

OPINION  
50-59

July 25, 1950 (OPINION)

ELECTIONS

RE: Marking Ballot

Re: Section 16-1205 N.D.R.C. 1943

Your letter of the twentieth inst. re above section has been received.

This section provides that the voter shall "prepare his ballot by placing a cross mark (x) within the square \* \* \*." In *Howser v. Pepper*, 8 N.D. 484, 79 N.W. 1018, our court held that, under a statute which required the voter to indicate his choice by a "mark or cross," "a ballot which is only marked with a single straight mark in the party square should be counted." 29 C.J.S. P. 257 states that in some states statutes specifying the mark to be used by the voter is mandatory, but other courts have held such provisions to be merely directory, and have held that where the mark is such as to clearly indicate the voter's choice, the ballot should be counted.

29 C.J.S. at page 269 discusses the question of the validity of ballots containing marks clearly made to enable the ballot to be identified. Some courts have held such ballots to be void under a constitutional provisions requiring secrecy in voting. Some states have express statutory provisions prohibiting such identification marks. South Dakota has such a statute. However, the court held that a ballot with three straight lines drawn through the cross in the circle was not a sufficient reason for rejecting the ballot. The voter was required to indicate his choice by an "X" mark. Held, so marking the ballot as above indicated, was a substantial compliance with the statute.

*Smiley v. Armstrong*, 66 S.D. 31, 278 N.W. 21.

We are unable to find that North Dakota has a statute like the South Dakota statute.

We believe that where the voter's mark is made in the proper square for the purpose of indicating his choice of candidate, the shape of the mark is immaterial and his ballot should be counted.

It is, therefore, our opinion that a ballot on which the voter has placed check marks in the squares of opposite candidates' names instead of cross marks is a valid ballot and should be counted.

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