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BALLOT, NATIONAL PARTY COLUMN — CROSS MARKS BOTH IN BLANK CIRCULAR SPACE AT HEAD OF PARTY TICKET AND IN SQUARE IN FRONT OF BRACKET BEFORE NAMES OF CANDIDATES OF ANOTHER PARTY FOR PRESIDENT AND VICE PRESIDENT OF UNITED STATES — INVALID — MAY NOT BE COUNTED — IMPOSSIBLE TO DETERMINE VOTER'S CHOICE.

SYLLABUS:

A national party column ballot which bears cross marks in both the blank circular space at the head of a party ticket and also in the square in front of the bracket before the names of the candidates of another party for president and vice-president of the United States is invalid and may not be counted for the reason that in such case it is impossible to determine the voter's choice.

Columbus, Ohio, October 24, 1940.

Hon. George M. Neffner, Secretary of State,
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion on the following:

"In marking the national party column ballot, if there should be a cross mark placed in the circle above the Democratic ballot and a cross mark in the square before the names of the Republican candidates for president and vice president, how should such ballot be counted?"

In the counting of ballots it is well settled that a voter's intention as evidenced by the mark or marks he places upon his ballot must be considered. Generally, if a voter affixes to his ballot any mark which fairly indicates his intention the ballot will be counted unless a mandatory provision of the election statutes has been violated. See 18 Am. Jur. 301, et seq. 15; O. J. 382, et seq.

The Legislature of Ohio has adopted this general rule in the enactment of Sections 4785-131 and 4785-144, General Code, which, is so far as are pertinent to your inquiry at this time, provide as follows:

Section 4785-131, General Code:

"* * * * * * * * *

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

* * * * * * * * * *"

Section 4785-144, General Code:

"No ballot shall be counted which is marked contrary to law, except that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choice. * * *"

In other words, no qualified elector will be disfranchised by the commission of any technical error in casting his ballot providing it is at all possible to determine his intent.

This proposition was considered by the Supreme Court of Ohio in the case of Village of Richwood vs. Algower, 95 O. S. 268, wherein at page 274 of the opinion, Jones, J. said as follows:

"* * * Suffice it to say that with a view to 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."

To the same effect is the pronouncement of Walters, J. in the early case

of State, ex rel. Bambach vs. Markley, 9 O. C. C. (N. S.) 561 (affirmed by the Supreme Court without opinion, 76 O. S. 636), at page 567 as follows:

> "It is a rule of construction laid down by all text-writers upon the subject of counting votes that the primary step is to determine, if possible, the intention of the voter, and where that can be done, no vote should be thrown out. This would seem to be a just rule as we all know that a great many people in this country give but little attention to the manner of voting under the Australian law, and especially where it is desired to vote a mixed ticket, and that a great deal of confusion has arisen. It takes a pretty intelligent man, from one election to another, his attention not having been called to the matter, and having given no thought to the manner of voting, to step into the voting booth, and without hesitation to vote a mixed ticket, and be sure it is correctly done. The courts, therefore, have construed all those Australian ballot laws in a liberal manner. The Legislature in adopting that system, and carrying out that idea of construction in Section 6935, provided as follows: 'No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice.' In obedience to this rule of construction, if from an inspection, and from the evidence, it is possible to determine the intention of the voter you must do so. In other words, if it is possible, in the language of the statute for us to determine for whom he intended to vote, it is our solemn duty to preserve that vote."

Let us now consider the manner in which an elector may vote the national party column ballot which consists only of the names of the candidates for president and vice-president of the United States. Section 4785-107, General Code, provides as follows:

> "The names of candidates for electors of president and vice-president of any political party or group of petitioners, shall not be placed on the ballot; but shall, after nomination, be filed with the secretary of state. In place of their names there shall be printed first on the ballot the names of the candidates for president and vice-president, respectively, of each such party or group of petitioners and they shall be arranged under the title of the office. Before the names of such candidates for president and vice-president of each party or group, a single square shall be printed in front of a bracket in which the voter shall place the cross mark for the candidates of his choice for such offices. A vote for any of such candidates shall be a vote for the electors of the party by which such candidates were named and whose names have been filed with the secretary of state."

Section 4785-105 General Code, provides in part as follows:

> "* * * The party column ballot shall be so printed as to give

each elector an opportunity to designate by a cross mark in a 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 his desire to vote for each and every candidate thereon, except as he may otherwise indicate, by a cross mark in a blank enclosed space on the left and before the name of each candidate, his choice of particular candidates. * * * "

In the recent case of State, ex rel. Sawyer vs. Neffner, 137 O. S. 309, the relator filed a petition praying that a writ of mandamus issue to compel the respondent, as Secretary of State, to place upon all national party column ballots at the general election this year the blank circular space in which to vote a straight party ticket provided for in Section 4785-105, supra. The court in allowing the writ said at page 310 as follows:

"The presidential ballot is a party column ballot and therefore comes within the provisions of Section 4785-105, General Code."

Obviously the court intended its order in said case to have some effect. By requiring the circular space to be placed at the head of each party ticket the court found that the Legislature had provided another method of voting for the Republican or Democratic nominees for president and vice-president of the United States and the respective party presidential electors whose names have been filed with the Secretary of State as provided by law. Therefore, a cross mark in the blank circular space below the device and above the name of the party must be construed as an intention on the part of the voter to vote for such candidates. Clearly, of course, by force of Section 4785-107, supra, such vote may be cast by placing a cross mark in the single square in front of the bracket enclosing the party nominees for president and vice-president.

To sum up, it appears that, in so far as a national party column ballot is concerned, an elector may cast his vote by either placing a cross mark in the circular space as provided in Section 4785-105, supra, or in the square in front of the names of the party nominees as provided in Section 4785-107, supra.

In the instant opinion we are concerned with a national party column ballot whereon appears a cross mark in the circle above one party ticket and also a second cross before the names of the opposition candidates for president and vice-president of the United States. In line with the foregoing

discussion, it is apparent that each cross mark standing alone is made in accordance with law; the former in accordance with Section 4785-105, supra, and the latter in accordance with Section 4785-107, supra.

Such being the case, having in mind the principles enunciated at the beginning of this opinion, we must now attempt to ascertain the intention of a voter casting this type of ballot. Section 4785-131, supra, provides in part as follows:

"* * * * * * * * *

> 7. If the elector marks more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for such office.
>
> * * * * * * * * * *"

Section 4785-144, supra, provides in part as follows:

> "* * * A ballot shall not be considered invalid when a less number of candidates are voted for than are to be selected for any particular office; but if more persons are voted for than are to be selected for any particular office, then such ballots shall be invalid, but only in so far as that office is concerned. * * *"

There can be no dispute that a national party column ballot bearing two cross marks, one in the circle above the Republican ticket and the other in the circle above the Democratic ticket should not be counted for the reasons contained in the sections just quoted. For like reasons, such a ballot containing a cross mark in each of the squares in front of the names of the nominees of the respective parties should be declared invalid and should not be counted. In either case it would appear that the elector has attempted to mark more names than there are persons to be elected and by reason thereof has made it impossible to determine his choice.

I fail to see any material distinction between these examples marked with two cross marks and the ballot about which you inquire whereon appears two cross marks, one in the circle above the Democratic ticket and the other in the square in front of the names of the Republican candidates for president and vice-president. As stated above, each cross mark was made in conformity with a provision of the election law and I see no reason, therefore, to give either a preference over the other. In my opinion an elector who casts such a ballot has marked more names than there are persons to be elected and has thereby made it impossible to determine his choice.

A former Attorney General had occasion to consider a question very similar to the one propounded by you. His conclusions are contained in Opinions of the Attorney General for 1928, Vol. IV, page 2625. The syllabus of said opinion holds as follows:

> "Where a voter makes a cross mark in the circle at the head of a party presidential ticket and also makes cross marks before the names of candidates for president and vice president on another party presidential ticket, the voter has thereby made it impossible to determine his choice for the office to be filled and the ballot should not be counted for such office."

At page 2631 of that opinion it was said:

> "By making the mark in the circle at the head of the Democratic ticket the voter has evidenced the purpose to vote for the candidates for elector set out on that ticket. By making the cross-mark in front of the names of Hoover and Curtis, on the Republican ticket, he has just as effectively evidenced an intention to vote for the Republican candidates for electors. It is true that the vote appearing on the Democratic ticket is made in accordance with the statute while the marks on the Republican ticket are not in accordance with the statute, but so far as the intention of the voter is concerned, one is as definite as the other. I do not believe, therefore, that the marks in front of the names of Hoover and Curtis on the Republican ticket can be regarded as mere surplusage or technical errors, and my conclusion is that such ballot falls within the provisions of paragraph 7 of Section 5070, supra, which provides that where the voter has for any reason made it impossible to determine his choice for an office to be filled, his ballot shall not be counted for such office."

This reasoning may be applied with greater force to the instant situation by reason of the fact both cross marks we are considering were made in pursuance of specific statutory authority, whereas the cross marks on the Republican ticket under consideration in the 1928 opinion were not contemplated by any statute then existing.

In view of the foregoing, it is my opinion that a national party column ballot which bears cross marks in both the blank circular space at the head of a party ticket and also in the square in front of the bracket before the names of the candidates of another party for president and vice-president of the United States is invalid and may not be counted for the reason that in such case it is impossible to determine the voter's choice.

Respectfully,

THOMAS J. HERBERT,
Attorney General.