

ing effect at some future date, or upon the happening of a contingency. The contingency in this case was the majority of the electors duly voting for the combination of the two courts, and the effect of that vote is in no sense neutralized, or the operation of the Constitution stayed, by the fact that at the same election the relator was elected probate judge for a four year term, since the electors of a county having created the contingency are without power to neutralize the constitutional effect thereof. * * *

The Court's language in this case, however, does not seem to justify the conclusion that upon the re-establishment of the Probate Court that said Shirley would not be entitled to said office having theretofore been duly commissioned and qualified.

It is therefore my opinion, specifically answering your second question, that said R. V. Shirley is now entitled to assume the duties of the office of probate judge of Paulding County, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2886.

ELECTION—PRESIDENTIAL BALLOT—EFFECT OF CROSS MARK IN
CIRCLE AT HEAD OF TICKET AND BEFORE PRESIDENTIAL CANDIDATE ON ANOTHER TICKET.

SYLLABUS:

Where a voter makes a cross mark in the circle at the head of a party presidential ticket and also makes cross marks before the names of candidates for president and vice president on another party presidential ticket, the voter has thereby made it impossible to determine his choice for the office to be filled and the ballot should not be counted for such office.

COLUMBUS, OHIO, November 14, 1928.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your recent communication in which my opinion is requested on a question therein stated, as follows:

“A voter in marking his Presidential ballot puts a cross mark in the circle at the head of the Democratic Ticket and then goes over and puts a cross mark in front of the names of Herbert Hoover and Charles Curtis on the Republican Ticket, even though there be no squares for the cross marks there. The question is: How shall the ballot be counted or shall the ballot be thrown out and not counted at all?”

Statutory provisions applicable to the consideration of the question here presented are hereby noted as follows:

Section 5017, General Code, provides that:

“On the separate ballot for presidential electors the Secretary of State shall place the names of the candidates for president and vice-president on the proper ticket, immediately following the name of the party, and immediately preceding the names of the presidential electors.”

Sections 5021 and 5026, General Code, provide as follows:

Section 5021. "The ballot shall be so printed as to give each elector a clear opportunity to designate by a cross-mark in a large blank circular space, three-quarters of an inch in diameter, below the device and above the name of the party at the head of the ticket or list of candidates his choice of a party ticket and desire to vote for each and every candidate thereon, and by a cross-mark in a blank enclosed space on the left and before the name of each candidate his choice of particular candidates."

Section 5026. "The heading of each party ticket, including the name of the party, the device above, and the large circle between the device and such name, shall be separated from the rest of the ticket by a heavy line, and the circle above the name of the party in which the voter is to place the cross-mark, if he desires to vote the straight ticket, shall be defined by heavier lines than the lines defining the blank spaces before the names of candidates, and such circle shall be surrounded by the following words, printed in heavy face nonpareil type: 'For a straight ticket mark within this circle.'"

Section 5070 of the General Code, provides for certain rules to be observed in marking and counting ballots. So far as pertinent to the question presented in your communication this section provides:

" * * *

1. If the elector desires to vote a straight ticket, or in other words for each and every candidate of one party for whatever office nominated, he shall, either,

(a) Make a cross mark in the circular space below the device and above the name of the party at the head of the ticket; or

(b) Make a cross mark on the left of and opposite the name of each and every candidate of such party in the blank space provided therefor.

* * *

7. 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.

* * *

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

The first question suggested by that presented in your communication is whether independent of, and aside from the fact that the voter in the case here presented made his cross-mark in the circle at the head of the Democratic Presidential Ticket, his act in making his cross-marks before the names of Herbert Hoover and Charles Curtis, the Republican candidates for President and Vice-President, effectually indicated the intent of the voter to vote for the electors on the Republican Presidential Ticket. Under the statutory provisions above noted, such intention upon the part of the voter, if such it was, could have been effectuated either by making a cross-mark in the circle at the head of the Republican Presidential Ticket or by making a cross-mark before the names of the electors upon that ticket whom he desired to vote for. In marking the Republican Ticket in the manner above indicated the voter did not comply with the statutory requirements, and the question is whether under the provisions of paragraph 9 of Section 5070, General Code, it can be said that the voter nevertheless intended to vote for the electors on the Republican Presidential Ticket. If so, the ballot cast by this voter would have to be rejected and not counted at all, for the

reason that in such case the intent of the voter to vote the Republican Presidential Ticket would neutralize his manifested intention to vote the Democratic Presidential Ticket with the result that neither vote can be counted. In 20 Corpus Juris at Page 157, it is said:

"In order to permit the counting of a ballot, the voter's intention must be manifested by a cross substantially in the place designated, showing an honest intent to follow the directions of the law. But while no conjecture will be indulged in as to where the cross was intended to be placed, yet where it is clear that the voter made an honest attempt to conform to the statute by making it in the proper place, although with more or less imperfect success, the ballot should be counted. Under the statutes requiring the voter to mark his ballot in the circle at the head of one of the columns or within a voting space opposite the candidate's name for whom he wishes to vote, it has been held that a cross mark elsewhere is insufficient. Under this rule it is held that a cross indicating the voter's choice for a particular candidate must be either wholly or partly within the square opposite such candidate's name, and a ballot marked with a cross in the square to the right of the first candidate's name on one party ticket, and marked nowhere else, should be counted for that candidate alone, although probably intended for the entire ticket on which his name appears. So it has been held that a ballot marked with a cross at the head of a party ticket, but not within the circle as required by the statute, cannot be counted for any candidate on the ticket so marked. But in other jurisdictions it has been held that in such case the intent of the voter to vote for all the candidates in the party column is unmistakable and the ballot should be counted. * * *"

In considering the above quoted propositions of law drawn from decided cases in jurisdictions other than Ohio, the following is noted in the opinion of the court in the case of *Richwood vs. Algover*, 95 O. S. 268, 273:

"For the reason that the election laws of the various states vary as to the efficacy of ballots marked without the space specifically provided by their election laws, it is obviously difficult to obtain a rule of uniformity from the authorities cited. Suffice it to say that with a view to preserving the right of elective franchise to the citizen elector, in the absence of statutory provisions invalidating the ballot, the courts of this country have generally adopted a rule of liberality for the purpose of ascertaining and safeguarding the intention of the voter in the exercise of his constitutional privilege, and the Ohio statute above quoted emphasizes that feature when it provides that no ballot shall be rejected for technicalities which do not make it impossible to determine the voter's choice. If the courts of other states have held that certain requirements for marking ballots are mandatory, it is because the specific laws of such states relating thereto make ballots marked in non-compliance therewith invalid, or direct that they shall not be counted. And it is because of these distinctive features in the several jurisdictions that the courts generally have differed in their holdings as to whether the requirements are mandatory or directory.

The provisions of our law, requiring the crossmark to be placed in the block directly opposite to the name voted for or proposition submitted, are directory. The Ohio law stipulates that no ballot shall be rejected if it is possible to determine the voter's choice, but the converse of the statement follows, that if it is possible to determine the voter's choice the ballot should not be rejected. * * *"

Likewise, in the opinion of the court in the case of *Thompson vs. Redington*, 92 O. S. 101, at page 112 it is said:

"Paragraph 9 of Section 5070, General Code, provides that no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice. 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."

In the case of *Dittrick vs. Kelly*, 20 O. N. P. (N. S.) 86, it was held that the placing of a cross-mark opposite the name of one of the candidates for President at a presidential election instead of in the space intended for such mark, indicated the intention on the part of the voter to vote a straight ticket of the party by whom such candidate had been nominated, and that the ballot should be so counted. This case was one following the general election in November 1916, at which election Dittrick and Kelly were opposing candidates for the office of county commissioners of Cuyahoga County, Ohio, on the Republican and Democratic tickets respectively. One of the questions presented in this case was whether certain ballots bearing cross-marks before the names of Woodrow Wilson and Charles E. Hughes, presidential candidates at such election should be counted as straight votes for the Democratic and Republican tickets, carrying votes for the candidates on the county tickets of said respective parties, which county tickets, together with the State party tickets were on the same ballot with the presidential tickets. In the opinion of the court in this case, it is said:

"It is claimed by the contestants that about 325 ballots marked with a cross opposite or in front of the name of Woodrow Wilson were counted incorrectly as straight Democratic tickets. There are a number of reputable authorities of other states supporting the claims of contestants. Section 5070, subsection 9, provides:

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

In view of the large interest taken by the electors in this country in the election of November, 1916, the prominence which the candidacy of Cox attained against the candidacy of Willis, the activities of the various candidates for county office, and the further fact that those ballots so marked average four or five per precinct, can it be claimed that those voters intended to vote for Wilson only? Some such ballots were marked in the same manner opposite the name of Hughes on the Republican ticket. Doubtless full examination of the ballots would disclose that an equal number so marked the Republican ballot. What was the intention of each voter? In the instance of a voter placing his cross in front of the name of a presidential elector, one for whom the voter directly exercises the right of franchise, the ballot must be counted for that elector only, for in that case the intention must be deemed to have been to vote for the elector marked; but in the instance of a cross in front of the name of either Wilson or Hughes, the voter does not vote for either one directly, but his cross appears at the top of the ballot, not in the place designated by statute that the same shall be placed. This court is of the opinion that the intention of said voters was to vote the straight ticket.

'Ballots marked with a cross at the head of a particular party column, although outside the square containing the party device, are to be counted for the candidates of that party.' 98 Ky., 596; *State, ex rel. vs. Markley*, 9 C. C. (N. S.), 560.

"The right of suffrage should not be denied to a voter because of his failure to follow the strict letter of the law in the marking of his ballot, and while laxity in the marking of ballots by those who know how should not be encouraged, yet in the case of irregular markings and erasures by a voter who is evidently actuated with an honest purpose, his ballot should be counted if his intention can be ascertained with reasonable certainty." 18 N. P., 500; 92 O. S., 101-112."

In the case of *State ex rel. Bambach vs. Markley* above referred to, the question was as to whether certain ballots informally marked should be counted for the contestant Bambach. Bambach was a candidate for Common Pleas Judge, and his name was the only one on a certain Non-Partisan ticket. The court held that "if a voter makes a mark above or below or on the side or at the top of the column occupied by the name of the Non-Partisan candidate, his intention to vote for such candidate is clearly indicated and the vote should be counted." This case was affirmed by the Supreme Court without opinion, 76 O. S. 636. The Kentucky case referred to in the opinion of the Common Pleas Court of Cuyahoga County in the case of *Dittrick vs. Kelly*, *supra*, is the case of *Houston vs. Steele*, 98 Ky. 596, where it was held that ballots marked with a cross at the head of a particular party column, although outside the square containing the party device, are to be counted for the candidates of that party.

Notwithstanding the liberal rule applicable with respect to the matter of counting ballots not marked in strict compliance with statutory requirements, it is difficult on principle to sustain the contention that a disputed ballot should be counted where it is apparent that the voter has made no attempt to comply with the statute as to the place where his cross-mark should be placed. On this point the following is noted from the opinion of the court in the case of *Slenker vs. Engel*, 250 Ill., 499, where it was said:

"The law requires the voter to indicate his choice by making a cross either in the circle at the head of his party ticket or in the squares opposite the names of the persons for whom he desires to vote. It is not sufficient to make a cross after the name of the candidate and entirely outside the square. It is not true that because we may be able to guess at what the voter intended, the law requires that his ballot should be counted. While the intention of the voter should be given effect when it is possible to do so without nullifying the statute, still there must be an honest effort on the part of the voter to observe the law and to express his intention in accordance with its requirements."

In this connection, it has been well said that the statutory provision that no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice, has reference to a choice which the voter has endeavored to express in the manner provided by law. *Hall vs. Sumner*, 194 Ky. 1, 6; 9 R. C. L. 1131.

The case of *Richwood vs. Algorer*, *supra*, involved certain disputed ballots cast at an election on the question of whether the sale of intoxicating liquors as a beverage should be prohibited in the Village of Richwood, Ohio. The ballots on this question contain an affirmative and a negative statement of the proposition to be voted upon, with enclosed blank spaces on the left of said statements for the cross-mark of the voter to indicate his vote upon said proposition. Said ballots contained a horizontal line directly under the negative proposition, enclosing it within a space of its own. They also contained a vertical line separating the affirmative and negative statements of the proposition submitted from the two enclosed blank spaces on the left; and the

cross-marks in the disputed ballots were made immediately below and entirely without the blank spaces where the law provides it should be. With respect to such disputed ballots the court in its opinion said:

“Applying a liberal rule to the ballots in dispute this court is unable to determine the voter's choice between the two propositions submitted to him. There should be some effort at least of compliance with the requirements of the law. So far as these ballots are concerned they may have been voted by illiterates unable to distinguish the propositions submitted. Such evidently was the character of the elector who voted exhibit ‘T’. Or they may have been marked by electors who did not desire to commit themselves on the issue submitted. If the cross-mark had impinged on the horizontal line below the negative proposition, there would have been reason to hold the ballot valid, in as much as the voter had thus identified and associated his cross-mark with the proposition submitted; likewise, had there been no horizontal line printed on the ballot below the negative proposition, the cross-mark might then also have been so associated with the full space so provided as to exhibit an intention to vote for the proposition embodied therein. These ballots are plainly distinguished from those reported in the case of *State, ex rel. Bambach vs. Markley*, 9 C. C., N. S., 561, affirmed by this court without opinion in 76 Ohio St., 636. In that case the cross-mark was made at various places within the column occupied by the name of Bambach alone, and it was there held that it was the evident intention of the voters to vote for the person occupying that column, but had there been another name in the independent column occupied by Mr. Bambach it is obvious that all the ballots thus marked would not have been credited to Mr. Bambach.”

In this connection, the case of *Devine vs. The State ex rel. Tucker*, 105 O. S. 288 should be noted. This case involved a construction of the provisions of Section 5069, General Code, which provides that ballots shall be marked by the voter with a black lead pencil. Holding the provisions of this section to be mandatory, the court in its opinion after quoting paragraph 9 of Section 5070, General Code, said:

“It is to be noted that the language is not ‘No ballot shall be rejected for any error which does not make it impossible to determine the voter's choice,’ leaving the clear intention of the voter as the sole test of the ballot; but the error, in order to be disregarded, must be ‘any technical error.’

If the sole test to a valid or invalid ballot be the determination of the voter's choice, then any mark, with any pen, pencil, or other instrument, would be quite sufficient in law to warrant the judges in counting the ballot, regardless of the direct and imperative requirement that ‘all marks upon the ballot must be made by black lead pencil.’ No, this section must be construed in connection with the other section dealing with the ballot.

There are three steps in the marking of the ballot:

1. By black lead pencil.
2. By a cross-mark in front of the name to be voted for.
3. Made in the blank space before the name of the candidate.

Suppose the intending voter does not make a complete cross-mark, but only makes three-fourths of it. Suppose he fails to put the cross-mark wholly within the vacant space, but partly within and partly without the vacant space. Clearly, this would be a technical error, technical departure or variation, and should not invalidate the ballot. But the use of the black lead pencil is made mandatory. The kind of mark, its being or not being a complete cross-mark, or wholly within or without the vacant space or circle, may

be a technical departure or error, which in the judgment of the election judges should not invalidate the vote."

A study of the Ohio decisions above cited indicates that the courts proceed on the principle that the voter's intention should be effectuated if ascertainable from the ballot, coupled with the purpose to keep the door closed against possible fraud. The determination of your question depends upon whether it is a case under paragraph 7 of Section 5070, General Code, *supra*, wherein the voter has made it impossible to determine his choice, or whether he has committed a mere technical error, as contemplated under paragraph 9 of Section 5070, General Code, but which does not interfere with the determination of his choice.

By making the mark in the circle at the head of the Democratic ticket the voter has evidenced the purpose to vote for the candidates for elector set out on that ticket. By making the cross-mark in front of the names of Hoover and Curtis, on the Republican ticket, he has just as effectively evidenced an intention to vote for the Republican candidates for electors. It is true that the vote appearing on the Democratic ticket is made in accordance with the statute while the marks on the Republican ticket are not in accordance with the statute, but so far as the intention of the voter is concerned, one is as definite as the other. I do not believe, therefore, that the marks in front of the names of Hoover and Curtis on the Republican ticket can be regarded as mere surplusage or technical errors, and my conclusion is that such a ballot falls within the provisions of paragraph 7 of Section 5070, *supra*, which provides that where the voter has for any reason made it impossible to determine his choice for an office to be filled, his ballot shall not be counted for such office.

I am, therefore, of the opinion that such a ballot should be thrown out and not counted at all.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2887.

APPROVAL, BONDS OF PUTNAM COUNTY—\$129,378.71.

COLUMBUS, OHIO, November 15, 1928.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2888.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS, IN
CUYAHOGA COUNTY.

COLUMBUS, OHIO, November 16, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio,*