

This case would apparently justify the conclusion that the surety company is entitled to payment even as to estimates which were earned by the contractor prior to default. At least the case disposes of any rights to these estimates so far as claims of assignees of the contractor are concerned. It is possible, however, that circumstances might arise whereby the rights of the surety company would not be superior to other claims and, in view of the fact that the statute does not clearly cover the rights of the parties under these circumstances, I feel that the safest course for you to pursue would be to retain such estimates until such time as the relative rights of the interested parties may be judicially determined. It is, of course, possible that payment may be made without suit through agreement of the parties, but in each instance it would be advisable for you to consult this office in order that you may be properly protected in any such agreement.

In view of the foregoing, I am of the opinion that, where a contractor defaults upon public work and the surety company takes over the work of completing the contract, estimates earned by the contractor prior to default but not paid when the work is taken over by the surety company should be withheld until such time as the relative rights of the interested parties may be determined.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

1262.

ELECTION CONTEST—EXCLUSIVE JURISDICTION OF THE MUNICIPAL COUNCIL TO WHICH COUNCILMAN CLAIMS TO BE ELECTED—WHEN ELECTION BOARD REQUIRED TO TURN OVER BALLOTS.

*SYLLABUS:*

1. *Under Section 4237 of the General Code jurisdiction to hear the contest of a member of a municipal council has been conferred upon such municipal council, and that remedy is exclusive.*
2. *The council to which a member claims to be elected is the proper body to pass on his election.*
3. *Ballots involved in such contest must be turned over to the clerk of council by the board of deputy state supervisors of elections, if such board has been advised of the contest within thirty days subsequent to the election.*

COLUMBUS, OHIO, December 5, 1929.

HON. JOHN E. BAURNECHT, *Prosecuting Attorney, Lisbon, Ohio.*

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

“You will recall our conversation concerning the question of the election in Wellsville, and I am now submitting the question to you for an opinion.

The question is, first, whether the council of a city is the proper board to consider a contest of an election to the office of councilman, and involving a recount of the board; second, in the event the council is the proper body, does the council to which the contesting member claims to be elected or the council holding office at the time of contest, hear and determine the matter; third, is the board of deputy state supervisors of elections required to turn the ballots over to the council of the city for making the recount for position of councilman?

I would appreciate your early opinion on the question above submitted, and thank you very kindly for your cooperation in this matter."

While by the Constitution the *judicial* power of the State is vested in the courts, the absolute, unlimited and unqualified power over *elections*, being political and not judicial, is vested in the Legislature by Section 21, Article II of the Constitution of Ohio.

That section of the Constitution provides that "the General Assembly shall determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted." In the early times it was the practice of the Legislature to try all election contests itself, but now the Legislature has provided for the trial of most election contests by courts or other tribunals. For instance, the Legislature hears contests involving election of its members; the Governor and four judges of the court of appeals constitute a body to hear contests of election of presidential electors; the Supreme Court hears contests involving state officers, Supreme Court judges and appellate judges; court of appeals hears contests involving common pleas judges; common pleas court hears contests involving county officers and probate judge; a probate judge and three freeholders appointed by him hear contests involving election of justices of the peace, and the Legislature has enacted Section 4237 of the General Code, which reads in part:

"Council shall be the judge of the election and qualification of its members.

\* \* \*\*

In *State vs. McDonough*, 101 O. S. 363, it was held that "the tribunal and manner of contesting an election prescribed by the Legislature are exclusive of all others." In *State vs. Herdman*, 17 O. App., 269, the court ruled that "contest of the election of councilmen having been conferred on council, that remedy is exclusive." In *Flotron vs. Barringer*, 94 O. S. 185, it was held that Section 4237, *supra*, makes council the judge of the election and qualification of its members.

In *State ex rel. vs. Berry*, 47 O. S. 232, it was stated in the syllabus:

"A city council is, under the provisions of the Constitution, Section 21, article II, and Section 1679 R. S., the exclusive judge of the election of its own members."

Section 1679 of the Revised Statutes, now Section 4237 of the General Code, at that time read:

"The council, and when of two branches, each branch, shall be the judge of the election, returns and qualifications of its members. \* \* \*\*"

I presume your problem arises because of the seeming ambiguity of Section 5169 of the General Code, which reads:

"The election of any municipal officer, except a member of the council, may be contested in the manner hereinbefore provided for contesting the election of justices of the peace, but in cities the election of any such municipal officer may be contested only in the manner provided for the contest of election of county officers."

In other words, your question is whether Wellsville, falling within the legislative classification of a city, must take its contest of election of a councilman into common pleas court because of the phraseology "but in cities the election of any such municipal

officer may be contested only in the manner provided for the contest of county officers."

In view of the decisions cited, and the fact that the 88th General Assembly, in revamping the election code, to become effective January 1, 1930, did not disturb Section 4237, supra, but did clarify Section 5169, supra, when it enacted in its stead Section 4785-166, I am of the view that the phrase "any such municipal officer" used in Section 5169, supra, refers to all municipal officers except members of council.

This view is strengthened by the fact that Section 5090-1 provides that the ballots shall be delivered by the booth officials to the board of deputy state supervisors of elections and preserved by such board for thirty days subsequent to the election, and that "the court or body trying such contest" shall have the right to open the ballots "in open court or in open session of such body," the statute thus carrying out the legislative intent that bodies other than courts may hear election contests.

It also is to be observed that Section 5114 provides that the returns of municipal elections shall be made by the judges and clerks in each precinct to the clerk or auditor of the municipality, who shall make an abstract and ascertain the candidates elected, and make and deliver a certificate to each candidate elected; also that Section 5111 provides that clerks and judges of elections shall certify the returns for municipal officers to the clerk or auditor of the municipality.

In view of the thirty day limitation for preserving ballots, and in view of the rule that in an election contest the notice of contest is the foundation of the proceeding, notice of the contest should be served upon the board of deputy state supervisors, and upon the person whose right to take his seat is disputed, before the expiration of such thirty day period.

Coming to a consideration of your second question, I am confronted with a line of decisions from other states which seem to conclusively decide that the council to which a member is elected, and not some previous council, is the one entitled to pass on his election and qualifications. The leading cases supporting this view, as cited by Corpus Juris in Volume 20, page 216, are *Green vs. Adams*, 119 Ala., 472, 24 So., 41; *Stack vs. Com.*, 118 Ky., 481, 81 S. E. 917; *Hilton vs. Grand Rapids*, 112 Mich., 500, 70 N. W. 1043; *State vs. Studebaker*, 80 W. Va., 673, 93 S. E. 755; *Trunick vs. Northview*, 80 W. Va., 9, 93 S. E., 1081.

I am therefore of the view that the council to which the councilman whose seat is questioned was elected, is the proper body to hear the election contest.

Coming now to your third question, it seems clear that the board of deputy state supervisors would be required to turn over to the council of Wellsville the ballots involved in such contest. The statute having provided the remedy that council shall hear the contest, that remedy must be followed, and it would be futile for council to attempt to decide the contest without possession of the ballots.

The wording of Section 5090-1 "provided that if any contest of election shall be pending at the expiration of said time the said ballots shall not be destroyed until such contest is finally determined" shows the intention of the Legislature that such ballots shall be turned over to the "court or body trying such contest" upon receipt of notice that such contest has been filed.

Specifically answering your questions, therefore, I am of the opinion that:

1. Under Section 4237 of the General Code jurisdiction to hear the contest of a member of a municipal council, has been conferred upon such municipal council, and that remedy is exclusive.
2. The council to which a member claims to be elected is the proper body to pass on his election.
3. Ballots involved in such contest must be turned over to the clerk of council by the board of deputy state supervisors of elections, if such board has been advised of the contest within thirty days subsequent to the election.

Respectfully,

GILBERT BETTMAN,  
Attorney General.