

is executed under the authority of Section 471, of the General Code, as amended by the Conservation Act.

Upon examination of the provisions of this lease I find the same to be in conformity with the provisions of the section of the General Code above noted, and with all other statutory provisions relating to leases of this kind.

Said lease is accordingly approved by me as to its legality and form, as is evidenced by my approval endorsed upon said lease and upon the duplicate and triplicate copies thereof, all of which are herewith enclosed.

Respectfully,

GILBERT BETTMAN,
Attorney General.

2006.

CANDIDATE—COMMON PLEAS JUDGE—LIMITED TO EXPENDITURES OF FIVE HUNDRED DOLLARS EACH AT PRIMARY AND GENERAL ELECTION.

SYLLABUS:

Under the provisions of Section 4785-184, General Code, a candidate for the office of judge of common pleas, probate or insolvency court, may not expend more than five hundred dollars as therein set forth. The provision of this section authorizing an additional expenditure by candidates of five dollars for each one hundred electors in excess of five thousand who voted for governor at the last preceding state election relates only to candidates for other public offices to be voted for by the qualified electors of a county, city, township or village, or any part thereof, than those limited in clauses "(a)" to "(f)," both inclusive, of this section.

COLUMBUS, OHIO, June 21, 1930.

HON. JAMES M. AUNGST, *Prosecuting Attorney, Canton, Ohio.*

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

"A question has arisen over the interpretation of clause (h) of Section 4785-184 of the new election code. This section reads as follows:

'(h) if the total number of votes cast therein at such last preceding election be in excess of five thousand, the sum of five dollars for each one hundred in excess of such number may be added to the amount above specified. The amount which may be spent by any candidate at or before any primary election may be equal to, but shall not exceed the amount which is permitted by law to be expended for the general election. Any candidate for a public office who shall expend for the purpose above mentioned an amount in excess of the amount herein specified shall be guilty of a corrupt practice.'

The clause (g) which immediately precedes clause (h) is as follows:

'(g) a candidate for any other public office to be voted for by the qualified electors of a county, city, township, or village, or any part thereof, if the total number of votes cast therein for governor at such last preceding state election be five thousand or less, the sum of three hundred dollars.' while in clause (e) the limit of expenditure is placed at the sum of \$500.00 for candidates for common pleas judge. Does the excess amount provided

for in clause (h) apply to the office of common pleas judge or does it only apply to the county offices embraced in clause (g)?

It will be noted that the above section, which was substituted in the new code for Section 5175-29 of the old, reads differently. Clause (h) in the new section is only a clause while the same wording was used in the old section as a new sentence with this exception; that in clause (h) the word 'amount' is used while in the old section the word 'amounts' was used.

You may be interested in knowing that the old section was interpreted by the Attorney General in two different opinions to mean that the additional amount did not apply to the office of common pleas judge or rather to any of the offices where the amount was specified. Attorney General's opinions, 1916, p. 1517, and Attorney General's opinions, 1918, p. 1349. This view of the Attorney General was, however, overruled in the case of *Baker vs. Slusser*, 19 O. N. P. (N. S.) 523; *Baker vs. Slusser*, 27 O. C. A. 197; *Slusser vs. Baker*, 96 O. S. 606. It will be noted, however, that in the Slusser case the Supreme Court does not discuss the question and relies apparently upon the lack of jurisdiction in the court of common pleas, to remove the candidate rather than upon the construction of the statute adopted by that court.

I would very much appreciate your opinion on the foregoing."

The provisions of Section 4785-184, upon which you desire my opinion, were heretofore contained in modified form in Section 5175-29, General Code. This section provided in so far as is pertinent as follows:

"The total amount expended by a candidate for public office, voted for at an election, by the qualified electors of the state, or any political subdivision thereof, for any of the purposes specified in Section 26 of this act (G. C., Secs. 5175-1, et seq.), for contributions to political committees, as that term is defined in Section 1 of this act, or for any purpose tending in any way, directly or indirectly, to promote or aid in securing his nomination and election, shall not exceed the amount specified herein; * * * by a candidate for judge of common pleas, probate or insolvency court, the sum of five hundred dollars; by a candidate for the office of state representative the sum of three hundred and fifty dollars; by a candidate for any other public office to be voted for by the qualified electors of a county, city, town or village, or any part thereof, if the total number of votes cast therein for all candidates for the office of governor at the last preceding state election, shall be five thousand or less, the sum of three hundred dollars. If the total number of votes cast therein at such last preceding state election be in excess of five thousand, the sum of five dollars for each one hundred in excess of such number may be added to the amounts above specified. * * * * ."

The question of whether or not candidates for offices which, under this section, were limited to the expenditure of definite sums without regard to votes cast, were authorized to expend five dollars for each one hundred electors in excess of five thousand in addition to the specified limitations in the section, was first considered by this office in an opinion appearing in Opinions of the Attorney General for the year 1916, Vol. II, p. 1517, the syllabus of which is as follows:

"The provision of the second sentence of Section 5175-29, G. C., 103 O. L. 580, permitting the expenditure of an additional sum of five dollars for each one hundred votes in excess of five thousand cast for governor at the last preceding state election, by candidates for office, is applicable only to candidates for other public offices than those specifically enumerated in the earlier

part of said section, to be voted for by the qualified electors of a county, city or village, or a part thereof as referred to in the latter part of the first sentence of said section."

In reaching his conclusion, the then Attorney General said at p. 1518:

"The second sentence of the above quoted section is not entirely free from ambiguity. I am inclined to the view, however, that when the same is taken in connection with the latter part of the preceding sentence, the meaning of the second sentence is rendered reasonably clear. It will be first observed that there is no reference found in the preceding provisions of said section relative to the number of votes cast in the state or subdivision in which the candidate seeks election to office except in that applicable to 'any other public office,' which is as follows:

'by candidate for any other public office to be voted for by the qualified electors of a county, city, town or village, or any part thereof, if the total number of votes cast therein for all candidates for the office of governor at the last preceding state election, shall be five thousand or less, the sum of three hundred dollars.'

It is clear that this provision with reference to the total number of votes cast has application only to the 'candidates for any other public office' in that part of the first sentence of the above section, in which it is found. It further appears that the phrase 'total number of votes cast therein' in the second sentence has the same meaning as that phrase when used in that part of the first sentence last above quoted. That is to say, the term therein as used in both the latter part of the first sentence and in the second sentence of said Section 5175-29, supra, has reference to the county, city or village referred to in said latter part of the first sentence."

The case of *Baker vs. Slusser*, to which you refer, decided in the year following the rendition of the foregoing Attorney General's opinion by the court of common pleas of Summit County, considered the provisions of Section 5175-29, supra. The syllabus of this case reported in 19 O. N. P. (N. S.) 523, 27 O. D. (N. P.) 169, is as follows:

"The office of probate judge, under the corrupt practices act, especially Sec. 5175-29, G. C., limiting the amount of expenditures by candidates for election, comes within the provision prescribing an expenditure of a sum of \$500 and an additional expenditure of \$5 per hundred for all excess above 5,000 in the votes cast at the last preceding state election.

A court of common pleas, on appeal from a declaration of a board of deputy state supervisors of elections under favor of Secs. 5148 to 5153, G. C., cannot declare a forfeiture in office for violation of Sec. 5175-29, G. C., in the absence of such a provision therein, the only method by which a forfeiture can be accomplished is by resort to a prosecution under Sec. 13323-1, G. C., which must precede appeal in an election contest."

The foregoing decision was reversed by the Court of Appeals, the case being reported in 27 O. C. A. 197, this court holding as set forth in the syllabus:

"1. The provision of the corrupt practices act, which permits an expenditure of five dollars for each one hundred votes cast in excess of five thousand at the last preceding state election, is not supplementary to the fixed maximum sums named earlier in the act as the amounts which may be ex-

pended by candidates for the several offices designated, and the expenditure by a candidate for probate judge of a sum in excess of five hundred dollars is in violation of that act.

2. A prior conviction under the corrupt practices act is not requisite to a judgment invalidating the election of one shown to have been guilty of expending an unlawful amount of money in promoting his candidacy, but the fact of such violation itself renders the election void, and a court will so declare."

The Supreme Court reversed the Court of Appeals, being the case of *Slusser vs. Baker*, 96 O. S. 606, upon the holding of the Court of Appeals set forth in the second branch of the syllabus hereinabove quoted. The per curiam opinion of the Supreme Court is as follows:

"It is ordered and adjudged by this court, that the judgment of the court of appeals be, and the same hereby is, reversed, for the reason that it appears from the record that the contestor was not entitled to judgment against the contestee in this proceeding. Even if it be proven that there was a violation of the section of the statute under which this proceeding is brought it would not constitute a ground for removal. And coming now to render the judgment that the court of appeals should have rendered, it is hereby ordered and adjudged that the judgment of the court of common pleas be, and the same is hereby, affirmed."

Subsequent to the decision in the case of *Slusser vs. Baker* in the Supreme Court, this office rendered an opinion upon the question involved, appearing in Opinions of the Attorney General for 1918, Vol. II, p. 1349, adopting the same construction as was adopted in the 1916 opinion. The syllabus is as follows:

"The provision of Section 5175-29, G. C., which permits an expenditure of five dollars for each one hundred votes cast in excess of five thousand at the last preceding state election is not supplementary to the fixed maximum sums named earlier in the act as the amounts which may be expended by candidates for the several offices designated, and the expenditure by a candidate, for any of the offices named therein, of a sum in excess of the amount designated for the particular office, is in violation of the corrupt practices act."

In the course of the opinion, after discussing the holding of the Supreme Court, the then Attorney General said:

"It is evident that the supreme court did not pass upon the question decided by the court of appeals, in the first paragraph of the syllabus, above quoted.

I am inclined to agree with the opinion of my predecessor, Mr. Turner, and with the view expressed by the court of appeals on the reasoning therein set forth."

As heretofore mentioned, the provisions of Section 5175-29, supra, have been substantially incorporated as a part of Section 4785-184, General Code. This section provides in so far as pertinent as follows:

"The total amount expended by a candidate for election to a public office shall not exceed the amount herein specified: (a) a candidate for governor,

the sum of five thousand dollars; (b) a candidate for other state elective offices the sum of two thousand five hundred dollars; (c) a candidate for office of representative in congress or presidential elector, judge of the court of appeals, the sum of two thousand dollars; (d) a candidate for the office of state senator, the sum of three hundred dollars in each county in his district; (e) a candidate for judge of common pleas, probate or insolvency court, the sum of five hundred dollars; (f) a candidate for the office of state representative the sum of three hundred and fifty dollars; (g) a candidate for any other public office to be voted for by the qualified electors of a county, city, township or village, or any part thereof, if the total number of votes cast therein for governor at such last preceding state election be five thousand or less, the sum of three hundred dollars; (h) if the total number of votes cast therein at such last preceding election be in excess of five thousand, the sum of five dollars for each one hundred in excess of such number may be added to the amount above specified. The amount which may be spent by any candidate at or before any primary election may be equal to, but shall not exceed the amount which is permitted by law to be expended for the general election. Any candidate for a public office who shall expend for the purpose above mentioned an amount in excess of the amounts herein specified shall be guilty of a corrupt practice."

The provision allowing additional expenditures where the total number of votes cast at the last preceding election is in excess of five thousand, is no longer contained in a new sentence as was the case heretofore. This provision of clause "(h)" now refers to an additional expenditure which may be added to the "amount above specified" instead of an expenditure which may be added to the "amounts above specified" as heretofore. The ambiguities of the clause as heretofore existing have been removed and it is manifest that it now only modifies the clause immediately preceding it.

The question of whether or not this provision, allowing additional expenditures depending upon the number of votes cast, qualifies the provisions as to maximum expenditures that all candidates referred to in this section could make, presented a more difficult question as contained in Section 5175-29 than it does in its present form. Notwithstanding the ambiguity of Section 5175-29, as to this matter, this office held that the provision as to additional expenditures only related to the last clause of the sentence immediately preceding it.

In specific answer to your question, it is my opinion that under the provisions of Section 4785-184, General Code, a candidate for the office of judge of common pleas, probate or insolvency court, may not expend more than five hundred dollars as therein set forth. The provision of this section authorizing an additional expenditure by candidates of five dollars for each one hundred electors in excess of five thousand who voted for governor at the last preceding state election relates only to candidates for other public offices to be voted for by the qualified electors of a county, city, township or village, or any part thereof, than those limited in clauses "(a)" to "(f)," both inclusive, of this section.

Respectfully,
GILBERT BETTMAN,
Attorney General.