"It is a rule of construction laid down by all text-writers upon the subject of counting votes that the primary step is to determine if possible the intention of the voter, and where that can be done no vote should be thrown out. * * * The courts, therefore, have construed all those Australian ballot laws in a liberal manner. * * * In obedience to this rule of construction, if from an inspection, and from the evidence it is possible to determine the intention of the voter, you must do so."

Upon a careful consideration of the foregoing authorities and especially the provisions of Section 5070, supra, it is my opinion that the ballot marked as indicated in your letter, should be counted as a straight Republican ticket including the one candidate for county commissioner on the Republican ticket, G. T. M., there being but one nominated on the Republican ticket, and in addition thereto, the candidate on the Democratic ticket, N. E. G., before whose name the voter made the proper cross mark. The voter had the right to vote for two county commissioners but his own party ticket had but one nominee thereon. Since he had the right to vote for two candidates for county commissioner and there being but one nominee on his own party ticket, he evidenced a clear intention to vote for the one Democratic candidate before whom he placed a proper cross mark.

In specific answer to your question you are therefore advised that the ballot as marked should be counted for the Republican candidate for county commissioner and the Democratic candidate for county commissioner before whose name the cross mark was placed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2960.

BOND ISSUE—SPECIAL ELECTION—NO AUTHORITY FOR SUBMISSION TO VOTERS TO REPLACE SCHOOL BUILDING CONDEMNED BY DEPARTMENT OF INDUSTRIAL RELATIONS WHEN CONDITION OF BUILDING COULD HAVE BEEN ANTICIPATED—CONSENT OF TAX COMMISSION IMMATERIAL.

SYLLABUS:

Where a school building has been condemned by the Department of Industrial Relations, and the use of same for school purposes is prohibited, the condition of such building having resulted from natural processes of its general use and decay, which condition could have readily been foreseen, the question of issuing bonds to repair or rebuild the same may not be submitted at a special election, notwithstanding the Tax Commission may consent thereto.

COLUMBUS, OHIO, December 1, 1928.

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

GENTLEMEN:—Your recent communication reads:

"We respectfully request you to furnish this department with your written opinion upon the following:

Under Section 2293-22, General Code, whenever it is necessary to rebuild or repair public property, wholly or partly destroyed by fire or other casualty, or to build a new similar property in lieu of repairing or rebuilding such property, with the consent of the Tax Commission of Ohio the question of issuing bonds may be submitted to popular vote at a primary election or at a special election called for that purpose.

Question: Where a school building has been condemned by the State Department, and the use of same prohibited for school purposes, may the question of issuing bonds to repair or replace such building be submitted at a special election by consent of the Tax Commission?"

In the correspondence of the city solicitor directed to you which you enclose, it appears that the building you have in mind has been condemned for school purposes by the State. The letter does not indicate what department has so condemned it, but it appears that notwithstanding its condition it has been used for school purposes in its present condition for a number of years, and it is feared that the Department of Industrial Relations may issue an order prohibiting its use.

As mentioned in your letter, Section 2293-22, General Code, is a part of the so-called Uniform Bond Act, as enacted by the 87th General Assembly of Ohio (112 O. L. 364). In a number of opinions heretofore rendered by me it has been pointed out that said Uniform Bond Act undertook generally to provide the methods whereby bonds may be issued by any political subdivision of the State; and if bonds may be issued in this instance, it must be in accordance with the terms set forth in said act. Section 2293-2, General Code, in part provides:

"The taxing authority of any subdivision shall have power to issue the bonds of such subdivision for the purpose of acquiring or constructing, any permanent improvement which such subdivision is authorized to acquire or construct. * * *"

The power of a board of education to repair or construct a school building, which constitutes a permanent improvement is so well known as to make it unnecessary to mention the specific statutes relating thereto.

Section 2293-22, General Code, to which you refer, and pertinent to consider herein, provides:

"The question of issuing bonds shall always be submitted to popular vote at a November election, except that, whenever it is necessary to rebuild or repair public property, wholly or partially destroyed by fire or other casualty or to build a new similar property in lieu of repairing or rebuilding such property, with the consent of the tax commission of Ohio the question of issuing such bonds may be submitted to popular vote at a primary election or at a special election called for that purpose. The tax commission shall consent to such submission only if they find that the submission of such question at a primary or special election is absolutely necessary to meet the requirements of the people of said subdivision."

By virtue of the provisions of the section last quoted, the question of issuing bond when submitted to the electors for approval must be submitted at the November election unless the purpose comes within the exception mentioned in said section. In construing this section it will be noted that Section 7630-1, General Code, which heretofore authorized boards of education to issue bonds to repair or rebuild

school buildings which had been condemned by the Department of Industrial Relations, was expressly repealed by the said Uniform Bond Act. It will be further noted that this section authorized the issuance of bonds when a building was destroyed by "fire or other casualty" and then expressly authorized the issuance of such bonds when the building was condemned by the Department of Industrial Relations, which indicates that the Legislature did not consider the latter situation included within the phrase "other casualty."

In analyzing the provisions of Section 2293-22, General Code, it is clear that it was the intention of the Legislature to permit a *special election* to be held upon the question of isuing bonds *only* in those cases where it was necessary to rebuild or repair public property wholly or partially destroyed by fire or other casualty. In the use of the word "casualty" it is not believed the Legislature intended to include within its terms a building that has come into a state of decay by reason of the ordinary depreciation that comes about because of general and ordinary use and the effect of the elements thereon.

The following is quoted from Words & Phrases:

> "'Casualty' means accident; that which comes by chance, or without design, or without being a foreseen contingency; and where the client was prevented by the dishonesty of his attorney for hearing and defending an action, so that judgment was rendered against him by default, it was such a casualty as entitled him to have the judgment set aside. *"Anthony* vs. *Karbach,* 90 N. W. 243."
>
> "'Casualty,' as used in a lease providing that rent shall cease if the premises become untenantable by fire or through casualty, means some fortuitous interruption of the use, and does not include an interruption of possession which takes place in pursuance of established law, as where a portion of the premises are torn down for the purpose of widening a street. *Mills* vs. *Baehr's* (N. Y.) 24 Wend. 254."

While there are other decisions which give the term a broader meaning than that given in the cases heretofore mentioned, it is believed that the weight of authority supports the holdings in the cases above cited. In other words, it seems clear that the condition of a building which comes about by ordinary wear and decay, which condition can be readily foreseen cannot be said to be a "casualty" within the meaning of said section.

It is believed the decisions upon the question of what constitutes an "emergency" under statutes authorizing public improvements in cases of emergency apply by analogy, and support my conclusions herein. See *State ex rel.* vs. *Zangerle,* 95 O. S., 1.

You are therefore specifically advised that where a school building has been condemned by the Department of Industrial Relations, and the use of same for school purposes, is prohibited, the condition of such building having resulted from natural processes of its general use and decay, which condition could have readily been foreseen, the question of issuing bonds to repair or rebuild the same may not be submitted at a *special* election, notwithstanding the Tax Commission may consent thereto.

Respectfully,
EDWARD C. TURNER,
Attorney General.