

ELECTIONS: Registration and special election under
the Week's Bill.

July 28, 1933. 8-1



Hon. Walter G. Stillwell,
Prosecuting Attorney,
Marion County,
Hannibal, Missouri.

Dear Mr. Stillwell:

Your letter of July 18, 1933, addressed to this office in which you request an immediate opinion on the following questions, has been assigned to me for answer:

"The County Court has requested my opinion on the following questions:

1. Under the registration law passed at the last Legislature, making it permanent at Hannibal, will not the registration matter be handled by the new Board set up under this law?
2. What, if any, order will the county court make with reference to registration at Hannibal?
3. Will not this election come under the registration law as does the Primary, General or other special election?
4. Will the County Court be required to select the usual number of judges or can they select a smaller number for each precinct?
5. Can the Court reduce the number of precincts used at the last general election?
6. Will the new absentee ballot law (passed by the last Legislature) be applicable to this repeal election?
7. Number of times in how many newspapers must the election notice be published?

8. How long does a newspaper have to be in operation or business to be eligible to publish an election notice?

I am unable to comply with their request because I do not have at my disposal a copy of the Week's Bill or other recent legislation pertinent to these questions. For your information I will state that the population of Hannibal proper at the time of the last decennial census was approximately 23,000 and comes within the provisions of the new legislation for permanent registration. As you know, it is necessary that these questions be answered immediately and I would sincerely appreciate it if this request would meet with your usual prompt attention. If for any reason you find it impossible to prepare this opinion prior to the time necessary for us to publish notices in newspapers, I should like to know that fact immediately."

In answer to the first question: "Under the registration law passed at the last Legislature making it permanent at Hannibal, will not the registration matter be handled by the new Board set up under this law?", please be advised that according to Sec. 30, p. 249, Laws of Missouri, 1933, pertaining to registration in cities from 10,000 to 30,000 in which class Hannibal is classified, the present Board will handle the registration until 1934, said section being as follows:

"In all cities and towns now having a board of registration, in which the registration of voters has been had in accordance to law, the board of registrars duly elected at the election of November, 1932, shall constitute the board of registrars for said city under the provisions of this article as rewritten until the general election 1934."

In answer to question #2, the only orders necessary will be found in Sec. 20, p. 247, Session Acts of 1933, which is as follows:

"All costs of registration books and other equipment needed by the board of registration shall be furnished by the county and it is hereby provided that the judges of the county court shall order the county clerk or other purchasing agent to furnish any necessary equipment to the said board or its clerk for the purpose of carrying out the provisions of this article."

Any orders which might be necessary under the general election laws as the next section being Sec. 21, p. 247, Laws of Missouri, 1933, wherein we are referred to the chapter on elections, said section being as follows:

"All elections in such cities shall be conducted in all respects as provided in this article and subject to all the provisions of Chapter 61, Revised Statutes of the State of Missouri, 1929, entitled 'Elections', so far as the same do not conflict with this article."

As to question #3 wherein you ask "will not this election come under the registration laws as does the primary, general, or other special election", in the strict sense of the word the coming election is not a special election or an election. While it will be noted in the Week's Bill that the Governor will call a special election, "****such delegates shall be elected at a special election to be called on the date fixed by the Governor and his Official Proclamation calling said election. ****" In other words, the people will not be voting directly on the repeal of the Eighteenth Amendment, but will vote for delegates who will convene in convention at a later date. Under the Constitution, Art. V, there are two methods of ratifying an amendment--by the legislatures of 3/4 of the states or by conventions in 3/4 of the states. In the present instance the amendment is being ratified by the conventions of the several states.

In the case of *Hawke v. Smith*, Secretary of State of Ohio, 253 U.S., l.c. 226-227, Mr. Justice Day speaks as follows:

"This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the legislatures of two-thirds of the states; thus securing deliberation and consideration before any change can be proposed. The proposed change can only become effective by the ratification of the legislatures of three-fourths of the States, or by conventions in a like number of States. The method of ratification is left to the choice of Congress. Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people.

The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by

action of the legislatures of three-fourths of the States, or conventions in a like number of States. *Dodge v. Woolsey*, 18 How. 331, 348. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed."

And again on pp. 228-229 Mr. Justice Day utters the following:

"There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several States. Article 1, Sec. 2.

The constitution of Ohio in its present form, although making provision for a referendum, vests the legislative power primarily in a General Assembly consisting of a Senate and House of Representatives. Article II, Sec. 1, provides:

'The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives, but the people shall reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided.'

The argument to support the power of the State to require the approval by the people of the State of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the States through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this--ratification by a state of a constitutional amendment is not an act of

legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment."

In a recent case of State ex rel Thomas J. Donnelly v. George S. Meyers, Secretary of State, the same being a decision rendered by the Ohio Supreme Court, being number 24269, decided July 12, 1933, and as yet unprinted, the court said:

"In our opinion action in calling of such a convention is but a step necessary and incidental to the final action of the convention in registering the voice of the state upon the amendment proposed by the Congress. The action of the legislature in performing this function rests upon the authority of Article V of the Constitution of the United States. It is a Federal function, which in the absence of action by the Congress, the state legislature is authorized to perform. (Leser v. Garnett, 258 U.S. 137; Smiley v. Holme, 285 U.S. 335). The mode of assembling the convention set up in Amended Senate Bill No. 204 provides for a vote by all the electors of the state upon the selection of all the delegates. The views of the candidates for election as delegates to the convention will be known in advance, so that the final action of the convention should be truly representative of the will of the people upon the one special question involved. The intent of Article V of the Constitution of the United States will therefore be effectuated by this action of the state legislature."

In view of the foregoing authorities, we have come to the conclusion that the permanent registration law passed by the recent legislature is not applicable in this election of delegates. However, Sec. 2, p. 234, Laws of Missouri 1933 is in part as follows:

"In all other respects, such special election in each precinct in this state shall be conducted under the provisions of the election laws of this state, insofar as such laws will apply and the judges and clerks of each such election shall be paid in the manner provided by law. ***"

The Weeks Bill does not provide for qualifications of the voters, but it is reasonable to assume that there should be some orderly procedure in this election. From the foregoing section just quoted, we are of the opinion that a person voting should be a

registered voter and should vote where registered, for the reason that said section just quoted states "shall be conducted under the provisions of the election laws of this state insofar as such laws will apply". As to the words "shall be conducted", in the case of *State v. Adams*, Alabama Reports, 2 Stewart 231, l.c. 242, the court in its opinion discussed the word "conducted" as follows:

"Does this provision, for deciding in the event of a tie, form a part of the 'manner of conducting the election?' If it does, then the relator was duly elected; if it does not, he was not. There is certainly a great distinction between the manner of conducting an election, and the election itself. By 'the manner of conducting the election' I understand the formal part of the election, viz: the mode of voting, the mode of receiving and registering the votes, of computing them, etc. The word 'manner' has never been considered as including substance, but form only, and the word 'conducting' certainly cannot be synonymous with 'effecting'. Now the giving a casting vote is clearly not a part of the 'manner of conducting', but it is effecting the election. The qualifications of the electors is substance, the manner of determining upon those qualifications is form. Under the provision which we are considering, it devolved upon the managers to determine whether the voters possessed the necessary qualifications to vote; but the law must definitely prescribe those qualifications.***"

And likewise, in the case of *Blake v. Walker*, 23 South Carolina Reports 517, l.c. 525, the court said:

"It is true that the act does provide that the election should be conducted according to the law governing municipal elections in the city of Spartanburg, and it may be true that, according to a strict and literal construction of the word 'conducted', it would not embrace a declaration of the result; but if there is anything else in the act tending to show that the legislature did not intend to use this word in its limited sense, then it is the duty of the court to give effect to such intention.

Now, it seems to us clear that the legislature intended to apply the same law regulating the municipal election to the election provided

for in the local option act, and that this act must be read as if the provisions of the fifth section of the charter of the city of Spartanburg had been incorporated into it. So reading it, we think it manifest that the legislature did not intend to use the word 'conducted' in its strict and limited sense, but intended it also to embrace the declaration of the result. ***"

In view of these authorities, it is the opinion of this department that the judges for convenience sake should have at their command the registration books in order that they may determine the qualified voters and in the event there is a question of qualifications of a voter, the judges should use their discretion and if necessary, place the prospective voter under oath.

In answer to question #4, you are referred to Sec. 2, p. 234, Laws of Missouri 1933, said section being as follows:

"For the purpose of electing delegates to any convention to vote upon the ratification of any proposed amendment to the Constitution of the United States, the Governor is hereby authorized by proclamation to call a special election and fix the date of holding thereof, which shall not be held within ninety days of the date of any primary or any general election in this state. For each such special election there shall be appointed by the county court two judges and two clerks who are in favor of the proposed amendment and two judges and two clerks who are opposed to the proposed amendment, who shall be qualified electors within their respective precinct. In all other respects such special election in each precinct in this state shall be conducted under the provisions of the election laws of this state, insofar as such laws will apply and the judges and clerks of each such election shall be paid in the manner provided by law for paying the costs of special elections, and shall perform the duties required and be subject to the penalties imposed upon judges and clerks of elections under the election laws of this state."

In answer to your question #5, you are referred to Sec. 10189, R.S. of Mo. 1929, said section being as follows:

"The county courts of the several counties in this state shall have power to divide any township in their respective counties into two or more election districts, or to establish two or more election precincts in any township, and to alter such election districts and precincts from time to time as the convenience of the inhabitants may require."

In answer to your question #6 as to whether or not an absentee voter can vote in this election, we herewith quote the new section, being Sec. 10181, p. 219, Laws of Missouri 1933:

"Any person being a duly qualified elector of the State of Missouri, who expects in the course of his business or duties to be absent from the county in which he is a qualified elector on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, may vote at such election as hereinafter provided."

In view of our opinion holding that this is not an election in the strict sense of the word, the reasons for which have been given under question #3, we naturally come to the conclusion that the absentee voter cannot vote in this election. The words "questions of public policy" should not apply in this election for the reasons as stated under question #3; the people are not voting directly on the question of the repeal of the Eighteenth Amendment, but for the delegates who will later assemble in conventions.

In answer to your question #7 dealing with the election notice, you are again referred to the Week's Bill, Sec. 13, p. 237, Laws of Missouri 1933, which is as follows:

"Notice of the proposed amendment and the time and place of electing delegates to any convention called under the provisions of this act to vote upon the ratification thereof, shall be published by the authority and in the manner provided by law for the publication of notices of amendments to the Constitution of the State of Missouri."

"All amendments proposed to the constitution of the State of Missouri by the general assembly shall be published with the laws of the session at which they are proposed, and also in some newspaper, if such there be, in each county in the state for four consecutive weeks next preceding the general election then next ensuing, and two or more copies of such amendments, printed in Great Primer Poster Type shall be posted at each voting place for the information of voters; such copies shall be furnished by the Secretary of State to the county clerks of each county, who shall have the same duly posted at each voting place in his county on the morning of the election day on which said amendments are to be voted on."

Your County Clerk will, no doubt, receive additional information and instructions from the Secretary of State with regard to the printing of the notices.

Lastly, question #8 relates to the length of time the newspaper must be in operation to publish an election notice. Sec. 13775, p. 303, Laws of Missouri 1931 is as follows:

"All public advertisements and orders of publication required by law to be made, and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of one year; shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for a subscription for a definite period of time. Provided, that when a public notice required by law to be published once a week, for a given number of weeks, shall be published in a daily, tri-weekly, semi-weekly or weekly newspaper, the notice shall appear once a week on the same day of each week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this act. All laws or parts of laws in conflict with this section, except sections 13777, 13776, 13779, 7631, 7632, and 7633, Revised Statutes of Missouri, 1929, are hereby repealed."

Hon. Walter G. Stillwell -10-

July 28, 1933.

It is the opinion of this department that this section should be so construed as to include the present election.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

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