

ELECTIONS: printing of ballot to vote on dog tax may be done on regular election ballot and not invalidate same, but a better form would be to have a separate ballot.

10-19

October 19, 1934.



Hon. Morris E. Osburn,
Prosecuting Attorney,
Shelby County,
Shelbyville, Missouri.

Dear Sir:

This department is in receipt of your request of October 18 for an opinion as to the following matter:

"I would like an opinion as to whether or not a ballot to vote on a dog tax, as set out in Section 12881, R.S. Mo. 1929 should be printed on the regular election ballot or on a separate ballot."

Section 10300, Laws of Mo. 1933, page 225 is in part as follows:

"Every ballot printed under the provisions of this article shall contain the names of every candidate whose nomination for any office specified on the ballot has been certified or filed according to the provisions of this chapter, and no other names. The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot; all nominations of any political party or group of petitioners being placed under the party name designated by them in their certificates of nomination or petitions, and the ballot shall contain no other names, except that in place of the names of candidates for electors of president and vice-president of any political party or group of petitioners, there shall be printed within a bracket, immediately below the circle in the

column of said party, with a square to the left of such bracket, the names of the candidates of each political party for president and vice-president. ****"

We especially call your attention to the fact that the statute uses the phrase "and no other names". This may be interpreted to mean not only are there to be no other names on the ballot, but no other propositions or questions.

Section 12881, R.S. Mo. 1929 provides in part as follows:

****"Provided that upon the filing of petition signed by one hundred or more householders of any county and presented to the county court at any regular or special session thereof more than thirty days before any general election to be had and held in said county, it shall be the duty of the county court to order the question, as to whether or not there should be adopted the law, creating a license tax on dogs, submitted to the qualified voter, to be voted upon at the next election. Upon the receiving of such petition it shall be the duty of the county court to make an order as herein recited, and the county clerk shall see that there is printed upon all ballots to be voted at the next election the following: ****"

You will note that the statute uses the clause "and the county clerk shall see that there is printed on all ballots to be voted at the next election the following ****" This clause could be interpreted to mean that under the provisions of Section 12881, supra, the ballot to vote on a dog tax could be included on the regular ballot; however, regardless of the interpretation we may place upon the statute, the Supreme Court of Missouri has made a pointed decision in the case of State ex inf. Barrett v. Imhoff, 291 Mo., 1.c. 620-621, wherein the Court said:

"The provision in Section 4859, Revised Statutes, 1919, that ballots shall contain only the names of the candidates nominated by the party which the ticket represents will not render invalid the printing of the proposition thereon of the submission of township organization,

if otherwise in conformity with the statutory requirements. Although the course pursued in the instant case was irregular, to render the same fatal the statute must so declare. As was said in *Nance v. Kearbey*, 251 Mo. 374, where an irregularity is not declared by statute to be fatal, the courts will be slow to so construe it as to disfranchise voters because of the errors of officials. As was further said in effect by Lamm, C.J., in that case, to permit a great mass of voters to be disfranchised because of an irregularity in the printing of the ballots, whether the result of design or inadvertence, would be to turn the law into an indefensible trap, and greatly multiply the powers of election officials to control the result of an election. It was further held in that case that a challenge of the tickets for irregularity comes too late after the election in which there was no fraud of any sort; that a timely challenge is necessary to change the result of an honest count.

In the early case of *Applegate v. Eagan*, 74 Mo. 258, this court held that where ballots cast at a general election for state, county and township officers contained, in addition to the names of the candidates and the offices to be filled, a clause for and against township organization and a clause against restraining swine from running at large, with a caption to these clauses in the words 'erase the clause you do not favor', did not invalidate the ballot either as to township organization or the restraining of swine or as to the candidates voted for. A like rule was announced as to clauses on ballots other than the names of the candidates in *State ex rel. Broadhead v. Berg*, 76 Mo. 136, and in *Gumm v. Hubbard*, 97 Mo. 318, in which it is held that where the order of the county court submitting a proposition to the voters is otherwise valid the submission of the same on the general ballot will not render it invalid."

The question was again before the court in the case of *Yowell v. Mace*, 221 Mo. App., l.c. 91, wherein the court said:

"Plaintiff further contends that the form of ballot used for the stock-law election invalidated the election. The stock-law election was held on the same day as the general election. Instead of a separate ballot, however, there was printed at the foot of each of the seven party tickets appearing on the Australian Ballot used, the following, to-wit:

- ' For enforcing the law restraining horses and mules, asses, cattle, goats, swine and sheep from running at large. Yes.'

- ' For enforcing the law restraining horses and mules, asses, cattle, goats, swine and sheep from running at large. No.'

In other words, this form of ballot for the stock-law election appeared seven times on the ballot, once at the bottom of each party ticket. No words of direction or explanation as to how the ballot should be voted appeared thereon. It is contended that this form of ballot was confusing to the voter and not in accordance with section 4284, Revised Statutes 1919, which provides a form of ballot to be used at stock-law elections in language as follows: 'There shall be written or printed on each ballot voted at said election either of the following sentences: "For enforcing the law restraining (insert name of animals in petition) from running at large" "against enforcing the law restraining (insert the name of animals in petition) from running at large."' This statute evidently contemplates that the voter shall be provided with two stock-law ballots, one for and the other against adoption of the law, and that such voter shall use the ballot he desires to vote, the other to be placed in the box of rejected ballots or destroyed. The statute is, however, somewhat ambiguous and is capable of the interpretation apparently placed upon it by the county clerk when he provided only one form using the words heretofore set out.

The statute nowhere prescribes what shall be the result of failure to use the form of ballot provided therein. That being the situation the failure of the county clerk to provide a ballot identical in form with the statutory ballot would not necessarily invalidate the election. The present rule in this State indicates a liberal attitude on such questions and is thus stated, 'Where a statute provides specifically that a ballot not in a prescribed form shall not be counted, the statute is mandatory and must be enforced; but where it merely provides that certain ballots shall be used, and does not prescribe what results shall follow if they are not used, the statute is directory, and the test as to the legality of the ballot is whether or not the voters were afforded an opportunity to express, and that they did fairly express their will.' (State ex rel. Memphis v. Mackman, 202 S.W. 14, 273 Mo. 670.)"

CONCLUSION

In view of the above decisions, it is the opinion of this department that the ballot in question, relating to the dog tax law, may be printed on the regular general election ballot and the same will not invalidate the election. However, noting that the courts treat this as an irregular procedure, it would be a better form to have a separate ballot for the same.

Respectfully submitted,

OLLIVER W. NOLEN,
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APPROVED:

ROY McKITTRICK,
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