ship, Greene County, Ohio, from Sarah C. B. Scarborough, which premises were minutely described in my Opinion No. 1202, rendered to you under date of November 16, 1929.

You have now supplemented the abstract by providing a certificate from the treasurer of Greene County as to the amount of taxes and assessments due. This shows that the only liens on said real estate are the taxes due in December, 1929, amounting to $33.97, the taxes due in June, 1930, amounting to $33.97; seven more payments on the road tax of $5.20 each, amounting to $36.40, and the mortgage referred to in my opinion No. 1202, in the sum of $2500.00, plus accrued interest.

I am now of the opinion that said abstract shows a good and merchantable title to said premises to be in the name of Sarah C. B. Scarborough and that the deed submitted when delivered, is sufficient to convey said premises to the State of Ohio.

I am returning herewith the certificate of the treasurer of Greene County and the supplemental certificate of the abstracters.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1228.

ELECTION—ERROR IN TALLYING OF VOTES ADMITTED BY PRECINCT OFFICIALS—REASSEMBLING FOR PROPER COUNT SANCTIONED.

SYLLABUS:

Where election officials in a precinct admit that an error was made in tallying the votes for a condidate for municipal council, thus failing to substantially comply with the laws relating to the counting and tallying of ballots, and such non-compliance is prejudicial to the substantial rights of parties or the public interest therein, the judges and clerks in such precinct should be re-assembled and a proper count of the vote cast be made as is required by Section 5088, General Code.

COLUMBUS, OHIO, November 26, 1929.

HON. MARION F. GRAVEN, *Prosecuting Attorney, Wooster, Ohio.*

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

> "At the last election in Wooster two parties, Mr. Garver and Mr. Glasgow, were the candidates for Councilman from the first ward.
>
> "The clerks in tallying the votes forgot to include in their final totals thirty-one straight democratic votes and eighteen republican votes. It was done in this way, the straight ticket votes were counted and then the mixed tickets. By an oversight the straight tickets were not included in the final count. Mr. Garver apparently had the highest number of votes according to the tally sheets, but there was a discrepancy between the votes cast for other things and the vote for Councilman of approximately forty-nine votes. Both clerks, Republican and Democratic, stated before the Board of Elections that an error was made. The one clerk remembered the number of votes, while the other clerk did not, but both agreed that the

straight votes were not counted. Under the circumstances it is hard to determine the proper procedure, but the opinion of the Attorney General in the year 1926, page 347 of the Attorney General's Opinions and number 3588 held that the Board of Deputy State Supervisors and Inspectors of the elections may re-assemble Judges and Clerks to make a proper count of the votes cast.

"The question is whether the Board of Deputy State Supervisors can re-assemble the Judges and Clerks and order a proper count under the facts or whether under Section 4237 G. C. which provides that the Council shall be the judge of the election and the qualification of its members precludes the Board of Deputy State Supervisors from going into the matter.

"The tally books did not have printed in them the names of the candidates for Council. These had to be written in by the Clerk. It was this omission that caused the mistake.

"It is the desire of the officials here to treat both contestants in this case fairly, and if a mistake has been made, to rectify it. For that reason I would appreciate it very much if you would send me an opinion at your earliest possible convenience."

The sections of the elections law pertinent to your inquiry are as follows:

Sec. 5081. Immediately upon the close of the polls, the number of electors entered and shown on the poll books as having voted, shall be first certified therein and signed by the board of judges and clerks. Before any other or further proceedings, the president or chairman of the board shall make proclamation in a loud voice outside of the polling room, stating the number of votes so shown and certified on the poll books. Thereupon the judges, in the presence of the clerks and inspectors above provided for, shall destroy the ballots remaining unvoted.

Sec. 5082. The ballot box shall then without adjournment or delay be opened, and, without opening any ballot or ascertaining its contents, the number of ballots shall first be counted. If the number of ballots exceeds the number of names on the poll books, the ballots shall be replaced in the box and one of the judges, with his back to the box and without seeing it, shall draw out, without showing them, and destroy a number of ballots equal to the excess. If, during the counting of ballots or at the conclusion of the counting, an excess of ballots is discovered, all the ballots shall be returned to the box, and after being thoroughly mingled, the excess shall, in the same manner, be drawn out and destroyed, and the count corrected accordingly. When ballots have thus been drawn out and destroyed, a minute of the number destroyed and the reason therefor shall be made on the tally sheet. The count shall then commence and proceed without interruption or delay, and in no case shall cease until it is completed, proclaimed and the final result credited as herein required.

Sec. 5083. One of the ballots shall then be taken out of the ballot box by one of the judges and shall forthwith be inspected by all the judges and inspectors. If the judges all agree as to how the ballot shall be counted, one of them shall then place it where it can readily be seen by the other judges and by the inspectors, and shall read aloud distinctly the names of the candidates voted for and the answers to any questions that may have been submitted, and the clerks shall forthwith tally the same. In the event that the judges do not agree as to how any part of the ballot shall

be counted, such ballot shall not be counted, but shall be placed in an envelope provided for the purpose. The same method shall be observed in respect to all the ballots until all the ballots shall have been taken from the ballot boxes.

Sec. 5088. The clrek shall enter in separate columns by tallies under or opposite the names of the persons voted for, and the answers to the questions that may have been submitted as provided in the form of tally sheets, ail votes thus read by the judges. After the examination of the ballots has been completed, the number of votes for each person and for the respective answers to each question submitted, shall be enumerated under the inspection of the judges and set down, as provided in the form of the tally sheets.

It is apparent from the facts you present that an error occurred which changed the result of the election for councilman in the first ward of Wooster.

It should be observed that the best of men and women who act as election officials, working under pressure, with perhaps poor light and under great strain, and with haste, are very apt to make mistakes, however carefully they endeavor to guard against errors.

Here we have the frank admission of both the Democratic and Republican clerk that an error was made. Both agree that straight Democratic and straight Republican votes were not included in the final count. One remembers all those straight votes; the other does not. In other words, the clerks did not properly perform their duties and the tally sheets do not show the correct vote.

In a ruling found in the Opinions of the Attorney General for 1926, page 347, it was held:

"In cases in which the tally sheets show that the laws relating to the counting and tallying of ballots have not been substantially complied with, and such non-compliance is prejudicial to the substantial rights of parties or the public interest therein, the judges and clerks should be re-assembled and a proper count of the vote cast be made as is required by Sections 4933 G. C., et seq."

Although the tally sheets in the case before me do not show that 'the laws relating to the counting and tallying of ballots have not been substantially complied with", we have the admission of both officials that an error was made in the count.

This admission would justify the Board of Deputy State Supervisors in re-assembling the judges and clerks to make a proper count of the vote cast as provided in Section 5088, General Code, if such action is not in conflict with other laws.

I am not unmindful of the decision in the case of *State ex rel, Meck* vs. *Board of Elections,* 111 O. S. 203, which would appear, upon casual examination, to negative the rights of any one to recount ballots except in open court. The syllabus reads:

"No duty is enjoined by Section 4984, General Code, upon the county board of deputy state supervisors of elections to recount the undisputed ballots cast in the several precincts of the county upon the demand of any candidate.

No provision is made by statute for any recount of undisputed ballots otherwise than in an election contest."

The petition in the Meck case contained no allegations of mistake, while in the question before me it is admitted by all concerned in the counting of the vote—by clerks of opposite political parties—that a mistake was made. The main portion of the opinion in the Meck case was devoted to a discussion which excluded the board of deputy state supervisors of elections from making a re-count, it being pointed out that it would be "a colossal task" and a duplication of the work.

But here we have the question of re-assembling the precinct officials for the purpose of making a correct count and I believe the Meck case would not interfere with this right.

Surely it could not be said that if the judges and clerks in a precinct refuse to tally and count the vote and refuse to certify the number of votes cast in the precinct, and adjourn, they could not be compelled to properly perform the duties enjoined upon them. If they may be compelled to perform the duties which they have refused to perform, they certainly may be compelled to properly perform duties which they have improperly performed.

You inquire whether Section 4237, General Code, precludes the Board of Deputy State Supervisors from going into the matter. That portion of said section which is germane reads:

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

In *State ex rel, Holbrock* vs. *Egry,* 79 O. S. 401, it was stated in the opinion:

> "The weight of authority is to the effect that a constitutional provision that each house shall be the judge of the election and qualification of its members confers upon it exclusive jurisdiction, but that a statutory provision that a city council shall be the judge of the election and qualification of its members does not, unless it is expressly so provided, make council the exclusive judge."

Our statutes do not expressly make council the exclusive judge of the election and qualification of its members.

In any event, a candidate for council would not become a member of council until the Board of Deputy State Supervisors had declared him elected.

I assume from your inquiry that issuance of a certificate of election for member of council is being withheld by the Board of Deputy State Supervisors of Elections until an opinion is rendered on this subject.

Specifically answering your question, I am of the opinion that where election officials in a precinct admit that an error was made in tallying the votes for a candidate for municipal council, thus failing to substantially comply with the laws relating to the counting and tallying of ballots, and such noncompliance is prejudicial to the substantial rights of parties or the public interest thereon, the judges and clerks in such precinct should be re-assembled and a proper count of the vote cast be made as is required by Section 5088, General Code.

Respectfully,
GILBERT BETTMAN,
Attorney General.