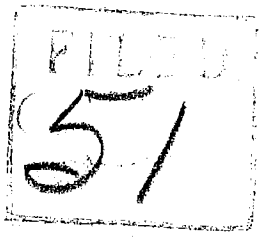
CIRCUIT CLERKS: 1. Duty of judges to return ballots and poll books to
ELECTIONS: county clerk. 2. Duties of sheriffs at election.
3. Absentee ballots may be sent by certified mail.
4. Time off for voting applies although employee lives in county other than where he is employed. 5. Allowance to election judges for returning poll books and ballots to clerk and for services as election judge may not exceed maximum fixed by §111.350. 6. Circuit clerk who "earns" fees on change of venue receives such fees.

November 3, 1960



Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
Savannah, Missouri

Dear Mr. Lance:

This is in response to your letter in which you ask several questions with respect to the election laws. We will quote each of your questions and answer them separately. Your first question is:

> "1. Section 111.480 RSMo 1949, As Amended, provides that 'the Clerk of the County Court shall cause to be delivered to the judges of election of each election district which is within the County in which the election is to be held, the number of ballots printed for such district, said delivery to be made by the Sheriff of the County or his Deputy, who shall be allowed a reasonable compensation for his services to be provided for by the County Court.' Section 111.690, RSMo 1949, As Amended, states 'at the close of each election the judges shall transmit one of the poll books by one of their clerks or by registered mail at their discretion, to the Clerk of the County Court in the County in which the election was held, within two days thereafter; if the poll books are not returned within the time provided, the Clerk shall have the power to either send the Sheriff or a messenger for said books;'. Section 111.700 RSMo 1949, As Amended, provides that the judges or clerks shall return the ballots to the County Clerk. Section 111.690 also provides for the payment of a messenger if such be necessary to return the poll books. In our County, which is a county of the third class, there seems to arise a rather violent dispute each time we have an

> election over who is going to return the ballots to the County Clerk. In some instances the Deputy Sheriff, who has been present at the polling place during the day to preserve the peace, has returned ballots when there seemed to be a deadlock between the Republicans and Democrats who were equally divided, as to who was going to return the ballots. What is your opinion as to the proper method to select the person designed to return the ballots? Would the County Clerk or the Sheriff have the authority to designate that the Deputy Sheriff should act as the messenger and return the ballots to the County Clerk?"

We set forth Section 111.630, V.A.M.S., in part, and Section 111.690, V.A.M.S., as follows:

Section 111.630:

> "The judge to whom any ticket shall be delivered shall, upon receipt thereof, pronounce in an audible voice the name of the voter; and if the judges shall be satisfied that the person offering to vote is a legal voter, his ticket, with the number covered as directed in section 111.620, shall be placed in the ballot box without inspecting the names written or printed thereon, or permitting any other person or persons to do so; and the clerks of election shall enter the names of voters and the number of the ballots, in the order in which they were received, in the poll books, in conformity with the form printed in section 111.510; and no ballot not so numbered shall be deposited in the ballot box and counted; and the ballots, after being counted, shall be sealed up in a package and delivered to the clerk of the county court or corresponding officer in any city not within a county, who shall deposit them in his office, where they shall be safely preserved for twelve months; * * * "

Section 111.690:

> "At the close of each election the judges shall transmit one of the poll books by one of their clerks or by registered mail at their discretion to the clerk of the county court in the county in which the election was held within two days thereafter; if the poll books are not returned in the time provided the clerk shall have the power to either send the sheriff or a messenger for said books; the other poll book shall be retained in the possession of the judges of election open to the inspection of all persons; provided, that if such poll books be transmitted by messenger, the county court shall pay such messenger for such service at the rate of ten cents per mile for each mile necessarily traveled, going and returning."

You will note that Section 111.630, supra, provides that the ballots, after being counted, shall be sealed up in a package and delivered to the county clerk, and Section 111.690, supra, provides that the election judges shall transmit one of the poll books to the county clerk by one of their clerks or by registered mail. It would seem apparent that the law places the responsibility upon the election judges to see that the ballots and the poll books are delivered to the county clerk, and there is no provision for reconciling disputes between the judges with respect to who shall deliver the ballots and poll books.

As a practical matter it would seem that if no agreement can be reached under which some one person is to perform this function, the only apparent answer would be for two or more persons to perform this function. Therefore, we believe that it is the responsibility of the election judges to see that both the poll book and the ballots are returned to the county clerk.

Your second question is:

> "2. Would the Sheriff's Deputy in a Class III County such as Andrew County have any duties other than delivering the ballots to one of the judges as provided by Section 111.-480, RSMo 1949, As Amended, and preserve the peace under the direction of the judges as provided by Section 111.050, RSMo 1949, As Amended, at the election place during the day of the election?"

In answer to your second question we would simply state that the sheriff's deputy in a class three county, such as Andrew County, does have duties other than delivering the ballots to one of the judges, and other than preserving the peace under the direction of the judges, at the election place during the day of election. There are certain other duties that the sheriff or his deputy are to perform prior to the election, such as delivery of the poll books to the judges and delivery of the ballot boxes, etc.

Your third question is:

> "3. Section 112.030, RSMo 1949, As Amended, provides that 'the official charged with the duties of furnishing absentee ballots shall send by registered mail, postage prepaid, or deliver in person, an official ballot.' Would mailing the absentee ballots by certified mail qualify under the laws pertaining to delivery of absentee ballots?"

Section 1.025, V.A.M.S., reads as follows:

> "As used in the statute laws of this state, 'registered mail', when used with reference to the sending of notice or any article having no intrinsic value, includes certified mail as defined and certified under regulations of the United States Post Office Department."

This would make apparent that the answer to your third question is that the mailing of absentee ballots by certified mail is proper.

Your fourth question is:

> "One of the reasons given for the issuance of an absentee ballot is absence from the County on the day of election. In Andrew County we have many voters who are employed in St. Joseph, which lies in Buchanan County. Many of these workers leave Andrew County before the polls open and they return to the County after the polls are closed. Would their employer be required to allow them sufficient time to return to Andrew County to vote in person where it would probably take two hours to do so, or would these persons be qualified to vote absentee ballots?"

In considering your fourth question, we think it only necessary to set forth paragraph 1 of Section 129.060, V.A.M.S., which is as follows:

> "1. Any person entitled to vote at any election held within this state, or any primary election held in preparation for such election, shall, on the day of such election be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of three hours between the time of opening and the time of closing the polls for the purpose of voting; and any absence for such purpose shall not be sufficient reason for the discharge of or the threat to discharge any such person from such services or employment; and such employee, if he votes, shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages; provided, however, that request shall be made for such leave of absence prior to the day of election, and provided further, that this section shall not apply to a voter on the day of election if there be three successive hours, while the polls are open, in which he is not in the service of his employer. The employer may specify any three hours between the time of opening and the time of closing the polls during which such employee may absent himself as aforesaid."

You will see from the above section that any person entitled to vote at an election held within this state is entitled to be absent from any employment for a period of three hours between the time of opening and the time of closing the polls for the purpose of voting. The primary condition to his absence would appear to be that he shall request such leave of absence prior to the day of election; and you will note further that he is not entitled to this three-hour absence if, on the day of election, there be three successive hours, while the polls are open, during which he is not in the service of his employer. Therefore, the answer to your question is that the employer is required to allow employees sufficient time to return to vote in Andrew County, within the limitations set forth in Section 129.060, supra. The fact that

the employment is in another county would not affect the employee's right in this regard.

Your fifth question is:

> "5. Section 111.350, RSMo 1949, As Amended, provides that judges are to receive 'not to exceed $8 per day except in townships or precincts where the vote at any election is in excess of 600 votes, the County Courts may at their option, pay at the rate of $.50 per hundred for each additional 100 votes or major fraction thereof, not to exceed $10 per any election to be paid out of the County Treasury.'
>
> "In the event that your opinion on questions No. 1 indicates that a judge may or shall return the ballots to the County Clerk, would such judge be allowed, in addition to the $8 per day, mileage at the rate of 5¢ per mile, or at the rate of 10¢ per mile as provided in Section 111.690, RSMo 1949, As Amended? You may assume that all of the precincts in Andrew County have less than 600 voters."

In answer to your fifth question, we are enclosing a copy of an opinion written to Marion Robertson, Marshall, Missouri, on March 25, 1943. You will see from this enclosed opinion that the county court may make such allowance as is reasonable for payment of election clerks, provided that this compensation does not exceed statutory limitations. It is our belief that this opinion correctly states the law and therefore the law restricts the total allowance which the county court could grant to an election judge for returning the ballots to the county clerk so that such allowance, together with the compensation allowed for his services, may not exceed the maximum fixed by §111.350, V.A.M.S. However, it will be seen from Section 111.690, supra, that if the poll books are transmitted by a messenger sent by the county clerk, this messenger may be paid by the county court for his service at the rate of ten cents per mile for each mile necessarily traveled, going and returning.

Your sixth question is:

> "6. In a recent criminal case tried in Andrew County the case was tried prior to the last election and the defendant was convicted of a felony. The case was then

> appealed to the State Supreme Court and the decision of the Circuit Court was affirmed by the Supreme Court. Between the time of conviction in the Circuit Court of Andrew County and the affirmation of such conviction in the Supreme Court of Missouri, a regular general election was held and a new Circuit Clerk was elected. At the time the case was appealed to the Supreme Court the 'old' Clerk had accumulated fees of $12.35 due to the Circuit Clerk. Now that the case has been affirmed and finally disposed of during the tenure of a newly elected Circuit Clerk, who is entitled to the $12.35 Circuit Clerk fees, the lady who was Circuit Clerk at the time the fees were incurred during the trial in Andrew County, or the person who was Circuit Clerk at the time the case was finally closed and disposed of by the Mandate of the Supreme Court of the State of Missouri?"

In answer to your final inquiry, we would point out that, by §483.660, V.A.M.S., the circuit clerk in your county is required to pay into the county treasury all fees collected by him, "except fees collected in cases of change of venue from other counties." Section 483.335, V.A.M.S., permits the circuit clerk in Andrew County to retain fees earned by him in cases of change of venue from other counties. In view of these provisions, your question has significance only in cases of change of venue.

If the case about which you inquire is one in which the clerk would be entitled to retain the fees because the case was in Andrew County on change of venue, then the person who had "earned" such fees would be entitled to them, although she was not the clerk at the time that the fees were finally paid. This conclusion is based on the case of Thornton v. Thomas, 2 Mo. App. 595, wherein the court held that:

> "1. The clerk of the Circuit Court, to whom fees are taxed in any case, is the only person entitled by law to receive them from the party chargeable, or from the sheriff, who has collected them on fee-bill or execution.
>
> "2. When fees are collected, they will be held by the clerk, to his own use, or paid into the county treasury, according

> to the determination of the inquiry whether he has retained to his own use from other fees, earned in the same year, the maximum sum allowed him by law for any one year.
>
> "3. The incumbent clerk has no right to fees earned by, or taxed to, his predecessor; they belong either to the latter or to the county, and the incumbent is not a trustee for the county, and has no power to administer this fund."

CONCLUSION

It is the opinion of this office that:

(1) It is the responsibility of the election judges to see that the poll book and the ballots are returned to the county clerk.

(2) The sheriff's deputy in a class three county does have duties other than delivering the ballots to one of the judges and other than preserving the peace under the direction of the judges, at the election place during the day of election.

(3) The mailing of absentee ballots by certified mail by the county clerk is proper.

(4) Any person entitled to vote at an election held within this state is entitled to be absent from any employment for a period of three hours between the time of opening and the time of closing the polls for the purpose of voting, consistent with the qualifications set forth in Section 129.060, V.A.M.S.

(5) The total allowance which a county court may grant to an election judge for returning the ballots to the county clerk and for his services as such judge may not exceed the amount fixed by Section 111.350, V.A.M.S. However, a messenger sent by the county clerk who transmits the poll books to the county clerk may be paid for his services by the county court at the rate of ten cents per mile for each mile necessarily traveled going and returning.

(6) When fees may be retained by circuit clerk in change of venue cases, the clerk who earned such fees is entitled to them, whether or not in office at the time of their actual payment.

Honorable Alden S. Lance

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James B. Slusher.

Very truly yours,

JOHN M. DALTON
Attorney General

JBS/mlw
Enclosure