

1386.

APPROVAL, BONDS OF THE VILLAGE OF OLMSTED FALLS, CUYA-
HOGA COUNTY, OHIO—\$2,600.00.

COLUMBUS, OHIO, December 17, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

1387.

DISAPPROVAL, BONDS OF PARMA VILLAGE SCHOOL DISTRICT,
CUYAHOGA COUNTY, OHIO—\$47,500.00.

Re: Bonds of Parma village school district, Cuyahoga County, Ohio,
\$47,500.00.

COLUMBUS, OHIO, December 17, 1927.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.

GENTLEMEN:—The transcript pertaining to the above issue of bonds contains a proof of publication of a notice of election to submit the question of issuing said bonds to a vote of the people at the November, 1927, election in the "Parma Citizen" for three consecutive weeks, beginning September 29, 1927.

Section 2293-21, General Code, provides in part:

"Notice of the election shall be published in one or more newspapers of general circulation in the subdivision once a week for four consecutive weeks prior thereto, stating the amount of the proposed bond issue, the purpose for which such bonds are to be issued, the maximum number of years during which such bonds shall run and the estimated average additional tax rate, outside of the fifteen mill limitation, as certified by the county auditor."

Inasmuch as publication of the notice of election was had only three times, it is clear that Section 2293-21 was not complied with, and I am therefore compelled to advise you not to purchase the above issue of bonds.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1388.

ELECTIONS—RECOUNT HAD ONLY ON PROCEEDING UNDER
STATUTES.

SYLLABUS:

In the absence of a proceeding under the statutes to contest an election, there is no authority under the election laws of Ohio to obtain a recount of the ballots.

COLUMBUS, OHIO, December 17, 1927.

HON. A. E. WALTON, *Prosecuting Attorney, Upper Sandusky, Ohio.*

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

"In Pitt Township, Wyandot County, Ohio, all the members of the school board's terms had expired, and it became necessary to elect five members. Three for four years and two for two years. Upon the printed ballot was left space in which to write names of candidates. The electors selected a candidate whose name was not upon the printed ballot and wrote it into the blank space. Some for four years and some for two years, but when the ballots were counted out, the votes for the candidate, whose name was written upon the blank space, some of which were for four years and some for two years, were all counted for the four year term and elected upon the face of the returns, the man whose name was written into the ballot for four years.

What method is there, except a contest of the election, to get a recount of the ballots?"

The matter concerning which you inquire has been the subject of judicial inquiry in this state. In the case of *Scidel vs. Duncan*, 18 N. P. (N. S.) 193, a motion was directed to the court to order ballots to be opened and recounted and all errors in the same, pertaining to the candidates for office of prosecuting attorney of Franklin County, corrected. In the opinion on page 195, the court said:

"The provision for subpoenas for ballots can not have relation to the ballots as is requested by the motion now submitted, for the reason that original Section 5090 and as amended Section 5090-1 contain specific and strict provisions for securely sealing them with official wax impression seals in such manner that they can not be opened without breaking the seals, thus securing the secrecy of the ballot until they may be opened in open court for the correction of any errors in counting.

Provision against their ever being opened is 'iron clad' even before they are burned.

So, in case of a contest, this amendatory law provides that the ballots shall be opened only in open court, and in the presence of the officers having the custody thereof.

It seems clear that it can not be contemplated that the ballots may be used as original evidence in the taking of testimony before the justices. It is also clear that it was not intended to have the ballots opened by the court before any testimony is taken, and before trial, and that the court itself, or by persons designated can not make an entire recount for the avowed purpose of discovering any errors and having them corrected. If such had been the purpose, definite provision would have been made."

And again on page 196:

"The amendment, Section 5090-1, contemplates that the court may open the ballots and correct all errors therein when *trying such contest*, while Section 5152 contemplates a trial at which time oral testimony may be offered, and depositions taken as provided in civil actions. This provision for the taking of depositions, as in civil actions, is in addition to the statutory method of taking them before justices of the peace. It also contemplates that corrections may be made by testimony offered at the preliminary proceeding before the justices.

An election contest can not be converted into a recount. This court has no power to order the ballots opened up for an entire recount.

The general grounds for contest stated in the notice, and the requests

by counsel made in court and the motion submitted, unequivocally call for an entire recount. There is no provision whatever to authorize any persons whatever to go over and examine the entire vote cast for the office of prosecuting attorney in order to discover evidence of errors.

The court would be making law violative of the secrecy of ballots which has not been made by the appropriate legislative body.

The proposition made by the motion that the court determine a time and place and a judicious and expeditious plan for opening and correcting errors, and the oral suggestion that an agreement be made to select five persons on each side to examine the ballots, is a matter which might appropriately be presented to the legislature, but not to the court under existing law, because it is *coram non judice*.

The contestor must proceed in the way pointed out by statute. After depositions are taken before the justices, and when the case comes on for trial, if the court finds from such evidence, or from oral testimony taken at trial, that there are any errors in counting the ballots in any precinct or precincts, or if it is of the opinion that there probably are errors, then it may have power to open the particular ballots in a precinct or precincts, and correct all errors therein found."

In the case of *State, ex rel. vs. Graves*, 91 O. S. 113, which was an action in mandamus seeking to compel the secretary of state to recount or direct a recount of the ballots counted at an election and preserved under the provisions of Section 5090-1, General Code, the court, in denying the writ, said on page 118:

"The legislature has defined clearly the purpose for which the ballots are preserved. They can be recounted in cases of contested elections only. It is to be observed that the ballots are to be opened and errors in counting corrected by the court or body trying the contest, and they are to be opened only in open court or in open session of such body. No reference is made in this section to the secretary of state. The deputy state supervisors are made the custodians of the ballots, but with no authority whatever to open or recount them.

So there can be no doubt as to when or by whom or where a recount of the ballots can be had. There must be a contest before there is the right in any one to demand a recount. The recount must be made by the court or by the body trying the contest and in open court or before the body in open session."

In view of the foregoing and specifically answering your question it is my opinion that there is no method to obtain a recount of the ballots except under proper proceedings in contest of the election.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1389.

COUNTY COMMISSIONERS—MAY SELL COUNTY JAIL AND SHERIFF'S RESIDENCE AND USE PROCEEDS TO CONSTRUCT NEW COUNTY JAIL WITHOUT SUBMITTING QUESTION TO VOTERS.

SYLLABUS:

Under the provisions of Sections 2447 and 2447-1, General Code, the Board of County Commissioners of a county may sell a county jail and sheriff's residence