Original

ORIGINAL

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

STATE EX REL. GARY D. ZEIGLER, STARK COUNTY TREASURER.

Relator,

-vs-

ALEXANDER A. ZUMBAR, STARK COUNTY TREASURER,

Respondent.

CASE NO. 10-1570

ORIGINAL ACTION IN QUO WARRANTO

MERIT BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Statement of the Case 1

Standard of Decision 3

Argument 4

I. **RELATOR'S CLAIM THAT CONST. ART. II, § 38 REQUIRES FACIAL CONFORMITY MUST FAIL ON THE AUTHORITY OF *STEBBINS V. RHODES*. RELATOR WAS REMOVED FOR CAUSE UPON COMPLAINT AND AFTER NOTICE AND HEARING, AND SO WAS FULLY ACCORDED HIS RIGHTS WITH REGARD TO ARTICLE II, SECTION 38 OF THE OHIO CONSTITUTION.** 4

A. Article II, section 38 of the Ohio Constitution requires due process, not a formulation of words, and a statute will not be declared unconstitutional where a complainant is fully accorded his rights thereunder. 4

B. The statutory scheme of R.C. 321.37 and 321.38, providing for removal of a county treasurer upon institution of suit followed by deliberation of the county commissioners does not conflict with the Ohio Constitution. 8

II. **THE EXTRAORDINARY WRIT OF QUO WARRANTO WILL NOT LIE WHERE RELATOR HAS NOT PROTECTED HIS CLAIMED RIGHTS, AND HAS FAILED TO APPEAL FROM THE ADMINISTRATIVE ACTION OF THE BOARD OF COUNTY COMMISSIONERS ON AUGUST 23, 2010.** 12

III. **THE PRESENT RESPONDENT ZUMBAR IS THRICE REMOVED FROM THE BOARD'S PROCEEDINGS PURSUANT TO R.C. 321.38, AND THE PRESENT ACTION SHOULD BE DISMISSED FOR MOOTNESS AND LACHES.** 15

Conclusion 16

Proof of Service 17

TABLE OF AUTHORITIES

Cases

American Power & Light Co. v. S.E.C. (1946), 329 U.S. 90, 108, 67 S.Ct. 133 . . . . . 6, 7

Beach v. Beach (2d Dist. 1955), 99 Ohio App. 428, 434, 134 N.E.2d 162 10

Cleveland Bd. of Education v. Loudermill (1985), 470 U.S. 532 7

Dorrian v. Scioto Conservancy Dist. (1971), 27 Ohio St.2d 102, 271 N.E.2d 834 11

Lima v. McBride (1878), 34 Ohio St. 338 11

Mobil Oil Corp v. City of Rocky River (1974), 38 Ohio St.2d 23, 309 N.E.2d 900 14

State ex rel. Bowman v. Bd. of Comm'rs of Allen County (1931), 124 Ohio St. 174, 177 N.E. 271 11

State ex rel. Burns v. Ross (7th Dist. 1957), 105 Ohio App. 307, 6 Ohio Op.2d 102, 152 N.E.2d 332 3

State ex rel. Dickman v. Defenbacher (1955), 164 Ohio St. 142, 147, 128 N.E.2d 59 . . . . . 4, 5

State ex rel. Flask v. Collins (1947), 143 Ohio St. 45, 73 N.E.2d 195 3

State ex rel. Fogle v. Village of Carlisle, 99 Ohio St.3d 46, 788 N.E.2d 1060, 2003-Ohio-2460 13

State ex rel. Hanley v. Roberts (1985), 17 Ohio St.3d 1, 476 N.E.2d 1019 . . . . . 12, 13

State ex rel. Haylett v. Ohio Bur. of Workers Comp., 87 Ohio St.3d 325, 720 N.E.2d 901, 1999-Ohio-134 4

State ex rel. Heer v. Butterfield (1915), 92 Ohio St. 428, 111 N.E. 279 4

State ex rel. Herman v. Klopfleisch, 72 Ohio St.3d 581, 585, 651 N.E.2d 995, 1995-Ohio-156 10

State ex rel. Hoel v. Brown (1922), 105 Ohio St. 479, 138 N.E. 230 . . . . . 6, 8, 9, 15

State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas (1967), 9 Ohio St.2d 159, 224 N.E.2d 906 4

State ex rel. Jackson v. Allen, 65 Ohio St.3d 37, 599 N.E.2d 696, 1992-Ohio-27 12

State ex rel. Meacham v. Preston (1932), 126 Ohio St. 1, 183 N.E. 777 14

State ex rel. Newell v. Jackson, 118 Ohio St.3d 138, 886 N.E.2d 846, 2008-Ohio-1965 16

State ex rel. Ohio AFL-CIO v. Voinovich (1994), 69 Ohio St.3d 225, 631 N.E.2d 582 8

State ex rel. Paluf v. Feneli (8th Dist. 1995), 100 Ohio App.3d 461, 654 N.E.2d 360 15

State ex rel. Trago v. Evans (1957), 166 Ohio St. 269, 274, 2 O.O.2d 109, 141 N.E.2d 665 8

State v. Ferguson, 120 Ohio St.3d 7, 896 N.E.2d 110, 2008-Ohio-4824 4

Stebbins v. Rhodes (1978), 56 Ohio St.2d 239, 383 N.E.2d 605, 10 O.O.3d 387 . . . . . 5, 6

Statutes and Constitutional Provisions

Ohio Const. Article II, §38 . . . . . 1, 2, 6, 11, 13

R.C. 2733.01 15

R.C. 2733.06 1

R.C. 3.04 5

R.C. 321.37 . . . . . *passim*

R.C. 321.38 . . . . . *passim*

Rules

Civ.R. 3(A) 10

Rule X, Sup.Ct.Prac.R. 3

Statement of the Case

Relator Gary D. Zeigler has brought an action in quo warranto pursuant to R.C. 2733.06, alleging that the statutory provisions by which he was removed as treasurer of Stark County, R.C. §§ 321.37 and 321.38, are facially and irremediably unconstitutional as being clearly incompatible and irreconcilable with Article II, §38 of the Ohio Constitution.

This controversy began when it was discovered on or around March 30, 2009 that Vincent J. Frustaci, the Chief Deputy Treasurer in the office of Stark County Treasurer Gary D. Zeigler – Relator herein – had stolen a large sum of money from the Stark County treasury. After extensive examination by the Ohio Auditor of State, it was determined that Mr. Frustaci had stolen $2,734,560 in public monies, and had illegally cashed checks in the amount of $230,000, for a total theft of $2,964,560, and a finding for recovery was duly issued. A copy of the Audit Report, issued and filed on June 25, 2010, is submitted as Joint Stipulated Exhibit ("Jt. Stip. Ex.") M.

On July 26, 2010, acting pursuant to R.C. 321.37, the Stark County Auditor demanded that John D. Ferrero, Stark County Prosecuting Attorney, institute suit against Relator and his sureties. A copy of said demand letter is submitted as Jt. Stip. Ex. N.

After making demand on Relator by letter dated July 27, 2010 (Jt. Stip Ex. A), the prosecuting attorney instituted said suit against Relator, Stark County Case No. 2010-CV-02773, grounded on R.C. 321.37 and other statutory and common law claims (the "Recoupment Action"). A copy of the complaint in the Recoupment Action is submitted as Jt. Stip. Ex. J.

Acting pursuant to R.C. 321.38, the Stark County Board of County Commissioners (the "Board") gave notice of a special meeting and hearing to consider the status of the treasurer's

office in light of the Recoupment Action. Copies of that notice and subsequent notices are submitted as Jt. Stip. Exs. B, C and E.

In response to the Recoupment Action, Relator commenced an action for declaratory judgment and injunction, seeking a declaration that R.C. 321.38 – a companion statute to R.C. 321.37 – was unconstitutional on its face as violative of Ohio Const. Art. II, § 38; and further seeking to restrain the Stark County Board of County Commissioners from acting pursuant thereto to remove him from office. On August 23, 2010, the trial court issued an order upholding the constitutionality of R.C. 321.37 and 321.38, and denying Relator's request for a preliminary injunction. A copy of said court order is submitted as Jt. Stip. Ex. L.

Also on August 23, 2010, the Board held a public hearing pursuant to notice. By letter from counsel, Respondent declined to participate in that hearing. A copy of said letter is submitted as Jt. Stip. Ex. F. That hearing concluded with the Board adopting a resolution removing Relator as Stark County Treasurer, and appointing Respondent to temporarily fill the vacancy. A transcript of the hearing is submitted as Jt. Stip. Ex. K; a copy of the resolution of the Board is submitted as Jt. Stip. Ex. G.

Relator appealed the trial court's order denying him declaratory and injunctive relief, Case No. 2010-CA-00244, which appeal is presently stayed by order of the Fifth District Court of Appeals, Stark County, pending a ruling by this Court in the present action. See Jt. Stip. Ex. H. Relator has *not* appealed from the action of the Board removing him as county treasurer, and the time for such appeal has passed.

Pursuant to R.C. 321.28 and R.C. 305.02(F), the Board appointed Jaime Allbritain as acting Stark County Treasurer, and Ms. Allbritain actually took office (see Relator's Complaint

at ¶17; Respondent's Answer at ¶33); pursuant to R.C. 305.02(B), on September 20, 2010, Kenneth N. Koher duly qualified as Stark County Treasurer to succeed Respondent, and Mr. Koher actually took office; and pursuant to R.C. 305.02(A), Alexander A. Zumbar was elected to the position of Stark County Treasurer for the unexpired term, and now holds that office. The Election Summary Report of the Stark County Board of Elections for the General Election held November 2, 2010 is submitted as Jt. Stip. Ex. I.

Apart from Relator's initial request for a preliminary injunction – which request was denied by the Court of Common Pleas – Relator did not seek further injunction, stay or other practical relief against Respondent, the Board, the county central committees, or the county board of elections to prevent the vacancy election or the due qualification of Respondent Zumbar as duly elected county treasurer. To the contrary, Relator vacated the premises, permitted his successors to take office, and in all practical ways acceded to the actions of the Board. Nevertheless, the Complaint herein seeks that this Court remove and oust the duly elected successor county treasurer; and reinstate Relator to that office; thereby nullifying not only the Board's action, but all subsequent proceedings culminating in the election of November 2, 2010.

As set forth below, Respondent is entitled to judgment dismissing this action and denying the writ of quo warranto.

Standard of Decision

In an original action in quo warranto pursuant to R.C. Chap. 2733. and Rule X, Sup.Ct.Prac.R., the relator must show a clear right to the office he claims before he is entitled to a judgment of ouster against the incumbent. *State ex rel. Burns v. Ross* (7th Dist. 1957), 105 Ohio App. 307, 6 Ohio Op.2d 102, 152 N.E.2d 332; see also *State ex rel. Flask v. Collins* (1947), 143

Ohio St. 45, 73 N.E.2d 195. Moreover, the relator must show not only that he is entitled to the office, but also that the office is unlawfully held and exercised by the respondent. *State ex rel. Heer v. Butterfield* (1915), 92 Ohio St. 428, 111 N.E. 279.

By casting his challenge as a facial attack on the constitutionality of a statute, R.C. 321.38, Relator must show a clear constitutional infirmity beyond a reasonable doubt. *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 147, 128 N.E.2d 59. That is, Relator must show that there are no circumstances under which the statute can be applied constitutionally – including Relator's own circumstances.

Argument

I. RELATOR'S CLAIM THAT CONST. ART. II, § 38 REQUIRES FACIAL CONFORMITY MUST FAIL ON THE AUTHORITY OF *STEBBINS V. RHODES*. RELATOR WAS REMOVED FOR CAUSE UPON COMPLAINT AND AFTER NOTICE AND HEARING, AND SO WAS FULLY ACCORDED HIS RIGHTS WITH REGARD TO ARTICLE II, SECTION 38 OF THE OHIO CONSTITUTION.

A. Article II, section 38 of the Ohio Constitution requires due process, not a formulation of words, and a statute will not be declared unconstitutional where a complainant is fully accorded his rights thereunder.

"Our inquiry begins with a fundamental understanding: a statute enacted in Ohio is presumed to be constitutional." *State v. Ferguson*, 120 Ohio St.3d 7, 9, 896 N.E.2d 110, 2008-Ohio-4824 ¶ 12, citing *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 161, 224 N.E.2d 906. "[E]very reasonable presumption will be made in favor of its validity. Accordingly, any doubt as to constitutionality is resolved in favor of the validity of the statute." *State ex rel. Haylett v. Ohio Bur. of Workers Comp.*, 87 Ohio St.3d 325,

328, 720 N.E.2d 901, 1999-Ohio-134 (citations omitted). The party seeking to overcome this presumption of validity must show a clear constitutional infirmity beyond a reasonable doubt. *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 147, 128 N.E.2d 59. Because Relator cannot meet this burden, his challenge must be rejected.

This Court has construed the provisions of Ohio Const. Art. II, § 38 as they relate to a removal proceeding, and held that the constitution requires the substance of due process notice and opportunity to be heard, but does not dictate the form of any removal proceeding. In *Stebbins v. Rhodes* (1978), 56 Ohio St.2d 239, 242, 383 N.E.2d 605, 10 O.O.3d 387, the governor sought to remove a member of the Industrial Commission of Ohio pursuant to R.C. 3.04, which provides for the removal of a gubernatorial appointee with the advice and consent of the senate on the basis of inefficiency or dereliction in the discharge of the appointee's duties, but which does not make express provision for any complaint or hearing.[1]

This Court found no constitutional error, as follows:

> Appellant urges primarily that R.C. 3.04 must be struck down because it fails to explicitly provide that actions for removal shall be upon complaint and hearing ....
>
> We decline to reach appellant's contention concerning constitutional due process because the record unequivocally establishes that he was fully accorded his rights in that regard. Appellant was removed for cause upon complaint and after notice and hearing, and he was not prejudiced by that which he argues is a

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[1]Section 3.04 provided, in pertinent part, that "an officer who holds his office by appointment of the governor with the advice and consent of the senate may be removed from office by the governor with the advice and consent of the senate, if it is found that such officer is inefficient or derelict in the discharge of his duties, if the ethics commission ... has found, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitutes a violation of Chapter 102 of the Revised Code, if the officer fails to file or falsely files a statement, required by section 102.02 of the Revised Code, or if it is found that he has used his office corruptly." *Stebbins*, 56 Ohio St.2d at 242 n.

flaw in the statute.

Stebbins, 55 Ohio St.2d at 242.

In support of this conclusion, *Stebbins* cites directly to the cardinal rule of constitutional jurisprudence, which is that "statutes must be interpreted in accordance with constitutional principles" so that the legislature is assumed to have intended that a statute lacking express provision for notice and opportunity for hearing is to be "lawfully executed by giving appropriate notice and opportunity for hearing to all those constitutionally entitled thereto." *American Power & Light Co. v. S.E.C.* (1946), 329 U.S. 90, 108, 67 S.Ct. 133, cited in *Stebbins*, 56 Ohio St.2d at 242. In the *American Power* case, the S.E.C. had actually given all affected parties notice and an opportunity to be heard, even though it was not required to do so by statute, and so the U.S. Supreme Court declined to find any constitutional infirmity.

Significantly, the *Stebbins* court next cites the very case principally relied upon by Relator, i.e., *State ex rel. Hoel v. Brown* (1922), 105 Ohio St. 479, 485, 138 N.E. 230. Such a citation would be impossible if *Brown* truly stood for the proposition urged by Relator, i.e., that Art. II, Sec. 38 requires facial conformity for any removal statute, because it was conceded in *Stebbins* that R.C. 3.04 did not expressly provide for "complaint" and "hearing." Rather, upon examination *Brown* fully supports the construction provided in *Stebbins* because the *Brown* court discussed and analyzed at great length the facts of the case and the circumstances of the removal in question, finding a constitutional violation only after setting out the ex parte proceedings, without any pretense of notice or hearing, that led to the removal in question.

Accordingly, Relator's argument that R.C. 321.38 is irremediably void on its face solely because the legislature did not use the words "complaint" and "hearing" is without merit. Article

II, § 38 of the Ohio Constitution requires the substance of notice and a hearing prior to removal, and a removal proceeding providing that type of due process is fully constitutional. *American Power & Light*, supra; see also *Cleveland Bd. of Education v. Loudermill* (1985), 470 U.S. 532 (constitutional due process requirements of notice and opportunity for hearing would be read into statute, and statute would not be declared void on its face for failure to so specify).

In the present case, shortly after the Recoupment Action was commenced by the filing of the complaint therein, the Board set meeting times "[t]o consider the status of the Treasurer's Office in light of pending action by the Stark County Prosecutor pursuant to ORC § 321.37," and these notices were delivered to Relator. The Board subsequently adopted a formal and detailed recitation of the legal basis for the hearing to be held on August 23, 2010, and of the matters to be considered at that hearing. The August 18 resolution and notice (Jt. Stip. Ex. E) makes explicit what was previously implied – that a "consideration" of the Treasurer's Office in light of the filing of the complaint pursuant to R.C. § 321.37 would be by way of a hearing at which Relator would be entitled to appear, with or without counsel. Under the broadest view of Relator's "rights," he is not entitled to more than this.

Thus, it appears plainly that the Board always intended to give Relator more than the due process protections enunciated by the U.S. Supreme Court in *Loudermill* or this Court in *Stebbins*.[2] The transcript of the hearing held on August 23, 2010 shows that the Board duly considered all of the circumstances of Relator's failure to account for the county funds in his custody, and after due deliberation exercised its authority to remove the treasurer. The Board's

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[2]There is no support anywhere in the record for Relator's bald assertion that the Board had predetermined its action. The transcript of the hearing held on August 23, 2010 belies such an assertion. Jt. Stip. Ex. K.

procedure fully comported with the due process requirements of Ohio Const. Art. II, § 38. Accordingly, "the record unequivocally establishes that [Relator] was fully accorded his rights" and that he "was removed for cause upon complaint and after notice and hearing, and he was not prejudiced by that which he argues is a flaw in the statute." *Stebbins*, 55 Ohio St.2d at 242.

It bears noting that the rights to be vindicated are not personal to Relator, because Ohio law does not create any property right or expectation on behalf of elected officials with respect to their tenure in office. *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 239, 631 N.E.2d 582; *State ex rel. Trago v. Evans* (1957), 166 Ohio St. 269, 274, 2 O.O.2d 109, 141 N.E.2d 665 ("[p]ublic offices are held neither by grant nor contract, and no person has a vested interest or private right of property in them.") Although Relator attempts to distinguish *Stebbins* by contrasting the office at issue therein (a gubernatorial appointment) with the elected office of county treasurer, the facts of this case show that the rights of the electorate have been fully respected and vindicated, just as the power of appointment was upheld in *Stebbins*. Here, the incumbent county treasurer sought to be ousted was duly nominated and stood for election, receiving 54.24% of the votes cast in the general election. (Jt. Stip. Ex. I at I-4). A county treasurer who has lost $2.9 million of taxpayer money cannot complain that the law allows for his removal and for the nomination and election of a successor.

B. The statutory scheme of R.C. 321.37 and 321.38, providing for removal of a county treasurer upon institution of suit followed by deliberation of the county commissioners does not conflict with the Ohio Constitution.

Relator relies almost exclusively on the case of *State ex rel. Hoel v. Brown* (1922), 105

Ohio St. 479, 138 N.E. 230. As mentioned above, both the discussion set out in the *Brown* case and its subsequent citation by this Court in *Stebbins* make it plain that even there this Court was not primarily concerned with abstract parsing of the statutory language, but with the lack of any semblance of due process in fact. However, on its own terms that case examined a very different statutory scheme than the law in effect today and at issue in this action.

The present statutory scheme for removal of a county treasurer for failure to account for public money dates from 1951, when the legislature enacted Revised Statutes §§1126 and 1127. Even a cursory examination of the changes made by the legislature show that the Supreme Court's concerns as expressed in Brown were addressed very specifically:

Prior law, R.S. §2713	Current law, R.C. §§321.37 & 321.38
On examination of the county treasury, if it appears by the report of the examiner or examiners that an embezzlement has been committed by the county treasurer, the county commissioners shall forthwith remove the treasurer from office, and appoint some person to fill the vacancy thereby created. The person so appointed shall give bond, and take the oath of office prescribed for county treasurers.	321.37 If the county treasurer fails to make a settlement or to pay over money as prescribed by law, the county auditor or board of county commissioners shall cause suit to be instituted against such treasurer and his surety or sureties for the amount due, with ten per cent penalty on such amount, which suit shall have precedence over all other civil business. 321.38 Immediately on the institution of the suit mentioned in section 321.37 of the Revised Code, the board of county commissioners may remove such county treasurer and appoint some person to fill the vacancy created. The person so appointed shall give bond and take the oath of office prescribed for treasurers.

The *Brown* Court first found the prior law deficient because there was no provision for a complaint. However, whereas the prior law was triggered by "the report of the examiner or

examiners" (former R.S. § 2713), the present law is triggered by "the institution of the suit mentioned in section 321.37 of the Revised Code" (R.C. § 321.38). Institution of a suit "against such treasurer and his surety or sureties" (R.C. § 321.37) must, of course, be accomplished by the filing of a complaint. Civ.R. 3(A) ("A civil action is commenced by filing a complaint with the court"). Consequently, the present scheme cannot be invoked or utilized except upon complaint, and therefore complies with Ohio Const. Art. II, sec. 38.

Relator herein repeatedly insists that this Court must limit itself to the second part of this scheme, R.C. 321.38, without reference to § 321.37's requirement of instituting suit. Neither this Court's jurisprudence nor the statutory language itself support such an unreasonably restrictive view. To the contrary, the rule is that statutes relating to the same general subject matter must be read in pari materia, and this Court will give them a reasonable construction so as to give proper force and effect to each and all of the statutes. *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 585, 651 N.E.2d 995, 1995-Ohio-156. This is particularly so where the statutes in question expressly refer to each other. See *Beach v. Beach* (2d Dist. 1955), 99 Ohio App. 428, 434, 134 N.E.2d 162. Accordingly, the requirement of institution of a suit found in R.C. 321.37 is part and parcel of the authority granted by R.C. 321.38.

The *Brown* Court next found the prior law deficient because there was no provision for a hearing. However, whereas the prior law directed that "the county commissioners shall forthwith remove the treasurer from office" (former R.S. § 2713), the present law places the matter within the sound discretion by the Board, which by no means precludes notice and a hearing. "In statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that

they receive a construction other than their ordinary usage." *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, syllabus par. 1, 271 N.E.2d 834. Thus, R.C. § 321.38 merely gives the Board of Commissioners authority to remove the treasurer at their discretion once suit has been filed on the treasurer's bond pursuant to R.C. § 321.37, and the exercise of that discretion implies that the board must engage in some form of deliberative process in order to take action under R.C. § 321.38.

The board's proceedings in this regard are quasi-judicial in nature, not legislative and not ministerial. See *State ex rel. Bowman v. Bd. of Comm'rs of Allen County* (1931), 124 Ohio St. 174, 190, 177 N.E. 271; *Lima v. McBride* (1878), 34 Ohio St. 338, 349 ("The proceedings of the board are, in many respects, those of a court of special and inferior jurisdiction."). Consequently, the present scheme permits a hearing, and therefore complies with Ohio Const. Art. II, sec. 38. Accordingly, *Brown* is neither direct authority nor controlling law. *Brown* dealt with an entirely different statute.

It should also be noted that the prior law and the *Brown* decision addressed the question of wrongdoing by the treasurer, specifically embezzlement by the treasurer. Thus, the prior law, R.S. § 2713, was effective "[i]f ... it appears ... that an embezzlement has been committed by the then county treasurer ...." The *Brown* court understandably viewed this as "a condemnation for a crime, followed by a penalty" (*Brown*, 105 Ohio St. at 487). This is also the principal thrust of the constitutional provision, which is addressed to "any misconduct involving moral turpitude or for other cause provided by law" (Ohio Const. Art. II, sec. 38). The present scheme, by contrast, does not require or even contemplate any finding of moral turpitude or embezzlement or any other human failing. It purely and simply addresses the bedrock issue of accounting for money:

if the county treasurer cannot account for county money, he may be removed - the very facts here. The Board does not allege that Relator embezzled any funds or engaged in any act of malfeasance, but that he failed unequivocally and demonstrably to account for the public money with which he was entrusted. This is sufficient under the statute and sufficient under the Ohio Constitution.

II. THE EXTRAORDINARY WRIT OF QUO WARRANTO WILL NOT LIE WHERE RELATOR HAS NOT PROTECTED HIS CLAIMED RIGHTS, AND HAS FAILED TO APPEAL FROM THE ADMINISTRATIVE ACTION OF THE BOARD OF COUNTY COMMISSIONERS ON AUGUST 23, 2010.

Quo warranto will not issue to oust a claimed usurper where the complaining party has a remedy by way of appeal. *State ex rel. Jackson v. Allen*, 65 Ohio St.3d 37, 599 N.E.2d 696, 1992-Ohio-27. In *Jackson*, a defendant sought to challenge the appointment of a special prosecutor by way of a motion to dismiss the indictment, which motion was denied, and then filed his action in quo warranto seeking the same relief. This Court found that the available avenue of an appeal of the dismissal motion precluded issuance of the writ of quo warranto, citing *State ex rel. Hanley v. Roberts* (1985), 17 Ohio St.3d 1, 5, 476 N.E.2d 1019 (allowing extraordinary writ only because administrative appeal was not available).

In the present case, Relator in fact has two independent avenues of appeal by which he can challenge, or could have challenged, the constitutionality of the statutory removal proceedings pursuant to R.C. 321.37 and 321.38. The first avenue is by way of an appeal from an adverse result in his Declaratory Judgment Action that R.C. § 321.37 and .38 are unconstitutional – which is the same position asserted herein. Thus, Relator initially filed his Declaratory Judgment Action on August 17, 2010, in the Court of Common Pleas. That action

sought a declaration that R.C. 321.38 was in conflict with Ohio Const. Art. II, § 38 and therefore void; and sought an injunction preventing the Board from holding any hearing that might lead to his removal. Relator's motion for a preliminary injunction was denied by order issued August 23, 2010, and Relator filed a Notice of Appeal from that order in the Fifth District Court of Appeals on August 27, 2010, Stark App. No. 2010-CA-00244. That appeal was pending even as Relator commenced the instant quo warranto action, and it is pending still although the Court of Appeals has deferred its decision on the merits pending a resolution of Relator's action in this Court. Regardless of the stay in that appeal, Relator has a remedy by way of appeal, and so the writ of quo warranto should be denied, allowing the prior-instituted appeal to proceed.

Relator's second avenue of appeal is by way of administrative appeal from the action of the Board, taken on August 23, 2010, removing him from office. The Board's action, taken after the hearing held on August 23, 2010, was journalized and served on Relator on August 26, 2010. Accordingly, unlike the situation in *State ex rel. Hanley v. Roberts*, supra, in which the administrative action was never journalized, here Relator was presented with a final order of the Board which plainly could have been appealed to the Court of Common Pleas pursuant to R.C. Chap. 2506. See *State ex rel. Fogle v. Village of Carlisle*, 99 Ohio St.3d 46, 788 N.E.2d 1060, 2003-Ohio-2460 (adequate remedy at law where former police sergeant had available civil service appeal).

By either appeal avenue, Relator had available to him regular opportunities to appeal (eventually to this Court) on the same issues of law and fact that are presented by this action in quo warranto. Indeed, Relator is seeking from this Court a ruling on the constitutionality of R.C. 321.37 and 321.38 at the very same time he has invoked the jurisdiction of the Court of Appeals

on the same issue. Accordingly, Relator is not entitled to the extraordinary writ of quo warranto.

Relator has previously asserted that any appeal of the Board's decision pursuant to R.C. Chap. 2506. would have been futile, on the unsupported assumption that such an administrative appeal would have been assigned to the same trial judge who had previously upheld the constitutionality of R.C. 321.37-38. Apart from the implication that the present action is fundamentally an exercise in forum shopping, Relator's proffered excuse is simply insufficient to justify his disregard of proper procedure and failure to avail himself of the proper challenge to the Board's action. Accordingly, Relator cannot now collaterally attack the determination of the Board at a time when that action is final. *State ex rel. Meacham v. Preston* (1932), 126 Ohio St. 1, 183 N.E. 777 (final judgment on the merits in prior suit for injunction was a bar to subsequent action in quo warranto).

Nor is it any answer that Relator intentionally failed to take part in the proceeding before the Board, and therefore declined to avail himself of the opportunity to present evidence and argument to the Board. Although the constitutionality of R.C. 321.37 and 321.38 could not be determined by the Board, the issue of constitutionality could have been raised by Relator on an appeal from the Board's action. See *Mobil Oil Corp v. City of Rocky River* (1974), 38 Ohio St.2d 23, 26, 309 N.E.2d 900 (constitutionality of zoning ordinance, not subject to attack before the BZA, may be challenged in common pleas court on administrative appeal). Accordingly, the finality and preclusive effect of the action of the Board in removing Relator as county treasurer is res judicata.

III. THE PRESENT RESPONDENT ZUMBAR IS THRICE REMOVED FROM THE BOARD'S PROCEEDINGS PURSUANT TO R.C. 321.38, AND THE PRESENT ACTION SHOULD BE DISMISSED FOR MOOTNESS AND LACHES.

Quo warranto is an action against a person, not against an office. R.C. 2733.01(A). It is not timely where the sought-after term of office has expired. *State ex rel. Paluf v. Feneli* (8th Dist. 1995), 100 Ohio App.3d 461, 654 N.E.2d 360. Accordingly, it appears that quo warranto would not lie against a person who no longer claims to hold the subject office.

Although Relator characterizes the present action as a challenge to the actions of the Board pursuant to R.C. 321.38, it is necessarily true that the relief sought would nullify the further actions, taken in good faith, of the county central committee pursuant to R.C. 305.02(B); of the county board of elections; and finally of the electors of Stark County. Thus, regardless of Relator's claims, the county central committees, both Republican and Democrat, were entitled to rely on the presumption of regularity of proceedings before the Board and they did so, with the party of the prior incumbent nominating Kenneth Koher first as the party's selection for interim county treasurer and then as the party's nominee in the upcoming election; and the competing party nominating the present county treasurer, Respondent Zumbar, who was in fact elected on November 2, 2010. At no time did Relator seek to block any of these further proceedings.

Unlike the relator in *State ex rel. Hoel v. Brown*, Relator herein vacated the office of county treasurer and allowed first one, then another, and finally a third successor in office to qualify and take office as county treasurer. Accordingly, the status quo has repeatedly shifted while Relator has sought to stand on ceremony without taking action to preserve his claims. The chain of events that began with the thefts from Relator's office and the certified audit findings

have involved far more than the simple question posed by Relator concerning the Board's authority to act and which Relator never appealed. It is not possible at this late stage to cleanly unravel the situation so as to afford Relator the relief he seeks and, consequently, this action should be dismissed. See *State ex rel. Newell v. Jackson*, 118 Ohio St.3d 138, 886 N.E.2d 846, 2008-Ohio-1965 (laches applicable to quo warranto).

Conclusion

For the foregoing reasons, this Court should deny the writ of quo warranto, and grant Respondent's motion for judgment on the pleadings, and dismiss this proceeding.

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Proof of Service

I hereby certify that a true copy of the foregoing Respondent's Merit Brief was served this 17th day of January, 2011, by regular U.S. mail, on the following persons:

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