

In conclusion I venture to give expression to a thought that has been in mind during the whole of the above discussion, and that is that the use of the part of the premises in question which you designate as "East Main Street" has been, perhaps, something more than a mere passing or repassing thereon by members of the public as a matter of convenience, and has been so effectually adverse in nature and extent, and has been so long continued as to establish such strip of land as a public highway and street, even though it be determined that the purpose and effect of the deed was to establish said premises as public park grounds. In such case the village authorities in the improvement of such street, and in the assessment of the cost and expense thereof, will have to take into account Section 3837, General Code, which provides for the payment by the corporation of a part of the cost and expense of an improvement where the same passes by or through a park or other public ground.

Respectfully,

EDWARD C. TURNER,
Attorney General.

1458.

ELECTIONS—CANDIDATE FOR MAYOR—MAY HAVE NAME APPEAR AS PARTY NOMINEE AND ALSO AS INDEPENDENT CANDIDATE FOR SAME OFFICE.

SYLLABUS:

Under the provisions of Section 4995, General Code, 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 is done at the time and in the manner provided for original nominations.

COLUMBUS, OHIO, December 28, 1927.

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

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

"We are enclosing herewith letters from the Board of Deputy State Supervisors of Elections for Columbiana County, Ohio, and request your opinion as to whether a candidate for Mayor nominated at the primary may also file by nominating petition and thereby have his name placed both upon the ticket of his party and upon an Independent ticket as a candidate for the same office."

Section 4995, General Code, is as follows:

"When no nominations were made originally for a particular office, it shall be unlawful for any committee appointed for the purpose of filling vacancies to name a candidate of another political party for such office or to so name a candidate nominated by petition. When the nomination of a candidate of one party is endorsed by another, it shall be done at the time and in the manner provided for original nominations."

Under the original Australian ballot law the name of the same candidate could not appear twice upon the same ballot: *State ex rel., vs. Conser*, 5 O. C. C. (N. S.) 119.

This same question was considered by this Department in the Annual Report of the Attorney General for 1909 at page 623, from which the following language is taken:

"You inquire whether a person nominated in compliance with law by a political party, may, by the circulation of petitions, become an independent candidate and have his name appear twice upon the ballot at the municipal election as a candidate for the same office. I beg to state that, in my opinion, this may be done. The same is not prohibited by the primary election law, nor by any other provision of the statutes. It was formerly prohibited by Section 2966-19 R. S., but the same was amended so as to strike out this provision. That section now applies merely to the filling of vacancies by the controlling committee of a political party."

Also in Annual Report of the Attorney General for 1912, Vol. II, page 1279 the following language is found:

"Section 4995, supra, authorizes a candidate to run on more than one ticket for a particular office, providing he is nominated therefor 'at the time and in the manner provided for original nominations.' Therefore, if the party voters of a political party so see fit they may write in the name of a candidate of another party as a candidate on their own ticket for a particular office, and if he receives the highest number of votes cast by the electors on that ticket for that office he is the nominee of their own party for the particular office, and the fact that he is also a candidate on another ticket would make no difference.

Of course, this vote on the party ticket of which he is not a party member, can in no way interfere with or be counted in connection with the candidate's vote on his own party ticket; it is just as if he were another and different individual.

This must be permitted under the law; otherwise, a candidate of one party could not be endorsed by another party as is now allowed by the terms of Section 4995."

and again on page 1296 of the same Annual Report of the Attorney General for 1912, the syllabus is as follows:

"Section 4995, General Code, provides that a candidate of one party may be endorsed by another providing it is done at the time and in the manner fixed for original nominations, and as the original nominations are now made at the primaries, it is permissible to so endorse a candidate of an opposite party by merely filling in his name on the ballot.

When a candidate is so entered, however, upon the ticket of both parties, he runs as a separate candidate upon either ticket and the votes from each party must be counted separately as for separate candidacies."

An examination of the correspondence accompanying your letter discloses that your inquirer asks in the event that the candidate's name may appear on the party ticket and also as an independent candidate, "how about the count of the votes he receives on the two places on the ballot."

What has been said heretofore in this opinion refers largely to primary elections for the purpose of nominating candidates. Coming now to the question of the count of the votes cast for the same candidate on the party ticket and also on the independent

ticket, at the November election, I find this matter 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."

Section 4950, General Code, provides as follows:

"Nothing in this chapter shall repeal the provisions of law relating to the nomination of candidates for office by petition, and no elector shall be disqualified from signing a petition for such nomination of candidates for office by petition, because such elector voted at a primary provided for herein to nominate candidates to be voted for at the same election or because such elector signed nomination papers for such primary; provided, that no person who has been defeated as a candidate for an office at primary election, may be nominated by petition for the office for which he was defeated at the primary, and to be voted for at the next ensuing election."

The above section was amended in its present form in 110 Ohio Laws, 131, prohibiting a defeated candidate in a primary election to obtain a place on the ballot by petition to be voted for at the next ensuing election. However, this wholesome provision only extends its inhibition to a defeated candidate in the primary, and does not prevent the name of the nominee from appearing on the ballot if he is regularly petitioned for as provided by law.

It is therefore my opinion that under the provisions of Section 4995, General Code, a candidate for mayor who was nominated at the primary election may also file for the same office by nominating petition and thereby have his name placed on the ticket of his party and upon an independent ticket as a candidate for the same office, and that in the counting of ballots he is entitled to have counted the votes cast for him on each of said tickets at the November election.

Respectfully,

EDWARD C. TURNER,
Attorney General.