

as for the purpose of ascertaining the sum of the claims and demands due to or to become due to the company on account of that business. * * *

The opinion then concluded as follows:

"Admitting, then, the seeming injustice of the application of the rule to the case at hand, but being unable to find statutory or other ground for assigning to the business of the Columbus branch of the H. J. Heinz Company, any part of the indebtedness of the home office of the company for the purpose of deducting such part from the total sum of the claims and demands due to the Columbus office and arising out of the business conducted by it, I am of the opinion that the only debts of the company which may be deducted from such claims and demands, for the purpose of arriving at its credits taxable in Franklin County, Ohio, are the debts which have been incurred in the course of the business conducted at Columbus, considered as a separate undertaking; that is, such debts as have been incurred by the Columbus office in or by the corporation itself for and on behalf of the Columbus office in such a way as that the relation between a particular indebtedness and the business of the Columbus office can be definitely shown and ascertained. Inasmuch as the company does not claim the existence of any indebtedness of this class, but asserts merely the right to deduct either all debts of the company owing to persons residents in Ohio or a proportionate part of the debts of the company assigned to the Columbus office on the basis suggested by the sales of the Columbus office, as compared with the sales of all the other branch offices of the company, I am of the opinion that both of these claims of right, should be denied, and that the company should be limited to the deduction of such indebtedness as has been created by or in behalf of the Columbus agency and that only."

In an opinion to the Tax Commission of Ohio, No. 2254, rendered June 19, 1928, I held as stated in the syllabus that:

"A foreign corporation, in listing its 'credits' liable to taxation in Ohio, may under the provisions of Section 5327, General Code, deduct from its claims and demands that arise out of the business it transacts in this state, only such bona fide debts as arise from the same source."

Inasmuch as the accounts payable in this instance grew out of the business of the local plant, they are properly deductible from the accounts receivable growing out of the local business, although they are paid from the Providence office.

Specifically answering your question, I am therefore of the opinion that a foreign corporation which does business in Ohio is entitled to deduct from its outstanding credits arising from its Ohio business, all of its bona fide debts which arise from the same source.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2615.

BALLOT—DISPUTED BALLOTS—UNCOUNTED AND RETURNED TO BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS—DUTY OF BOARD TO COUNTY, DISCUSSED.

SYLLABUS

Under the provisions of Section 5090, General Code, it is the duty of the board of deputy state supervisors of election to count the ballots placed in envelopes for uncounted

ballots by the judges and returned to the board of deputy state supervisors with the returns of the election.

COLUMBUS, OHIO, September 24, 1928.

HON. D. H. PEOPLES, *Prosecuting Attorney, Pomeroy, Ohio.*

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

“Please render me an opinion upon the following facts.

At the August primary election, 1928, twenty six (26) absent voters ballots were received by the local board of elections of Middleport 2nd Ward. The same were challenged upon the grounds, the voters were not legal residents of said Middleport 2nd Ward, and were not entitled to vote in said ward. The local election board, without opening said ballots, enclosed them in an envelope, marked them ‘disputed ballots’ and transmitted them to the Deputy State Supervisors of Elections, with the return from said ward.

The deputy supervisors have not opened said ballots. What are their duties as to said ballots, and what proceedings should they take as to the canvassing of the same?

Some of the members of the board of deputy state supervisors of elections personally know that some of the persons casting said ballots, are not residents of said second ward, but are residents of other places and other states, and have no right to vote in said second ward. Shall they open the envelope containing the ballots, canvass, count and tally the votes therein contained?”

Section 5078-1, General Code, provides for the issuance of an absent voter’s ballot upon proper application and is as follows:

“It shall be lawful for any qualified elector who finds that he will be unavoidably absent from his home precinct on the day of any general, special or primary election to apply to the clerk of the board of deputy state supervisors of elections of his home county in writing or in person not earlier than thirty days and not later than three days prior to election day, stating the fact of his unavoidable absence from his precinct on election day and making application in writing for an absent voter’s ballot.

After such clerk shall have satisfied himself that the applicant is a duly qualified voter in such precinct and is the person representing the name in which such application is made and that in precincts where registration is required the applicant has complied with the law in regard to registration, he shall deliver to such voter or send him by registered mail, as the case may be, one of the absent voter’s ballot provided for such election, together with an identification envelope and a return envelope such as are hereinafter described, to be used by said voter as hereinafter directed.

All supplies necessary for absent voting shall be furnished by the proper election officers without cost to the voter, and no election or other official of the state of Ohio shall make any charge for services rendered to voters under the provisions of this act, but each voter shall be required to pay the cost of mailing and registering the envelope containing his ballot after the same has been sealed. Where there are two or more ballots to be voted at such election in the absent voter’s home precinct he shall be supplied with one of each such ballots.”

Section 5078-4, General Code, requires the clerk of the board of deputy state supervisors of elections to notify the presiding judge of the precinct of which the absent voter claims to be an elector, of the fact that such voter has obtained an absent voter's ballot, which notification is to be made before election day. Should such absent voter unexpectedly return to his home precinct on election day, he should not be permitted to vote at said precinct until he surrenders to the judge of elections the absent voter's ballot previously furnished to him.

Section 5078-5, General Code, provides as follows:

"Ballots cast by absent voters under the provisions of this act shall be received and counted by the several boards of deputy state supervisors of elections, as follows: In all precincts of the state outside of registration cities all envelopes containing such votes deposited with the board or received by mail before the delivery by such board of the election supplies to the several presiding judges of elections as provided in Section 5038 of the General Code shall be opened by such board of deputy state supervisors of elections and the identification envelopes containing the ballots shall be distributed and delivered to the presiding judge of the home precinct of each absent voter along with the other election supplies specified in such Section 5058. Such presiding judge shall preserve the same and as soon as the polls are opened on the morning of election day he shall proceed to deposit the absent voter's ballots in the following manner. He shall take up one absent voter's identification envelope in the presence of all the judges and after announcing in an audible voice the name of such absent voter he shall tear open such envelope without defacing the affidavit or certificate printed thereon or mutilating the enclosed ballot or ballots, and, without unfolding, deposit the same in the proper ballot box. The identification envelope shall be preserved and returned to the board of deputy state supervisors of elections at the close of the polls with the registration lists and tally sheets. This process shall be repeated with each absent voter's ballot until all such ballots have been deposited in the box.

In all such precincts all envelopes containing absent voter's ballots deposited with or received by any board of deputy state supervisors of elections after the delivery by such board of the election supplies to the several presiding judges as described above and before the hour for closing the polls on election day shall be opened by the board in its office before such close of the polls and tabulated according to the home precinct of the voters whose votes have been so deposited or received, each voter's ballot being accredited to his proper precinct and counted with the votes therein cast, the total vote thus arrived at in each precinct shall be the vote of that precinct for that election. Absent voter's ballots so counted by the board of deputy state supervisors of elections shall be preserved with the other ballots cast in the proper precincts for such time as ballots are required to be preserved by law. In all precincts of the state where registration is required by law all envelopes containing absent voter's ballots deposited with the board of deputy state supervisors of elections or received by mail before the delivery by such board of the election supplies to the several presiding judges of elections as provided in Section 5039 of the General Code shall be opened by said board of deputy state supervisors of elections and the identification envelopes containing the ballots shall be distributed and delivered to the presiding judges of the home precinct of each voter along with the other election supplies specified in such Section 5039. Such presiding judges shall care for and deposit all such absent voter's ballots in the same manner

as such ballots are cared for and deposited in precincts where there is no registration. In all such precincts if any such envelopes containing absent voter's ballots are received by the board of deputy state supervisors of elections before the hour for the close of the polls on election day but too late to be distributed to the proper precincts the same shall be opened by the board of deputy state supervisors of elections and the ballots therein counted, accredited and prescribed as is done with ballots received after the distribution of supplies in precincts where no registration is required."

Section 5039, General Code, referred to in the above section, pertains to the delivery of ballots in registration cities and therefore is not applicable to your inquiry.

Section 5090, General Code, providing for the preservation of and counting of disputed ballots, is as follows:

"If there are any ballots placed in the envelopes for uncounted ballots, such envelopes shall be sealed and returned to the deputy state supervisors with the returns of the election, to be by them counted. At least one day before the beginning of the official count, the board of deputy state supervisors, in the presence of one person duly authorized by the chairman of each county controlling committee and the chairman of the committee of each set of candidates nominated by petition, shall open the envelopes containing the uncounted ballots and determine what part and for whom each such ballot shall be counted, and proceed to count and tally the same. Said ballots shall be further preserved for such judicial or other investigation as may be necessary."

In the case of *State ex rel. vs. Tansey et al.*, 49 O. S. 656, the Supreme Court of Ohio held that the board of deputy state supervisors of elections was without power to do more than to receive and file the uncounted ballots "for such judicial or other investigation as may be necessary" in order that they might be used as evidence in the event of a contest, or other investigation before a tribunal or body having jurisdiction to inquire into the regularity and validity of the election. This decision was rendered in 1892 upon the statute as it then existed. It did not give authority to the board of deputy state supervisors of elections to count the uncounted ballots.

The statute was amended in 1911 by the 79th General Assembly as it appears in 102 Ohio Laws, page 186. The pertinent part of the amendment as it is found in Section 5090, General Code, being:

"But if there are any ballots placed in the envelopes for uncounted ballots, such envelopes shall be sealed and returned to the deputy state supervisors with the returns of the election, *to be by them counted.*"

A somewhat similar question was before this Department heretofore. In an opinion found in Opinions of the Attorney General for 1922, page 906, the question of the right to challenge an absent voter's ballot was under consideration. It was there said:

"It is to be assumed that if there were special means provided by law to cover the challenge of the so-called absent voter's ballots that there would be no difficulty in handling any practical question arising in this or any other election. You are advised that there is no specific provision for the challenge of absent voter's ballots. The requirements to be met by the elector who desires to vote under the absent voter's law are well known, and must be met in every particular before the ballot can be finally received, placed

in the ballot box and counted. If any question should arise as to illegality on the face of the proceeding attendant upon the voting of an absent voter's ballot, and it should be determined by the election officials that the lot offered is not a bona fide absent voter's ballot either by reason of the fact that the elector is not in the first place qualified to cast such a ballot or the legal requirements have not been met in the preparation of the ballot, then there is no question whatsoever that the same safeguards placed around the voting of an ordinary ballot should be employed to prevent any fraudulent voting in the case of the so-called absent voter's ballot. In other words, a ballot offered as an 'absent voter's ballot' by one found not to be entitled to vote in the particular precinct by reason of non-residence or otherwise, should be refused.

Election officials should be impressed with the fact that great care should be exercised with such refused ballot to the end that in any subsequent judicial investigation no injustice could possibly result from the refusal of the ballot by the election officials.

The provisions of Section 5090 of the General Code should be strictly adhered to in the care of any disputed so-called absent voter's ballots.

The identification envelopes of so-called absent voter's ballots which are found by the election officials to be fraudulent should not under any circumstances be opened."

On this subject it may be pertinent to observe that Section 5078-1, General Code, makes it the duty of the clerk when an application for an absent voter's ballot is made, to satisfy himself that the applicant is duly entitled to receive such ballot and vote in the precinct in question. Its provision in this respect is:

"After such clerk shall have satisfied himself that the applicant is a duly qualified voter in such precinct and is the person representing the name in which such application is made and that in precincts where registration is required the applicant has complied with the law in regard to registration, he shall deliver to such voter or send him by registered mail, as the case may be, one of the absent voter's ballot provided for such election, together with an identification envelope and a return envelope such as are herein-after described, to be used by said voter as hereinafter directed."

This section imposes the duty upon the clerk to satisfy himself that the applicant for an absent voters ballot is qualified to vote. Attention should also be directed to Section 5078-6, General Code, which requires the board of deputy state supervisors of elections, before delivering the identification envelope to the presiding judge, to compare the signature of the voter on such ballot with the signature of such voter as it appears upon the application for the absent voter's ballot or with the signature on the precinct register. It is unnecessary to quote the provisions of this section, but it may be stated that the board is authorized to refuse to deliver or to count such ballot when satisfied that the signatures are not the same.

These various provisions of law make clear the duty of the board with respect to ballots of this character. In the first instance the clerk must be satisfied that the voter is entitled to cast a vote before the ballot is delivered to him. Thereafter the board has the function of determining whether or not the signature upon the envelope is that of the qualified elector. After the ballot is delivered to the local precinct officials, all further jurisdiction with respect thereto ceases so far as the election board is concerned. That is to say, the board has no further function to perform with respect to the determination of the qualification of the voter. While, as suggested in the

opinion heretofore referred to, the right to challenge exists in the voting booths and extends to absent voter's ballots as well as those cast in person, the decision in case of such challenge is one to be performed solely by the local precinct officials. The board has no original or revisory jurisdiction on this question.

In this instance the precinct officials have apparently neither rejected nor finally accepted the ballots in question. They have, however, enclosed them in the envelope marked "disputed ballots" and forwarded them to the election board. Since these ballots are presented to the election board in the form of disputed ballots, their only function with respect thereto is that set forth in Section 5090, supra. The board's duty under this section is clear and specific. It is to count the ballots if the intention of the voters can be ascertained therefrom.

The duty of the deputy state supervisors of elections under Section 5090 of the General Code is thus expressed in the case of *Board of Elections vs. Henry*, 24 O. App. 481 at page 483:

"Section 5090, General Code, provides that the deputy state supervisors of elections (board of elections) 'shall open the envelope containing the uncounted ballots and determine what part and for whom each such ballot shall be counted, and proceed to count and tally the same.'

This is a mandatory statute, and it became the duty of the board of elections to canvass the uncounted ballots, to count and tally them, and issue the proper certificate of election."

In my opinion it would be a dangerous precedent to permit the election board from extraneous information to do other than the duty specifically enjoined upon it by law. Whatever the reasons which actuated the local precinct officials in enclosing the ballots to the board as "disputed ballots", the election board has no authority to go beyond the fact that they are so found as "disputed ballots" and it is the board's duty to proceed in accordance with the directions of Section 5090, supra. Had the ballots in fact been rejected, they would never have reached the board in this way or any other way, since there is no provision of law with respect thereto.

In passing, it is necessary to note that you state the members of the board of deputy state supervisors of elections personally known that some of the persons casting the ballots are not residents of the ward involved. It may be stated that the question of residence must of necessity be determined largely upon the intention of the voter and it is difficult to perceive how actual knowledge of a question of residence can be obtained without a personal investigation which must, of course, include an examination of the person, who seeks the privilege of voting. However this may be, the statutes clearly indicate that the board of deputy state supervisors of elections has no authority whatsoever to pass upon the qualifications of an absent voter. Such being the case, whatever the knowledge of the individual members of the board may be, the duty of the board remains to count the ballots in the event that the intention of the voters may be determined therefrom.

Answering your question specifically, it is my opinion, that under the provisions of Section 5090, General Code, it is the duty of the board of deputy state supervisors of elections to proceed to count the uncounted ballots returned to the board by the precinct judge of elections marked "disputed ballots".

Respectfully,
EDWARD C. TURNER,
Attorney General.