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1. ELECTION—CANDIDATE'S NAME WRITTEN IN—WHERE ELECTOR VOTES FOR A PERSON WHOSE NAME DOES NOT APPEAR ON BALLOT, WRITES IN NAME AND PLACES NO CROSS MARK TO LEFT OR OPPOSITE NAME, SUCH VOTE SHOULD BE COUNTED FOR CANDIDATE WHOSE NAME IS WRITTEN IN.

2. WHERE IT WAS SHOWN THERE WAS ONLY ONE CANDIDATE FOR MAYOR OF VILLAGE, AND NAME WAS NOT PRINTED ON BALLOT. A BALLOT ON WHICH SURNAME "LITTEN" WAS WRITTEN IN SHOULD BE COUNTED IN FAVOR OF HARRY LITTEN.

SYLLABUS:

1. Where an elector, who desires to vote for a person whose name does not appear on the ballot, writes in the name of the person for whom he desires to vote and places no cross mark to the left of or opposite such name, such vote should be counted for the candidate whose name is written in.

2. Where it is shown that one Harry Litten was the only candidate for mayor of a village, whose name was not printed on the ballot, a ballot on which the surname "Litten" is written in should be counted in favor of said Harry Litten.

Columbus, Ohio, December 5, 1945

Hon. Kenneth M. Robbins, Prosecuting Attorney
Circleville, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads:

> "The Pickaway County Board of Elections by a resolution passed during a special session of the said board has requested me to submit the following question to you for your formal opinion:
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> > 'Should a ballot be counted for a candidate for mayor when only the surname of the said candidate is written in at the proper place on a non-partisan ballot to designate that the voter was attempting to vote for a candidate for mayor by writing the candidate's name on the ballot?'
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> To give you a factual background of the situation may I add that the above question arose during the conduct of a recount by the said board of elections of the ballots cast for the office of mayor for the village of Ashville, Ohio. During the said recount the board of elections agreed upon the counting or not counting of every ballot cast for an office of mayor except one. This disputed ballot was voted by the voter writing in, without placing an X in front of the said name, the name 'Litten' in the space just below the candidate whose name was printed upon the ballot.
>
> The said board of elections split along party lines in trying to determine whether or not this ballot should be counted. The election resulted, as a result of the said recount, in each candidate receiving 154 votes with this one ballot in dispute. So you can easily see the adamance with which the respective board members sustain their opinions.

I might further add in the way of factual information that in so far as I can learn from my own inquiries the only two persons living in the said village with the surname 'Litten' are Harry Litten and his wife whose given name I do not know. I might also say from my opportunity to observe the ballots as they were being recounted that no name other than the name of either 'Harry Litten' or 'H. Litten' was written in for the said office of mayor.

On some of these ballots, however, the name 'Litten' was spelled 'L-i-t-t-o-n' rather than by 'L-i-t-t-e-n.' All of these ballots were counted by the board of elections for Harry Litten without any dispute.

The precinct officials did not designate the disputed ballot as a disputed ballot in making their returns to the board of elections. There was, however, an error of more than 2% in the precinct officials counting of the votes, and so it is impossible to say whether or not they counted the said ballot which is in dispute.

In view of the fact that the board of elections can not certify its return to the secretary of state until this matter is disposed of, I will appreciate an early opinion."

The provisions of law presently in force, which authorize an elector to vote for a person whose name does not appear on the ballot and which define the method for so doing are set out in Section 10 of Amended Substitute Senate Bill No. 216 of the Ninety-Sixth General Assembly, which act, temporary in character, supersedes until December 31, 1947, certain sections of the election laws of Ohio. In said Section 10 it is provided:

"6. 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."

An application of the above language, standing alone, would seem to indicate that unless a cross mark is placed at the left of a name written on a ballot by an elector, a vote for the person whose name is so written can not be counted. In connection therewith, however, additional language appearing in said section must also be considered. Such language reads:

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

In commenting on the effect of the above provision when applied to a case where a person's name is written on a ballot with no cross mark placed opposite thereto, the Supreme Court of Ohio, in the case of Orewiler v. Fisher, 133 O. S. 608, stated:

> "* * * Where names printed on a ballot are not deleted by the elector but an additional name is written in by the elector, with black lead pencil in a blank space provided for such purpose on the ballot, and no cross or other mark is placed opposite any of the names, the ballot should be counted in favor of the candidate whose name was written in, since the writing in thereof shows the intention of the voter and the lack of a cross mark is a technical error which should not invalidate the ballot."

Therefore, the fact that no cross mark was made to the left of the name in question in the instant case would not, of itself, constitute grounds for rejecting the vote.

Consequently, the sole remaining question is whether the writing in of a surname only is sufficient to identify the person for whom the elector intended to vote and if so, whether such vote should then be counted.

In Section 4785-143, General Code, which prescribes the method of counting votes cast at an election, it is provided:

> "* * * The clerks shall enter in separate columns by tallies opposite the names of the persons voted for, and opposite the questions or issues submitted, the votes for such persons and for and against such questions or issues. * * *"

This provision casts upon the clerks the duty of ascertaining, if possible, from the marking of the ballot, for whom the vote in question was intended.

In State, ex rel. v. Foster, 38 O. S. 599, a case which involved facts somewhat similar to those here under consideration, the Supreme Court, in discussing the duties of election officials under the statute then in force which required such officials "to ascertain the number of votes given for the different persons," stated at pages 603 and 604 of the opinion:

"We fully concede that the duties of the defendants, in the respect in question, were ministerial in their nature. But the performance of ministerial duties requires the exercise of intelligence, sense and judgment. Ministerial duties must be performed correctly; and the fact that a ministerial officer performed his duties according to his judgment is of no avail, if the duties are not correctly performed. A sheriff is bound to ascertain the identity of the person described in process, and to serve the right person. Nor would the fact that there were several persons of the same name relieve him from the performance of the duty; nor the fact that the Christian name of the party named in the process, was expressed by initials only."

Certainly, in the instant case, the election officials charged with the duty of counting the ballots may not assume that "Harry Litten" and "Litten" were different persons, without any consideration of what the facts might actually be.

While it may be true that in most cases the ballot is complete in itself and ordinarily extrinsic evidence need not be resorted to in order to ascertain the voter's intention, however, it must be borne in mind that the paramount rule is to give effect to the intention of the voter and if such intention can be determined by facts within the common knowledge of the voters of the district or by circumstances of a public character connected with the election, a vote should be counted in accordance with such intention. In regard thereto, it is stated in 18 Am. Jur. at page 310:

"* * * Nevertheless, the voter's intention frequently is important, for, as has been shown, if no mandatory provision of the election law is violated, any mark which fairly indicates the elector's intention will be given effect and, under some statutes, a ballot will be rejected only in case a fraudulent intent is shown. The ballot is to be construed as any other writing, and the voter's intention is to be gathered from the instrument itself, read in the light of the surrounding circumstances, extrinsic evidence of which is admissible. But extrinsic evidence is admissible only in aid of the ballot; it may not be received for the purpose of showing that the intention of the voter was in any way different from what plainly appears on the face of the ballot, nor may it be received when the ballot is too defective to express any intention whatever. * * *"

At page 311 of the same work it is declared:

"* * * Although some courts deem themselves bound by a stricter rule, it has been held that a ballot which contains a

candidate's surname only may be counted, even though there are other persons in the county having the same surname, where it is shown that there was no other person of such name who was a candidate for the same or any other office. This rule is also followed if only the middle name of the candidate is wrong, if the first name is abbreviated, or if the wrong initials are used. Furthermore, where there are two persons in the same district with the same name, one of them a candidate, and the other not, and there are ballots which do not designate which of these persons is voted for thereon, parol evidence may be received to show for whom the votes were intended."

Likewise, in State, ex rel. v. Foster, supra, it was said:

"* * * If H. L. Morey and Henry L. Morey designate the same person, as appears from the returns read in the light of such facts of public notoriety connected with the election as every one takes notice of, the defendants have performed their duty correctly in giving the certificate to Henry L. Morey.

It is not averred the votes were intended for different persons; and we understand it to be conceded, in argument, that H. L. Morey and Henry L. Morey, were, in fact, intended to designate the same person.

The rule that should govern in canvassing the returns is thus stated by Judge Cooley, in his work on Constitutional Limitations, and we think correctly: 'The action of such boards is to be carefully confined to an examination of the papers before them, and a determination of the result therefrom in the light of such facts of public notoriety connected with the election as every one takes notice of, and which may enable them to apply such ballots as are in any respect imperfect , to the proper candidates or offices for which they are intended, provided the intent is sufficiently indicated by the ballot in connection with such facts, so that extraneous evidence is not necessary for this purpose.' Cooley's Con. Lim. 623."

In the case of Kreitz v. Behrensmeyer, 125 Ill. 141, it was held by the Supreme Court of Illinois as disclosed by the syllabus:

"37. Where it is shown that there were but three candidates for the office of county treasurer, John B. Kreitz, the democratic nominee, Charles F. A. Behrensmeyer, the republican nominee, and B. L. Dickerman, the prohibition nominee, and that Kreitz had a brother named John M. Kreitz, who was not a candidate, and that John B. Kreitz was ordinarily known and called John Kreitz, while John M. Kreitz was ordinarily known

and called Matt Kreitz, it was held, that some tickets bearing the name of John M. Kreitz for county treasurer were properly counted for John B. Kreitz.

38. In the same case it was shown that there were several other persons in the county by the name of Behrensmeyer, but that no other person of that name was a candidate for that office. The court counted many ballots for Charles F. A. Behrensmeyer which had merely 'Behrensmeyer' on them for treasurer, without any designation of the christian name: *Held,* that such ballots were properly counted for Charles F. A. Behrensmeyer."

Your letter states that your own inquiries disclose that Harry Litten and his wife are the only persons living in Ashville with the surname "Litten." In view of this and in light of the fact that Harry Litten was known to be a candidate for the office in question, it seems to me that all doubt as to the intention of the voter in question is removed. Your letter does not indicate that it is claimed by anyone that the person voted for as "Litten" is in fact a different person from Harry Litten and certainly the board of elections has no right to assume such to be the case, under the facts set out in your letter.

You are, therefore, advised and it is my opinion that the vote in question should be counted for Harry Litten.

Respectfully,

HUGH S. JENKINS

Attorney General