

624.

APPROVAL, BOND OF VILLAGE OF FAIRVIEW, CUYAHOGA COUNTY,
\$79,675.00

COLUMBUS, OHIO, June 15, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

625.

ELECTION—COST OF PRINTING OF BALLOTS IN SPECIAL ELECTION—
SECTIONS 5052 AND 5053, GENERAL CODE, CONSTRUED.

SYLLABUS:

Under the provisions of Sections 5052, General Code, and 5053, General Code, there is no authority in the November elections of the even-numbered years, to require the charging back of the costs of printing the ballots against the city or political division in which such election was held upon a special question. The same are required to be paid out of the county treasury as other proper and necessary expenses of a general and special election.

COLUMBUS, OHIO, June 16, 1927.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication requesting my opinion as follows:

“You are respectfully requested to furnish this department your written opinion upon the following:

Section 5052 of the General Code provides that

‘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.’

Section 5053 of the General Code, provides that

‘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 town-

ship, city, village or political division, at the time of making the semi-annual distribution of taxes. * * * '

In a case involving the constitutionality of Section 5052, G. C., as to the requirements therein that the county shall pay the cost of special elections, the Common Pleas Court of Summit County held that the law was unconstitutional and the Court of Appeals in the same case held that the law was constitutional. Upon appeal to the Supreme Court, 98 O. S. 446, four members of the court were of the opinion that the section was unconstitutional but inasmuch as it requires the concurrence of six members to declare a law unconstitutional, the decision of the Court of Appeals was permitted to stand. The case was remanded to the Common Pleas Court for trial on its merits and that court again held the law unconstitutional and upon appeal to the Court of Appeals (the personnel of which in the meantime had been changed), that court held that the law was unconstitutional, following the majority of the Supreme Court.

Following this litigation this department has held that the costs of special elections should be paid by the particular subdivision in which the election was held.

Question: In the event that a city or other subdivision of a county submits a special question to be voted upon at the November election in even-numbered years, should the county be charged with the cost of the preparation of the special ballots required to submit such proposition to the electors? For example, when the Board of Education of the Columbus City School District submits to a vote of the people at the November election in an even-numbered year the question of additional tax levy for school purposes, should the cost of printing the ballots be paid by the county or the school district?"

In connection with your inquiry and the example you cite in your letter, it is proper to consider Section 4945, General Code, which reads as follows:

"For November elections held in even-numbered years, the county in which such city is located shall pay the general expenses of such election other than the expenses of registration. Such allowance and order of the board for such expenses and compensation to such judges and clerks of elections shall be certified by the chief deputy and clerk to the auditor of such county, who shall issue his warrants upon the county treasury for the amounts so certified."

It will be noticed that the above section excepts from the expenses which are to be paid by the county the expense of registration, which expenses are to be paid by the city.

The sections about which you inquire have been before this Department for consideration a number of times. In Annual Reports of the Attorney General for 1912, Vol. I, pages 200-213, a very full and exhaustive opinion was rendered to the Bureau considering these sections along with others affecting the expenses of holding elections and the various items of charges and expenditures by counties with and without registration cities.

It was said in that opinion at page 208:

"The statute does not provide that the expense of special elections shall be charged back to the political subdivision in which such election

is held. Section 5052 provides that the expenses for a special election therein specified shall be paid from the county treasury. Section 5053 then provides that in November elections in odd numbered years such expense shall be charged back. Nothing is said about the expense of a special election being charged back. Nor do I find any other provision governing the same. In the absence of statutory authority the county auditor cannot charge back such expense. It would be no more than right that the political subdivision in which a special election is held should pay the expense of such election. The statutes, however, do not so provide. It is my conclusion, therefore, that the expense of a special election cannot be charged back to the political division in which such election was held. In registration cities another section is to be considered."

See also to the same effect, Annual Report of the Attorney General, 1913, page 93; also Opinions of the Attorney General for 1915, Vol. I, page 138, the syllabus of which reads as follows:

"All the expenses of municipal local option elections coming within the terms of Section 5052, G. C., must be paid out of the county treasury and may not thereafter be charged back against the municipality. The same is true of the expenses of special elections for township bond issues, except that in case of an election for the issue of bonds for a township road district, the expense of the ballots for such election shall be paid by the township."

See also to the same effect, Opinions of the Attorney General for 1915, Vol. II, page 413, the second paragraph of the syllabus. Again in Opinions of the Attorney General for 1916, page 703, the syllabus reads as follows:

"Expenses of a special election by a city for the purpose of voting upon the proposition of a home rule charter commission, as well as the expenses of a special election held upon the adoption of a charter submitted by such a commission, are to be paid by the county, and the same are not to be charged back by the county against the municipality to be retained from the funds due said municipality at the next semi-annual distribution of taxes."

On page 705 the Opinion has this to say:

"Section 5052, G. C., requiring that the county shall pay all the expenses of elections, and there being no statutory authority under Section 5053, G. C., to charge the same back to the municipality, the conclusion is inevitable that no such charge can be made.

In passing on this question, I have not considered whether or not said Sections 5052 and 5053, as found in the General Code, are constitutional. I have simply passed on the question of the meaning of the provisions of said sections as found in the General Code."

Again in Opinions of the Attorney General for 1920, Vol. I, page 3, this department rendered an opinion to Hon. Hugo N. Schlesinger, prosecuting attorney of Franklin County.

Under the above mentioned Sections 5052, General Code, and 5053, General Code, among others involving the payment of costs arising out of a taxpayer's

action against the Board of Deputy State Supervisors of Elections to enjoin the performance of a contract involving the expenditures of public funds, it was there held that the costs in question should be allowed and paid from the county treasury as other county expenses. On page 7 of said opinion this language is found:

"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.

(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.

(3) Expenses to be paid by board and apportioned.

(4) Expenses to be paid by registration cities direct.

(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 these 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.'

In the case of *Barker, et al., County Commissioners, vs. The City of Akron*, 98 O. S. page 446, the Court had under consideration Section 5052, General Code. The opinion is as follows:

"It is ordered and adjudged by this court, that the judgment of the said court of appeals be, and the same is hereby affirmed.

The election expenses in question in this case were incurred for elections other than November elections in odd-numbered years and clearly come within the provisions of Section 5052, General Code, which requires that the same be paid from the county treasury as other county expenses.

Four members of this court are of the opinion that this section of the General Code is unconstitutional. Three members are of the opinion that this section is not repugnant to any constitutional provision. The court of appeals held the statute constitutional. In such cases the Constitution of Ohio requires a concurrence of six members of the Supreme Court to declare a law unconstitutional. It follows that the judgment of the court of appeals must be affirmed."

It will be observed that the Supreme Court affirmed the decision of the Court of Appeals in the case wherein said court held the act to be constitutional. While the majority of the members of the Supreme Court at the time were of the opinion that the law was unconstitutional and while the Court of Appeals at a

later decision held the law unconstitutional, yet the fact remains that the last opinion of the Supreme Court is that announced in 98 O. S. 446, affirming the constitutionality of the act.

Specifically answering your question you are advised that you are without authority to require the charging back at November elections in even-numbered years of the costs of printing the ballots against the city or political division in which such election was held upon a special question, but that the same are required to be paid out of the county treasury as other proper and necessary expenses of a general and special election.

Respectfully,
EDWARD C. TURNER,
Attorney General.

626.

APPROVAL. FINAL RESOLUTION ON ROAD IMPROVEMENT ON
LOUDONVILLE LEXINGTON ROAD, ASHLAND COUNTY.

COLUMBUS, OHIO, June 16, 1927.

HON. GEORGE F. SCHLESINGER, *Director, Department of Highways and Public Works,*
Columbus, Ohio.

627.

PROSECUTING ATTORNEY—IS LEGAL ADVISER TO THE COUNTY
TREASURER—MUST PROSECUTE ALL ACTIONS WHICH THE
COUNTY TREASURER MAY DIRECT OR TO WHICH HE IS A
PARTY.

SYLLABUS:

1. *By virtue of the provisions of Section 2917, General Code, the prosecuting attorney is the legal adviser of the county treasurer, and it is the duty of the prosecuting attorney to represent the county treasurer and to prosecute all suits and actions, which the county treasurer may direct or to which he is a party, including suits and actions for the collection of personal taxes.*

2. *By the express terms of Section 2917, General Code, no counsel or attorney other than the prosecuting attorney may be employed to represent the county treasurer, unless such employment be authorized by the common pleas court, upon the application of the prosecuting attorney and county commissioners, as provided in Section 2412, General Code.*

COLUMBUS, OHIO, June 16, 1927.

HON. GEORGE A. MEEKISON, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of recent date reading as follows: