

“The general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.”

I am therefore of the opinion, in specific answer to your question, that guards at the Ohio Penitentiary should be paid in accordance with the schedule set up in Section 2181 of the General Code of Ohio.

Respectfully,

THOMAS J. HERBERT,  
*Attorney General.*

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VOTING MACHINES—WHERE COUNTY COMMISSIONERS AND ELECTORATE DID NOT AUTHORIZE PURCHASE—BOARD OF ELECTIONS—MAY NOT LAWFULLY ENTER INTO CONTRACT TO PURCHASE OR RENT ONE OR MORE FOR LESS THAN ENTIRE COUNTY—STATE EX REL. FISHER V. SHERMAN ET AL., 135 O. S., 458—TRUMBULL COUNTY.

*SYLLABUS:*

*Under the holding of the Supreme Court of Ohio in the case of State, ex rel. Fisher v. Sherman et al., 135 O. S., 458 (1939), since the board of county commissioners of Trumbull County has not authorized the purchase of voting machines for the entire county, and since there has been no adoption of voting machines by the electorate of such county, the board of elections may not lawfully enter into a contract or contracts providing for the purchase of one or more voting machines for less than the entire county and the renting of an additional number sufficient to supply the entire county.*

COLUMBUS, OHIO, July 10, 1939.

HON. PAUL J. REAGEN, *Prosecuting Attorney, Trumbull County, Warren, Ohio.*

DEAR SIR: I have your letter of June 30, 1939, enclosing original copies of two contracts and requesting my opinion in the following language:

“Confirming our 'phone conversation of today regarding two contracts submitted to my office for an opinion, one a lease agreement between the Automatic Voting Machine Corporation and the Board of Elections of Trumbull County, Ohio, and the other a purchase agreement between the Automatic Voting Machine

Corporation and the Board of Elections of Trumbull County, Ohio.

The Board would like an opinion as to the legality of these two contracts, which were submitted to them by the Voting Machine Corporation and it is claimed that they are drafted in accordance with the recent Supreme Court Decision, 135 O. S. at 458, on the particular question involved. The Board, under these contracts, would purchase outright, through the County Commissioners, a number of machines and then would rent the balance of machines necessary from year to year to conduct the elections.

In view of the fact that the primary is very close at hand, Mr. Griffith, a member of the Board of Elections, who conversed with you on the 'phone today, and I would appreciate an opinion some day next week."

In view of my conclusions with reference to the question asked by you, it is deemed unnecessary to set out in detail the provisions of these proposed contracts. Suffice it to say one is a contract providing for the purchase by the county of certain voting machines therein described, the number of the machines to be purchased not being set forth, while the other proposed contract provides for temporary rental by the county of sufficient additional voting machines "to equip the county fully." It is provided in the proposed contract of rental that the owner of the voting machines shall rent the machines to the county for the primary and general elections to be holden in August and November of 1939, at the rental price stipulated therein; that the county shall have an option to purchase said machines, which must be exercised on or before May 1, 1940; that in the event of the exercise of the option to purchase all of the machines, the county shall receive credit for any moneys paid as rental for the use of the machines in the 1939 elections, with a provision for credit of part of the money paid as rental, in case less than all the machines are purchased.

The proposed purchase contract further provides:

"The Company agrees to and does hereby guarantee that the voting machines hereby sold to the County under the terms hereof shall fulfill the fourteen requirements for voting machines as contained in Section 4785-161c of the General Code of Ohio; and the Company further agrees to post with the Board of Elections a bond in the principal sum of Ten Thousand Dollars (\$10,000) with the Hartford Accident and Indemnity Company, surety, securing that such machines comply fully with the above requirements, and that the said machines will correctly, accurately and continuously register and record every vote cast on them.";

while in the proposed contract of rental, paragraph 3 reads in part:

“Provided further that as a condition precedent to the payment by the County of the purchase price or balance of the purchase price of any voting machines purchased under the exercise of the above described option, the Company shall deliver to the County its bond in a principal sum equal to the number of machines purchased times \$1080.00 less the \$16,000.00 amount of bond hereinbefore described, securing that the machines purchased will comply fully with all of the requirements contained in Section 4785-161c of the General Code of Ohio and will correctly, accurately and continuously register and record every vote cast on said machines. The Company will also separately deliver its written guarantee that the voting machines so purchased fully comply with and fulfill the requirements contained in Section 4785-161c of the General Code of Ohio.”

The rental contract also provides that:

“The County agrees that it will be responsible for the storage, safe keeping and care of said machines during the time within which they remain in the County’s possession as lessee hereunder, and if any of said machines shall in any way become damaged during said time, the County will pay for such repairs as will be necessary to place said machines in proper working condition.”;

that in the event the option to purchase is not exercised, it will ship the machines to the owners, transportation charges prepaid; and that if any personal property tax be imposed upon the machines as the property of the owner during such time as they are in the possession of the County, such tax shall be added to the amount fixed as rental.

The case of *State, ex rel. Fisher, a taxpayer, appellant, v. Sherman et al., Board of Elections of Trumbull County et al., appellees, etc.*, 135 O. S., 458 (Ohio Bar, June 5, 1939) was decided by a divided court on May 31, 1939, three judges dissenting. The syllabus of the court reads:

“1. Except where electors of a county voted to adopt voting machines prior to the effective date of Section 4785-161, General Code, such statute provides for the purchase but not the rental of voting machines for an entire county or municipality.

2. Under Sections 4785-161 and 4785-161a, General Code, voting machines may be rented only (a) where electors adopted voting machines prior to the effective date of Section 4785-161, (b) where temporarily necessary to equip all precincts until a full

quota for a county or municipality can be supplied under contract of purchase, or (c) for experimental use in a limited number of precincts in a county or municipality.

3. Where there is a doubt about the character of an instrument the substance rather than the form will prevail.

4. Where, upon recommendation of a board of elections, a board of county commissioners, after giving careful consideration to the question of the purchase of voting machines, authorizes the 'acquisition' of voting machines by the board of elections for the entire county, such authorization is not one for the rental but for the purchase of voting machines.

5. A contract for the purchase of voting machines by a board of elections for an entire county without the seller providing therewith a satisfactory bond as required by Section 4785-161c, General Code, is illegal and void."

This case involved the legality of a contract entered into between Trumbull County and the company named in the proposed contracts under consideration, wherein the company agreed to rent and re-rent one hundred voting machines over a fifteen year period during which, if all rentals which might become due under such contract were promptly and fully paid, the county was to have the right to purchase such voting machines on or before August in any one of the years 1938 to 1951, inclusive, for stipulated sums which diminished from year to year.

A majority of the court held that the contract was invalid because the county commissioners had only authorized the *acquisition* of such voting machines out of current revenue, which the court construed to mean outright purchase and not rental; because the provisions of Section 4785-161c, General Code, were not complied with, in that the owner had not given an adequate guarantee in writing and posted a satisfactory bond with the board of elections securing that such machines complied fully with the requirements of the statute; and because, if considered as a rental contract, it was void "for the reason that the board of county commissioners did not and could not legally thus authorize the rental of voting machines for the entire county, under the facts of the instant case," while if regarded as a purchase contract, it was "illegal and void by virtue of non-compliance with Section 4785-161c requiring the defendant corporation to furnish a satisfactory bond."

Touching the question of the absence of bidding and the failure of certification of funds by the county auditor, as required by law, the court said at page 470.

"\* \* \* Where a contract like the one known as Exhibit 'D' is so manifestly illegal and void under the statutes, examination

of other claimed errors in respect to such agreement would be a work of supererogation.”

In the majority opinion it was said at page 459, et seq.:

“\* \* \*

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\* \* \*

It is claimed by the defendants that the contract in question was authorized by Section 4785-161a, General Code, but a careful reading of that section will reveal that it provides: First, that where an entire municipality or an entire county has previously adopted or authorized a contract for the purchase of voting machines, then and then only may voting machines be temporarily rented until the full allotment thereof has been supplied to such municipality or county; and second, for the rental or purchase of voting machines in a limited number of precincts for experimental use. The language used is ‘make provision for the experimental use.’

There are two principal methods and one exception by which voting machines may be acquired for an entire county or municipality. The methods are to be found in Section 4785-161, General Code. Under one method ‘the board of county commissioners of any county or the legislative authority of any municipality may on recommendation of the board of elections, authorize the purchase of such voting machines \* \* \* respectively for the entire county or for such municipality, either out of current revenue or by the issuance of bonds within the limitations fixed by law.’ The word ‘rent’ is not found in the language used. Since the word rent is not used, it follows therefore that the board of county commissioners, in the absence of a vote by the electorate, may, on recommendation of the board of elections, authorize only the purchase of voting machines for an entire county or municipality.

The second method for the purchase of voting machines for an entire county or municipality mentioned in Section 4785-161 is by filing a petition signed by two per cent of the electors requesting that the question of adopting voting machines be submitted to the electors at the next general election. The law further provides that upon the filing of such a petition the board of county commissioners shall forthwith determine whether it will be necessary to issue bonds to provide for the purchase of such voting machines, if adopted. If it is deemed necessary to issue bonds therefor, the county commissioners, by resolution, shall provide for the submission on the same ballot, but as a separate issue, the question of issuing such bonds.

An exception to the foregoing methods of purchase of voting

machines for an entire county or municipality is to be found in the last sentence of Section 4785-161, reading as follows: 'If the electors of any county or municipality shall have voted prior to the enactment of this provision in favor of adopting the voting machine, then such board of county commissioners or legislative authority of such municipality, as the case may be, shall provide for the purchase or rent of such machines in the manner herein provided.' The word 'rent' is not found in the entire Section 4785-161, except in the foregoing sentence. The provision is an exception and applies only to a county or municipality which voted to adopt voting machines prior to the effective date of such statute. \* \* \*

At page 461 of the court's opinion, it is said that "there was no submission of the question to the electorate by the county commissioners and therefore no adoption of voting machines in Trumbull County."

Since the proposed contracts or contract contains covenants providing for the giving of a written guarantee and the posting of satisfactory bonds to meet the requirements of Section 4785-161c, G. C., the question presented by you narrows to an inquiry as to whether or not, under Sections 4785-161 and 4785-161a as construed by the Supreme Court, the county commissioners may authorize the board of elections to enter into a contract to purchase one or more voting machines and rent sufficient additional machines to equip all precincts in the county. In this connection it is noted that it does not appear in the proposed contract, and your letter does not state, just how many machines are to be purchased at this time, although the proposed purchase agreement states that the Board of Elections "finds that 130 voting machines are needed to equip the said county completely with voting machines."

While at first blush it might seem that Sections 4785-161 and 4785-161a, G. C., as construed in the second paragraph of the syllabus in the Fisher case, particularly that part reading "voting machines may be rented \* \* \* (b) where temporarily necessary to equip all precincts until a full quota for a county \* \* \* can be supplied under contract of purchase", authorizes purchase by the county of one or more voting machines and a rental of additional machines to equip all the precincts in the county, when the entire syllabus is considered as a whole; when the syllabus is construed with reference to the facts in the case and in the light of the language used in the court's opinion, and especially when the provisions of Section 4785-161a are looked to *ab initio*, I am constrained to hold that the proposed contracts or contract may not be legally entered into at this time by the Trumbull County Board of Elections.

I am, of course, aware that it is, and has been since 1858, a rule of the Supreme Court that the syllabus of a reported decision states the law, that is, the points decided in any case are found in the syllabus. It is

also the law in this state that in case of a conflict between the syllabus and the opinion, the former governs, although attempt should always be made to harmonize them. See 11 O. Jur., 797 and cases cited. As stated at page 798 of the same authority, the "rules stated in the syllabus must be interpreted with reference to the facts of the case and *the questions presented to and considered by the court,*" it not being possible "for a court to comprehend in every syllabus all the many phases of facts that may arise in other litigation touching similar transactions".

Reading syllabus 2 in connection with the very positive language of syllabus 1, to the effect that Section 4785-161, G. C., "provides for the purchase *but not the rental of voting machines for an entire county*"; giving full force and effect to the language of the second syllabus that under Sections 4785-161 and 4785-161a "voting machines may be rented only \* \* \* where *temporarily* necessary to equip all precincts until a full quota for a county \* \* \* can be supplied under *contract of purchase*", or "for *experimental* use in a limited number of precincts in a county;" considering the syllabus in the light of the facts in the case and the language used in the opinion, as well as that used in the dissenting opinion, I am of the opinion that the proposed contracts would be invalid.

It is, of course, obvious that the proposed contracts, though separately written, are in reality one. They are between the same parties and are concerned with one subject matter, viz., the purchase of one or more voting machines and the rental of a sufficient additional number to furnish machines for the entire county. As stated by the court in the third syllabus of the *Fisher case*, "the substance rather than the form will prevail."

While the two proposed contracts meet the objections of the Supreme Court to the contract under consideration in the *Fisher case*, that no written guarantee was given and no satisfactory bond posted as provided by Section 4785-161c, G. C., the fundamental propositions laid down by the court that Section 4785-161, G. C., does not authorize the rental of voting machines for the entire county, and that such section and Section 4785-161a, together authorize a rental only (1) where the electors had adopted voting machines prior to the effective date of Section 4785-161, (2) where temporarily necessary to equip all precincts until a full quota can be supplied under contract of purchase, or (3) for experimental use in a limited number of precincts in a county or municipality, are still the law.

Since there was no adoption of voting machines by the electorate, and since there is no question of experimental use in a limited number of precincts (1) and (3) may be disregarded. In so far as renting machines, where *temporarily* necessary to equip all precincts until a full quota for the county can be *supplied under contract of purchase*, it will be observed that in the court's opinion emphasis is laid on the fact that the commissioners by the use of the word "acquisition", in fact and in law authorized a purchase and not rental of machines for the entire

county and the fact that the question of adopting voting machines was not submitted to the voters of Trumbull County.

In considering these two facts it was said in the opinion (p. 460) that "the board of county commissioners, in the absence of a vote by the electorate, may, on recommendation of the board of elections, authorize only the *purchase* of voting machines for an entire county or municipality". Touching the fact that there was no submission of the question to the electorate, it was said at page 461, that there was "therefore no *adoption* of voting machines in Trumbull County". On the other hand, the dissenting opinion at page 474 reads into Section 4785-161a the words italicized as follows:

"When voting machines have been authorized (*by the board of county commissioners*) or adopted (*by the majority vote of the electors*), a sufficient number of machines shall be *purchased or rented* by the board of elections so that all polling places within such county, \* \* \* shall be equipped with voting machines. \* \* \*" (Italics the writer's.)

This is quoted chiefly to show that the writer of the court's opinion clearly entertained a contrary view.

From what has been said, when read in the light of the facts in the case and considered by the court, that part of the second syllabus with which we are here concerned should be read as though it were written:

"Under Sections 4785-161 and 4785-161a, General Code, voting machines may be rented only \* \* \* (b) where temporarily necessary to equip all precincts until a full quota for a county or municipality can be supplied under contract of purchase *lawfully entered into by the board of county commissioners, providing for the purchase of voting machines for the entire county, or lawfully entered into after adoption of voting machines by a vote of the electorate.*"

Since neither of these conditions exist in your county, I am constrained to hold that it would not be lawful for your Board of Elections to enter into the proposed agreements submitted to me and which I herewith return.

In reaching this conclusion I am somewhat persuaded by the provision of Section 4785-161a, G. C., to the effect that:

"\* \* \* If it shall be impracticable to supply each election precinct with a voting machine or voting machines at any election following such adoption, or authorization, as many shall be supplied for that election as it is practicable to purchase or rent and



the same may be used in such election precincts within the county or municipality as the board of elections may direct, *but the additional voting machines necessary to supply all precincts shall be purchased and installed at the next preceding election; \* \* \**" (Italics ours.)

I am informed that in the case of your county that there are no means immediately in sight by which this section can be complied with.

Reaching this conclusion it is unnecessary to pass upon the question as to whether or not the absence of public bidding as required by statute or the absence of a proper certification of funds by the county auditor also render these proposed contracts invalid.

Specifically answering your question, it is my opinion that:

Under the holding of the Supreme Court of Ohio in the case of State, ex rel. Fisher, v. Sherman et al., 135 O. S., 458 (1939), since the board of county commissioners of Trumbull County has not authorized the purchase of voting machines for the entire county, and since there has been no adoption of voting machines by the electorate of such county, the board of elections may not lawfully enter into a contract or contracts providing for the purchase of one or more voting machines for less than the entire county and the renting of an additional number sufficient to supply the entire county.

Respectfully,

THOMAS J. HERBERT,  
*Attorney General.*

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869.

PRISONER—TRANSFER FROM ONE COUNTY JAIL OF SECOND COUNTY—DUTY OF SHERIFF TO FURNISH NECESSARY SURGICAL SERVICE, MEDICAL CARE—EXPENSE BORNE BY COUNTY WHERE PRISONER IS LAWFULLY CONFINED IN JAIL—SECTION 3170, G. C.

**SYLLABUS:**

*It is the duty of the sheriff to furnish, at county expense, such surgical service as may be necessary to the health of a prisoner who has been transferred to such county from the county jail of a second county, under the provisions of Section 3170, General Code.*

COLUMBUS, OHIO, July 10, 1939.

HON. LLOYD JONES, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion, which reads as follows: