

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,

EDWARD C. TURNER,

Attorney General.

2766.

ABSENT VOTER'S BALLOT—DUTIES OF CLERK OF BOARD—APPLICATION FOR BALLOT—CLERK HAS REASONABLE TIME TO INVESTIGATE—WHEN MANDAMUS MAY BE ISSUED.

SYLLABUS:

1. Under provisions of Section 5078, *General Code*, an elector found by the clerk of the board of deputy state supervisors of elections to be properly qualified in all other respects, is entitled to receive an absent voter's ballot upon the applicant's own statement that he finds that he will be unavoidably absent from his own precinct on the day of election.

2. The clerk of a board of deputy state supervisors of elections, to whom application is made for an absent voter's ballot and supplies, is entitled to a reasonable time, in view of the facts of the case, to satisfy himself upon the qualifications of the person making such application.

3. Where an application for an absent voter's ballot is filed with a clerk of a board of deputy state supervisors of elections, and the clerk has failed or refused to act on such application, mandamus will lie to compel the clerk to act and pass judgment upon the right of the applicant to the absent voter's ballot. Mandamus will not lie, however, to review or control the discretion vested in the clerk to determine whether or not the applicant is a duly qualified voter in the precinct in which he desires to vote. Nor may mandamus be employed so as to substitute the discretion and judgment of the court for the discretion and judgment of the clerk.

4. In an action in mandamus to compel the clerk of a board of deputy state supervisors of elections to deliver an absent voter's ballot to an applicant therefor, an alternative writ should in all cases first be issued, unless facts, showing that the applicant is entitled to the ballot, are admitted, or unless it is clear that the applicant is entitled to the ballot, and it is apparent that no valid excuse can be given for refusing to deliver such ballot.

5. An absent voter's ballot and accompanying supplies may and should be delivered to an applicant entitled thereto in person, or by sending same by registered mail, as the facts in the case warrant.

COLUMBUS, OHIO, October 19, 1928.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of the 16th instant requesting my opinion as follows:

"Section 5078-1 of the General Code of Ohio, provides:

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.'

We are desirous of having your opinion,—

First—As to whether or not the clerk of the county board of elections has the right to make any inquiries to determine whether or not a voter will be unavoidably absent from his home precinct on the day of election and also if the clerk, in his judgment, believes that the voter will not be unavoidably absent, whether or not said clerk has the authority to refuse the applicant a ballot if he is otherwise qualified.

Second—Under the wording, 'if such clerk shall have satisfied himself that the applicant is a duly qualified voter,' etc., has the clerk the right and authority to take a reasonable length of time to satisfy himself that the person is a duly and qualified elector and the person he represents himself to be or must the clerk deliver the absent voter's ballot to the applicant forthwith without reasonable time for investigation?

Third—If the clerk of the board of elections has the right to a reasonable time to satisfy himself as to qualifications and identity, etc., what length of time, in your opinion, is a 'reasonable time'?

Fourth—Has the Common Pleas Court of the county authority to issue a writ of mandamus to compel the issuance of an absent voter's ballot by the clerk of elections, or to take action upon the application therefor, unless it is first shown and proven that the clerk has had reasonable and sufficient time to pass upon the qualifications and identity of said voter?

Fifth—Where a writ of mandamus in such a case has been issued against a clerk to compel him to issue such absent voter's ballot, said writ being issued at 4:30 and returnable at 5 o'clock of the same afternoon, then upon appearance and request the case continued until 7 o'clock of the same afternoon, the application upon which the writ has been based having been made at 2 o'clock of the same afternoon, has the clerk been given a reasonable time to satisfy himself as to the qualifications and identity and will a writ of mandamus be proper in such a case? In other words, should not a reasonable time be given the clerk to act before such a writ could be legally issued?

Sixth—If a clerk of the board of election makes inquiry as to the qualifications and identity of an applicant for an absent voter's ballot and has not satisfied himself that the applicant is a duly qualified elector and the person he represents himself to be and the clerk thereupon refused to issue said absent voter's ballot to said applicant, can a writ of mandamus be issued by a Court of Common Pleas and allowed against such clerk where it is shown that the clerk has not acted in an arbitrary manner but has simply used his judgment and discretion based upon his knowledge and investigation to the best of his ability. In other words, is the action of the clerk in refusing an application for an absent voter's ballot upon grounds that the clerk deems sufficient, subject to review by the Court? Can the judgment of a Court of Common Pleas be substituted for the judgment and discretion of a clerk of the board of elections in performing his duty as defined in Section 5078-1?

Seventh—Section 5078-1 provides that 'he shall deliver to said voter or send him by registered mail as the case may be, one of the absent voter's ballots provided for such election.' Is it compulsory that the clerk deliver the absent voter's ballot according to the desires of the voter or has the clerk of the board of elections, under this wording, the right and authority to use either means of delivery? In other words, if an absent voter demands

the delivery of his ballot in person, has the clerk authority to deliver by registered mail to the post office address of the voter instead, if the clerk so desires?

Inasmuch as we are now confronted by these very questions coming up daily, we will appreciate your usual prompt rendering of an opinion interpreting Section 5078-1 on the various phases we have mentioned."

Upon consideration of your first question it is my opinion that where an applicant who is otherwise qualified, makes application for an absent voter's ballot and states that he will be unavoidably absent from his home precinct on the day of election, the clerk has no authority to refuse the applicant a ballot on the ground that he doubts the applicant's statement as to whether or not he will be unavoidably absent. That is a question that the applicant alone is to determine.

Your second question involves the extent of the inquiry of the clerk on the qualification of the applicant as a voter in his precinct before the delivery of the absent voter's ballot to him. On this subject the statute has this provision:

"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."

It is the duty of a clerk in the first instance when application is made for an absent voter's ballot, to satisfy himself of the qualification of the voter offering to vote, as to his residence in the precinct and his legal qualifications to vote. Finding these present, it is his duty at once to issue upon proper application the absent voter's ballot. If he is in doubt as to his qualifications, it is his duty to satisfy himself upon that question by proper investigation without unnecessary delay. He can not unreasonably delay investigation as the delay might interfere with the elector's right of franchise to the extent of causing him to lose his vote. The clerk not only has the right, but it is his duty, to satisfy himself upon this question, but it must be done with all reasonable expedition.

Your third question is, "If the clerk of the board of elections has the right to a reasonable time to satisfy himself as to qualifications and identity, what length of time in your opinion, is a 'reasonable time?'" This question can not be categorically answered, for what might be a reasonable time in one instance would be an unreasonable length of time in another instance. There is no hard and fast rule that can be given in answer to this question, what is a reasonable time depending on the facts and circumstances in each particular case.

Your fourth question is, "Has the Common Pleas Court of the County authority to issue a writ of mandamus to compel the issuance of an absent voter's ballot by the clerk of elections, or to take action upon the application therefor, unless it is first shown and proven that the clerk has had reasonable and sufficient time to pass upon the qualifications and identity of said voter?"

The statutes relating to the jurisdiction of courts in mandamus proceedings, particularly applicable to your question, are Sections 12283, 12284 and 12286, General Code, which read as follows:

Section 12283. "Mandamus is a writ issued, in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station."

Section 12284. "The writ of mandamus may be issued by the supreme court, the court of appeals or the common pleas court."

Section 12286. "The application for the writ must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit. The court may require notice of it to be given to the defendant, or grant an order to show cause why it should not be allowed, or allow the writ without notice."

From these sections, it is apparent that the Common Pleas Court has "authority" to grant the remedy of mandamus in a case such as you present, using the term "authority" as synonymous with "jurisdiction of the subject matter."

Section 12285 of the General Code provides that:

"The writ may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion."

The rule here laid down is declaratory of, and in accordance with, the common law principles stated in 38 Corpus Juris, at page 607, in this language:

"* * * While mandamus may be employed to compel an inferior tribunal to act or to exercise its discretion, the particular method of acting or manner in which the discretion shall be exercised will not be controlled. This general principle applies to every case where the duty, performance of which is sought to be compelled, is in its nature judicial, or involves the exercise of judicial power or discretion, irrespective of the general character of the officer or body to which the writ is addressed."

This same authority at page 659 states that:

"As in the case of courts and judicial officers, it is a rule of general application that mandamus will not lie to review or control the acts of executive officers and boards of state and federal governments in respect of matters as to which they are vested with discretion. *In other words, they cannot be compelled to act or render a decision in any particular way, and this is so, even though the exercise of this discretion requires the construction and interpretation of statutes. Where public officials exercise their discretion, it is said that their conclusions, although disputable, are impregnable to mandamus.*

A limitation of the rule is that mandamus lies to review the acts of these officers or boards where it clearly appears that they have acted arbitrarily and unjustly and in abuse of the discretion vested in them; but it has been said that before the judiciary will interfere in such a case, it must clearly appear that such officer has so far departed from the line of his duty under the law that it can be said he has in fact so far abused such discretion that he has neglected or refused to exercise any discretion." (Italics the writer's.)

Applying the rule stated in Section 12285, supra, and the principles of law set forth in the quotations from Corpus Juris, supra, to the fourth question, it is manifest that while a writ of mandamus might properly be issued to compel the clerk to take action upon an application for an absent voter's ballot filed with such clerk, mandamus will not lie to review or control the discretion of a clerk who, as above pointed out, is required by Section 5078-1 to satisfy himself "that the applicant is a duly qualified voter." Of course, as stated in the last paragraph of the excerpt from page 659 of Corpus Juris, mandamus will lie where it appears that a clerk in a case of the kind

here under consideration has acted arbitrarily and abused the discretion vested in him, as well as where the clerk is refusing or fails to act. However, the remedy of mandamus should not be employed to divest the clerk of his authority and jurisdiction to pass upon the qualifications of an applicant for an absent voter's ballot and to satisfy himself that the applicant is entitled thereto; nor should mandamus be employed so as to substitute the discretion and judgment of the court for the discretion clearly vested by law in the clerk.

In connection with the above discussion, your attention is directed to Section 12288 of the General Code, which reads as follows:

"When the right to require the performance of the act is clear and it is apparent that no valid excuse can be given for not doing it, a court, in the first instance, may apply a peremptory mandamus. In all other cases an alternative writ must first be issued, on the allowance of the court, or a judge thereof."

You will observe that by the terms of this section "an alternative writ *must* first be issued" in all cases excepting those in which "the right to require the performance of the act is *clear* and it is apparent that *no valid excuse* can be given for not doing it." Under this Section (formerly Section 6745, Revised Statutes) the Supreme Court of Ohio held in the case of *Banks vs. DeWitt*, 42 O. S. 263, 275:

"Where the material facts, upon an application for mandamus, *are admitted*, and the plaintiff is entitled to relief, this court should award, not an alternative, but a peremptory writ of mandamus." (Italics the writer's.)

You will observe that the Supreme Court in this case stated that a peremptory writ should issue *where the material facts are admitted*. Inferentially this case is authority for the conclusion that such a writ should not issue unless the material facts be admitted, or unless, as stated in Section 12288, supra, the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not doing such act.

From the above discussion it seems manifest that only in exceptional cases should a peremptory writ issue without notice. On the other hand, where an application for an absent voter's ballot is filed with the clerk and an application for a writ of mandamus is made to a court to compel such clerk to deliver an absent voter's ballot to the applicant, the clerk should be given an opportunity to prove to the satisfaction of the court, either that he is acting with all reasonable diligence in an effort to satisfy himself that the applicant is entitled to the ballot, or that he has so acted and has, in the exercise of the discretion vested in him, upon reasonable grounds, judiciously determined that the applicant is not a qualified voter.

The above views are in accord with the statement of the law in 38 Corpus Juris at page 929, citing, among others, the case of *Banks vs. DeWitt*, supra, as authority:

*** * Nevertheless, in most jurisdictions, a peremptory writ may be granted in the first instance after notice where there are no disputed questions of fact and a clear case is presented; but, even where this doctrine prevails, it has been held that on application for mandamus involving fairly debatable questions, the Supreme Court will ordinarily issue an alternative writ, to the end that an issue may be made and the facts ascertained, and an opportunity given for review in error." (Italics the writer's.)

In view of the foregoing and in specific answer to the two questions contained in your fourth inquiry, it is my opinion that:

1. Where an application for an absent voter's ballot is filed with a clerk of a board of deputy state supervisors of elections, and the clerk has failed or refused to act on such application, mandamus will lie to compel the clerk to act and pass judgment upon the right of the applicant to the absent voter's ballot. Mandamus will not lie, however, to review or control the discretion vested in the clerk to determine whether or not the applicant is a duly qualified voter in the precinct in which he desires to vote. Nor may mandamus be employed so as to substitute the discretion and judgment of the court for the discretion and judgment of the clerk.

2. In an action in mandamus to compel the clerk of a board of deputy state supervisors of elections to deliver an absent voter's ballot to an applicant therefor, an alternative writ should in all cases first be issued, unless facts, showing that the applicant is entitled to the ballot, are admitted, or unless it is clear that the applicant is entitled to the ballot and it is apparent that no valid excuse can be given for refusing to deliver such ballot. Since the discretion to determine the qualifications of the applicant for an absent voter's ballot as a voter is vested in the clerk, and since the vesting of such discretion necessarily confers upon the clerk the power and duty to employ such a period of time as may be reasonably necessary to satisfy himself as to the applicant's qualifications, the fact that the clerk had not delivered the ballot applied for, for the reason that he had not had a sufficient time, in view of all the circumstances, to satisfy himself as to the voter's qualifications, would be a defense in an action in mandamus and a peremptory writ should not issue in such a case.

The above discussion and the answer to your fourth question renders unnecessary a specific answer to your fifth question.

While your sixth question is also answered in the consideration given your fourth question, in the interest of clarity, I will repeat that the discretion to determine whether or not applicant for an absent voter's ballot is a duly qualified voter in the precinct in which he desires to vote is by law vested in the clerk of the board. It is the clerk's discretion that is to be exercised and his determination that is to govern and not the discretion and determination of the court; subject, however, to the limitation that the court may interfere where, and only where, the clerk has acted in an arbitrary or whimsical manner, or has otherwise abused his discretion.

Your seventh question involves the method of delivery of the absent voter's ballot to the voter. The language of Section 5078-1, General Code, upon that subject, is:

" * * * 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.
* * *

The language of this section plainly authorizes delivery of the ballot to the applicant in person, or by sending it by registered mail.

I see no reason why the manner of delivery should not be governed by convenience in each particular case. If the applicant is present when the clerk has satisfied himself of his qualifications as a voter in the manner hereinbefore set forth, the ballot and supplies should be delivered to the voter personally, otherwise delivery should be by registered mail. The apparent intent of the statute in this respect is that delivery shall not be made to any other person, as agent or otherwise.

Respectfully,

EDWARD C. TURNER,
Attorney General.