ELECTIONS: Hours of opening and closing polls in 1942 governed by War Daylight Time; in cities of less than 25,000 close at sunset if after 7 p.m.

March 17, 1942

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

Dear Mr. Brown:

We have your request of March 14, 1942, which is as follows:

"Question has been asked concerning time of closing the polls, since adoption of War Time.

Sec. 11487 R. S. Mo. 1939 provides that polls (except in cities of 25,000 or more) shall be closed at 7 o'clock in the evening, or sunset if the sun shall set after 7 o'clock.

Please favor me with your opinion, as to when such polls shall be closed during the existence of War Time."

Section 11487 R. S. Mo., 1939, provides as follows:

"The judges of each election hereafter to be held, general or municipal, shall open the polls at six o'clock in the morning and continue them open until seven (7) c'clock in the evening, unless the sun shall set after seven (7) o'clock, when the polls shall be kept open until sunset, except in cities in the state of twenty-five thousand (25,000) inhabitants or upward, when the

polls shall be opened at six (6) o'clock in the morning and be kept open until seven (7) o'clock in the evening."

The Public Law of the 77th Congress in an act approved January 20, 1942, is as follows:

"(Public Law 403-77th Congress)

(Chapter 7-2d Session)

(S. 2160)

AN ACT

To promote the national security and defense by establishing daylight saving time.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That beginning at 2 o'clock antemiridian of the twentieth day after the date of enactment of this Act, the standard time of each zone established pursuant to the Act entitled 'An Act to save daylight and to provide standard time for the United States', approved March 19, 1918, as amended, shall be advanced one hour.

Sec. 2. This Act shall cease to be in effect six months after the termination of the present war or at such earlier date as the Congress shall by concurrent resolution designate, and at 2

o'clock antemeridian of the last Sunday in the calendar month following the calendar month during which this Act ceases to be in effect the standard time of each zone shall be returned to the mean astronomical time of the degree of longitude governing the standard time for such zone as provided in such Act of March 19, 1918, as amended.

Approved, January 20, 1942. "

In the case of McComb v. Dutton reported in 32 Delaware Reports, l.c. 260 and 261, the court says as follows:

"'It seems clear to us that the provisions of a statute fixing the time of opening and closing the polls at an election are so far directory that an irregularity in this respect which does not deprive a legal voter of his vote, or admit a disqualified person to vote, will not vitiate the election. But if the departure from the provisions of the statute in regard to the time for opening or closing the polls was so great that it must be deemed to have affected the result, the election must be held invalid. People v. Lodi High School, 124 Cal. 694, 57 Pac. 560; Fry v. Booth, 19 Ohio St. 25; Pickett v. Russell, 42 Fla. 116, 634,28 South.764; Patton v. Watkins, 131 Ala. 387,31 South. 93,90 Am. St. Rep. 43; People v. Cook, 8N.Y. 67, 59 Am. Dec. 451; Holland v. Davies, 36 Ark. 446; Cleland v. Porter, 74 Ill. 76, 24 Am. Rep. 273.

The election in the case before us was held from two to five o'clock P. M., Daylight Saving Time; under such time the polls were opened and closed one hour earlier than they would have been under Standard Time; but should the election be held illegal and void because it was not held strictly in accordance with Standard Time? The statute under which the election was held provided that the polls should be kept open from two to five o'clock in the afternoon, but nothing is said about Standard Time or any other time; and there was no law of this state, at the time the election was held defining legal time or making Standard Time the lawful time.

It is not clearly shown in the case stated that Daylight Saving Time was the recognized and accepted time in the district where the election was held, although it was not denied at the argument. If Daylight Saving Time was the recognized and accepted time in the district, the time by which the people arose in the morning, conducted their daily affairs and retired at night, would there have been any better or more suitable time by which to hold the election? The election is presumed by law to be legal, and in order to rebut that presumption it must be shown that it was illegal. The mere fact that the election was held under Daylight Saving Time does not, in our opinion, rebut the presumption. To have that effect it would have to appear that the

time observed in opening and closing the polls was not the recognized and accepted time in the district.

The second exception,'The purposes for which said taxes were to be used were not school purposes'; and the third exception, 'The amount to be raised was set out as being $20,862.00. The amount they showed they intended to raise was $21,073.00,' will be considered together.

The statute provides that notice shall be given for such election stating the amount to be raised and the purposes for raising the same. Vol. 32, Delaware Laws, chap. 160, sec. 54. The notice given in this case was as follows:* * * * * * * * * * *"

In the case of Armstrong v. Tama County, reported in 34 Iowa Reports, l.c. 308 and 309 the court says as follows:

"* *Section 81, chapter 172, acts ninth general assembly, provides that no district township meeting or sub-district meeting shall organize earlier than 9 o'clock A.M., nor adjourn before 12 m., and in all independent school-districts the polls shall be open from 9 o'clock A.M. to 4 o'clock P.M. Section 85 provides for an election by ballot, in the Independent school district, upon the question of its organization. It was clearly an election contemplated in the other section just cited. It was an election held in the district, and it was by ballot. The polls

> should have been kept open as provided from 9 o'clock A.M. until 4 P.M. The language of the two sections cannot be misunderstood, and its obvious meaning is in harmony with reason. It cannot be supposed that the legislature would provide for more favorable opportunities for the expression of the will of the people in the ordinary election, than at the important one which determined the very existence of the district.
>
> The township trustees had no power to order an election to be held at a time not authorized by law, and it was therefore illegal. The action of the electors, deciding upon the organization of the district, being unauthorized and void, must be regarded for naught, and the district itself as having no legal existence. The tax in question cannot, therefore, be collected.* * *"

In the case of People v. Seale reported in 52 Cal. Rep. l.c.72 and 73, the court says as follows:

> "* * *In this case the notice was to the effect that the polls would be open only between the hours of one o'clock P.M. and six o'clock P.M., and in point of fact the polls were kept open only between those hours, and in this important respect the election, as held, was not 'in conformity with the general election law'—for that

> requires the polls to be open 'at one hour after sunrise on the morning of the election,' and to be kept open until sunset (Political Code, sec. 1160).
>
> Judgment reversed and cause remanded, with directions to dismiss the action."

In the case of Tebbe v. Smith, reported in 108 Cal. Rep. 111 and 112 the court says as follows:

> "* * The law provides that the polls must open at sunrise, and be kept open until 5 P.M., and that the ballot-box must not be removed from the polling-place or presence of the bystanders. (Pol. Code, secs. 1160, 1162.)
>
> It is the rule that mandatory provisions for the holding of an election must be followed, or the failure will vitiate it, while the departure from the terms of a directory provision will not render it void in the absence of a further showing that the result of the election has been changed or the rights of the voters injuriously affected thereby. (Code Civ. Proc., sec. 1112; Russell v. McDowell, 83 Cal. 70.) But the rule as to directory provisions applies only to minor and unsubstantial departures therefrom. There may be such radical omissions and failures to comply with the essential terms of a directory provision as will lead to the conclusive presumption that the injury must have followed. A substantial compli-

ance is not had by strictly following some provisions, while essentially failing to observe others. There must be a reasonable observance of all the prescribed conditions.* *"

In the case of State ex rel. v. Hackman, reported in 75 Mo. Rep. l.c.697, the court said as follows:

" * * * * * It is urged that the opening of the polls at seven instead of six o'clock a.m. as required by the statute, constituted such an error as to invalidate the election. The force of this contention depends upon whether the statute is mandatory or directory. Ordinarily it is held to be directory, especially where the omission is unsubstantial and there was no evidence of resultant injury. For example, it has been held that a delay of an hour or an hour and a half in opening the polls will not affect the validity of an election, especially where there is no evidence that anyone was deprived of the right of voting. (People v. Prewett, 124 Cal. 7; Packwood v. Brownell, 121 Cal. 478; Pickett v. Russell, 28 So. (Fla.) 764; Graham v. Graham, 38 S.W. (Ky.) 1093; Marks v. Park, 7 Leg. Gaz. 70; Cleland v. Porter, 74 Ill. 76.) In the absence, therefore, of any injury resulting from a failure to open the polls at the time designated in the statute we hold the same as applied to the facts in this case to be direc-

tory and overrule respondent's contention.* * * * "

In the State ex rel. v. Ruark, reported in 34 Mo. App. Rep. l.c. 330, 331 and 332, the court said as follows:

" * *But the first objection made by relator presents a question of more difficulty. Section 2 of the local option law provides, that 'and election shall be held within forty days after the receipt of the petition,'etc. The facts in this case are 'that the board of aldermen, of the city of Neosho, received the petition for said election on the twenty-seventh day of June, 1887, and the election was ordered for August 9, 1887, being forty-three days after the receipt of the petition.' If this provision of the statute in regard to the time within which an election shall be held, is directory merely,then a failure to comply with it will not invalidate the election. But, on the other hand, if the statute is mandatory, then a failure, to strictly comply with the law in this respect, does invalidate the election. The question as to whether statutory provisions are directory or mandatory, has been the subject of much discussion and controversy, and without establishing any well-defined rule of general or universal application. In case of People v. Cook, 14 Barb. 259, the court undertook to formulate a general rule, as

follows: 'That the mode of procedure by a public officer in the holding of an election was merely directory, and not regarded as essential to the validity of the election, unless it be so declared by the statute.' The supreme court of Kansas in case of Jones v. State, etc., 1 Kansas, 273, in commenting on this rule said, 'that the intention of the legislature, to make such provisions essential, may appear as well by the general scope and policy of the statute, as by direct averment.'

We think the New York rule is too narrow, and that the law of statutroy interpretation, as declared by the Kansas court, is sustained by both reason and authority. The general rule is that the time and place of holding an election, and the legal qualification of the electors, are of the substance of an election, and a failure to observe the law, in respect to such matters, will invalidate an election, while the provisions of the statute touching the recording the legal votes, etc., are directory. (McCrary Elect. ((3 Ed.)) sec. 192.) In order that a ballot in any election shall have any force or effect, it must be cast at an election held at a time and place either fixed by law or by the order of someone having authority. After the vote has once been legally cast, then any irregularities on the part of those con-

ducting the details of the elections cannot deprive the citizen of the benefit of his vote. In discussing this question, the supreme court of California in case of Dickey v. Hurlburt, 5 Cal. 343, said in substance: that the time and place of holding every election are essential. When a statute itself did not fix the time for holding the election, but left it to be determined by an officer, who was disqualified under the constitution of said state from acting, that an election held, under the direction and authority of the person named, was null and void.

While the general rule is that the time for holding any election is essential, and that a failure to observe the requirements of the statute in this respect, would render the election invalid, yet if it appears, from the general scope and policy of the particular statute in question, that the contrary is intended, then the latter interpretation should prevail.

In the statute under consideration the legislature certainly had some good reason for embodying in it the provision that the proper authorities, when petitions were presented, should order elections within a certain time. We think that the legislative design was to prevent county courts and city councils from thwarting the

> operation of the law, either by failing to call an election, or fixing some day that would render the election invalid, because held within sixty days of some other state or municipal election. Therefore, we think, that the object was to place it within the power of the friends of the law to compel county and city officials to order the election within the time prescribed. To hold that this statute is merely directory is to put it within the power of officials to practically nullify the law. Under the view we have taken of this case, we are compelled to hold that the election was void, and that the circuit court erred in refusing to grant a peremptory writ of mandamus, compelling defendants to issue to relator a dramshop license.
> * * * * * * * * *"

CONCLUSION

It is therefore the opinion of this department that in all elections the closing of the polls is governed by Daylight Savings Time, commonly referred to as "War Time", and that in those elections within the purview of sec. 11487 R. S. Mo.,

1939, the polls should be kept open until seven (7) o'clock in the evening (Daylight Savings Time) unless the sun shall set thereafter, then until sunset.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

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