ELECTIONS: Moving of election place from general store to basement of Methodist Parsonage would not invalidate returns unless fraud existed.

It is illegal for candidate to remain in voting booth or voting precinct and electioneer for themselves or any one else.

October 31, 1934.

11-9

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Hon. Orin J. Adams,
Prosecuting Attorney,
Caldwell County,
Kingston, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of October 24, 1934, requesting an opinion based on the facts as contained in a letter to you from Mr. Frank E. Hilton of Braymer, Mo. His letter is as follows:

"At the primary election on August 7, 1934, I observed the following at one voting place:

The voting is done at the township house, which is used as a country general store. The rental contract with the storekeeper stipulates that elections will be held in this township house. On the morning of August 7 the constable proceeded to set up the voting booths in the back room of the store and had this job completed when the judges and clerks arrived. The judges at once decided that it would be too hot in the rear of the store building and voted among themselves to move the voting place to the basement of the Methodist Parsonage, about 1/8 mile away; this parsonage being located about 100 feet from the Methodist Church where Sunday school is held every Sunday morning, weather permitting. A former storekeeper had vacated the parsonage about four months previous, but had some miscellaneous furniture stored on the first floor. Was it legal to hold the election in the basement of this parsonage under these conditions?

At this same election the township committeewoman, who has been in office for a number of years, had her name on the ballot for reelection. When the voting started she took a list of the voters and placed herself in the room where the voting and counting of the ballots was being done. Fre-

> quently she would get up and go out and tell her husband to take their car and go and get some one whom she would designate to vote. About two weeks previous to August 7 and independent candidate was brought out for this same office, although her name was not placed on the ballot, and the other name was scratched out and this independent candidate's name was written in, and it was counted. Was it legal for this first committee woman to take her list of the voters and remain in the room where the voting and counting was being done? By doing this, she could just about tell where she stood most of the time. The township committeeman informed me that it was all right when I mentioned it to him."

I

Section 10192, R.S. Mo. 1929 provides:

> "The place of holding the elections shall be designated, and the judges and clerks of election appointed in such districts or for such election precincts, and the elections therein shall be conducted, in all respects, in the same manner as is hereinafter provided by law for the townships."

Section 10254, R.S. Mo. 1929, further relating to the polling places, is as follows:

> "The primary shall be held at the regular polling places in each precinct on the first Tuesday of August, 1910, and biennially thereafter, for the nomination of all candidates to be voted for at the next November election."

In the case of State v. Himmelberger-Harrison Lumber Co., 58 S.W. (2d), l.c. 752, the Court said, in regard to places of holding elections or voting precincts in a school election:

> "As we have said, the statute fixes the time of holding such annual meetings or elections, and it is sufficient if the notices posted of such meeting follow the law in fixing the time. The exact place of holding such elections is so generally fixed by custom, if not by law, and such

exact place is so easily ascertained by any one desirous of voting, that laws in that respect are liberally construed to the end that elections fairly held and which afford the voters a fair opportunity to exercise their right to suffrage will be upheld. The Court of Appeals in Martin v. Bennett, 139 Mo. App. 237, 244, 122 S.W. 779, 781, overlooked the fact that the Thornburg Case, supra, cited and relied on there, was dealing with fixing the time of a special election, when on the authority of that case it said that 'It is our duty to follow the decisions of the Supreme Court, and under the authority of the case above quoted from we hold that the order of the board made March 12, 1907, was insufficient in not specifying the place for the election', though it correctly held that 'on that order the secretary was not authorized to submit the proposition of furnishing the schoolhouse and purchasing a site for the new building', when the order of the board, as shown, was 'authorizing the board of directors of said school district to borrow the sum of ten thousand dollars for the erection of additional school building.'

We approve what is said in State ex rel. Mercer County v. Gordon, 242 Mo. 615, 624, 147 S.W. 795, 797, to-wit: 'It is rare indeed that any one desiring to cast a vote in a special election has any difficulty in finding the place where the election is to be held. Either those urging the adoption of the measure submitted or those desiring its defeat will take such an interest in the result of the election that every one who may desire to vote thereat will have no difficulty in finding the place where he should cast his ballot. **** The law contemplates that everything necessary shall be done to afford the voters a free and fair opportunity to vote yes or no on the proposition submitted, and unless some mandatory statute has been violated, or something has been done or omitted, which has deprived the voters of a free and fair expression of their will, such election should be upheld. (cases cited). **** The record is barren of even an intimation that any voter in said county failed to understand where he should vote or was deprived of his right to vote in the special election by reason of any alleged defect or ambiguity

> in the notice of election as published.' This was said with regard to a special election, and would be even more applicable to an annual school election.
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> In State ex rel. Gentry v. Sullivan, 320 Mo. 362; 8 S.W. (2d) 616, 618, the notice of an election to be held in a consolidated school district specified the place of the election as 'at Stoutland', a village of some 300 people. The election was actually held at the Christian Church in that town by making public announcement on the street just before the voting began. As to this the court said: 'Before the voting commenced the county commissioner made a public announcement that the election would be held at the Christian Church. It was accordingly held at that place. No evidence having been adduced that any voter was deprived of his right to vote by reason of the general nature of the notice, no right was impaired or privilege denied, and we are, in all fairness, prompted to overrule this contention. In so doing we are not without a precedent therefor in our own rulings. State ex inf. Poage v. Higley, (Mo. Sup.) 250 S.W. 61'.
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> Defendant cites State ex rel. v. Martin, 83 Mo. App. 55, and Harrington v. Hopkins, 288 Mo. 1, 231 S.W. 263, but we find nothing therein justifying our holding the annual school election void for failure to sufficiently apprise the voters of the place where the election was held, and we rule this point against defendant."

In the case of Bowers v. Smith, 3 Mo., l.c. 61-62, the Court, in passing upon the question of voting places, said:

> "It is next asserted that the votes from Sedalia should be excluded because they were received at two polling places instead of at one.
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> It appears that the county court had designated Sedalia city as one election district, but had further provided two voting places therein for holding this election, with one set of judges at each, as hereafter more particularly described. This was done by orders to that effect before the election. Both of the voting precincts were at the courthouse in that city.

At one, the voters whose surnames began with the letters 'A' to 'K' voted; at the other, those with the letters 'L' to 'Z'. Each poll was reached by way of a window, and the two were only seventy-five feet apart. The windows fronted on one portico of the court building. Through them, passways led to the polling booths in the rooms within, where the election judges were stationed and received the ballots.

Assuming that these arrangements involved the irregularity of receiving the vote at two places instead of at one, does it nullify the will of the people so expressed, the election having been regular in other respects?

Undoubtedly some irregularities are of so grave a nature as to invalidate the whole return of the precinct at which they occur; as, for example, the omission of registration. Zeiler v. Chapman (1874), 54 Mo. 502. In determining which are of that kind, the courts aim merely to give effect to the intent of the law-makers in that regard, aided by established rules of interpretation.

If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. Ledbetter v. Hall (1876), 62 Mo. 422. In the absence of such declaration, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise, it is considered immaterial.

It has been sometimes said, in this connection, that certain provisions of election laws are mandatory, and others directory. These terms may, perhaps, be convenient to distinguish one class of irregularities from the other. But, strictly speaking, all provisions of such laws are mandatory in the sense that they impose the duty of obedience on those who come within their purview. But it does not, therefore, follow that every slight departure there-

> from should taint the whole proceedings with a fatal blemish.
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> Courts justly consider the chief purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribe the formal steps to reach that end; and, in order not to defeat the main design, are frequently led to ignore such innocent irregularities of election officers as are free of fraud, and have not interfered with a full and fair expression of the voters' choice.
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> Thus, in Davis v. State ex rel (1889), 75 Tex. 420, the law required that each ward in a town should 'constitute an election precinct'; Yet, in SAn Marcos, a town incorporated with four wards, the county commissioners established two precincts only (without reference to ward lines), and each included parts of the adjacent country; but the court, after full discussion of the general subject, held that the election at those precincts was not avoided by the irregularity.
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> In Stemper v. Higgins (1888), 38 Minn. 222, a general election was conducted in the village of Madelia by its officers, as though it constituted a district separate from the township in which it was situated, where also a precinct was open; whereas, the law declared that ' every organized township, and every ward of an incorporated city, is an election district;' yet the court held the returns from the village valid, despite the irregularity indicated."

While in the above decision the facts are not identical with the first question presented in Mr. Hilton's letter, the underlying principle of law is the same in that in the absence of any statutory enactment making such an irregularity fatal, and we confess we find none in the statutes, the returns from such precinct will not be invalidated.

Conclusion

In view of the above decisions, we are of the opinion that the place of holding the election, as described in Mr. Hilton's letter, would not invalidate the returns from the precinct unless it could be shown that fraud existed, and that the voters were precluded from exercising their free will and having an

opportunity to cast their votes.

II

The next question presented in your letter relates to what is commonly termed "electioneering". Section 10332, R.S. Mo. 1929 provides:

> "No officer of election shall disclose to any person the name of any candidate for whom any elector has voted. No officer of election shall do any electioneering on election day. No person whatever shall do any electioneering on election day within any polling place, or within one hundred feet of any polling place. No person shall remove any ballot from any polling place before the closing of the polls. No person shall apply for or receive any ballot in any polling place other than that in which he is entitled to vote. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor."

The section relating to electioneering in the booth is Section 3980, R.S. Mo. 1929, which provides as follows:

> "It shall be unlawful for any judge of election, clerk or person designated as a challenger under any laws of this state, or any person or persons within the polling place, to electioneer for any candidate, party or proposition. Any violation of this section shall be a misdemeanor, and shall be punished by imprisonment not less than ten days nor more than ninety days, or by a fine of not less than fifty dollars nor more than one hundred dollars."

Conclusion

Under the terms of the above sections, it is our opinion that it is illegal for a candidate, or any other person, to remain in the voting booth or voting precinct and electioneer for themselves or any any else.

Respectfully submitted,

APPROVED:

OLLIVER W. NOLEN
Assistant Attorney General