of a county, also contains the following provision:

‘\* \* \* By the same proceedings the use of the voting machine may be discontinued.’

Sections 4785-161, et seq. on voting machines were amended in 114 O. L. page 700 and the 119 O. L. page 127. The amendments as set out in the 114 and 119 Ohio Laws omit the provision found in the original Section 4785-161 providing that if at any time the electors of a county desired to discontinue the use of voting machines, the same could be accomplished by the same proceedings by which they were adopted.

Under the present laws Sections 4785-161, et seq. effective July 31, 1941, there is no provision enabling the electors of a

county to vote on the question of discontinuing the use of voting machines in the county should the electors desire their discontinuance. The electors of the county may adopt the machines, but have nothing to say concerning their discontinuance.

Under Section 4785-161, as originally enacted to become effective January 1, 1930, the authority to purchase voting machines was vested in the Board of Elections of the county.

The only authority the Board of County Commissioners had concerning the voting machines was to provide the necessary funds with which the machines were to be purchased by the Board of Elections.

Under the law as it existed at the November election in 1930 the mandate of the electors of Montgomery County was to the Board of Elections to purchase the machines and comply with the provisions of the law.

Under Section 4785-161 as amended to be effective July 31st, 1941 the authority to purchase voting machines then vested in the Board of Elections, was divested from the Board of Elections, and vested in the Board of County Commissioners, when being acquired for use of the county.

After the election in 1930 at which election the electors of Montgomery County authorized the adoption of voting machines under the law as it was then enacted nothing was done; at first because of a letter from the Secretary of State advising caution because the machines at that time were not large enough, and the conditions of the depression that followed, and the decision of the Portsmouth case by the Supreme Court in 1936 rendered financing the project too difficult.

Acting under the mandate of the electors expressed in the general election of November, 1930, the Board of Elections of Montgomery County on the 24th of July, 1946 adopted a resolution requesting the Board of County Commissioners of Montgomery County to expend Four Hundred Thousand Dollars in the purchase of the necessary number of voting machines for Montgomery County, and One Hundred Thousand Dollars in acquiring a site and a fireproof building for safely storing the machines when not in use, and in acquiring the necessary equipment for holding elections with the use of the machines in Montgomery County.

As a bond issue will be necessary, the Board of Elections, and the Board of County Commissioners desire your opinion on the following questions.

1. Is the mandate voted by the electors of Montgomery County at the General Election 1930, still effective?

2. Under the original Section 4785-161 the authority to purchase voting machines was vested in the Board of Elections and it was under this act that the electors of Montgomery County adopted voting machines in 1930.

No action having been taken subsequent to this election, does the amendment of Section 4785-161, effective July 31st, 1941 annulling the power of the Board of Elections to purchase machines, and vesting the power in the County Commissioners, when for county use; authorize the Commissioners to exercise the power delegated to the Board of Elections by the original Section 4785-161 and the vote of the people in 1930 under it.

3. Does the omission in the amendment of Sections 4785-161, et seq. effective July 31st, 1941 of the provisions providing a method by which the electors of the county may by their vote, discontinue the use of voting machines in the county, when they deem it advisable, as was provided in the original Section 4785-161, under which the electors of Montgomery County adopted voting machines in 1930, render the Section 4785-161 adverse to Section 26, Article II of the Constitution of Ohio, as not being uniform in its operation.

The people voted under the original act giving them both the right to adopt voting machines and the right to vote for their discontinuance in the future should they deem it advisable. After the people voted adopting voting machines, the legislature by its amendment deprived the voters of their right to discontinue their use by a vote of the people.

Does not the uniformity of the operation of a law mean something more than the territorial operation of a law throughout the state? Does not the amendment in discriminating against the right of the people of the county to relieve themselves of the obligation by vote of the people if they so desire, violate the principle and spirit of Section 2 of Article I of the Constitution?

4. If there is a bond issue authorized by the County Commissioners for this project, is it necessary that the resolutions for the bond issue be limited within the period of ninety days previous to the next general election, or if the mandate of 1930 is still effective, may the resolutions, by the County Commissioners, concerning the bond issue comply with Section 2293-19, Uniform Bond Act."

The provisions of law in effect in the year 1930 and under the authority of which the election on the question of adopting voting machines in your county was held in said year were set out in then Section 4785-161 of the General Code and read as follows:

"The board of elections in any county may adopt the voting machine or machines for use in any or all elections in the county or municipalities in the following manner and under the following restrictions:

a. The board, upon the filing of a petition signed by two per cent of the qualified electors of such county or any municipality thereof, shall submit to the electors at the next general election the question, 'Shall the voting machine be adopted in . . . . . county (or municipality)?' If the proposal is approved by a majority vote thereon then the board shall be authorized to purchase voting machines for use in all general and primary elections in such county or municipality in which the voting machine can be used. By the same proceedings the use of voting machines may be discontinued. \* \* \*"

It will be noted that the above language is permissive, rather than mandatory. In the first sentence it was provided that the board of elections "may adopt" voting machines. Following this the section provided that if the proposal is approved the board "shall be authorized" to purchase voting machines.

The use of the word "may" is generally construed to make the provisions in which it is contained optional or permissive. See: *State, ex rel. v. Hadaway*, 113 O. S. 658; *Lindsey v. Public Utilities Commission of Ohio*, 111 O. S. 6; *Morton v. The State of Ohio*, 105 O. S. 366.

In *State, ex rel. v. Klinger*, 114 O. S. 212, our Supreme Court, in quoting from *Carlin v. Freeman*, 19 Colo. App. 334, stated:

"In a statute the word 'may' may be construed in a mandatory sense only, where such construction is necessary to give effect to the clear policy and intention of the Legislature; and where there is nothing in the connection of the language or in the sense or policy of the provision to require an unusual interpretation, its use is merely permissive and discretionary. \* \* \*"

Clearly, the term "shall be authorized" imposes no mandatory duty. In *State, ex rel., v. Commissioners*, 122 O. S. 456, an original action in mandamus to compel the county commissioners of Fayette County to proceed with the issuance of bonds which had been voted for, the court held that the provisions of then Section 2293-23, General Code, which read "the taxing authority of such subdivision shall have authority to proceed, etc.", imposed no mandatory duty upon the county commissioners to issue the bonds in question.

Therefore, in the instant case, the General Assembly did nothing more than vest the boards of elections with authority to purchase voting machines after a proposal for the adoption of the same had been approved by a majority of the electors.

It would, therefore, appear and it is accordingly my opinion that the language in question is to be construed as having conferred upon boards of elections discretionary power in the premises.

Whether or not the present statute imposes a mandatory duty upon the county commissioners to acquire voting machines after the same were adopted by a vote of the people is not before me and I express no opinion thereon.

Your letter states that:

“\* \* \* the Board of Elections of Montgomery County on the 24th of July, 1946 adopted a resolution requesting the Board of County Commissioners of Montgomery County to expend Four Hundred Thousand Dollars in the purchase of the necessary number of voting machines for Montgomery County, \* \* \*”

Section 4785-161, General Code, as the same became effective on July 31, 1941 (119 O. L. 127) and is now in force, provides in part:

“Voting machines may be adopted for use in elections in any county or municipality in the following manner:

1. By the board of county commissioners of such county or the legislative authority of such municipality on the recommendation of the board of elections; or

2. By the affirmative vote of a majority of the electors of such county or municipality voting upon the question of the adoption of voting machines in such county or municipality.”  
\* \* \*

In an opinion rendered by my predecessor on April 17, 1942, Opinions of the Attorney General for 1942, page 249, wherein the question presented concerned the duty of county commissioners with respect to the adoption of voting machines for their county upon the recommendation of the board of elections, it was held:

“1. The Board of County Commissioners is under no mandatory duty to adopt voting machines for the county merely because the Board of Elections has recommended such adoption.”

In commenting on the above provisions of Section 4785-161, General Code, it is stated in said opinion:

“This section provides alternative methods for the adoption of voting machines in a county, viz: (1) By the Board of County Commissioners on the recommendation of the Board of Elections; or (2) by the affirmative vote of the majority of the electors of the county voting upon such question at the first general election occurring not less than ninety days after a petition, signed by two per cent of electors voting at the last preceding general election held in such county, has been filed with the Board of Elections.

The first method requires action by both the Board of Elections and the Board of County Commissioners. The Board of County Commissioners has no authority to act until the Board of Elections recommends the adoption of voting machines. However, the Board of County Commissioners is not required to follow the recommendation of the Board of Elections and it may decline to adopt voting machines upon such recommendation. You will note that the language used in Section 4785-161, General Code, supra, is permissible rather than mandatory. The particular words of the Section which are controlling are the words ‘voting machines may be adopted.’ Similar language is ordinarily construed as being permissive in character and as vesting discretion rather than as imposing a mandatory duty. Thus, in *State, ex rel. Dworken, v. Court of Common Pleas*, 131 O. S., 23, 25, it was said:

‘In the recent case of *State, ex rel. Wendling Bros. Co., v. Board of Education of Magnolia Rural School Dist.*, 127 Ohio St., 336, 188 N. E., 566, it was said, in effect, that in interpreting a statute, the word “may” used therein should be given its ordinary, permissive and discretionary force, unless the sense of the entire enactment requires a construction equivalent to “shall” or “must.”

For statements of the same tenor, compare *State, ex rel. Methodist Children’s Home Association of Worthington, v. Board of Education of Worthington Village School Dist.*, 105 Ohio St., 438, 444, 138 N. E., 865, 867; *State, ex rel. John Tague Post No. 188, American Legion, v. Klinger et al., County Commrs.*, 114 Ohio St., 212, 214, 151 N. E., 47, 48.

Many other cases of similar import from Ohio and elsewhere could be cited. Let it suffice to call particular attention to *Bechtel v. Board of Supervisors of Winnebago County*, 217 Iowa, 251, 254, 251 N. W., 633, 635, wherein it is remarked:

"The great weight of American authority is that the word 'may' when used in a statute is permissive only, and operates to confer discretion, unless the contrary is clearly indicated by the context of the statute."

I am therefore of the opinion, in specific answer to your first question, that the Board of County Commissioners is under no mandatory duty to adopt voting machines for a county merely because the Board of Elections has recommended such adoption, and if the Board of County Commissioners is under no duty to adopt voting machines upon such recommendation, a fortiori, they are under no duty to acquire voting machines for the county."

With the above reasoning and conclusion based thereon, I am in full accord.

Therefore, since Section 4785-161, General Code, as the same existed in 1930, cast no mandatory duty upon the board of elections to adopt voting machines after the approval of a proposal for such adoption by the electors of the county, and inasmuch as there is now before your Board of County Commissioners a recommendation of the Board of Elections of your county for the adoption of voting machines, upon which the county commissioners can act, it would appear that a categorical answer to your first question, to-wit, whether or not the vote of the electors in 1930 is still effective, could serve no real purpose. In other words, even if such vote is still effective and the authority to act thereon is now vested in the county commissioners, the county commissioners acting upon such vote may or may not, in their discretion, adopt such voting machines; and, if such vote is no longer effective the county commissioners have presently before them a recommendation of the board of elections upon which they likewise may or may not, in their discretion, adopt such voting machines.

Therefore, since the authority of the county commissioners would be the same in either event, it is unnecessary to give your first question any further consideration.

In view of the disposition of your first question, it is apparent that consideration of your second and third questions becomes unnecessary.

I come, then, to your fourth question wherein you ask whether, in the event of a bond issue, "it is necessary that the resolutions for the bond

issue be limited within the period of ninety days previous to the next general election”.

Since I have been unable to find any provisions either in the law of 1930 or that presently in effect under which a ninety day period next preceding an election is in any way related to the issuance of bonds for the purchase of voting machines, I am at a loss to understand what might have suggested your question, unless it be that portion of the present law which reads:

“If a petition signed by two percent of the electors voting at the last preceding general election held in a county or municipality be filed with the board of elections, such board shall submit to the electors of such county or municipality, as the case may be, at the next general election occurring not less than ninety days thereafter the question, ‘Shall voting machines be adopted in the county (or municipality) of . . . . .?’”

It will be noted that the above provision refers only to the election at which the question of whether or not voting machines shall be adopted shall be submitted to the voters. While it is true that this section further provides that if bonds are to be issued for the acquisition of voting machines, the question of issuing such bonds shall be submitted at the same election, there is, however, nothing in said section which prescribes the time for the passage of the resolution providing for the submission of said question. The pertinent provisions of the section in this regard read:

“\* \* \* If such board or legislative authority determines that it is necessary or advisable to issue bonds therefor it shall by resolution provide for the submission on the same ballot, but as a separate issue, of the question of issuing such bonds. The question of issuing such bonds shall be submitted in the manner and form provided in the act known as the uniform bond act; and such bonds, if approved, shall be issued in conformity with the provisions, and subject to the limitations, of the uniform bond act. If sixty-five per centum (65%) of the electors voting on the question so submitted shall vote in the affirmative voting machines shall thereby be adopted.”

The statute in effect in 1930, under the authority of which the election in question was held, contained no provisions with respect to the

issuance of bonds which were similar to those above, the only reference to the issuance of bonds therein reading :

“d. After any such voting machine has been adopted and approved, the county commissioners or the proper municipal authorities shall provide the necessary funds, either by issuance of bonds or otherwise with which to purchase and provide for each polling place one or more voting machines in complete working order, \* \* \*.”

The provisions in the present statute dealing with the issuance of bonds in the cases where voting machines are adopted by action of the county commissioners on the recommendation of the board of elections state that the county commissioners shall have the power to acquire the necessary number of such machines “By purchasing same and paying the purchase price therefor in cash out of the proceeds of the issuance and sale of bonds, provided, that the question of issuing bonds for such purpose shall have been submitted to the vote of the electors of the county or municipality, as the case may be, as herein provided for, and provided further, that the issuance of such bonds shall have been approved as provided by law”.

The provisions of law prescribing the procedure to be followed by county commissioners in connection with the submission of the question of issuing bonds, the resolution with respect thereto and the certifying of such resolution are set out in Section 2293-19, General Code.

In light of the above, it would, therefore, appear that if the county commissioners of your county, acting upon the recommendation of the Board of Elections, adopt voting machines and if it is necessary or advisable to issue bonds for the purchase of such machines, the issuance of such bonds would be governed by the provisions of the above section.

Summarizing, you are advised that in my opinion the Board of County Commissioners of Montgomery County, acting on the recommendation made by the Board of Elections of said county on July 24, 1946, may, at its discretion, adopt voting machines, and if such machines are adopted, bonds for the purchase thereof may be issued in accordance with the provisions of Section 2293-19, General Code.

Respectfully,

HUGH S. JENKINS,  
Attorney General.