

2895.

ILLEGAL VOTING—PROSECUTION FOR VOTING WRONG TICKET AT PRIMARY—STATEMENTS MADE AT PRIMARY ARE ADMISSIBLE IN EVIDENCE AS PART OF RES GESTAE—WHAT CONSTITUTES PROOF OF THE CORPUS DELICTI.

SYLLABUS:

In a prosecution of a person for voting, or attempting to vote, at the primary election of a political party other than the political party with which he has affiliated, under the provisions of Section 13335, General Code, statements made by such accused person to the judges of the election while voting, or attempting to vote, at such primary election, tending to show that he was affiliated with a political party other than the political party at whose primary election he was voting, or attempting to vote, are admissible in evidence as part of the res gestae of the offense charged; and such statements so made by the accused, together with independent evidence of his acts in voting, or attempting to vote, at such party primary election, constitute sufficient proof of the corpus delicti of the offense charged to make admissible other statements made by the accused tending to show his affiliation with a political party other than the political party at whose primary election he voted, or attempted to vote.

COLUMBUS, OHIO, November 19, 1928.

HON. E. P. MCGINNIS, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads as follows:

“In our summer primaries the United Mine Workers were making a strong fight against our sheriff and some of their officers, including E. E. of this place, issued letters advising all union mine workers to call for a Republican ballot and help to rout the gang that had been ‘oppressing them,’ to use their words. The township in which most of the union miners were living was Democratic by a large majority and this year practically all of them voted in a Republican primary. Many voters were challenged and more than 20 were arrested for illegal voting, but the evidence was so meager that the Grand Jury ignored all except one. This man, E. E., who is a leader among them, was indicted by our October Grand Jury for he had made the statement openly that he was a Democrat and had voted the Democratic ticket in 1926; and yet he asked for a Republican ballot in the primaries, walked into the booth, came back, was challenged, asked to take the oath which he refused to do, but presented his ballot to the officials and asked that it be accepted. They refused him. He even told them right then that he had voted the Democratic ticket two years before.

I think I can prove my case on him if I can use his own statement but the corpus delicti is my stumbling block. I cannot produce any evidence as to how he voted in 1926, except his own statement. I cannot see how it would be possible to have any evidence of this kind. If it is not possible then this Section No. 13335 under which he is indicted is useless. I thought it might be possible that the recent prosecutions might have brought forth a ruling on this question which I do not have. Some of the precincts in our county about the mines have made a habit of switching their voters at the primaries and we need some way to stop this.”

Section 13335, General Code, referred to in your communication, provides :

“Whoever votes or attempts to vote at the primary election of a political party other than the political party with which he has affiliated as defined by law, shall be fined not less than fifty dollars nor more than five hundred dollars or imprisoned in jail not less than three months nor more than six months, or both.”

The provisions of this section should be read in connection with those of Sections 13327 and 4980, General Code. Section 13327, General Code, provides as follows :

“Whoever votes at a primary election, not having voted at the last general election, held in an even-numbered year, with the political party with which he desires, or offers, to vote at such primary election, unless he is a first voter, or did not vote at such general election, shall be fined not less than one hundred dollars nor more than three hundred dollars or imprisoned in the penitentiary for one year, or both.”

Section 4980, General Code, makes certain provisions with respect to the qualifications of electors at primary elections. This section, among other things, provides that it shall be the duty of the challengers and of the judges, and the right of any elector, whenever there is reason to doubt the legality of any vote that may be offered, to interpose a challenge ; and that the cause of a challenge shall be, among other things, that the person challenged “has not previously affiliated with the party whose ticket he now desires to vote. Affiliation shall be determined by the vote of the elector making application to vote, at the last general election held in even numbered years.”

It thus appears that to constitute a violation of the provisions of Section 13335, General Code, it must appear that the person in question has voted or attempted to vote at the primary election of a particular political party when he is at the time affiliated with another political party, determined by the fact that at the last general election held in an even numbered year prior thereto he voted such other party ticket.

In your communication you express an apprehension of your ability to successfully prosecute the accused person therein named by reason of the fact that you are unable to prove the *corpus delicti* of the offense charged against him independent of his statements that he was a Democrat and had voted the Democratic ticket in 1926.

Touching the question you have in mind, the Supreme Court in the case of *State vs. Maranda*, 94 O. S. 364, held as follows :

1. “By the *corpus delicti* of a crime is meant the body or substance of the crime, included in which are usually two elements :

1. The act. 2. The criminal agency of the act.

2. It has long been established as a general rule in Ohio that there must be some evidence outside of a confession, tending to establish the *corpus delicti*, before such confession is admissible. The *quantum* or weight of such outside or extraneous evidence is not of itself to be equal to proof beyond a reasonable doubt, nor even enough to make it a *prima facie* case. It is sufficient if there is *some* evidence outside of the confession that tends to prove *some* material element of the crime charged.”

In this connection it may be observed that the statements of the accused as to his previous party affiliations can hardly be characterized as confessions. A confession is a statement made at any time by a person admitting or suggesting the inference that he has committed, or participated in the commission of, a crime ; and a con-

fession is distinguished from an admission by the fact that an admission is a statement of fact not necessarily incriminating the accused person. *Underhill, Criminal Evidence*, Sec. 215, page 303, 304; *State vs. Campbell*, 73 Kan. 688, 698; *State vs. Gilman*, 51 Me. 206; *Covington vs. State*, 79 Ga. 687, 690; *State vs. Red*, 53 Iowa, 69, and *Kohn vs. State*, 12 C. C. (N. S.) 197.

However, this distinction is perhaps not material with respect to the question here presented; for although admissions by an accused person of specific facts, not themselves constituting an element of the crime charged against him, but merely furnishing links in the chain of evidence leading to the conclusion of his guilt, are admissible against him without reference to whether the *corpus delicti* has been established or not (*Till vs. State*, 132 Wis. 242), this would not be true of admissions of specific facts which in themselves constitute an element of the crime charged. As to this, the rule seems to be that "extra judicial admissions, declarations, or confessions of accused are not of themselves sufficient to establish the *corpus delicti*, although they may be considered in connection with other independent evidence in determining whether the *corpus delicti* is sufficiently proved." 16 *Corpus Juris*, 771, 772.

In the case of *State vs. Knapp*, 70 O. S. 380, cited with approval in the case of *State vs. Maranda*, supra, it was held:

"If the facts extrinsically proved by the state corroborate the confession, then full, direct and positive evidence of the *corpus delicti* is not indispensable to admit the confession in evidence; and if such extrinsic corroborative facts, when considered with the confession, persuade the jury beyond a reasonable doubt of the prisoner's guilt as charged, such evidence will support a verdict of guilty."

The Supreme Court in its opinion in the case of *State vs. Maranda*, supra, on this point says that it seems to be conclusively settled:

1. That an extrajudicial confession is not sufficient in and of itself to sustain a conviction of a crime.
2. That *some* corroborating circumstances tending to prove criminal agency should be offered by the state before such extrajudicial confession is competent."

Looking to the second syllabus of the report of the case of *State vs. Maranda*, supra, it is not at all clear that independent evidence of the fact that the accused person here in question at the primary election in August, 1928, voted, or attempted to vote, the Republican primary ticket is not of itself sufficient proof of the *corpus delicti* to admit the statements of the accused that he was a Democrat and had voted the Democratic ticket at the general election in 1926. As to this it will be noted that in the *Maranda* case above cited it was held that "it is sufficient if there is *some* evidence outside of the confession that tends to prove *some* material element of the crime charged." In this connection it is noted that in the case of *Berman vs. State*, 16 C. C. (N. S.) 106, affirmed without opinion, 81 O. S. 508, it was held that in order to authorize the introduction in evidence of an admission by the accused that he was guilty of arson, it was sufficient to show that the building he confessed burning was in fact burned at the time charged.

In the case presented by your communication there are two elements of the offense charged:

1. That at the primary election held in August, 1928, the accused voted, or attempted to vote, at the Republican primary; and

2. That at said time the accused was affiliated with the Democratic party, determined by the fact that he voted the Democratic ticket at the general election held in 1926.

The fact that the accused voted, or attempted to vote, at the Republican primary election in August, 1928, can, of course, be proven by evidence independent of any statements made by the accused. This being so, it would seem under the above quoted language from the syllabus in the Maranda case that this would be sufficient proof of the *corpus delicti* to admit the statements of the accused with respect to his political affiliations at the time he voted, or attempted to vote, at the Republican primary.

However this may be, I am quite clearly of the view that the statement made by the accused to the judges at the primary election at the time he was attempting to cast his ballot at the Republican primary election then held, is admissible either in his favor or against him, without respect to the question of the state of the evidence in the case as to the *corpus delicti*. The statement made by the accused at this time that he had voted the Democratic ticket two years before, or any other statements made by him or other persons present touching the question of his right to vote at said Republican primary election, are competent as part of the *res gestae* of the alleged crime in voting, or attempting to vote, as he did. "The expression '*res gestae*' as applied to a crime, means the complete criminal transaction from its beginning or starting point in the act of the accused until the end is reached. What in any case constitutes the *res gestae* of the crime depends wholly on the character of the crime or the circumstances of the case." *Underhill, Criminal Evidence*, Sec. 160, page 212.

Without multiplying authorities on the question as to the admissibility of statements or declarations made as part of the *res gestae* of an act or transaction, it is sufficient to note the general rule that "declarations which are the immediate accompaniments of an act are admissible as part of the *res gestae*." *State vs. Lasecki*, 90 O. S. 10, 14.

The declaration made by the accused as to his party affiliation while he was attempting to vote at said Republican primary being admissible on the independent ground that the same was a part of the *res gestae* of the alleged criminal transaction will afford, together with his act in attempting to vote at the Republican primary, sufficient evidence of both of the elements making up the *corpus delicti* of the offense to authorize the admission of evidence of other statements made by the accused tending to prove that he was affiliated with the Democratic party at the time he attempted to vote at said Republican primary.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2896.

BOARD OF EDUCATION—STADIUM FOR ATHLETICS—MAY ERECT ON
CITY OWNED LAND—APPROPRIATION FOR SAME.

SYLLABUS:

1. Section 4065-5, *General Code*, and related sections, authorize any city, village or county and any school district jointly to equip, operate and maintain playgrounds, playfields, gymnasiums, etc., upon lands set apart for said purpose by the municipality, which said lands are not otherwise dedicated to public use. A stadium for athletic purposes is included within the purposes mentioned in said section.