ELECTION CONTESTS: Will not lie in elections to determine municipal form of government.

August 22, 1944

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Mr. Raymond L. Falzone
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

I am in receipt of your letter of August 9, 1944, wherein you state as follows:

> "Moberly, Missouri, is a city of the 3rd class, and on July 18, 1944, at an election held at Moberly under Section 7080, et seq. the people voted in favor of adopting the City Manager Form of Government. The majority was substantial.
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> "I have been informed that on the day of the election the proponents of the plan placed at least one person inside of each polling place; that these persons made a record of those who voted and frequently during the day would pass this record to those outside of the polling place; that those outside of the polling place would then communicate with people who had not yet voted and request them to vote in favor of the plan. The people inside the polling place who made this record were supposed to be watchers or challengers and some of them resided in precincts and wards other than the precinct or ward in which they were stationed. Sometime during the day of the election the City Attorney requested the proponents of the plan to ask these watchers, or challengers, to get out of the polls and they did so.
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> "At the request of those who opposed the plan, I am writing you for an opinion as to whether or not said watchers, or challengers, or those responsible for their being in the polls, could be prosecuted. Also, could the election be set aside because of the said actions of the proponents of the plan. There is no evidence that the watchers, or challengers, talked to, or influenced any one voting inside the polling places.

"I can find no law which provides for the contest of an election of this kind, nor can I find any law under which the watchers, or challengers, could be prosecuted. I understand the law forbids electioneering within 100 feet of the polling place, but it occurs to me that these people were not electioneering.

"In as much as a Primary Election will be held shortly under this new plan, I would appreciate having your opinion on this matter just as soon as possible."

There are two sections in our statutes relating to electioneering. Section 4374, R. S. Mo. 1939 provides:

"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."

Section 11625, R. S. Mo. 1939 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."

One of the questions to be determined is whether the activity of the watchers or challengers in making a record of those who voted and in passing said information to persons out side of the polling place were guilty of electioneering within the meaning of the term as used in the above statutes.

You specifically call attention to the fact that there is no evidence that the watchers or challengers talked to or influenced anyone voting inside the polling places.

We have made a careful search of the authorities and fail to find where the terms "electioneer" or "electioneering" have ever been defined by the courts of this or any other state.

In the case of City of St. Louis v. Pope, 343, Mo. 479, 126 S. W. (2d) 1201, l.c. 1210, 1211, the Supreme Court of Missouri said:

> "In the Senter Commission Company case, City of St. Louis v. Senter Comm. Co., 337 Mo. 238, 85 S. W.2d 21, this court laid down this rule (page 24), 'The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent * * *this should be done from the words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose'. * * *"

Although the terms "electioneer" and "electioneering" have not been defined by the courts, the meaning most commonly ascribed to these terms is the attempt or effort by an individual to influence the vote of another individual for a person, ticket, party, or issue. This practice by an officer of an election or a person within the polls is condemned by the statutes. Officers of elections within the polls on election day have but one duty, and that is to see that the election laws of this state are complied with and that no attempt is made to influence the voters in the exercise of their priviledge.

The plain and rational meaning of the above terms can not be broadened to include the action of the watchers and challengers in the matter at issue. We do not wish, however, to be understood that we are condoning and approving this practice. It is rather to be condemned as encouraging distrust and suspicion in the election machinery.

The above statutes condemn electioneering in polling places and provide punishment both by fine or imprisonment. Penal statutes are construed strictly aganist the State. State vs. Green, 344 Mo. 985, 130 S. W. (2d) 475. In the case of St. vs Taylor, 345,Mo. 325, 133 S. W. (2d) 336, l.c. 341 the Court said:

> "The statute is penal and criminal and such statutes are generally 'construed strictly as to those portions which are against defendants, but liberally construed in those which are in their favor--that is, for their ease and exemption. No person in to be made subject to such statutes by implication, and, when doubts arise

> concerning their interpretation, such doubts are to weight only in favor of the accused.' State v. Butler, supra, 178 Mo. loc. cit. 320, 77 S. W. loc. cit. 572.* * *"

Since any doubt concerning the interpreation of a penal statute must be resolved in favor of the accused, we are of the opinion that the action of the watchers and challengers in making a record of those who voted and in passing such information to persons outside of the polling places although to be condemned does not come within the meaning of Sections 4374 and 11625, R. S. Mo. 1939, supra, condemning electioneering within the polls. Consequently the watchers and challengers, in our opinion, would not be subject to prosecution for their activity.

The next question to be determined is whether there is any statutory authority for the contest of an election of this kind.

Section 11632, R. S. Mo. 1939 deals with jurisdiction of election contests in part as follows:

> "The several circuit courts shall have jurisdiction in cases of contested elections for county and municipal offices, and in all cities now having or hereafter attaining three hundred thousand inhabitants, the said circuit courts shall have jurisdiction in cases of contested elections for justices of the peace, and in cases of contested elections for seats as directors in the boards having charge of the public schools and public school property, and the county courts in contests of township offices:* * *"

In the case of St. ex. rel. Hartly v. Gideon, 225, Mo. App. 459, l.c. 461, 40 S. W. (2d) 745, the Court discusses the history of the above statute pointing out that all election contests must be tried by some court. The court said:

> "* * *This provision of our statute has been on the books since 1895 but has never been construed or referred to in any case in Missouri as far as we are informed. The Constitution of the State, Article VIII, Sec. 8, is as follows: 'The trial and determination of contested election of all public officers, whether state, judicial, municipal or local, except governor and lieutenant-governor, shall be by a court of law or by one or more of the judges thereof. The general Assembly shall, by general law, designate the court or judge by whom the several classes of election contests shall be tried and regulate the manner of

> trial and all matters incident thereto . . .' The first act of the Legislature in which it sought to perform the duty imposed by that section of the Constitution gave the Circuit Court jurisdiction to try contests of elections for county officers and did not mention municipal officers. The Supreme Court held in State ex. rel. Francis v. Dillon, 87 Mo. 487, that the act did not give the Circuit Court jurisdiction to try an election contest for a municipal office because the word 'municipal' did not appear in the act. Later the Legislature amended the law by what is now section 10339, Revised Statutes 1929, provided that 'The several Circuit Courts shall have jurisdiction in cases of contested election for county, and municipal offices. . .' Since the enactment of that law, the Supreme Court held in State ex rel. Brown v. Klein, 116 Mo. 259, 22 S. W. 693, that the change in the statute gave the Circuit Courts jurisdiction to try contested election cases for municipal offices."

In the case of State v. Speer, 223, S. W. 655, l.c. 659, the Supreme Court of Missouri in banc, declared the rule to be that there can be no election contest except where one is authorized by the statute. This case dealt with an attempt to contest a county's bond election. The Court said:

> "* * *Elections to incur public debts have been conducted in this state from an early day, and yet the rule has always been declared that there can be no contest of any election except where one is authorized by statute, and so far no statute of the kind has been enacted in respect of municipal bond elections; whereas statutes are in force for the contest of other kinds. By reason of this nonaction by the General Assembly and the common-law doctrine that the result of elections, if declared by supervising officials, could not be re-examined judicially, and the prevalent doctrine that equity takes no cognizance of such matters, we hold the circuit court of Pemiscot county is without jurisdiction of the cause there pending to annul the election in contest."

In the case of State v. Barton, 254, S. W. 85, l.c. 89 the Supreme Court of Missouri, in banc, again announced the rule that:

> "* * *Election contests are purely statutory. As such, the letter of the law is the limit of their power.* * *"

The Court announced the same rule in the case of State ex rel. Jefferson County v. Waltner, 340 Mo. 137, 100 S. W. (2d) 272, l.c. 273 holding that the right to contest an election was neither a common law right nor an equitable right, but purely statutory. That case also dealt with the attempt to contest a county bond election. The Court said, l.c. 276:

> "* * *The question before us concerns the jurisdiction of the circuit court, not the truth or falsity of the facts alleged. There being no common law, equitable or statutory authority for the bringing of a bond election contest, the circuit court has no jurisdiction of the proceeding, and can no more grant an injunction therein on facts not disputed than it could after a determination of disputed facts."

The above statute governing election contests clearly does not include elections to determine the form of government municipalities shall be governed by and absent statutory authority for contesting such types of election, we are of the opinion that no election contest can here be maintained.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

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