

ELECTIONS:

Ballots may not be counted for nominee, even though straight ticket is voted, where his name does not appear on ballot.

November 20, 1940

11/20



Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This office is in receipt of your request for an opinion dated November 15, 1940, which may be briefly summarized as follows:

In St. Francois County no candidates were nominated in the Primary on the Republican Ticket for member of Congress from the Eighth District of Missouri, and for Judge of the Twenty-seventh Judicial District, St. Francois County lying within the bounds of both districts. Application for absentee ballots were made in some instances thirty days prior to the date of the General Election, as permitted by law, and the County Clerk immediately furnished such applicants with absentee ballots which did not contain the names of candidates for Congress and Circuit Judge on the Republican Ticket, because no such candidates had been nominated by a Primary, or otherwise. A certificate of nomination was received by your office naming Park M. Banta as a candidate for Congress, which was mailed to the County Clerk at Farmington on Monday, October 14, 1940. The certificate of nomination of Frank K. Fenwick as candidate for Circuit Judge on the Republican Ticket was mailed to the County Clerk by your office on October 19, 1940, which was the day on which it was received.

Your specific question is:

May ballots be counted for these two candidates where straight Republican Tickets were voted by such absentee voters who had received their ballots before the names of the above candidates were printed thereon and where no name, either written or printed, appeared in the proper places for candidates to such offices?

Section 10181 found in Laws of 1933, at page 219, provides that any person who is a qualified elector who expects to be absent from his county on the day of any general election may vote an absentee ballot.

Section 10182 found in Laws of Missouri, 1935, page 264, provides that this application may be made not more than thirty nor less than five days prior to an election for an official ballot to the County Clerk, or other proper officer, who shall furnish him with a ballot. It appears, in view of the dates given above, that it was impossible for ballots furnished to those absentee voters who applied for their ballots, prior to the time that the supplemental certificates of nomination were received by the County Clerk, to have contained the names of the two candidates above.

Our attention is directed by the letter accompanying your request for an opinion to the case of Bradley v. Cox, 271 Mo. 438. The facts in that case were very different from those at hand. The opinion was that the contestant John H. Bradley duly filed as a candidate in the Primary election, and defeated Arch A. Johnson for nomination as Judge of the Springfield Court of Appeals. Through an error by the County Clerk of Maries County the Democratic ballot contained the name of the defeated candidate Arch A. Johnson as nominee for the office, although he had been previous-

ly defeated. In that case the votes in question were cast for the nominee for the Court of Appeals, evidencing the intention of the voters to cast their ballots for the Democratic candidate. In the case at hand no names appeared and the absentee voter may have cast his ballot at a time when there was in fact no nominee on the Republican Ticket for either Congressman or Circuit Judge and had the names of such candidates appeared the voter might have desired to cast his vote against both, or either of them, and those counting such absentee ballots should not attempt to read into the ballot a name which does not appear, and for whom such voter may have not desired to vote. A search of the Missouri cases fails to reveal any mention of a similar state of facts under consideration. In *Rollins v. McKinney*, 157 Mo. 656, the contestee had been nominated by the Republican Party at a Primary election for the Seventh, Thirteenth and Fourteenth Wards in Kansas City, and his name was properly certified for those wards. The voter in the same district, but outside these particular precincts had failed to certify his name and McKinney had furnished the Judges in three precincts with a rubber stamp containing his name which was stamped on the ballots furnished voters in certain precincts. We find the following in the opinion of the Court, (l. c. 665):

"* * * The ballots prepared and printed by the clerk as required by the statute and which were to be voted at this election for the office of constable of the 'Eighth district of Kaw township,' were duly delivered to the judges of election. But the eighteen ballots in question cast for that office, were not the ballots which the judges of the election received, and which the statute required should by them be delivered to the electors and by them be cast for that office. The statu-

tory ballot for that office was a blank space on the Republican ticket, under the title of the office, in which the elector might write the name of his choice for that office, and by which he was advised of the fact that there was no nominee of that party for that office at that election. * * * And it is these false ballots for that office, manufactured by the judges of the election, without any authority of law, and in flagrant violation of their official duties, that were counted for the contestee in the court below. These were certainly ballots other than those printed according to the provisions of the statute, the casting and counting of which is thereby expressly prohibited, and the court in counting them for the contestee committed error for which its judgment will be reversed and the cause remanded for new trial."

Also, in *Bradley v. Cox*, 271 Mo. 438, mentioned above, we find the question squarely decided by way of dictum, in the following language, (l.c. 450):

"* * * Nor is there any provision of law permitting the voter to write in the name of a nominee which has been inadvertently omitted or misprinted. * * *"

Hon. Dwight H. Brown

-5-

November 20, 1940

CONCLUSION.

In view of the foregoing authorities, it is the conclusion of this department that absentee ballots which did not contain the names of nominees for Congress and Circuit Judge, and which had been lawfully prepared by the County Clerk, prior to his receiving certificates of nomination for such offices, could not be counted for such nominees where no names were found designating the voter's choice for these offices when the ballot was cast and returned by the voter.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:FW