

poor who reside in such city. From the fact that the jurisdiction of the township trustees of Marion Township in granting public support to the needy is limited to persons who reside outside of the city of Marion it follows that they have no authority to employ anyone to dispense public funds for the relief of the poor within the city.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1517.

ELECTION—WRITING IN NAME OF CANDIDATE— ELECTION RETURNS CONTROL.

SYLLABUS:

1. *Under the provisions of paragraph 6, Section 5070, General Code, and also under the provisions of Section 5071, General Code, if the name of a candidate regularly nominated is omitted from the ballot, and if an elector writes the name of said candidate in the space provided therefor, the vote for said candidate is valid and must be counted.*

2. *It is presumed as a matter of law that the elector intended to vote for the person shown to have received the vote on the face of the election returns, and in the absence of a contest of election said election returns will control.*

COLUMBUS, OHIO, January 4, 1928.

HON. GEORGE H. BLECKER, *Prosecuting Attorney, Mansfield, Ohio.*

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

“Within the time prescribed by law for filing petitions for the November election one Mrs. James E. Fellows of Lexington, Ohio, filed her petition with the board of elections of this city as a candidate for a member of the school board in the Village of Lexington, Ohio, and her petition was signed ‘Mrs. J. E. Fellows.’ I believe there were two other candidates filed petitions, one Harry Palm and one A. E. Leonard. When the ballots were printed by the board of elections inadvertently the ‘Mrs.’ was left off in front of the J. E. Fellows so that it appeared on the ticket as J. E. Fellows being a candidate.

When canvass of the vote was made it was found that James Fellows had received 131 votes, Harry Palm 120, and A. E. Leonard 90 votes, and that was about the first time it was discovered that the name of ‘Mrs.’ had not appeared on the ballot. The result is that James Fellows who received high vote was not a candidate by nomination nor was his name written in but was printed on the ballot by mistake by the deputy state supervisor of elections. Mrs. Fellows, who was the regular candidate, had her name written in, I guess, by about six or seven voters who had discovered the error.

The question was submitted to me by the school board as to whether James Fellows was elected or whether Mrs. Fellows was elected, or what the real situation was and requested that I get an opinion from the Attorney

General. To further complicate the matter, since this time Mrs. James E. Fellows has died and I was wondering if you would give me an opinion as to who was elected, and how this vacancy may now be filled if she, in your opinion, was legally elected."

Paragraph 6 of Section 5070, General Code, 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."

Section 5071, General Code, provides:

"If there was no nomination for a particular office by a political party, or if by inadvertence, or otherwise, the name of a candidate regularly nominated by such party is omitted from the ballot, and the elector desires to vote for some one to fill such office, he may do so by writing the name of the person for whom he desires to vote in the space underneath the heading or designation of such office, and make a cross mark in the circle at the head of the ticket, in which case the ballot shall be counted for the entire ticket, as though the name substituted had been originally printed thereon."

In this connection I desire to direct your attention to the provisions of Section 4998, General Code, which provides as follows:

"When nominations of candidates for member of the board of education have been made by nomination papers filed with the board of deputy state supervisors, as herein provided, such board of deputy state supervisors shall publish on two different days prior to the election a list of the names of such candidates in two newspapers of opposite politics in the school district, if there is such printed and published therein. If no newspaper is printed in such school district, the board shall post such list in at least five public places therein."

I also direct your attention to the provisions of Section 5033 and 5036, General Code. If these sections of the Code were complied with by the board of deputy state supervisors of elections, it would seem that the electors of the district were sufficiently advised as to who were and who were not candidates at the election.

Under the statutory provisions relating to the marking of the ballot, the elector is given full opportunity to vote for whom he chooses. If the make up of the ballot does not suit him he may write in the names of persons for whom he desires to vote.

It appears from your letter that six or seven voters did not choose to vote for "J. E. Fellows" and wrote in the name of "Mrs. Fellows." The fact that the title "Mrs." was left off the ballot so that the ballot carried the name of J. E. Fellows instead of that of his wife may have confused some voters who by reason thereof voted for J. E. Fellows instead of Mrs. Fellows. The presumption, however, remains that the elector intended to vote for the person shown to have received the vote upon the face of the returns. In the absence of a contest of election, the proper officials are governed by the face of the election returns.

It is therefore my opinion that in the absence of a contest of election the proper election officials are governed by the election returns and, therefore, in the instant case, J. E. Fellows should be declared elected.

In this connection it may be well to invite your attention to the case of *Board of Elections vs. Henry* in the Court of Appeals, Franklin County, Ohio, 25 Ohio Appellate -----, wherein it is held in the eighth branch of the syllabus, as follows:

“Ballots on which voters wrote H.’s name in pencil, but did not add cross mark, held properly counted for H.”

This case was presented to the Supreme Court upon motion to certify which was overruled November 2, 1927, 158 N. E. 94.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1518.

FINE AND IMPRISONMENT—THIRD OFFENSE UNDER LIQUOR—
COURT OF COMMON PLEAS WITHOUT AUTHORITY TO REMIT
FINE OR SUSPEND SENTENCE.

SYLLABUS:

1. *By the terms of Sections 6212-17 and 13706, General Code, a Court of Common Pleas is without authority to remit a fine or part thereof or suspend a sentence or part thereof imposed under Section 6212-17, General Code.*
2. *By the terms of Section 6212-17, General Code, a Court of Common Pleas, upon conviction of an accused of a third, or of a subsequent offense, under Sections 6212-13 to 6212-20, General Code, must impose a fine and imprisonment as provided in said Section 6212-17, General Code.*

COLUMBUS, OHIO, January 4, 1928.

HON. CARL Z. GARLAND, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—This will acknowledge your letter dated January 2, 1927 (1928) which reads:

“We are having some difficulty in determining the rights of the Common Pleas Court in sentences for a third offense under the liquor laws of Ohio. We are asking for an opinion from your department on the following circumstances.

An indictment has been returned in this county charging the defendant with a third offense for the sale of liquor, he having been charged with sale and convicted on two other occasions. Can the Common Pleas Court suspend any part of the sentence? Is it compulsory on the part of the Common Pleas Court to sentence the defendant to a fine and also impose the penitentiary sentence, or can either be given and not include the other?”

The answer to your questions is found in Sections 13706 and 6212-17, General Code, which in so far as pertinent, provide:

Sec. 13706. “In prosecutions for crime, except as mentioned in Section 6212-17 of the General Code, and as hereinafter provided, where the defendant has pleaded or been found guilty and it appears to the satisfaction of