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ELECTION BALLOT—MARKED BY CHECK MARK, NOT AN X MARK—SQUARE SPACE OPPOSITE CANDIDATE'S NAME—TECHNICAL ERROR—NOT IMPOSSIBLE TO DETERMINE VOTER'S CHOICE—BALLOT SO MARKED NOT INVALIDATED.

SYLLABUS:

An election ballot marked by a check mark, rather than the "X" as directed by law, in the square space opposite a candidate's name, is a technical error only, and is one which does not make it impossible to determine the voter's choice, and such ballot so marked is not thereby invalidated.

Columbus, Ohio, May 15, 1950

Hon. Anthony J. Bowers, Prosecuting Attorney
Allen County, Lima, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"At the election held May 2, 1950, there was a tie vote for member of the Republican County Central Committee between two candidates. However, there are two disputed ballots which were not counted. The Board of Elections adopted a resolution whereby the two disputed ballots were not counted and the tie vote resulted. They later rescinded the resolution and disregarded the two ballots.

Your formal opinion is requested as to interpretation of General Code 4785-144 in regard to the two disputed ballots. The two ballots, instead of being marked with an X, were marked with a check mark as indicated below:

(Here you indicate by a sketch that in the square space at the left of the candidate's name the voter placed a check mark instead of an "X")

General Code 4785-144 reads 'No ballot shall be counted which is marked contrary to law except that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choice.' It is my opinion that the voter's choice can be determined and that there is no technical error. However, your attention is invited to your former 1948 OAG 3785 wherein it holds that 'a ballot which bears any mark other than X placed

thereon by the voter is invalid and the entire ballot shall be invalidated and not counted.' This opinion was rendered under the former General Code and not as it stands at the present time.

The present General Code 4785-144 became effective January 1, 1950, and I believe that no opinion has been rendered under the present statute. The present law as it now reads was originally the law and the Court in 44 OLA 529, 4 Ohio Sup 332, ruled that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choice is intended to make effective the honest voter's indication of his choice notwithstanding technical defects and irregularities.

The Courts held that 'provisions relative to the use of the cross mark as a means of indicating the voter's choice has been generally construed as directory only'.

Therefore, it is requested that you give your opinion as to whether or not any mark other than X, particularly a check mark, placed in the space provided before the name should be counted for the individual."

In considering the question here presented an examination of the history of this statute is most helpful. In paragraph 9 of Section 5070, General Code, as passed April 18, 1892, in Senate Bill No. 279, the following language is found:

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

The substance of this provision of the statute was retained in the 1929 codification of the Ohio election laws, Section 4785-144 therein reading in part as follows:

"No ballot shall be counted which is marked contrary to law, except that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choice."

It should be noted here that another provision of the 1929 codification, Section 4785-131, provided for the marking of ballots in the space to the left of and opposite the names of the candidates by making a "cross mark."

This provision of the statute was substantially changed by an amendment to Section 4785-144, effective January 2, 1948, the pertinent part of this section being changed to read as follows:

"No ballot shall be counted which bears any marks other than 'X' marks placed thereon or a name written therein by the

voter, in a blank space provided therefor, and the printed or other matter ordered placed thereon for use in such precinct by the board of elections.”

This provision of Section 4785-144, General Code, was again amended, effective November 1, 1949. The pertinent portion of the statute as thus amended reads as follows:

“No ballot shall be counted which is marked contrary to law, except that no ballot shall be rejected for any technical error unless it is impossible to determine the voter’s choice.”

The extent to which a voter might deviate from the technical requirements of the statute without invalidating his ballot was considered by the court in *Thompson v. Redington, et al.* 92 O. S., 101. The applicable statute in that case was paragraph 9 of Section 5070, General Code, quoted above. In that case the court held valid a ballot on which the voter had written the word “yes” in the space to the left of a candidate’s name instead of indicating his choice by a cross mark as required by the statute. The court said relative to this point:

“This statute requires that where the ballot is so marked that the intention of the voter is evident, the ballot should be counted regardless of whether the mark indicating his intention is the mark the statute directs him to make or not.”

Moreover, I do not believe it can be considered that the rule just cited was in any way affected by the decision in the case of *Village of Richwood v. Algower*, 95 O. S., 268. In that case the ballot contained an issue on which the voter was required to make a cross mark in the space opposite the “yes” or “no”. Instead of indicating his intention by a cross mark the voter wrote the word “no” opposite the negative of the proposition. The ballot in this case was considered to be invalidated, not because of any technical error but because the word “no” was placed opposite the negative of the proposition, making it impossible to say whether it was his intention to emphasize the negative of the proposition or his dissent from the negative proposition.

The provisions of Section 4785-144, as effective during the period January 2, 1948, to November 1, 1949, were considered in an opinion by my predecessor, reported in *Opinions of the Attorney General* for the year 1948, page 461. In that opinion it was held:

“A ballot which bears any marks other than ‘X’ marks placed thereon by the voter is invalid and the entire ballot should be invalidated and not counted.”

It is my notion, in view of the explicit provision of the statute as it existed during the years 1948 and 1949, that no construction other than the narrow one expressed by my predecessor could properly have been placed on this statute. I do not believe, however, that this narrow construction is applicable to the statute as it now exists for the reason that in the latest amendment, effective November 1, 1949, the legislature has adopted the precise language which was in effect prior to the amendment of January 2, 1948, and substantially the same language as was previously found in Section 5070, General Code, considered by the court in *Thompson v. Redington*, *supra*.

It is a commonly accepted rule of statutory construction that unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed to be used in the same sense. Furthermore, language substantially the same as that used in another act relating to the same subject matter will be given the same construction as given to that language. See *Commonwealth v. Bates*, 235 Ky., 763.

Since there is nothing in the context of the most recently enacted legislation on this particular point which indicates a contrary intention on the part of the legislature, I think the conclusion is inescapable that the legislature by adopting in substance the language of Section 5070, General Code, as it previously existed, intended thereby also to adopt the construction placed on that statute by the decision of the court in *Thompson v. Redington*.

Accordingly, and in specific answer to your question, you are advised that it is my opinion that an election ballot marked by a check mark, rather than the “X” as directed by law, in the square space opposite a candidate’s name, is a technical error only, and is one which does not make it impossible to determine the voter’s choice, and such ballot so marked is not thereby invalidated.

Respectfully,

HERBERT S. DUFFY,
Attorney General.