4580.

BOARD OF EDUCATION—ELECTION—ERRONEOUS PLACING OF NAME ON BALLOT—RIGHT TO CONTEST ELECTION MAY NOT BE RAISED WHEN.

SYLLABUS:

Where a person has been duly nominated as a candidate for member of a board of education of a school district and there was a mistake in one of the initials of his name as it appeared on the ballot, and a certificate of election was issued to said candidate, said name having received a plurality of votes cast for said office at the election, and where no demand for a recount was made and no suit was filed to contest his election as provided by law and said candidate duly qualified for said office and has since said election been performing the duties of said office, the question of his right to said office by reason of said error cannot be raised.

COLUMBUS, OHIO, August 24, 1935.

HON. BIRNEY R. PETTAY, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—This acknowledges receipt of your communication which reads as follows:

> "I would like your opinion on whether or not there would be a vacancy in the board of education where an acting member was nominated by petition, his initials, through an error, appearing on the ballot which elected him incorrectly.
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> To be more explicit, the facts are as follows:
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> P. L. Stewart, who is now serving as a member of the Washington Township Board of Education, circulated and filed his petition as P. L. Stewart. His name appeared on the ballot that elected him as R. L. Stewart. He qualified as P. L. Stewart.
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> Your earliest opinion will indeed be appreciated."

I assume from your letter that P. L. Stewart received a certificate of election, qualified as a member of the board of education of the above district and has acted as such member ever since that election. I am informed that there is no R. L. Stewart in said district but that there is a Roy B. Stewart who is a brother of P. L. Stewart, but who was not a candidate for said office. The nominating petition carried the candidate's correct name but apparently by mistake of the printer a wrong initial of his name was placed upon the ballot.

In determining the validity of a vote, the prime consideration is the in-

tent of the voter. If the intent of the voter cannot be determined, then, of course, the vote cannot be counted. Under the weight of authority, this intent is determined from the ballot read in the light of surrounding circumstances. 20 C. J. 155.

In Michigan, only the ballot can be considered. See *Ott* vs. *Brissette,* 137 Mich. 717, where the name of the candidate, Christian Ott, was erroneously printed O. N. Christian; and *Andrews* vs. *Probate Judge,* 74 Mich. 283, where the name of the candidate, Samuel Tobey, appeared on the ballot as Samuel Toley. In both these cases the court held that votes cast for the names appearing on the ballot could not be counted for the legally qualified candidate.

Paragraph 9 of Section 4785-131, General Code, reads as follows:

> "No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice."

In the case of *Richwood* vs. *Algower,* 95 O. S. 268, the following is said:

> "Suffice it to say that with a view of preserving the right of elective franchise to the citizen elector, in the absence of statutory provisions invalidating the ballot, the courts of this country have generally adopted a rule of liberality for the purpose of ascertaining and safeguarding the intention of the voter in the exercise of his constitutional privilege, and the Ohio statute above quoted emphasizes that feature when it provides that no ballot shall be rejected for technicalities which do not make it impossible to determine the voter's choice."

The following was held in *Brown* vs. *McCollum,* 76 Iowa 479:

> "In an election contest, where there is a dispute as to whom certain ballots should be counted for, the intention of the voter, if it can be ascertained from the ballot itself, or from the ballot examined and considered in light of all the facts and circumstances, should control, but if such intention cannot be fairly determined, the ballot should be rejected. If such intention can be found, it cannot be defeated by the fact that the name of the candidate is misspelled or the wrong initials are employed, or some other or slightly different name of like or similar sound has been written instead of the real name of the candidate intended to be voted for."

In the case of *Norton* vs. *County Court,* 79 W. Va. 432, the syllabus reads as follows:

> "1. In a proceeding to ascertain the identity of the person voted for in an election, it is competent, when necessary, to show by proof the facts and circumstances pertaining to the election, including the nominating convention or primary, the correct name of the candidate, his eligibility and residence within the territorial division or subdivision in which if elected he will perform the duties of the office; whether on the ballot to be used therein his name appears as certified to the printer as required by law; and whether any other person of the same or a similar name was nominated or voted for the same office and possesses the requisite constitutional or legislative official qualifications to hold such office. This proof is admissible only to the extent it tends to establish the identity of the candidate and with substantial accuracy the preference of the voter as indicated by the ballot he casts.
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> 2. Where such identity and intention may so be ascertained, the ballot cannot be ignored or disregarded merely because of the unauthorized or inadvertent substitution of a false for the true initial letter of the candidate's surname, or the wrong initial of his Christian name, or of other slight alterations therein, unless thereby the ballot fails to reveal with reasonable certainty the real intention of the voter.
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> 3. Slight errors or irregularities on the part of one charged with the duty of preparing official election ballots will not be permitted to defeat the real intention of the voter, if such intention may be determined with reasonable certainty from the ballot cast by him in the light of the surrounding circumstances.
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> 4. The mere inadvertent alteration in the name of a candidate can not so operate, unless the alteration renders doubtful or ineffectual the designation of the candidate intended by the voter."

In this case, the name of the candidate was E. B. Norton but his name appeared on the ballot as E. B. Morton. The court said:

> "It is competent to ascertain by proof, when controverted, whether the relator was a candidate regularly nominated by his party for the position to which he alleges he was elected; and, if so, whether any other person of the same or similar name resided within the territory and was a candidate for the same office, and, if so, whether he was eligible to fill the office or had also been nominated therefor within the district; and if a ballot had been printed imperfectly

or inadvertently, or changed so as to be defective. This proof is admissible to show the circumstances surrounding the election, for the purpose of ascertaining with substantial certainty the intent of the elector in casting his ballot. *Cooley, Const. Lim.* 919; 9 *R. C. L.* 1123. Where such intention may be ascertained with reasonable accuracy, by the application of the rule stated, that intention ought not to be defeated merely by the unauthorized substitution of a false for the true letter in the name of a candidate, or a wrong initial of his name, or some other slightly different appellation, unless it more nearly approximates or represents the name of another candidate for the same office. *Down* vs. *McClelland,* 76 Ia. 479. The ballots polled in an election should be accepted in view of all the facts and circumstances involved in the preliminary and subsequent proceedings, including the nominating convention or primary, for the sole purpose of ascertaining, so far as may be with accuracy, the intention of the voter, and, when ascertained, to give effect to that intention. The rule of liberal interpretation is especially applicable in cases of this character, whatever may be the nature of the contest, in order to render effective rather than ineffectual the preference of a voter when expressed or indicated by the ballot he casts. *McCrary on Elections* 393; *Johns* vs. *Hubbard,* 97 Mo. 311. Mere irregularities or slight errors on the part of an officer charged with the preparation of official ballots will not destroy the efficacy of the ballots, nor invalidate the election. 15 *Cyc.* 352. The negligent or unauthorized act of the officer whose duty requires him to print the ballots as they are certified to him by the proper authority will not deprive the elector of the right to cast his ballot and to have the same counted for the candidate of his choice, nor the successful candidate to enjoy the benefits and perform the duties of the office. The mere inadvertent alteration of a letter in the name of a candidate can not have that effect, unless the printed or substituted name so materially differs from the true name as to render the ballot wholly ineffectual, or so defective as a designation of the candidate nominated and intended by the voter. Such diversity between the name certified and the one printed on the official ballot is not sufficient to defeat the right of E. B. Norton to qualify as a justice and enter upon the discharge of the duties of the office, under the rule announced by Judge Cooley, re-enforced in *Attorney General* vs. *Eli,* 4 *Wis.* 438, and reiterated in *Johns* vs. *Hubbard, supra.* Such an irregularity on the part of election officers, or their omission to observe some merely directory provision of law, or the failure of the printer to print the ballots as they are certified to him, ought not to vitiate the polls and deprive the elector of the right to express his preference between can-

didates for any office, except where the defect is such that it can not be determined for whom the elector intended to cast his ballot. *Anderson* vs. *Winfree,* 85 Ky. 597. But it must be made to appear, by those claiming the benefit of the election, that such irregular conduct or departure from legal requirements has not prevented an honest and fair election as between contesting candidates. *Fowler* vs. *State,* 68 Tex. 30.

These legal principles, when applied to the uncontroverted facts of this case, make it clear that no person named or known as E. B. Morton resided in the same district, or was a candidate for the office of justice of the peace therein, or aspired to that position, or was eligible or qualified to fill the office, or claimed to qualify as such; and that E. B. Norton was known and recognized as the candidate of his party for that position in the district, actively canvassed the district in his behalf, and that the board of canvassers who issued the certificate of election to E. B. Norton delivered it to E. B. Norton. Their failure to make return to the rule awarded and duly executed on them, and the proof taken in support of the averments of the petition, lead to the conviction that E. B. Norton was the candidate duly elected to discharge the duties of the office, and justify the award of the writ to require the county court to permit him to qualify as such officer, in obedience to the expressed will of the legal voters voting upon that subject."

Whether the intention of a voter can be ascertained in any case is always a question of fact to be determined in the proper tribunal.

Section 4785-115, General Code, reads as follows:

"After the letting of the contract for the printing of the ballots, as herein provided, the board of elections shall secure from the printer printed proofs of the ballot, and shall notify the chairman of the local executive committee of each party or group represented on the ballot by candidates or issues, and post such proofs in a public place in the office of the board for a period of at least twenty-four hours, for inspection and correction of any errors appearing thereon. The board shall cause such proof to be read with care and after correcting any errors shall return the corrected copy to the printer.

The above provisions give every candidate the opportunity to correct any errors which appear in the form of ballot before the ballots are printed, of which opportunity he should avail himself.

However, whatever might be the rule in this state with respect to the question raised by you, in case of a contested election, it appears that in the

case you present no recount was demanded and no action to contest the election of said person was filed as provided by law. Sections 4785-162 and 4785-167, General Code.

Section 21 of Article II of the Ohio Constitution reads as follows:

> "The general assembly shall determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted."

It is well settled that where the legislature has provided a method for contesting an election, that method is exclusive. See *State, ex rel.* vs. *Herdman,* 17 O. App. 269, and cases therein cited; *Opinions of the Attorney General for* 1934, Vol. I, page 173. In the Herdman case, said Herdman became a candidate by filing a petition although there was no provision at that time for the nomination of candidates by petition in cities of more than 2000 population. He received a majority of votes cast, was declared elected and duly qualified for the office and entered upon his duties. Neither his nomination nor election was contested as provided by law. The court held:

> "The legislature having conferred special power upon common pleas courts to try contests of elections of mayors of cities, the court of appeals has no authority, to inquire into the validity of such an election in an original action *in quo warranto* brought to have defendant ousted from the office of mayor of a city on the ground that his name was improperly placed on the ballot, and praying that relator be adjudged entitled to such office. The same ruling applies to city solicitors."

I am of the view, therefore, that the question of the right of said P. L. Stewart to the office of member of said board of education cannot at this time be questioned and, consequently, no vacancy exists on said board by reason of the fact that there was an error in his name as it appeared on the ballot.

Respectfully,

JOHN W. BRICKER,

Attorney General.