

ELECTIONS: In regard to color of ballots, num-
BALLOTS: ber and kind of ballot boxes, and
BALLOT BOXES: depositing of various ballots in the
CONDUCT OF ballot box.
ELECTIONS:

September 17, 1942

Mr. Harry L. Thomas, Chairman
Board of Election Commissioners
County Court House
Kansas City, Missouri



Dear Mr. Thomas:

This is in reply to yours of recent date wherein you submitted to this department the following questions for an official opinion:

- "1. May paper of color other than white be used for ballots other than the political ballots, and if so, upon all others or upon what others?
2. Under the prevailing conditions would the use of a single ballot box for all except the constitutional ballots invalidate any part of the election?
3. Would the use of a substantial cardboard box, sealed with a paper seal, be permissible for the deposit of any of the ballots voted in the election?
4. In view of the provisions of Section 3 of the judicial amendment of 1940 to the constitution, should the judicial ballots be deposited in the same box with the constitutional ballots?"

In considering these questions the follow-

ing principles of law which have been applied by the Missouri courts should be applied. In State ex rel. v. Hackman, 273 Mo. 670, 699, the court said:

" * * * * * The general rule on this subject is that 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. (Sanders v. Lacks, 142 Mo. l.c. 263; Horsefall v. School Dist., 143 Mo. App. 541.) Here the statute simply prescribes a certain form of ballot, but does not declare what results will follow if it is not used. The statute, therefore, may be a reasonably held to be directory. * *

* * * "

And the court in speaking of minor complaints in the conduct of an election further said at local citation 701:

" * * * * * As we have said in regard to other complaints of this character of which there are many, the spirit of the modern rulings is to disregard irregularities that have worked no injury, when it is shown that everything has been done that could be done to afford the voters a fair election and no mandatory statute has been

violated. * * * * *

These are general principles which have been announced and followed by both the Supreme Court and the appellate courts.

However, the above principles have been applied in cases of election contests. The main reason for applying them after the ballot has been cast was that the voter should not be deprived of his right of franchise because some official has failed to strictly follow the statute pertaining to elections. In your case the question is raised before election.

Election officials are creatures of the statutes; and, as to their duties, we think the principle announced in *Lamar Township v. City of Lamar*, 261 Mo. 171, would be applicable here. That principle at l.c. 189 is as follows:

* * * * * Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power

of attorney; if he neglect to follow it,
his cestui que trust ought not to suffer.
* * * * *

Applying this rule to your inquiry as to the duties of the election officials in the preparation and obtaining of election supplies we think that the election officials would be required to follow the statutes applicable thereto.

Then referring to your first question which relates to the color of the political ballot we find the following statute, Section 11595 R. S. Mo., 1939, provides in part as follows:

* * * * * The ballot shall be plain white paper, through which the printing or writing cannot be read. * * * * *

This section pertains to the ballots for the general election.

You inquire particularly to ballots used for voting on constitutional amendments. The law pertaining to elections on constitutional amendments is contained in Article 9, Chapter 76, R. S. Mo., 1939; the portion of that article which relates to ballots and forms of ballots is in Section 11680. The last sentence of that section provides as follows:

* * * * * In all other respects the law governing the printing, distribution of ballots, the number to be distributed,

and the manner of voting ballots at a general election shall apply to 'constitutional ballots' where not in conflict with this article."

From this provision it will be seen that the general law pertaining to printing, distribution of ballots, etc. shall apply to constitutional ballots.

We are, therefore, of the opinion that paper of a color other than white may not be used for ballots other than political ballots.

On your second question relating to the use of a ballot box for all ballots except constitutional amendments we find that the provisions for ballot boxes in elections in cities of three hundred thousand to six hundred thousand are set out in Article 23 of Chapter 76, R. S. Mo., 1939. Section 12123 of this article provides for one ballot box for each precinct with a sealed package of ballots. The ballot box with the sealed ballots, poll books, blank stationery for the election is delivered to one of the election judges and the key or keys to such ballot box is delivered to a judge of the election of the opposite political party.

Section 12136 of this article requires that the ballot box, before any ballots are placed in it, shall be opened and shown to those present and it must be empty before the voting begins. Then the box must be closed and locked and not opened until the polls close. This section also requires the ballot box to be kept in public view during the time the polls are open.

Section 12139 of this article makes provisions for depositing of the ballot in the ballot box after it has been voted and properly marked and identified by the election officials.

After the result of the election has been proclaimed then under Section 12148 the following procedure is prescribed:

" * * * * * One of the judges of election shall take charge of said ballot box and place therein the poll books, the tally sheets and all certificates or statements of votes cast not otherwise provided for, and one of the judges, who shall represent the opposite political party from the one taking the ballot box, shall receive and hold the key thereto. * * * * * "

Said Article 23 of Chapter 76 is a special election act applicable to cities of 300,000 to 700,000. The general election statute, Section 11499, pertaining to ballot boxes does not apply here. However, we think Section 11680 pertaining to ballots and ballot boxes for voting on constitutional amendments does apply. It provides that the clerk of the county court shall supply the proper election officials with separate ballot boxes for the deposit and reception of constitutional amendments. This section also provides that the manner of voting ballots at the general election shall apply to "constitutional ballots" where not in conflict with this article.

Considering the statutes relating to

elections in cities of 300,000 to 700,000 and the general election provisions and the constitutional amendment provisions it is the opinion of this department that they would authorize the use of a single ballot box for all ballots cast at the election except those cast on constitutional amendments which should be deposited in a special ballot box.

On the question of the kind of ballot box which may be used we find that the statute, general or special, makes no designation to this. The general election law requires that the ballot boxes be provided and that during the process of an election they shall be securely closed. Section 11499 R. S. Mo., 1939. Article 23, Chapter 76, pertaining to cities of three hundred thousand to seven hundred thousand requires the ballot box to be locked with a key. Since the election law is silent on the question of the material out of which a ballot box is to be made we think this is a matter which would then be left to the discretion of the election officials and if they comply with the spirit and intent of the law their acts would be legal. However, we do not think that the law would authorize the ballot box in cities of three hundred thousand to seven hundred thousand to be sealed with a paper seal. From a reading of said Article 23 we think that the law-makers undoubtedly intended that the ballot box should be locked with a key.

On your fourth question as to whether or not judicial ballots shall be deposited in the same box with constitutional ballots, by Amendment No. 3 to the Constitution, adopted in 1940, a new plan for the election of judges to the Supreme Court was provided. By Section 3 of this amendment the name

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of the incumbent judge shall be placed on the judicial ballot if such judge files his declaration. Then the question of the retention of such judge is submitted at the general election. This ballot is designated as a separate judicial ballot without party designation. From the language of this section we think that this election comes within the same class as elections of other officials, and since this would not come within the class of constitutional amendments it is the opinion of this department that ballots for "judicial candidates" should be delivered by election officials as other political candidates and should not be deposited in the box with the constitutional ballots.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

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