ELECTIONS: Sec. 10310, Laws of Mo. 1933, p. 228 is mandatory, and not directory in the counting of votes when it states that the same shall not be counted.

April 10, 1936.

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Honorable George B. Calvin,
Washington, Missouri.

Dear Sir:

This department is in receipt of your letter of April 8, wherein you enclose a sample ballot and explain the method of voting in the city election in the City of Washington, and inquire as follows:

> " * * * * Some of the voters placed a cross in the Democratic circle and also in the Independent circle, in some of the wards the intent of the voter was interpreted as wishing to vote the Democratic ticket and for Mr. Rau, the Independent candidate for Mayor, since as you will note on the ballot there was no Democrat running for that office, and no other candidate except the candidate for Mayor running on the Independent ticket. In other wards the entire ballot was thrown out. This was enough to defeat our alderman, and I believe the Independent candidate for Mayor, who had the support of the Democratic Committee, since we were unable to get a candidate on our ticket.
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> "I know it is not the proper way to vote, but as I cited above, I do not believe there can be the slightest doubt as to the intent of the voter, and the Democratic Committee and the Independent candidate have asked me to obtain at once an opinion as to whether the vote should be counted, which we contend it should be, as I stated before was counted in some wards. * * * * * "

The City of Washington, being a city of the third class, conducts its elections, we assume, pursuant to Section 6721, R.S. Mo. 1929, which is as follows:

> "A general election for the elective officers of each city of the third class shall be held on the first Tuesday in April after the organization of such city under the provisions of this article, and every two years thereafter, and all city elections shall be held under the provisions of the general election laws of the state: Provided, that all certificates of nomination and petitions therefor, as provided by the state election laws, shall be filed with the city clerk and not with any other officer, and all duties specified to be performed by the constable or sheriff in the state election laws shall be performed by the marshal in city elections; and all tickets for city elections shall be printed by the city and at the city's expense; and all duties heretofore performed by the county clerk with reference to city elections shall be performed by the city clerk. The polling places for all elections in such cities, and the judges therefor, shall be selected and specified by the respective city councils of such cities by resolution, ordinance or otherwise. The manner of making returns of such election shall be prescribed by ordinance. Any city organizing under the provisions of this article may elect a mayor and such other officers as may be necessary to carry this article into effect, who shall hold office until the second Tuesday in April thereafter, and until their successors are elected and qualified."

As the above section contains the clause "And all city elections shall be held under the provisions of the general election laws of the state", we assume that the procedure in the calling of the election, the notice, etc. was carried out according to the usual procedure in conformity with the general election laws.

The manner of voting is set forth in Sec. 10310, Laws of Mo. 1933, p. 228, as follows:

> "On receipt of his ballot, the voter shall forthwith, and without leaving the enclosed space, retire alone to one of the voting booths so provided, and shall prepare his ballot for voting in the following manner: Should the voter desire to vote a 'straight' party ticket, he shall place a cross (x) mark in the circle immediately below the party name. If the voter desires to vote for one or more candidates on more than one party ticket, by voting what is commonly called a 'split' ticket, he may place a cross (x) mark in the circle immediately below one party name and mark cross (x) marks in the squares at the left of the names of candidates on other tickets for whom he wishes to vote. If the voter desires to vote for one or more candidates whose name or names do not appear on the printed ballot he may do so by drawing a line through the printed name of candidate for such office, and writing below such cancelled name the name of person for whom he desires to vote, and placing a cross mark in the square at the left of such name. The squares so marked shall take precedence over the cross marked in the circle. Where there are two or more candidates for like office in a group of cross (x) mark in the square to the left of a candidate's name, automatically votes against the candidate whose name appears within the same horizontal lines in the column under the circle in which appears the cross (x) mark unless the voter indicates another candidate to be voted against by drawing a line through such candidate name. All candidates of the party whose circle is marked shall be counted as voted for excepting where squares are crossed preceding the names of the candidates in other columns if two or more candidates for the same office are thus designated, neither shall be counted. If the cross (x) is not placed in the circle immediately below the party name at the head of the column, but does appear in the squares opposite the various candidates' names,

then only these names shall be counted for, and none other. A cross (x) mark is any line crossing any other line at any angle within the voting space, and no ballot shall be declared void because a cross (x) mark therein is irregular in form. It shall not be lawful to deface or tear a ballot in any manner nor to erase any printed name 'except as provided above in this section,' figure, word or letter therefrom, nor to erase any mark made thereon by such voter, nor inclose in the folded ballot any other paper or any article. If the voter deface or tear a ballot, or wrongly mark the name or make an erasure therein, he may obtain one additional ballot on returning to the ballot clerk the one so defaced or wrongly marked. A ballot placed in the ballot box without any marks shall not be counted. Ballots shall be counted only for the person for whom the marks are thereon are applicable; when a voter shall place a mark against two or more names for the same office, and only one candidate is to be chosen for the office none of the candidates shall be deemed to have been voted for and the ballots shall not be counted for either such candidate. Before leaving the booth the voter shall fold his ballot in such a manner as to conceal his marks thereon. He shall mark his ballot without undue delay. He shall then hand the ballot to the judge of election selected to take ballots, who shall number the ballot and deposit it in the ballot box. The voter shall quit and leave said enclosed place as soon as possible."

Therefore, the sample ballot which you enclosed, containing the cross (x) mark in the Democratic column and in the Independent column, would not conform with the above quoted section. In the Independent column there is only one person's name printed on the ballot--that of W.H. Rau, for Mayor, while in the Democratic column there is no candidate for Mayor, but names of candidates for the other offices, with the exception of City Attorney, and Treasurer, are printed therein.

We think Sec. 10310, supra, is mandatory--not directory--in its terms. It is definite as to what ballots shall be legal,

and prescribes no results if the voter does not follow the terms of the statute. We base this conclusion on the case of Horsefall v. School District, 143 Mo. App. l.c. 545-546, wherein the Court said:

> "The decisions of the Supreme Court in this state have not been altogether harmonious as to the effect of irregularities upon the result of an election, and we shall not attempt to review these cases, but we think it may now be said to be the established rule in this state, as it is generally in other jurisdictions, that when a statute expressly declares any particular act to be essential to the validity of an election, then the act must be performed in the manner provided or the election will be void. Also, if the statute provides specifically that a ballot not in a prescribed form shall not be counted, then the provision is mandatory and the courts will enforce it; but if the statute merely provides that certain things shall be done and does not prescribe what results shall follow if these things are not done, then the provision is directory merely, and the final test as to the legality of either the election or the ballot is whether or not the voters have been given an opportunity to express, and have fairly expressed their will. If they have, the election will be upheld, or the ballot counted as the case may be. (Bowers v. Smith, 111 Mo. 45, 20 S.W. 101; Hope v. Flentge, 140 Mo. 390, 41 S.W. 1002; Sanders v. Lacks, 142 Mo. 255, 43 S.W. 653; State ex rel. v. Roberts, 153 Mo. 112, 53 S.W. 520; McKay v. Minner, 154 Mo. 608, 55 S.W. 866; Hehl v. Guion, 155 Mo. 76, 55 S.W. 1024; State v. Swearingen, 128 Mo. App. 605, 107 S.W. 1)."

You will note from the above decision that the final test is whether or not the voter has been given an opportunity to express and has fairly expressed his will.

As further bearing on the question of the statute being mandatory in its terms, we call your attention to the case of Lankford v. Gebhart, 130 Mo. 621, wherein the Court said (l.c. 640):

> "One ballot voted for contestee contained the word 'yes' written under the name of one candidate for prosecuting attorney and the word 'no' written under the name of the other candidate for the same office. This ballot was rejected by the court.
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> "It may be that under the mandatory requirements of section 4671, that ballot should not have been counted because of writing the words 'yes' and 'no' therein. When the statute requires that a ballot, on account of want of conformity to any particular provision of the law, shall not be counted, it is mandatory. As was said in Gumm v. Hubbard, supra, sec. 5493, (the same as section 4671) furnishes an absolute rule of evidence. It makes the ballot fraudulent without regard to intent, when it has thereon any writing or printing other than that specified. But, as we have seen, this section was repealed by the act of 1891, and no such prohibition is now contained in the statute.
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> "The words written do not apply to the office of sheriff, which alone is in contest here. We can see no reason for rejecting the entire ballot for the reason that the vote for prosecuting attorney may be left in doubt. Atkeson v. Lay, 115 Mo. 538. We are of the opinion that this vote should have been counted for contestee."

A similar situation, although not identical with the facts you present, arose in the case of Bradley v. Cox, 271 Mo. 438. In that case it was said:

> "Bradley was the Democratic nominee. There were 1311 ballots cast on which the name of Johnson, who was not the nominee of any party, was printed. These ballots were headed 'Democratic Party', were prepared by the county clerk, and handed by the judges of election to the voters as they came to vote, and the names of the Democratic nominees for all other officers were printed thereon. The ballots were returned by the voters without erasing the printed name of Johnson and without writing in the name of Bradley or of any other person, and without any attempt to change them. The law required Bradley's name to be printed on the ballots and prohibited the voters from writing his name thereon and from providing other ballots for themselves. Held, that the ballots must be counted for Bradley. This conclusion is enforced by the statutes themselves."

And further bearing on the question of the intention of the voter, the Court said:

> "The provision of the Constitution that all elections shall be by ballot does not preclude the counting of votes for the party nominee although on their face the ballots show they were cast for a man whose name was unlawfully printed on them. That provision is intended principally to secure secrecy, and any manner of voting that shows the voter's choice and preserves secrecy is voting by ballot; and, besides, the votes were by ballot."

In the case of Yowell v. Mace, 221 Mo. App., l.c. 91-92, the Court, in speaking of the form of the ballot and the result, if the ballot is not voted in conformity with the statute, said:

"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. Hackman, 202 S.W. 14, 273 Mo. 670.)

"In another case where an irregular ballot was used in an election on township organization, the following test was promulgated: 'If it appears that no substantial right depends upon a compliance with the statutory requirement and no injury can result from ignoring it, and the other purpose of the Legislature can be accomplished in a manner other than that prescribed and substantially the same result obtained, then the statute will be regarded as directory; but if not so, it will be mandatory.

"To the same effect are State ex rel. Barrett v. Imhoff, 291 Mo. l.c. 621, 238 S.W. 122; Nance v. Kearby, 251 Mo. 374; 158 S.W. 629; Applegate v. Eagan, 74 Mo. 258, and other cases. From these authorities it is quite clear that the statute here involved is directory merely and unless the ballot be in such form as to prevent a free expression of the voter's will, it should not be cause for holding the election invalid.

Under the facts with which we are confronted there is no reason to believe the voter could have been misled or confused by the ballot used. The fact that the ballot provided a square before each proposition to be voted upon was not unusual and it was a method of voting with which each voter, in Missouri, may be presumed to be familiar since it is used almost uniformly, under our law, when voting upon candidates or upon propositions submitted to the voter. While the voter might also cross out the proposition he did not desire to vote, which the evidence shows was done, that should not invalidate the ballot under the rule that if the will of the voter can be determined from his ballot, and no law is infracted, the ballot should be counted. (Right v. Marquis, 255 S.W. 637) Some weight may also be given to the fact that in the township where one of plaintiffs resided, composed of Edgar Springs and Yancy voting precincts, there was a total vote for presidential electors 367. The vote in the precincts was 21 for and 332 against the stock law. It certainly cannot be said there was any misunderstanding or confusion in the minds of the voters in that township. The total vote in the county was 1755 for and 1505 against out of a total vote for presidential electors amounting to 5500. This indicates 1240 who voted at the election failed to vote on the stock law proposition. The large portion of those who failed to vote on the proposition resided in the cities of Rolla and St. James where, it may be presumed, the voters were not particularly interested in the outcome of the stock law election. There is no charge of fraud or mistake and no evidence in this case to indicate the voter was confused or misled by the ballot used. We are, therefore, of the opinion that the election was valid and the judgment should be affirmed."

CONCLUSION

As the precise question you present has never been before the courts of this state, we are loathe to pass any legal opinion

on the validity of counting such ballots, but we have attempted herein to cite the authorities which bear on the question and which will aid you in arriving at a conclusion as to the validity or invalidity of the ballot submitted.

We agree with you that one could arrive at a reasonable inference from the ballot submitted that it was the intention of the voter, by placing an X mark under the Independent Party emblem , W.H. Rau being the only person whose name appears on said Independent Ticket, to vote for Mr. Rau, and by placing an X mark under the Democratic emblem, intended to vote for the remainder of the officers on said Democratic Ticket. However, even though the intention of the voter may be reasonably gleaned from the submitted sample ballot, the decisions hereinabove quoted state that when the statute does not contain the results, if the prescribed form is not carried out, the statute is declared directory and not mandatory.

Bearing further in mind that Sec. 10310, supra, states instances when the ballot shall be lawful or unlawful, we call your attention to the sentence: "ballots shall be counted only for the persons for whom the marks thereon are applicable; when the voter shall place a mark against two or more names for the same office and only one candidate is to be chosen for the office, none of the candidates shall be deemed to have been voted for and the ballots shall not be counted for either such candidate". It is our opinion from the above terms that in the instance which you present, the terms of Section 10310 are mandatory and not directory.

Respectfully submitted,

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Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

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