

by counsel made in court and the motion submitted, unequivocally call for an entire recount. There is no provision whatever to authorize any persons whatever to go over and examine the entire vote cast for the office of prosecuting attorney in order to discover evidence of errors.

The court would be making law violative of the secrecy of ballots which has not been made by the appropriate legislative body.

The proposition made by the motion that the court determine a time and place and a judicious and expeditious plan for opening and correcting errors, and the oral suggestion that an agreement be made to select five persons on each side to examine the ballots, is a matter which might appropriately be presented to the legislature, but not to the court under existing law, because it is *coram non judice*.

The contestor must proceed in the way pointed out by statute. After depositions are taken before the justices, and when the case comes on for trial, if the court finds from such evidence, or from oral testimony taken at trial, that there are any errors in counting the ballots in any precinct or precincts, or if it is of the opinion that there probably are errors, then it may have power to open the particular ballots in a precinct or precincts, and correct all errors therein found."

In the case of *State, ex rel. vs. Graves*, 91 O. S. 113, which was an action in mandamus seeking to compel the secretary of state to recount or direct a recount of the ballots counted at an election and preserved under the provisions of Section 5090-1, General Code, the court, in denying the writ, said on page 118:

"The legislature has defined clearly the purpose for which the ballots are preserved. They can be recounted in cases of contested elections only. It is to be observed that the ballots are to be opened and errors in counting corrected by the court or body trying the contest, and they are to be opened only in open court or in open session of such body. No reference is made in this section to the secretary of state. The deputy state supervisors are made the custodians of the ballots, but with no authority whatever to open or recount them.

So there can be no doubt as to when or by whom or where a recount of the ballots can be had. There must be a contest before there is the right in any one to demand a recount. The recount must be made by the court or by the body trying the contest and in open court or before the body in open session."

In view of the foregoing and specifically answering your question it is my opinion that there is no method to obtain a recount of the ballots except under proper proceedings in contest of the election.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1389.

COUNTY COMMISSIONERS—MAY SELL COUNTY JAIL AND SHERIFF'S RESIDENCE AND USE PROCEEDS TO CONSTRUCT NEW COUNTY JAIL WITHOUT SUBMITTING QUESTION TO VOTERS.

SYLLABUS:

Under the provisions of Sections 2447 and 2447-1, General Code, the Board of County Commissioners of a county may sell a county jail and sheriff's residence

building owned by such county; and without submitting the question to the vote of the electors of the county, said Board of County Commissioners may use the proceeds of the sale of such building, or such portion of said proceeds as it may designate in the construction of a new county jail.

COLUMBUS, OHIO, December 17, 1927.

HON. H. E. CULBERTSON, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of recent date in which certain questions are submitted for my opinion. Your communication is as follows:

“The county building committee, appointed to supervise the construction of the new court house of this county, have put the following proposition up to me.

The voters of Ashland County authorized the erecting and the equipping of a new court house to be built at a cost of \$325,000.00. We have a jail building and a sheriff’s residence built about forty years ago by a special act of the legislature. The county commissioners have several offers for this building and the building commission is anxious to know before they complete plans for the new court house whether it would be possible to build a new jail on top of the new court house.

It appears to me that, in order to sell the jail and the sheriff’s residence, a special act of the legislature would be necessary because it was built by an act of the legislature. Secondly, it has been my opinion that they could not use the money from this jail building to build a jail even though it was incorporated into the new court house without a vote of the people.

The jail building and sheriff’s residence can possibly be sold for about \$75,000.00. That would be using about \$50,000.00 for the erection of a new jail and it looks to me that this could not be done without a vote.”

In the consideration of the first question suggested in your communication as to the power and authority of the board of county commissioners of Ashland County to sell the present jail and sheriff’s residence building in said county, I note the provisions of Sections 2447 and 2447-1, General Code, which read as follows:

Section 2447. “If, in their opinion, the interests of the county so require, the commissioners may sell any real estate belonging to the county, and not needed for public use; and, in case of the sale of such real estate not used for county purposes, the proceeds of such sale or such parts thereof as the board of commissioners may designate may be placed by the commissioners in a separate fund to be used only for the construction, equipment, maintenance or repair of other county buildings, and the provisions of Section 5638 of the General Code shall not apply to appropriations or expenditures of said fund.”

Section 2447-1. “No sale of such real estate shall be made unless authorized by a resolution adopted by a majority of such commissioners. When such sale is so authorized a deed therefore (therefor) shall be made by such board of county commissioners and only to the highest responsible bidder, after advertisement once a week for five consecutive weeks in a newspaper of general circulation within such county. Such board of county commissioners may reject any or all bids and readvertise until all such real estate is sold.”

It seems that the power and authority to sell real property belonging to the county, granted to the board of county commissioners by these sections, are but declaratory of a power and authority already existing in the board of county commissioners of the county, and that, in some respects, the provisions of these sections are limitations on the exercise of such power and authority. Many years ago in the case of *Reynolds vs. Commissioners*, 5 Ohio, 204, it was held that: "Where real estate is vested absolutely in the county commissioners for public purposes they may dispose of it in the same manner as individuals could." I am, therefore, of the opinion that if the interests of the county so require and such fact is found by the board of county commissioners, it may sell the jail and the sheriff's residence building, referred to in your communication, by proceeding in the manner pointed out and provided for in said Sections 2447 and 2447-1, General Code.

With respect to this question I do not consider the fact that this building was constructed under the authority of the special act of the legislature to be at all important. If the county owns this property absolutely and in its proprietary capacity as a quasi corporation, the board of county commissioners can sell the same; for in the acquisition and sale of real property the board of county commissioners is the county. *Carder vs. Commissioners*, 16 O. S. 354, 370; *State ex rel. vs. Allen*, 86 O. S. 244, 250.

With respect to the funds obtained from the proceeds of the sale of the jail and sheriff's residence building, it will be noted that said Section 2447, General Code, contains the following provision:

"The proceeds of such sale or such parts thereof as the board of commissioners may designate may be placed by the commissioners in a separate fund to be used only for the construction, equipment, maintenance or repair of other county buildings, and the provisions of Section 5638 of the General Code shall not apply to appropriations or expenditures of said fund."

Section 5638 of the General Code referred to in the above quoted provision of Section 2447, General Code, before its repeal in 112 O. L. 385, provided, among other things, that before the county commissioners should appropriate money for the purpose of constructing county buildings, or for enlarging, repairing, rebuilding, or improving the same, the cost and expense of which exceeded certain amounts therein stated, the question of the policy of making such expenditures should be first submitted to a vote of the electors of the county.

Under the provisions of said Section 2447, General Code, above quoted, the proceeds of the sale of the jail and sheriff's residence building, or such portion thereof as the board of county commissioners designate, may be placed in a special fund for the construction and equipment of another jail or other county building.

Touching this same matter Section 5625-10, General Code, 112 O. L. 396, provides in part as follows:

"If a permanent improvement of the subdivision is sold, the amount received for the same shall be paid into the sinking fund of the bond retirement fund of the subdivision, or into a special fund for the construction or acquisition of a permanent improvement or improvements.

Money paid into any fund shall be used only for the purposes for which such fund is established."

I assume that none of the bonds issued by the county for erecting said jail and sheriff's residence building, if any such were issued, are now outstanding.

Consistent with the above quoted provisions of Sections 2447 and 5625-10, General Code, the proceeds realized from the sale of said building, or such portion thereof

as the board may designate, should be placed in the fund provided for by paragraph (f) of Section 5625-9, General Code, which section so far as here pertinent provides:

“Each subdivision shall establish the following funds:

* * * * *

(f) A special fund for each class of revenue derived from a source other than the general property tax, which the law requires to be used for a particular purpose.”

In the consideration of your question as to the use of such proceeds in the construction of a jail on top of and as a part of the new court house building, it should be observed that no part of such proceeds can be used in addition to the proceeds of the bond issue for the new court house, for the purpose of constructing any part of the improvement contemplated by such bond issue. *State ex rel. vs. Andrews*, 105 O. S. 489. Subject to such limitation, however, I see no reason why the proceeds of the sale of the present jail and sheriff's residence building, or such portion of such proceeds as may be placed in fund for the purpose, may not be used in the construction of a new jail whether the same be constructed on top and as a part of the new court house or otherwise; and the expenditure of such funds may, of course, be made without submitting the question of making such expenditure to the vote of the electors of the county.

No question is made by you as to whether the construction of a new jail and the expenditure of the proceeds of the sale of the present jail and sheriff's residence building should be done under the supervision of the county building commission, or whether the same should be done under the supervision of the board of county commissioners; and I do not deem it necessary to express my opinion on this question.

Respectfully,

EDWARD C. TURNER,
Attorney General.

1390.

ELECTIONS—VALIDITY OF ELECTION OF OFFICER WHO OFFICIATES AS JUDGE OR CLERK AT POLLS, DISCUSSED.

SYLLABUS:

1. *Under the provisions of Section 5092, General Code of Ohio, a judge or clerk of elections whose name is printed on the ballot at said election as a candidate for member of council, is ineligible to the office if elected.*
2. *A judge or clerk of elections whose name is not printed on the ballot as a candidate for member of council, but whose name is written in, and who is actively promoting his candidacy for such office is also ineligible to the office if elected.*
3. *Where votes are cast, by writing in for member of council the name of a person who is serving as judge or clerk at the election but who has not been regularly nominated for the office of member of council, and who has not sought or aspired to such office or actively promoted his candidacy, said person is eligible to said office, if elected.*

COLUMBUS, OHIO, December 17, 1927.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion, as follows: