4974.

RECOUNT—APPLICATION FOR RECOUNT UNDER SECTION 4785-162, G. C., MAY NOT BE WITHDRAWN—DEPOSIT MAY NOT BE REFUNDED.

SYLLABUS:

When an application for recount of the vote cast in one or more precincts has been filed pursuant to the provisions of Section 4785-162, *General Code, there is no authority whereby the applicant may thereafter withdraw such application and receive a refund of moneys deposited in accordance with such section to defray the cost of such recount.*

COLUMBUS, OHIO, December 9, 1935.

HON. GEORGE S. MYERS, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

"I have received from the Board of Elections of Cuyahoga County a communication as follows:

'On Monday, November 25th on request of the Board I talked to you regarding your interpretation of Section 4785-162-163-164. At that time Mr. John Krause, Chairman of the Board, also discussed with you the same matter. At the conclusion of both conversations I was directed to write to you and request a written opinion on the following questions for future guidance,—

(1) If a candidate files a request to recount a certain number of precincts accompanied by the necessary deposit within the time requirements and after the completion of several precincts may he withdraw his request for the remaining precincts and have his deposit for the uncounted precincts refunded to him?

(2) When an application is filed for recount for a certain number of precincts accompained by the necessary deposit within the time requirements may an applicant withdraw said request prior to the commencement of the recount and have his money refunded?'

Inasmuch as the request for a ruling on the two questions submitted involves interpretation of election laws, I am submitting this to you for an opinion on both inquiries contained in said letter.

I desire to add that the Board of Elections of Cuyahoga County has pending recounts involving both questions and we would, therefore, appreciate an early ruling in this matter."

Section 4785-162, General Code, provides that any candidate voted for

at a primary or other election or any group of five or more qualified electors voting at such election shall be entitled to have the votes for any such candidate or other candidates for the same office recounted in any or all precincts by making application in writing therefor to the board of elections. This application may only be made within the time specified in the statute, to wit, not later than the fifth day after the certificate of the official count has been made. A deposit or bond must be furnished by the candidate or group desiring a recount. It is provided that a deposit of not less than five dollars nor more than ten dollars per precinct must be made in cases where bond is not furnished. The only statutory authority whereby any or all of this money deposited to defray the cost of a recount may be refunded is contained in Section 4785-162 and is dependent upon errors being disclosed in the recount as therein set forth.

Immediately upon invoking the jurisdiction of a board of elections in a proceeding for a recount of votes cast, certain mandatory duties are imposed upon the board, setting in motion the machinery for such recount as prescribed by Section 4785-163, General Code, in the following language:

> "Immediately upon the filing of such application and the deposit of the money or bond with the clerk of the board of elections to cover the cost of the recount, the clerk of the board shall give notice to all candidates for such office, or to the committee sponsoring or opposing any such issue or question, by delivering by registered mail to such candidate or to the chairman of such committee notice of the application for a recount; also stating the time and place for a recount to be had within ten days after filing of the petition. Such recount should be made by the board of elections. Such notice shall in each instance be given at least five days before the date set for such recount. Such notice shall also be given to the applicant or applicants."

Section 4785-164, General Code, likewise couched in mandatory language, provides that the board shall proceed at the time and in the place designated to recount the ballots; that all candidates notified and one representative of each committee and counsel for the applicants and each candidate or committee shall be permitted to witness the recount; that the ballot box shall be opened in their presence and they shall be permitted to examine the ballots; that the recount shall be made in their presence; that the board shall make a complete written abstract of the vote; and that the board shall transmit the revised abstract in case of a municipal election to the Secretary of State, as required for transmitting the abstract of the original count. It is provided in Section 4785-165, General Code, that if such recount shows sufficient error to change the result of election in any county, the board shall

correct its returns and issue a certifictae of election to the successful candidate or announce the results on the question or issue, as the case may be.

I shall first consider your second question as to the authority of an applicant to withdraw his request prior to the commencement of a recount and have his money refunded,—this for the reason that a consideration of your first question as to the authority of an applicant to withdraw his request after a portion of the requested precincts have been recounted is dependent upon an affirmative answer to your second question.

It is established that Sections 4785-162 to 4785-165, supra, must be strictly construed. *State, ex rel.* vs. *Election Board,* 126 O. S. 582. There is no express authority therein whereby an application for recount filed within the five day period in accordance with the provisions of Section 4785-162, supra, may be withdrawn under any circumstances either in whole or in part. The General Assembly has seen fit to provide the circumstances under which moneys deposited to defray the cost of a recount may be refunded to the applicant, and an application of the doctrine *"Expressio unius est exclusio alterius"* would indicate that this authority to refund moneys so deposited is exclusive.

Before construing these statutes as authorizing the withdrawals of such applications after they have been made, consideration must be given to the effect of such construction. As stated in *Lewis' Sutherland Statutory Construction,* Vol. 2, 2nd Ed., at page 909, quoting from *Roland Park Co.* vs. *State,* 80 Md. 448, 453, 31 Atl. 298: "A result which may follow from one construction or another of a statute is always a potent factor and is sometimes in and of itself conclusive as to the correct solution of the question as to its meaning." There is much force to the contention that in cases where a candidate has applied for a recount of a certain portion of the precincts in the election district, the opposing candidate, who is directly interested in the matter, has a right to rely upon the jurisdiction of the board thereby invoked being carried out in determining whether or not he shall request a recount in any or all of the remaining precincts. In case application for a recount is made by either a candidate or a group of five or more electors voting at such election, not only the candidate or the electors opposing such candidate or group, but the public generally have a right to rely upon the board conducting the recount. The purity of elections is of concern to every citizen. Had the legislature seen fit to permit withdrawals of such applications, thus requiring in case of close and doubtful elections both sides to request recounts for the same precincts to protect themselves from withdrawals after the five days have elapsed, it could easily have so provided.

I find nothing in the election laws whereby an intention may be attributed to the legislature to authorize the withdrawal of an application for a recount without a return of the money or bond deposited to defray the cost thereof,—that is to say, there appears no justification for holding that the

recount may be stopped and the money deposited not returned. In this view, it is pertinent to consider the fact that where money is deposited to defray the cost of a recount, such money must apparently be deposited in the county treasury. Section 4785-20, General Code, provides that "The expenses of the board in each county shall be paid from the county treasury, in pursuance of appropriations by the county commissioners, in the same manner as other expenses are paid." Obviously, the provision that expenses of the board of elections shall be paid from the county treasury applies to the payment of expenses of conducting recounts. I find no authority whereby the county commissioners may appropriate for such refunds as are here under consideration. The authority for refunds contained in Section 4785-162, supra, in case of certain errors in the original count, of course, supplants the necessity for appropriation by the county commissioners. It is well established that moneys may be withdrawn from the public treasury only pursuant to specific authority of law. *State, ex rel.* vs. *Menning,* 95 O. S. 97.

There is an additional element, however, in the determination of this question which I believe is dispositive thereof. A board of elections in recounting the vote pursuant to application having been filed under Section 4785-162, supra, is performing a function which is different from that theretofore performed by the board when it conducted its original count in that opposing candidates and their counsel are given rights as prescribed by Section 4785-164, supra, which they did not have when the original count was conducted, viz. the rights to examine the ballots, witness the recount and see that the ballot boxes or packages of returns or other pertinent material from the precincts are opened in their presence. Jurisdiction of the board in recounting ballots, once invoked, is supplemental and revisory in its nature. Its acts in making the original count of the precinct or precincts involved are *functi officio.* The situation is in my judgment analogous to that in which an action is filed in court to contest an election in that the action constitutes a review of the first action of the board. The early case of *Ingerson* vs. *Berry,* 14 O. S. 315, is in principle accordingly in point. The headnotes read in part as follows:

> "The clerk of the court of common pleas of Wyandot county, with two justices of the peace of his county, having opened the returns of votes polled by the electors of said county, at the election for state and county officers, held on the second Tuesday of October, 1863, rejected, in good faith, a part of said returns, as illegal, and refused to incorporate them into the abstract exhibiting the result of the election, and thereupon declared M. duly elected sheriff of said county, in conformity with the result of the abstract thus made, and gave him a certificate of election. Had the votes, included in the rejected returns, been counted, the election for sheriff would

have resulted in favor of I. Notice of intention to contest the right of M. to the office, was thereupon given by I., who took the necessary steps for perfecting his appeal, and giving jurisdiction of the whole case to the court of common pleas of Wyandot county. Pending this appeal, and after the expiration of the time limited by statute for instituting a contest in regard to the result of the election, application was made, on the relation of I., for a peremptory writ of mandamus, requiring the clerk to proceed to the proper discharge of his statutory duties, by counting the returns which were alleged to have been improperly excluded by him, and declaring the relator duly elected to the office of sheriff, and giving him a certificate accordingly. Held:

That, assuming the clerk to have erred in the attempted performance of his duty, and that the relator had a clear legal right to have rejected returns counted by the clerk and justices, and to demand and receive a certificate of his election, at the proper time, yet the remedy by mandamus would, under the circumstances stated, be no longer adequate, or appropriate.

A contest, on appeal to the court of common pleas, is the specific remedy provided by statute for the correction of all errors, frauds and mistakes which may occur in the process of ascertaining and declaring the public will as expressed through the ballot boxes.

When such appeal is perfected, the whole subject matter is withdrawn from the sphere of the clerk and justices' statutory power of action, and they become *functi officio.*"

The language of the court at pages 323, 324 and 325 is in many respects pertinent and I think dispositive of the question here under consideration:

"The duty of opening the returns, making abstracts and declaring the person having the highest number of votes duly elected, is, by statute, required to be performed within a limited number of days after the election. Had the relator been thus declared duly elected, at the proper time, it would have been the statutory right of Marlow, to whom the certificate of election was improperly given, or of any elector of Wyandot county, who might choose to contest the relator's right to the office of sheriff, to appeal from this declaration of election, to the court of common pleas of his county, and that court is required by law 'to hear and determine the contest.' But the times for perfecting such appeal, by entering notice thereof with the clerk of the court, and giving notice to the party declared elected, and for taking depositions in the case, are fixed by statute with reference to the day of election, and have now

expired. The statute directs, the declaration of a candidate's election to be made *'subject to an appeal,'* and it can hardly be the duty of this court to require it to be made *exempt from* all right of appeal, by requiring it at a time when appeal has ceased to be possible.

* * * * * * * * *

But in the present case, the relator has thought proper not to regard the action of the clerk and justices as a nullity, but to treat it as the rendition of a judgment, which though erroneous, is made in the exercise of legal jurisdiction, and may, therefore, be appealed from. He has taken the necessary steps, under the statute, to give full jurisdiction of the whole case, upon his own appeal, to the court of common pleas of Wyandot county. He has filed in that court his notice of appeal, and his testimony taken in the case, and has given notice of contest to the party declared duly elected, and the whole case is now pending before that court, where right and justice may be fully done between the parties to the contest, and where the decision and judgment when rendered will be final unless reversed upon error. Having this treated the defendant as *functus officio,* and withdrawn the whole subject matter from the sphere of his statutory power of action, it is difficult to perceive how he can call upon him to take further action in the case."

It is my opinion that having invoked the jurisdiction of the board of elections in recounting the ballots in one or more precincts pursuant to the provisions of Sections 4785-162, et seq., General Code, the previous count of the board of elections is automatically suspended and of no effect unless and until the recount should affirm such original count. The election law providing no authority for withdrawal of such application and refund of money deposited pursuant thereto, that authority must be denied. Upon invoking the jurisdiction of the board of elections under these sections in recounting ballots as therein provided, the board is under the mandatory duty to proceed as provided by law notwithstanding any subsequent change of opinion or desire on the part of the party or parties who invoked that jurisdiction. It is accordingly unnecessary to consider the first question submitted by the clerk of the board of elections of Cuyahoga County.

Respectfully,

JOHN W. BRICKER,

Attorney General.