

2548.

ELECTION BALLOTS—QUESTION OF ISSUING BONDS BY A SUBDIVISION SUBMITTED TO VOTERS—PERCENTAGE NECESSARY TO CARRY MEASURE—BLANK AND MUTILATED BALLOTS NOT TO BE CONSIDERED.

*SYLLABUS:*

*When the question of issuing bonds by a subdivision pursuant to Section 2293-23, General Code, is submitted to the electors at a general election, in ascertaining whether fifty-five per cent of the voters voting at such election upon the question of issuing the bonds have voted in favor thereof, as required by said Section 2293-23, blank ballots and mutilated ballots are not to be considered.*

COLUMBUS, OHIO, November 19, 1930.

HON. FRANK F. COPE, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—This will acknowledge the receipt of your request for my opinion on the following question:

“At the general election held November 4, Harrison Township of this county voted on a bond issue to build a high school building. There were 251 ballots cast; 136 were cast in favor of the bond issue; 106 against the bond issue; 7 were not marked and 2 were so mutilated or marked so that the intention could not be arrived at. Would the bond issue carry or fail?

If we take the total amount of ballots cast, 251, it would take 138 votes to carry the bond issue. If we leave out the 7 not marked and the 2 mutilated, and take 242 as a basis of computation, the bond issue carried.

Section 2993-23 of the General Code provides, “If 55 per cent of those voting upon a proposition vote in favor thereof, etc.” This we believe requires an interpretation of this section of the law.

If the total number of votes are considered as a basis or the number of votes cast upon that particular proposition.

It is very important that we may have as speedy a reply as may be convenient to your office.”

As you suggest in your communication, your question involves an interpretation of part of Section 2293-23, General Code, a section of the Uniform Bond Act. Although your letter cites Section 2993-23, as being applicable, the language which you quote is contained in Section 2293-23, General Code. I presume that the erroneous citation is a typographical error. Said Section 2293-23, General Code, provides so far as pertinent, as follows:

“\* \* \* If fifty-five per cent of those voting upon the proposition vote in favor thereof, the taxing authority of such subdivision shall have authority to proceed under Sections 2293-25 to 2293-29, inclusive, with the issue of such bonds and the levy of a tax outside of the fifteen mill limitation, sufficient in amount to pay the interest on and retire such bonds at maturity.”

It may be observed from the foregoing statute that the legislature used the words “if fifty-five per cent of those voting upon the proposition vote in favor thereof,” instead of “if fifty-five per cent of the votes cast at such election” or similar language.

In the case of *Wellsville vs. Connor*, 91 O. S. 28, the court had before it an

analogous situation to that which you present. The facts showed that a proposition of issuing bonds was submitted to the voters of a municipality and that several blank or unintelligible ballots were cast. The issue involved in the case was almost identically like that which confronts us here, viz.—Are blank ballots or unintelligible ballots to be counted in ascertaining whether the required percentage voted for the issue of bonds? The court was called upon to interpret Section 3947, General Code, which has since been repealed by the legislature. The language of said repealed Section 3947, which was particularly considered by the court, was as follows:

“If two-thirds of the voters voting at such election upon the question of issuing the bonds vote in favor thereof, the bonds shall be issued.”

The court held that the blank ballots or unintelligible ballots should not be counted. The law of the case is set forth in the syllabus as follows:

1. “Where the question of issuing bonds by a municipality pursuant to Section 3939, et seq., General Code, is submitted to the electors at a special or general election, in ascertaining whether two-thirds of the voters voting at such election upon the question of issuing the bonds have voted in favor thereof, as required by Section 3947, blank ballots or unintelligible ballots are not to be considered.

2. Where a voter at an election duly held does not by his ballot express his choice for an office to be filled, or on a question submitted to the electors, his ballot should not be counted for such office or on the question. But if it is required by law that a majority or any certain proportion of the votes cast at the election should be in favor of a proposition in order that it should carry, then all the votes cast at the election, including blank and unintelligible ballots, must be considered.”

It might be well to quote the gist of the court's opinion which appears on page 33, as follows:

“Section 5070, General Code, provides rules which the elector shall observe in marking his ballot. Subdivision 7 of that section provides: ‘If the elector marks more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for such office.’

By analogy, if it is impossible to determine the answer of an elector to a question submitted at the election, his ballot should not be counted upon that question. A ballot is merely the instrument by which a voter expresses his choice between candidates or on a question, and where the voter expresses no choice he has not voted for either candidate nor on the question. If upon any proposition the law requires that there shall be a majority of the votes cast at the election in order that the proposition should carry, it would be necessary to reckon with his vote. But if it is necessary to have a majority of those voting at such an election upon the question, his vote would not be reckoned with, for he did not vote upon the question.”

It is to be noted that the court quoted subdivision 7 of Section 5070, General Code, which is now repealed, but an exactly similar provision now appears in Section 4785-131, subdivision 7, General Code.

It therefore is apparent that the holding of the court, as disclosed by the first paragraph of the syllabus, is decisive of your question, since the repealed Section 3947, General Code, read practically the same as the part of Section 2293-23, General Code, here under consideration.

I am therefore of the opinion, in specific answer to your question, that when the question of issuing bonds by a subdivision pursuant to Section 2293-23, General Code, is submitted to the electors at a general election, in ascertaining whether fifty-five per cent of the voters voting at such election upon the question of issuing the bonds have voted in favor thereof, as required by said Section 2293-23, blank ballots and mutilated ballots are not to be considered. I am further of the opinion that under the facts disclosed by you, the bond issue carried.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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2549.

APPROVAL, CONTRACTS FOR ROAD IMPROVEMENTS IN FRANKLIN  
AND CLARK COUNTIES.

COLUMBUS, OHIO, November 19, 1930.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

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2550.

APPROVAL, BONDS OF NEWARK CITY SCHOOL DISTRICT, LICKING  
COUNTY, OHIO—\$20,000.00.

COLUMBUS, OHIO, November 19, 1930

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

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2551.

APPROVAL, BONDS OF VILLAGE OF LISBON, COLUMBIANA COUNTY,  
OHIO—\$57,000.00.

COLUMBUS, OHIO, November 19, 1930.

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