

Opinion No. 21-2866

March 28, 1921

BY: HARRY S. BOWMAN, Attorney General

TO: Mr. Keith W. Edwards, Attorney at Law, Fort Sumner, New Mexico.

Use of Paster on Australian Ballot.

OPINION

{*33} I have your letter of the 24th instant asking if the using of a paster on a ballot used in an election under the Australian ballot system is in compliance with that part of the law which permits the "writing in" of a name of a candidate whose name does not appear upon the ballot.

The provisions governing the marking of ballots appear in Section 15, Chapter 89, Laws 1917, as amended by Section 1, Chapter 110, Laws 1919. In that law, it is provided that if a person desires to vote for any particular candidate, he may do so by writing the name of the person for whom he desires to vote and whose name is not printed upon the ballot, in the blank space provided therefore and marking a cross in the square to the right thereof.

In a long line of decisions by the Supreme Court of Illinois, it has been consistently held that the use of a paster in place of the "writing in" of a name, is not a compliance with the law requiring that the name of a person may be "written in" on the ballot.

In the very late case of

Jackson vs. Winans, 387 Ill. 282, 122 N. E. 611,

the question was squarely before the court and it was held that under the wording of the Australian ballot law as construed by that court, ballots upon which the voters had placed pasters or stickers with the name of the candidates written or printed thereon must be held invalid. The entire ballot was held to be invalid and was not counted.

This decision is in line with other decisions from that state.

Fletcher vs. Wall, 172 Ill. 426, 50 N.E. 230, 40 L.R.A. 617;

Roberts vs. Quest, 173 Ill. 427, 50 N.E. 1073;

McSorley vs. Schroeder, 196 Ill. 99, 63 N.E. 697.

In the case of

Attorney General vs. Duncan (N.H.) 63 N.E. 697,

it was held that at a town meeting election where there were sixty-one ballots on which a strip of paper on which the relator's name was printed, was pasted over the defendant's name, with a cross marked in the square above the column, that the ballots thus pasted were not a substantial compliance with the statutes and could not be counted.

In the case of

Waterman vs. Cunningham, (Me.) 36 Atl. 395,

it was held that a sticker containing the name of a candidate whose name did not appear upon the ballot, which sticker was placed over {34} one of the printed names on the ballot, was not a compliance with the statute prescribing the Australian ballot.

On the other hand, it has been held in many cases that the printing or typewriting or engraving or lithographing would be construed to be "a writing."

In the case of

Henshaw vs. Foster, (9 Pick.) 26 Mass. 312-319,

it was held that printed votes were written votes within the meaning of a constitutional provision that,

"Every member of the house of representatives should be chosen by written votes,"

and there are many cases where the word "writing" or "written" was held to include printing.

In the case of

Sawyer vs. Hart, (Mich.) 160 N.W. 572,

it was held that the pasting of a slip containing a candidate's name and the office for which he is a candidate on the ballot is a sufficient indication of the voter's intention without a cross being made in the square above the name, where only the name of one candidate for any office appears on the ballot.

It would appear, however, that in the election law of that state, the use of a paster or sticker was authorized in the law.

In the case of

Snortum vs. Homme, (Minn.) 119 N.W. 59,

the following statute was under consideration:

"When the voter so desires, he may write other names in the blank spaces under the printed names of the candidates, and the names so written shall be counted as balloted for whether marked in the small square or not."

Certain ballots contained a paster upon which the name of the defendant was printed and the pasters were attached to the ballots. The validity of these ballots was questioned. The court said:

"The blank spaces are left on the official ballot to enable every voter who so desires to vote for any eligible elector he pleases. This is his constitutional right. The statute, then, must be liberally construed and with reference to well understood methods of expressing any matter in writing in vogue at the time the statute was enacted. So construing it, the words 'write' and 'writing' as used therein, include any mode of representing words or letters Therefore, our construction of the statute here in question is that it gives to every voter who desires to vote for a person other than those whose names appear on the official ballot, the right to express the name of the person for whom he intends to vote, by writing or putting his name in the blank space and, further, that if he intends to avail himself of the latter method, he may provide himself, before going into the booth, with, and use, the printed or typewritten name of his choice on adhesive paper; that is, with the so-called paster or sticker."

You will note from the foregoing cases that there is a conflict of authority regarding the right to the use of a sticker where a writing of the name of the candidate is prescribed by statute.

In my opinion, the modern decisions are inclined to hold that the use of the paster or sticker in such a case is a compliance with the statute. Whether our courts would hold to the same view, I, of course, am unable to state.

It would appear, therefore, that in order to be entirely safe that persons should write the name of the candidate in the place provided therefore rather than to use the adhesive paster or sticker.