

2799.

## ELECTION—PRESIDENTIAL ELECTORS—HOW SCRATCHED BALLOTS ARE MARKED.

## SYLLABUS:

*Where at an election for presidential electors, a voter makes a cross mark in the circular space at the head of one party ticket, and has likewise made a cross mark before the name of a candidate for presidential elector on another party ticket, but such voter fails to place cross marks before the names of any of the candidates on the party ticket at the head of which the cross mark is placed, and further fails to erase the name of any candidate on such ticket, the ballot so marked can be counted only for the candidate voted for on the party ticket other than the one at the head of which the cross mark is placed.*

COLUMBUS, OHIO, October 29, 1928.

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

DEAR SIR:—This is to acknowledge the receipt of a recent communication from you which reads as follows:

“I will appreciate your opinion upon the following question relative to voting for presidential electors and the marking of such ballot:

‘An elector places the cross mark in the circular space above the Republican group of presidential electors. He then makes a cross mark on the left of and opposite the name of a presidential elector on the Democratic party ticket. How should such a ballot be counted by the election officials in the precinct wherein such ballot is cast?’”

The Constitution of the United States by Section 1 of Article II thereof, provides that each state shall appoint in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress; and that Congress may determine the time of choosing the electors and the day on which they shall give their votes.

In the case of *McPherson vs. Blacker*, 146 U. S. 1, it was held that under the constitutional provisions above noted, the Legislatures of the several states have exclusive power to direct the manner in which the electors of president and vice president shall be appointed; and that such appointment may be made by the Legislatures directly or by popular vote in districts, or by general ticket, as the Legislatures may provide. And it has been further held that a presidential elector so chosen is a state and not a federal officer. *Todd vs. Johnson*, 99 Ky. 548; *In Re Green*, 134 U. S. 379.

In this state the Legislature has provided that such electors shall be chosen by general ticket to be voted on by the qualified voters of the state at large. Section 4824, General Code, provides as follows:

“On the first Tuesday after the first Monday in November in the year 1912, and every four years thereafter, the qualified electors shall elect a number of electors of president and vice president of the United States equal to the number of senators and representatives this state may be entitled to in the congress of the United States. No senator or representative in congress or other person holding an office of trust or profit under the United States or any law thereof shall be eligible as elector of president or vice president.”

By Section 4953, General Code, it is provided that candidates for presidential electors shall be nominated by delegate state conventions, the delegates to which shall be chosen at a primary election which shall be held on the last Tuesday in April of every fourth year after the year 1916.

Section 5017, General Code, provides that at the elections when presidential electors are to be voted for, the names of all candidates for presidential electors shall be printed on a separate ballot.

Section 5021, General Code, is one of general application to all ballots containing a list of candidates to be voted for at an election. This section reads as follows:

“The ballot shall be so printed as to give each elector a clear opportunity to designate by a cross-mark in a large blank circular space, three-quarters of an inch in diameter, below the device and above the name of the party at the head of the ticket or list of candidates his choice of a party ticket and desire to vote for each and every candidate thereon, and by a cross mark in a blank enclosed space on the left and before the name of each candidate his choice of particular candidates.”

Section 5070, General Code, provides certain rules to be observed in marking and counting ballots. So far as the same is applicable to the question presented in your communication, this section provides as follows:

“ \* \* \*

1. If the elector desires to vote a straight ticket, or in other words for each and every candidate of one party for whatever office nominated, he shall, either,

(a) Make a cross mark in the circular space below the device and above the name of the party at the head of the ticket; or

(b) Make a cross mark on the left of and opposite the name of each and every candidate of such party in the blank space provided therefor.

2. If the elector desires to vote a mixed ticket, or in other words for candidates of different parties, he shall, either

(a) Omit making a cross mark in the circular space above the name of any party, and make a cross mark in the blank space before the name of each candidate for whom he desires to vote on whatever ticket he may be; or

(b) Make a cross mark in the circular space above the name of a party for some of whose candidates he desires to vote, and then make a cross mark before the name of any candidate of any other party for whom he may desire to vote, in which case, the cross mark in the circular space above the name of a party will cast the elector's vote for every candidate on the ticket of such party, except for offices for which candidates are marked on other party tickets, and the cross marks before the names of such candidates will cast the elector's vote for them.

3. When two or more persons for the same office are to be voted for in any precinct, as two or more representatives or other officers, and the names of several candidates therefor appear on each party ticket, grouped under the office for which they all are running, the elector who has marked a ticket in

the circular space at its head, and marked one or more of a group of candidates for such office on another ticket or tickets, must in addition to marking the ticket in the circular space at its head, also make a cross mark before each one of the group of candidates for such office for whom he desires to vote on the ticket thus marked; or instead of marking the candidates for such office he desires to vote for on the ticket marked by him, he may erase the names of candidates for such office for whom he does not desire to vote on the ticket thus marked by him to the number of candidates for such office marked by him on other party tickets, in which case his vote shall be counted for the candidates for such office not erased.

4. If an elector who has thus marked a party ticket in the circular space at the head thereof, and has marked one or more candidates on another ticket or tickets for an office for which there is more than one candidate on his own party ticket, fails or neglects to indicate either by individual marks or by erasures which of the several candidates for the same office on his own party ticket he desires to vote for, then the vote shall be counted only for the candidate or candidates for that office that have the distinguishing mark before his or their names.

\* \* \*

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

Applying the above quoted provisions of Section 5070, General Code, to the question presented in your communication, it appears that although the voter in the supposed case presented by your question, has made a cross mark in the circular space at the head of the Republican presidential ticket as his apparent party ticket, and has likewise made a cross mark before the name of one of the candidates for the office of presidential elector on the Democratic ticket, he has not made any cross marks before the names of any of the candidates for presidential elector on the Republican ticket, nor has he erased the name of one such candidate on the Republican ticket. By failing to do these things or either of them, he has not indicated what candidates on the Republican ticket he desires to vote for in addition to the one Democrat he has voted for for said office; and therefore under the provisions of paragraph 4 of Section 5070, General Code, above quoted, the ballot marked as in the case here presented can be counted only for the candidate on the Democratic ticket who has the distinctive cross mark before his name.

The voter in the given case had the right to vote for twenty-four persons for the office of presidential elector, and no more. In addition to the one Democrat voted for for said office, the voter had the right, if he so desired, to vote for not more than twenty-three persons whose names appeared on the Republican ticket; but inasmuch as he has not indicated the names of the persons on said ticket for whom he desired to vote to the exclusion of any particular name thereon, such ballot so marked can not be counted for any of the persons whose names appear on the Republican ticket; but, as before noted, such ballot can be counted only for the person on the Democratic ticket before whose name the voter placed his cross mark. Lewis & Putney's Handbook of Election Laws, page 120; *Whittam vs. Zahorik*, 91 Iowa 23.

Respectfully,  
EDWARD C. TURNER,  
Attorney General.