

ELECTION - When three hundred or less vote in a precinct,
four judges may be appointed for said precinct
instead of six.

June 27, 1934.

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Honorable Arthur Huff
Clerk of the Iron County Court
Ironton, Missouri



Dear Sir:

This department acknowledges receipt of your letter of June 14, 1934. Also your supplemental letter of June 26, 1934 relating to the question of judges in the coming primary election. Your letter is as follows:

"We are doing everything possible to cut down expenses for 1934 in this county, and we are wondering if it would be legal to use only four judges in the coming Primary and General Elections instead of six, especially in the smaller precincts under the circumstances. Will you please give us your opinion in the matter.

If we can do that it will enable us to save considerably.

I am writing you at the request of our County Court, and I would appreciate an early reply as Court will convene in the very near future to appoint the judges for the Primary."

Section 10287, R. S. Mo. 1929 provides the manner of appointing judges and clerks for primary elections, and is as follows:

"The judges and clerks for primary elections held under this article shall be appointed in the same manner, and possess the same qualifications and consist of the same number as judges and clerks of general elections in this state: PROVIDED, that in all counties in this state which now contain, or hereafter may contain, a city of not less than one hundred thousand inhabitants and more than four hundred thousand inhabitants, the county committee of each political party which, at the general election held next preceding any primary election held under the provisions of this article, cast at least ten per cent, of all the votes cast at such election in such county, shall appoint three judges and one clerk for such primary election for each election precinct in such county outside of such city, and in all such cities the judges and clerks of election regularly appointed and commissioned for regular elections shall act as judges and clerks of all primary elections held under the provisions of this article."

Noting that the section quoted, supra, states that the judges and clerks of the primary election shall be appointed in the same manner as in the general election, we will refer to Section 10206, R. S. Mo. 1929, which deals with the manner of appointing judges for general elections and is as follows:

"In all counties in this state, four judges of election shall be appointed by the county court for each election precinct in each of said counties; and there shall also be provided two ballot

boxes for said judges of election, one of which shall be numbered No. 1 and the other numbered No. 2; and it shall be the duty of said judges to select from their number two judges who shall be designated and known as receiving judges, and two who shall be designated and known as counting judges. After the poll books are signed in the manner hereinafter provided in the form of the poll books, the ballot box No. 1 shall be opened and examined by all the judges and clerks, and everything removed therefrom; and one of the receiving judges, first selected, shall receive the ballot of each elector, and after pronouncing the name of such elector in an audible voice, shall pass the ballot to the other receiving judge, who shall number the same and deposit it in said ballot box No. 1, which shall be kept securely closed while the balloting continues for one hour from the time of opening the polls. At the expiration of said hour, the receiving judges shall deliver said ballot box No. 1 to the counting judges, who shall immediately deliver over to said receiving judges ballot box No. 2, which ballot box No. 2 shall be opened and examined in the presence of all the judges and clerks, and after everything is removed therefrom, shall be securely closed, and, during the next hour, said receiving judges shall receive and deposit ballots therein, in the same manner as during the first hour ballots were received and deposited in ballot box No. 1. After the delivery of ballot box No. 1 to the counting judges, the same shall be immediately opened by them, and the tickets shall be taken out,

one at a time, by one of the counting judges, who shall read distinctly, while the ticket remains in his hand, the name or names written or printed thereon, also the office that is intended to be filled by such person voted for, and deliver the same to the other counting judge, who shall string the same on a thread or string, as provided by law. The same method shall be observed with each ticket, and the counting shall continue thus until all the ballots in the box are counted, and then the counting judges shall securely close ballot box No. 1 and deliver the same to the receiving judges, and receive from the receiving judges ballot box No. 2; and so on in the same manner until the polls are closed and all the ballots are counted. No person or persons shall be admitted into the room or office where such ballots are being counted, except the judges and clerks of election: PROVIDED, that any political party may select a representative man who may be admitted as a witness of such counting. It shall be the duty of one of the judges to announce to the electors present the total number of votes polled at each change of the box; but the judges, clerks and witnesses shall make oath that they will make no statement nor give any information of any kind as to the number of votes polled for any office or person, nor the name of any person voted for, nor any other fact tending in any way to show the state of the polls at any time previous to the closing of the polls of said election on the day of the same."

Sections 10208 and 10211, R. S. Mo. 1929 have been repealed and two new sections enacted in lieu thereof, namely, Sections 10208 and 10211, Laws Missouri 1933, p.p. 238-239, the sections now being as follows:

Section 10208:

"In all precincts in this state that at the last preceding general election cast three hundred or more votes, at the same time and in the same manner as judges of election are appointed or elected, two additional judges of election for each such election district in the state shall be appointed or elected; three of the judges shall be taken from the political party that polled the largest number of votes at the last preceding general election and three of the judges from the party that polled the next largest vote. The judges of election shall designate two of their number, not of the same party, whose duty it shall be to have charge of the ballots and to furnish them to the voters in the manner hereinafter provided."

Section 10211:

"In all precincts casting less than three hundred votes in the last general election, the judges shall appoint two clerks, and in all precincts casting three hundred or more votes in the last preceding general election, the judges shall appoint four clerks. The clerks, before entering on the duties of their appointment, shall take an oath or affirmation, to be administered by one of the persons appointed or elected judges of the election, that they will faithfully record the names of all the voters; said clerks shall also take the oath above prescribed for judges to be administered at the same time and in the same manner heretofore directed."

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You state in your letter that you desire to reduce the usual number of six to four judges, especially in the smaller precincts. We call your attention to the fact that Section 10208, quoted supra, states that,

"at the last preceding general election cast three hundred or more votes * "

then two additional judges shall be elected. We construe the statute to mean clearly that in the event some of the smaller precincts cast less than three hundred votes, that it is not mandatory to have six judges, and therefore the four judges, as set forth in Section 10206 will suffice. Prior to the enactment of the two new sections which we have herein quoted, the Supreme Court of our State passed upon the effect of only four judges acting in an election. In the case of Sanders v. Lacks, 142 Mo. 255, l.c. 263, the court said,

"Popular elections involve the exercise of one of the most cherished rights of the citizen in a free government. But the right of suffrage must needs be exercised under conditions which do not always admit of a rigid observance of every technical requirement of law. The judges of election who manipulate the machinery necessary to record the expression of the voters' will are usually laymen, unfamiliar with legal technicality, and often wholly innocent of that sense of the importance of matters of mere form which often seems to possess a strange fascination to some learned minds. Election judges are drawn from the great body of the people. They serve for a short while. In the main they do their best to faithfully perform their duties under the law. But they are often guilty of omissions and

oversights in attempting to follow the strict letter of the law. In dealing with those lapses the courts have promulgated a practical general rule which seems to have a direct bearing upon the appeal at bar. That rule is thus stated by the most eminent American text writer on the law of this subject, viz: "If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, that statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory, if they do, and directory, if they do not, affect the actual merits of the election." McCrary, Elections (4 Ed.), sec. 225. The use of the terms "mandatory" and "directory" in this connection is, no doubt, sanctioned by usage in the law of elections by ballot. The terms are sometimes misleading and not strictly accurate; but they are convenient to point out the distinction between two general classes of irregularities, and they are sufficiently well understood to keep their places in the literature of the subject in hand.

Applying the rule already quoted, it is clear that the fact of four judges acting at a precinct in lieu of six (the complement prescribed by law) should not be held to deprive of their votes the citizens who voted at that precinct.

5. The next objection to the election is that the judges at the precinct were not equally apportioned to the two leading political parties. Of the four judges who finally acted, one was a Republican and three were Democrats.

It does not appear that any harm or prejudice to contestant's interests was occasioned by the failure to follow the law in the particular just mentioned. The full vote of the precinct was polled, counted, and returned. There is neither allegation nor proof of any sort of fraud or misconduct on the part of the judges in performing any of their duties in connection with the election. Nor is there any showing of unfairness in the result. This being so, we hold that the general rule already quoted, as to the effect or irregularities at elections, should be applied, and that the objection last above stated should be considered insufficient to nullify the vote cast at the precinct in question. The objection is one, however, that we should be disposed to treat very seriously if there was any testimony of an unfair result, which there is not in this case."

CONCLUSION.

It is the opinion of this department that in the

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precincts wherein less than three hundred electors cast their votes at the last presidential general election, that the county court of that county may appoint four judges instead of the usual number of six, and that the manner of appointing clerks should be carried out according to Section 10211, Laws Missouri, p. 239.

Respectfully submitted,

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APPROVED:

ROY McKITTRICK
Attorney General

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