

1138.

APPROVAL, BONDS OF GUERNSEY COUNTY—\$33,942.78.

COLUMBUS, OHIO, November 1, 1929.

*Industrial Commission of Ohio, Columbus, Ohio.*

1139.

APPROVAL, BONDS OF VILLAGE OF FRANKLIN, WARREN COUNTY—  
\$7,500.00.

COLUMBUS, OHIO, November 1, 1929.

*Industrial Commission of Ohio, Columbus, Ohio.*

1140.

ELECTION—NO CANDIDATE FOR MAYOR ON DEMOCRATIC TICKET  
—VOTES WRITTEN IN FOR CERTAIN PERSON ON BOTH TICKETS  
—ALL SUCH VOTES TO BE COUNTED.

## SYLLABUS:

*Where the Republican party has nominated a candidate for mayor, and the Democratic party has not, votes cast for a candidate for mayor whose name is written in by the voters either in the blank space provided in the Democratic column for the purpose, or in the blank space beneath the name of the Republican candidate, must be added together and counted; provided, however, that in no event can there be counted two votes for the same person on the same ballot. Conversely, if the name of the Republican candidate is written in on the Democratic ballot, votes for him so cast shall be added to the votes cast for him in the Republican column.*

COLUMBUS, OHIO, November 1, 1929.

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

DEAR SIR:—This will acknowledge receipt of your recent communication, requesting my opinion, as follows:

“A question has just been submitted to me by local officials upon which I very much desire your legal opinion.

‘A has not qualified as a candidate for mayor and his name has not been printed upon the ballot. B is the Republican candidate for mayor with his name printed on the Republican ticket. No Democratic candi-

date for mayor was nominated, and a blank space appears upon the Democratic ticket for such office. A part of the voters of the municipality write in the name of A on the Democratic ticket as a candidate for mayor. Other voters of the municipality write in A's name and vote for him as a candidate on the Republican ticket. A receives a total number of votes cast for him (adding both the votes received on the Democratic ticket and the votes received on the Republican ticket together) to give him a larger total vote than B. However, on neither ticket (taken separately) did A receive more votes than B.'

The question is whether or not A has been elected mayor. Or in other words, whether or not the total number of votes received by an individual elector as a candidate for an office shall consist of the votes received for such office on any and all tickets or ballots, or, whether or not he is only entitled to the highest number of votes received on some particular ticket as a candidate of the particular party?

While the writer has a rather well defined opinion of his own on this matter, it is his belief that because of no definite legal decisions or opinions on the matter, there is considerable misunderstanding among the election officials and that the question should be cleared up by an opinion from your Department as a matter of public record."

Section 5070, General Code, paragraph 6, provides :

"If the elector desires to vote for a person whose name does not appear on the ticket, he can substitute the name by writing it in black lead pencil or in black ink in the proper place, and making a cross mark in the blank space at the left of the name so written."

Paragraph 9 of Section 5070, General Code, provides that no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice. This statute requires that where the ballot is so marked that the intention of the voter is evident, the ballot should be counted, regardless of whether the mark indicating his intention is the mark the statute directs him to make or not.

In *State ex rel. Conner vs. Noctor*, 106 O. S., 517, the Supreme Court refused to order included in ballot totals the ballots on which the name of a candidate for council appeared in two places, namely, on the Democratic ticket and on the Independent ticket, with a cross-mark in front of the candidate's name in both spaces on each of the seven ballots. The court, in the opinion indicated that one vote on each of the seven ballots would have been ordered counted for the candidate, as the expression of the voter was clear, had the Independent ticket not been illegally placed on the ballot.

My immediate predecessor had under consideration the question of whether the name of a candidate may appear as a party nominee for mayor and also as an Independent candidate for the same office, nominated by petition, when each such act was done at the time and in the manner provided for original nominations. It was held that in the counting of the ballots the candidate was entitled to have counted the votes cast for him on both of said tickets at the November election. See Opinions of the Attorney General for 1927, Volume 4, page 2662.

It is the general rule that qualified electors have all political power, and this must be exercised through the ballot. Any limitations of their right to vote for

any person eligible for such office would be scrutinized closely and be subject to the rule of strict construction.

Cooley, in his work on Constitutional Limitations (7th Ed.), p. 912, says:

"The system of ballot voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases, and that no one is to have the right, or be in position, to question his independent action, either then or at any subsequent time."

Judge McCrary in his work on Elections, (4th Ed.) Sec. 700, says:

"The statutes of most of the states expressly permit the voter to cast his ballot for the person of his choice for office, whether the name of the person he desires to vote for appears upon the printed ballot or not."

So definitely fixed in our American jurisprudence is the doctrine that the elector may vote for whom he chooses that it is easy to understand that if a voter wishes to vote at a general election for a candidate for mayor whose name does not appear on the ballot, he may write in such name either in the blank space provided for such purpose in the Republican column or in a blank space provided for that purpose in the Democratic column.

A somewhat similar situation was considered by the court in the case of *State ex rel. Figley vs. Conser*, 5 O. C. C. (N. S.) 119. Figley was the Democratic nominee for township trustee and Conser was the Republican nominee for the same office. A citizens' ticket also appeared on the ballot with no name printed in the blank space for "township trustee". On page 125, the Court used the following language:

"In regard to the citizens' tickets, it is claimed that there were three of those where Figley's name was written in under the appropriate printed head of township trustee, indicating that the voter intended to vote for him. While there is some conflict as to the number, there is no dispute that there were two at least of these where Figley's name was written in its proper place, showing that the electors intended to vote for George Figley for township trustee. And the judges of the election honestly made a mistake in rejecting these ballots. In fact, the majority of them come here as witnesses and admit that they did make a mistake. They were honest in their action, but that does not affect the right of the elector to have his vote properly counted; and we think, therefore, that these four votes for Figley were erroneously rejected, which would give Mr. Figley a majority of two votes."

Specifically answering your question, it is my opinion that where the Republican party has nominated a candidate for mayor, and the Democratic party has not, votes cast for a candidate for mayor whose name is written in by the voters either in the blank space provided in the Democratic column for the purpose, or in the blank space beneath the name of the Republican candidate, must be added together and counted; provided, however, that in no event can there be counted two votes for the same person on the same ballot. Conversely, if the name of the Republican candidate is written in on the Democratic ballot, votes for him so cast shall be added to the votes cast for him in the Republican column.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*