

department over the signature of the chief of the bureau of inland lakes and parks in the division of conservation submitting for my examination and approval a certain reservoir land lease in triplicate executed by the conservation commissioner, pursuant to the authority conferred upon him by a resolution adopted by the conservation council, under date of March 5, 1931.

By the lease here in question there has been leased and demised to Mrs. Elsie Z. Sparrow and Mrs. Mayme Whalen of Cincinnati, Ohio, the right to use and occupy for a term of fifteen years and for cottage site purposes that portion of the State's allotment of lands on the north shore of Lake Loramie that is designated as parcel "A" on the plat of the subdivision of lands formerly included in the leasehold granted by the State of Ohio to the Bon Ton Fishing Club of Cincinnati, Ohio. Upon examination of said lease, I find that the same has been properly executed by the conservation commissioner, pursuant to the authority given to him by the conservation council aforesaid, and by the lessees above named.

From an examination of the terms and provisions of said lease and the conditions therein contained, I find said lease to be in all respects in conformity with the authority conferred on the conservation council by section 472-1, General Code, and in conformity with other statutory provisions relating to leases of this kind.

Said lease is accordingly approved by me as to legality and form as is evidenced by my approval endorsed upon said lease and upon the duplicate and triplicate copies thereof, all of which are herewith returned.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3720.

APPROVAL, SUPPLEMENTAL RESOLUTION FOR ROAD IMPROVEMENT IN HAMILTON COUNTY.

COLUMBUS, OHIO, October 31, 1931.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

3721.

VOTING MACHINE—NAMES OF CANDIDATES NOT ROTATED—ELECTION VALID.

SYLLABUS:

There is no statutory requirement as to the rotation of names of candidates when voting machines are used, and elections, at which such machines are used and such names not rotated, are valid.

COLUMBUS, OHIO, November 2, 1931.

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

DEAR SIR:—This office has recently received a request for an opinion from

Hon. G. H. Birrell, Prosecuting Attorney, Warren, Ohio, upon a matter involving your jurisdiction as chief election officer of the state and I am therefore addressing my reply to you. The prosecuting attorney's request reads as follows:

"This office has been requested for an opinion on the following question relative to voting machines:

'Where voting machines are used, will the rotation of names of candidates on the ballot labels by precincts, arranged in accordance with the method provided in Sec. 4976 of the General Code, be a rotation of names such as to comply with the provisions of the General Election Law required that the names of candidates be rotated.'

Since this is a matter of State interest, and should be determined with uniformity over the State, we will appreciate having your opinion on this question at your earliest convenience."

Section 4785-80, General Code, provides for the rotation of names of candidates upon primary ballots in the following language:

"* * * * The whole number of ballots to be printed shall be divided by the greatest number of persons whose names have been duly presented for any office and not withdrawn, and the quotient shall be the number of ballots in each series of ballots to be printed as follows: the names of candidates shall be arranged in alphabetical order and the first series of ballots printed; then the first name shall be placed last and the next series printed, so shall the process be repeated until each name shall have been printed first. The ballots shall then be combined in tablets by selecting one from each series of ballots in regular order, and so repeating, so that no two of the same order of name shall be together, except where there is but one candidate for any such nomination. * * * *"

These provisions were enacted in substantially their present form as part of Section 4976 in 1917.

Section 4785-101, General Code, provides that at the general election, names of candidates on the non-partisan ballot, including judicial and school board candidates, "shall be printed in rotation as in the case of names of candidates on the party primary ballots."

The use of voting machines was first authorized by the legislature at the time of the enactment of the present election code in 1929 by Section 4785-161, which was amended by the 89th General Assembly. These provisions are now contained in Sections 4785-161 to 4785-161 (1), both inclusive, of the General Code. There are numerous provisions in these sections as to the requirements which voting machines must fulfill before they may be approved as therein provided. Nowhere, however, is any provision made for the arrangement of the names of candidates where more than one candidate is running for nomination for the same office at a primary election or where more than one candidate is running at a general election for the same office on a non-partisan ballot.

The arrangement of the names of the candidates when a voting machine is used at a given election is, I am advised, necessarily fixed prior to the election and may not be changed on such machine during the progress of such election. This is a fact of which the legislature may be presumed to have had knowledge.

It has been judicially recognized in *People v. Nichols*, infra. The general provisions with respect to the rotation of names upon printed ballots are obviously inconsistent with the special provisions of the General Code relating to voting machines, since these machines do not permit of such rotation.

Section 4785-161 (1), General Code, relating to the matter of rules and regulations for the examination, testing and use of voting machines, concludes with the provision that "all other provisions of the election laws, not inconsistent with the provisions relating to voting machines, shall apply in any county or municipality using the voting machine." I think the provision authorizing a voting machine in view of the physical impossibility of rotating the names on such a machine is a provision "relating to voting machines" which is inconsistent with the general election laws on this point. It may be urged, therefore, that in this language of section 4785-161 (1), the legislature has expressly provided that the provisions under consideration of Sections 4785-80 and 4785-101 shall not apply in the event of the use of voting machines.

In the case of *People v. Nichols*, 167 N. Y. Supp. 150, the matter of the arrangement of the names of candidates on a voting machine with respect to the fixed character of such arrangement was under consideration, the court holding that although the names may not be rotated, candidates are not thereby prejudiced. The language of the court appearing on pp. 151 and 152 is as follows:

"Considering the fixed and rigid character of the ballot machines, it must be assumed that the Legislature intended to provide for their adaptability to situations where more than one person was being selected for an office, by permitting the 'grouping' of such candidates, provided they were arranged under the title of the office and independent voting was not destroyed. The language used in section 421 expressly permits the grouping of candidates for office, where there is more than one person to be elected to an office, as proposed by the commissioner of elections. As the ballot has been prepared, the titles of the offices appear at the top of the voting machine, and the names of the candidates are arranged vertically, and electors are enabled to vote for each individual candidate. This carries out the letter and spirit of the Election Law. It does not appear that the relator or any other candidate for office will be prejudiced in the slightest respect by the proposed arrangement, or that any elector will be disfranchised."

The case of *Heilman v. Olsen* (Minn.), 141 N. W. 791, though not involving voting machines, is directly pertinent in principle. The primary law of Minnesota provided for the rotation where there was more than one candidate for nomination for the same office. The law contained no provision for the rotation at the general election under such circumstances. There was an election for a certain judicial office to be voted for in a district of five counties. There was more than one candidate on the non-partisan ballots. In only one of these five counties the names were not rotated. After commenting upon the fairness of distributing the advantage of position by an alternation of names, the court said:

"It cannot be held that the Legislature omitted to provide for an altogether desirable rotation, and that now the court should supply the omission. Neither can the court say that the failure to rotate, with no

statute requiring it, is so violative of the intent and purpose of the primary law as to invalidate the election.

The fact that the auditor of Brown county, by his arrangement of the ballot, intended an advantage to the contestee, does not invalidate the election, if the arrangement was one which legally he might make."

There is no doubt but that when the statute does not require rotation, and the names are not rotated, the election is valid. It is interesting to note that the court held the election valid, notwithstanding the fact that the boards of elections in four of the counties had rotated the names without statutory authority therefor.

A rotation of names, however, by precincts is not authorized by the general election laws, and such a rotation is obviously not a compliance with Section 4785-80, supra. As herein indicated, Section 4785-161 (1) in effect provides that these provisions as to rotation shall not apply in the case of the use of voting machines.

It is accordingly my opinion that there is no statutory requirement as to the rotation of names of candidates when voting machines are used, and elections at which such machines are used and such names not rotated, is valid.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3722.

APPROVAL, BONDS OF MONROE COUNTY, OHIO—\$8,915.02.

COLUMBUS, OHIO, November 2, 1931.

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

3723.

APPROVAL, BONDS OF MONROE COUNTY, OHIO—\$15,213.96.

COLUMBUS, OHIO, November 2, 1931.

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

3724.

CANDIDATE—DEFEATED AT PARTY PRIMARY—MAY BE ELECTED
AT A GENERAL ELECTION WHERE NAME WRITTEN IN ON
BALLOT.

SYLLABUS:

A person may be legally elected to the office of mayor of a city if a sufficient number of electors of the municipality vote for him by writing in his name