

Elections, Method of Counting Ballots. Ballots, Method of Counting. Names, Written on Ballots.

Names written in upon ballots must be counted by the Judge of Election no matter in what column appearing, and regardless of whether they are printed elsewhere on the ballot or not, toward the election of the person to the office in connection with which his name is written.

Helena, Montana, October 27, 1916.

Mr. Paul J. Davies, Chairman,
Democratic County Central Committee,
Bozeman, Montana.

Dear Sir:

I have your communication under date October 25th, 1916, written at the request of one of the election judges for the coming election, enclosing a sample ballot in which names appearing in print in the Democratic party column on the ballot for certain offices, have been written in by the elector for the same office in the Republican party column. The question is: Should ballots marked in this manner be counted, and if so, how?

It is a general rule that official opinions of the Attorney General can be given only to certain state and county officers. However, in as much as there is apt to be more or less confusion in this matter on account of the rules applicable to primary nominating elections, and the failure to keep the two classes of elections, and their purposes, distinctly in mind, I deem it to the public interest to abrogate the rule in this case.

You state that it is the contention of some that a ballot so marked must be counted as a vote for the party in whose column the name appears, and if not so counted, that it should be thrown out. The laws regulating the primary nominating election must not be confused with those relating to general elections. The contention as to the method of counting ballots marked as indicated, would be true in the case of a primary nominating election, because at such an election, the elector is voting as a member of a particular political organization, and his whole purpose and function is to choose a party candidate, not to fill an office. He is in the same position practically and has the same functions as a delegate to a political convention. Hence, any name written upon a primary nominating election ballot is counted as a vote to nominate the person whose name is so written as a candidate of the party upon whose ballot it appears. At a general election, however, the elector is exercising his franchise as a citizen of the state and nation, and not as a member of a political organization. At a general election the purpose is to fill an office in which all citizens as such have an interest; at a primary nominating election, the purpose is to make party nominations, and theoretically at least, the interest of the voter is confined to the affairs of his party, and he is voting as a partisan for party purposes. Hence, it is manifested that a different rule applies to names written upon ballots at a general election than obtains when the same thing is done at a primary nominating election.

While cases exactly similar to the one in hand have not been found, the universal rule is that names written upon ballots at a general election, must be counted toward the election of the person to the office in connection with which his name is written. The leading text writer upon the subject declares the theory as follows:

"It very often happens that a printed ticket is changed by the voter by erasing some part of it or by writing on the face of it, or by both to make it conform to his wishes. A ballot is to be construed in the same way as any other written or printed document, and the construction must be such as to give effect to the voters intent if that can be ascertained from the face of the ballot, or, in some cases by evidence aliunde. If therefore, a voter has written upon his ballot the name of a particular person in connection with the title of an office, and omits to strike out the name of another person printed upon it in connection with the same office, the writing must prevail and the vote must be counted for the person whose name

is written. This is upon the ground that the writing is the highest evidence of the voter's intention."

McCrary on Elections, Sec. 543.

Again the same writer expresses the idea in this language:

"The statutes of most 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. Statutes which deny the voter this privilege are in conflict with the constitutional provision guaranteeing the right of suffrage to every citizen possessing the requisite qualifications, and are void. Legislatures may provide for the printing of an official ballot and prohibit the use of any other, but they cannot restrict the elector *in his choice of candidates*, nor prohibit him from voting for any other than those whose names appear on the official ballot."

McCrary on Elections, 700.

The Supreme Court of California has expressed the rule in this language:

"A ballot is the only expression of the voter's will, and it must be counted according to its legal effect, when it intelligently shows that a particular person is voted for to fill a particular office, it cannot be counted differently merely because the court may believe that the voter made a mistake in preparing his ballot."

Rutledge vs. Crawford, 91 Cal., 526.

The Supreme Court of New York say:

"The writing of a name upon a printed ballot in connection with the title of an office, is a designation for that office of the name so written, although the printed name for which it is so substituted be not erased. The writing prevails over the printed letters as the highest evidence of the voter's intention."

Hommel vs. Sexton, 22 N. Y. 309.

Furthermore, the privilege of writing in names upon ballots is expressly given by statute. Section 545, Revised Codes of Montana, 1907, is in part as follows:

"The elector may write in the blank spaces, or paste over another name, the name of any person for whom he wishes to vote, and vote for such person by marking an X in the square before such name."

This right being granted, it follows perforce that names so written in must be counted by the judges of election no matter in what column appearing, and regardless of whether they are printed elsewhere upon the ballot or not, toward the election of the person to the office in connection with which his name is written.

Yours very truly,

J. B. POINDEXTER,

Attorney General.