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1. ELECTION—VOTES—PERSON NOMINATED BY PETITION—WHERE ELECTOR PLACED CROSS MARK AT LEFT OF NAME AS SAME APPEARS ON BALLOT ON INDEPENDENT TICKET, AND ELECTOR ALSO VOTED FOR SUCH PERSON FOR SAME OFFICE BY WRITING HIS NAME ON PARTY TICKET AND PLACED CROSS MARK AT LEFT OF SUCH NAME WRITTEN IN, ON WHICH PARTY TICKET NO CANDIDATE WAS NOMINATED AT PARTY PRIMARY ELECTION, SUCH BALLOT SHOULD BE COUNTED AS ONE VOTE FOR SUCH PERSON.

2. WHERE PERSON'S NAME APPEARED ON BALLOT AS INDEPENDENT CANDIDATE FOR AN OFFICE AND HE RECEIVED VOTES ON PARTY TICKET, WHICH HAD NO CANDIDATE FOR SUCH OFFICE, THE NAME HAVING BEEN WRITTEN ON PARTY TICKET AND A CROSS MARK PLACED AT LEFT OF NAME, ALL VOTES SO CAST, TOGETHER WITH THOSE CAST BY PLACING CROSS MARK IN FRONT OF NAME ON INDEPENDENT TICKET, SHOULD BE COUNTED IN HIS FAVOR.

SYLLABUS:

1. Where an elector votes for a person who was nominated by petition by placing a cross mark at the left of his name as the same appears on the ballot on an independent ticket, and also votes for such person for the same office by writing his name on a party ticket and placing a cross mark at the left of the name so written in, on which party ticket no candidate for such office was nominated at the party primary election, such elector's ballot should be counted as one vote for the person so voted for.

2. Where a person whose name appears on the ballot as an independent candidate for a certain office is voted for for the same office on a party ticket which has no candidate for such office, by having his name written on such party ticket and a cross mark placed at the left thereof, all votes so cast, together with those cast for him by placing a cross mark in front of his name on the independent ticket, should be counted in his favor.

Columbus, Ohio, September 19, 1945

Hon. E. E. Erb, Prosecuting Attorney
Marietta, Ohio

Dear Sir:

This will acknowledge receipt of your communication, which reads as follows:

> "In the municipal election of the City of Marietta, Ohio, we have nominees for all offices on the Republican ticket. There is no candidate for mayor on the Democratic ticket, although several individuals have filed for member of council. We have one candidate for mayor on an independent ticket, which has been designated as "The Peoples Ticket.' Such candidate will be referred to as Mr. A.
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> The Washington County Board of Elections has asked me to obtain your opinion on the following question: If an elector votes for Mr. A as an independent candidate on the Peoples ticket and also writes his name in on the regular Democratic ticket for the office of mayor, can this ballot be counted as one vote for Mr. A, or should such ballot be considered as not having cast any vote whatsoever for Mr. A on either ticket, and not be counted.
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> Assuming that some electors will vote for Mr. A as a candidate for mayor on the Peoples ticket and others may write his name in for mayor on the Democratic ticket, will the votes for Mr. A on both the Democratic ticket and Peoples ticket be totaled to ascertain if he has the larger number of votes, or will the total of such votes be considered separately as a Democratic candidate and as a Peoples choice candidate?"

While your letter does no specifically so state, I assume that the candidates whose names will appear on both the Republican and Democratic tickets were nominated at the recent primary election and the candidates on the independent ticket were nominated by petition.

Provisions for writing in the name of a person whose name does not appear on the ticket and for whom an elector desires to vote, are contained in Section 10 of Amended Substitute Senate Bill No. 216 of the 96th General Assembly, under which act certain permanent sections of the election laws are suspended until December 31, 1947. In said Section 10, which in its essential features corresponds to Section 4785-131, General Code, suspended during the above period, it is provided in paragraph 6 thereof:

> "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 the proper place, and making a cross mark in the blank space at the left of the name so written."

It is significant to note that the above paragraph refers to a person whose name does not appear on *the ticket.* True, the name of Mr. A will appear on the ballot but not on the Democratic ticket. That a distinction exists in the election laws between the words "ballot" and "ticket" is beyond question. A ballot is the instrument by which a voter expresses his choice between candidates or some issue or question, while a ticket means the list of candidates nominated by the respective parties at a primary election or nominated by a nominating petition.

Attention is also directed to paragraphs 7 and 9 of said Section 10, which paragraphs respectively provide:

> "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."

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

Here, it seems, is the statutory test as to whether a ballot on which an elector votes for Mr. A as a candidate on both the People's Ticket and the Democratic Ticket shall be counted. It can scarcely be contended that a voter has rendered it impossible to determine his choice for an office to be filled by expressing such choice more than once on the same ballot. In the instant case, it seems to me, that a voter's intention to vote for Mr. A is clearly expressed when he places a cross mark to the left of Mr. A's name printed on the People's Ticket and again places a cross mark to the left of such name written by him on the Democratic Ticket.

Such double marking clearly and unmistakably would emphasize his intention to vote for Mr. A. He surely cannot be said to have less clearly indicated his choice of a candidate because he has expressed it more than once.

In the case of State, ex rel. v. Noctor, 106 O. S. 516, the Supreme Court had before it a question similar to the one here under consideration. In said case, the relator sought a writ of mandamus to compel the board of elections of Hamilton County to count in his favor certain ballots on which his name appeared as a candidate for councilman in two places, namely, on the Democratic Ticket and on the Independent Ticket, each of which bore a cross mark in front of his name in both places While said writ was denied because of other issues raised in the case, Hough, J., who wrote the opinion of the court, in commenting on such ballots, stated:

> "* * * It is urged that while the voting for the same person twice by a voter is an irregularity in itself, one vote on each of the ballots should have been counted for the candidate, for the reason that the intention of the voter was clearly expressed.
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> With this we are in accord. The making of a cross-mark in front of the name of a candidate on the ballot is of course the expression of the intention of the voter, and the making of a cross in each place in front of a name that appears in two places on the ballot is an accentuation of that expressed intention, and if the legal rule that the intention of the voter must prevail does not run counter to some one or more other legal rules the conclusion naturally obtains that these ballots expressed the intention of the voter and should be counted."

The fact that the name of the relator in said case was printed on the ballots on the two different tickets and in the case before us the name of Mr. A is printed on the ballot on the one ticket and written in on the other would, in view of the above reasons, have no bearing on the question. Suffice it to say, in each case the voter has clearly expressed his choice by a double marking and for such reason one vote on each of the ballots so marked should be counted for Mr. A.

I come now to your second question.

A case with factual aspects somewhat similar to those involved in your question is State, ex rel., v. Schirmer, 129 O. S., 143. In said case which was an original action in mandamus in the Supreme Court, the relator, who had been nominated as the candidate for the office of county

recorder on the Republican Ticket at the August 1934 primary, sought to compel the board of elections of Hamilton County to declare him elected to said office and to issue to him a certificate of election thereto. Under the facts set out in the petition filed therein, it appears that Leo H. Beckman was nominated for the same office at the Democratic primary and also thereafter by petition on the Citizens' Ticket. The name of Leo H. Beckman was printed on the official ballots, both on the Democratic Ticket and the Citizens' Ticket, and at the election Beckman received 64,334 votes on the Democratic Ticket and 38,411 votes on the Citizens' Ticket, while the relator received 92,775 on the Republican Ticket. A demurrer to the petition was sustained and the writ prayed for by the relator denied, solely upon laches, the court holding that the relator having failed to challenge the nominating petition filed on behalf of his oppenent, came into court too late to raise the question. Consequently, the decision in said case can hardly be accepted as authority to count votes cast for a candidate on both tickets where his name is printed on each. To the contrary, a concurring opinion in said case by Jones, J., contains impelling reasons why such a candidate should not have the votes cast for him on both tickets counted in his favor. After statiing that he concurred in the judgment on the minor question, to-wit, that of laches, and pointing out that the statute providing for nominations by petition contemplated such nominations to be of individuals, in addition to and other than those nominated at party primaries, Judge Jones declared (pages 150, 151):

> "As I view the case with its resultant judgment, the legal profession cannot think otherwise than that this court, though it has not definitely done so, has inferentially decided that the same candidate cannot be nominated at a party primary and also by petition. Why? For the cogent reason that if we found Beckman was entitled to nomination on both tickets, that would be dispositive of the case and there would be no need for considering the question of laches. And furthermore, since the court has decided the case solely upon laches, the connotation naturally follows that were it not for laches the relator's contention would prevail. The application of the equitable doctrine of laches presupposes a right which one could exercise, if he were not debarred from exercising it because of inexcusable delay in its enforcement. There is a strong implication in this judgment that, had this relator exercised his right seasonably by proper methods, we would have upheld his contention and his interpretation of the section here involved."

While, after reading the above statement, I find myself, in a measure, brought to the conclusion that a person nominated at a primary election may not thereafter be lawfully nominated by petition, yet such statement furnishes no argument to support the position that votes cast for Mr. A on both tickets should not be counted for him, since he was not nominated at a primary election. To the contrary, the inference which is drawn from the decision in the above case when considered in conjunction with the concurring opinion appears to be helpful in resolving the question posed by you. Analytical consideration when given to such opinion wll disclose that the major premise supporting the conclusion reached therein was the fact that the statutes recognized two distinct classes of candidates, one seeking party support and the other seeking support of a group independent of parties, and that the same candidate cannot be both a party candidate and at the same time be independent of that party.

In commenting on the distinction between candidates nominated at a primary election and those nominated by petition, it is stated in said concurring opinion (pages 147, 148 and 149):

> "* * * The act plainly recognizes the distinction, because the declaration of a party candidate must set forth, as a prerequisite to his candidacy, that (instead of being independent) he must declare, not only that he is a party member, but must also declare that he intends 'to vote for a majority of the candidates of such party at the forthcoming election.' By the same section he is required to declare that, if nominated and elected, he 'will support and abide by the principles enunciated' by that party 'in its national and state platform.' Section 4785-71, General Code.
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> Under the definition given above, how can it be claimed that the same individual can, at the same time, abide by the principles of a party and still be uncontrolled thereby? How can it be logically maintained that a party candidate who, as a legal prerequisite to his candidacy, is required to declare that he intends 'to vote for a majority of the candidates of such party at the forthcoming election' and swears to that statement (Section 4785-71, General Code), can be independent and exercise 'a free choice in voting with either or any party'? Any party candidate maintaining such an attitude would violate his statutory declaration, would stultify himself and would pursue a course which would have a tendency to perpetrate a fraud upon the electorate.
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> There is another controlling reason clearly showing that the Legislature never intended that the same individual could at

> the same time be on the ballot both as a party candidate and as an independent candidate. Section 4785-94, General Code, provides that vacancies in party nominations on the ballot shall be filled by the party executive committee; but vacancies on a ballot whose candidates are nominated by petition are to be filled by the committee of five representing the candidate.
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> Now, should a vacancy occur in the present case, what body can fill the vacancy? The executive party committee and the petitioner's committee could not both function in filling the vacancy. This in itself discloses that it was not the legislative intent to permit the same individual to be a party candidate and an independent candidate at the same time."

Therefore, since the conclusion reached in said opinion is based solely upon the incompatibility of the two nominations, it would seem to follow that in the case where there was but one independent nomination, the votes cast by writing the name of the person nominated as an independent candidate on the party ticket should be counted in favor of such person, notwithstanding his candidacy on the independent ticket.

As above pointed out, provision is made in paragraph 6 of section 10 of Amended Substitute Senate Bill No. 216 for voting for a person whose name is not printed on the ticket by writing his name thereon and making a cross mark in the blank space at the left of the name so written.

In view of such provision, it would appear that a vote cast in such manner must be counted for the person whose name is so written in.

Since the right of elective franchise is granted to our citizens by both the state and federal constitutions, it seems to me that, in the absence of statutory provisions invalidating the ballot, a liberal rule should be applied in all cases for the purpose of safeguarding the intention of the voter in the exercise of his constitutional privilege. This principle is emphasized by the section above quoted, which provides that no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice.

For the reasons stated, you are advised, in specific answer to your questions, that in my opinion:

1. Each of the ballots on which Mr. A was voted for twice, once as a candidate on the People's Ticket and once as a candidate on the Demo-

cratic Ticket, after his name was written in on the latter, should be counted as one vote for Mr. A.

2. All votes cast for Mr. A by writing his name on the Democratic Ticket and placing a cross mark at the left thereof, should, together with those cast for him on the Independent Ticket, be counted in his favor.

Respectfully,

HUGH S. JENKINS

Attorney General