ELECTIONS: 1. Section 10313 interpreted to include persons uninstructed who request aid in marking their ballots as well as persons who cannot read and write and are physically unable to cast their ballot.
2. Persons making the oath provided for in Section 10313 can inform election judges in any manner he choses how he wants his ballot prepared.

March 15, 1938

3/15

FILED
35

Honorable W. W. Graves
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of March 14, 1938, wherein you request an opinion based on the interpretation of Section 10313, R. S. Mo. 1929; your question being as follows:

> "(a) Is any voter who cannot read or write,
>
> "(b) Or who is unable to mark his ballot by reason of physical disability,
>
> "(c) Or who states that he does not know how to mark his ballot,
>
> entitled to the help of the Judge of Election in so marking his ballot?"

The first part of your question, designated as "a" and "b," is unquestionably answered by Section 10313, the statute being plain and unambiguous. That is, when an elector cannot read or write, or has a physical disability which prevents the actual physical act of voting, then the judges of the ballots should assist him in the manner as provided in the statute. Section "c" of your question states that "or does not know how to mark his ballot," presents a more serious and difficult problem. It must be conceded that the statute in its wording does not include expressly this class of electors, but at the outset we think a fair construction of the statute, and the

decisions are to the effect, that it was for the purpose of aiding electors and enabling them to exercise their franchise when, by reason of physical disability or illiteracy, or otherwise, they would be disfranchised. Our Constitution, by Article VIII, Section 2, has prescribed the qualifications of voters. In the decision of Nance vs. Kearbey, 251 Mo. 374, it was held that while the right to vote is not a vested natural right in a strict sense, yet it is a constitutional right in those citizens possessed of enumerated constitutional qualifications. Also, a constitutional right to vote may not be so regulated by statute as to be entirely abrogated or lightly denied.

In the decision of State ex rel. vs. Hough, 193 Mo. 615, it was held to the effect that election laws must be liberally construed in aid of the right of suffrage. The statute in question has been captioned "Illiterate voters -- judges to prepare ballot, when." The word "illiterate" is defined as,

> "a person ignorant of letters or books; unliterate; uninstructed; uneducated."

Under the Australian ballot system of voting, the prime purpose was to safeguard the right of the voters, and that the secrecy of the ballot be preserved as a great safeguard to the purity of elections. It has been said that "all knowledge of how a voter has voted is the voter's own secret, unless he chooses to divulge it he is fully protected, and a free and honest vote may be secured."

Having stated that the section does not expressly include the words of your question, we must consider the results which might arise if the elector does not know how to mark his ballot, and the judge or judges of election assist or give him information in marking his ballot.

In discussing such a situation, and what is now Section 10313, the court, in the case of Hope vs. Flentge, 140 Mo. l. c. 404, said:

> "Again it is urged that the court erred in not permitting the contestee to show that in the case of certain

electors the Democratic judges went into the booths and assited certain electors therein named. Section 4784, a part of which has already been copied, contains this proviso: 'Provided, however, that the provisions of this section shall not be construed to allow any judge or judges of any election to enter a booth for the purpose of assisting any elector in preparing his ballot. Such judges, after reading to the elector the contents of the ballot, shall, without leaving their respective positions, prepare such ballot as the elector may dictate.' Acts 1893, p. 164.

"Here again was a positive violation of the law. The judges had no right in the booths, and yet there is no allegation that this misconduct was in furtherance of a design to unduly influence these electors, or that they were in fact imposed upon, or any advantage taken of them by the judges. The judges rendered themselves amenable for a violation of the law, but the question here is, shall this unlawful action of the judge disfranchise the illiterate voter for whose protection the statute made provision? Must he suffer because those designated by the law to instruct him violate the law? To so hold would establish a precedent which unscrupulous partisan officials might seize upon to nullify a perfectly fair and honest election. It is a sound distinction of the law which disfranchises a voter for his own failure to obey the plain and positive rules adopted to secure an honest expression of the will of the people, and that which refuses to punish him for the neglect or misconduct of an officer, over whose conduct he has no control, as to some provisions which the legislature has not deemed of sufficient importance to declare a non-compliance

> therewith shall avoid the election or render a ballot illegal and void. This objection can not, for these reasons, be sustained."

Referring again to the terms of Section 10313, supra, the statute does not provide or state what shall be the result or the penalty in the event the terms of the statute are not strictly complied with. Some election statutes provide the result or the penalty for failure to comply with the terms of the statutes. The decisions of the court, and the general rule, are contained in Horsefall vs. School District, 143 Mo. App. 1. c. 545:

> "The decisions of the Supreme Court in this State have not been altogether harmonious as to the effect of irregularities upon the result of an election, and we shall not attempt to review these cases, but we think it may now be said to be the established rule in this State, as it is generally in other jurisdictions, that when a statute expressly declares any particular act to be essential to the validity of an election, then the act must be performed in the manner provided or the election will be void. Also if the statute provides specifically that a ballot not in a prescribed form shall not be counted then the provision is mandatory and the courts will enforce it; but if the statute merely provides that certain things shall be done and does not prescribe what results shall follow if these things are not done then the provision is directory merely, and the final test as to the legality of either the election or the ballot is whether or not the voters have been given an opportunity to express, and have fairly expressed their will. If they have, the election will be upheld, or the ballot counted as the case may be. (Bowers v. Smith, 111 Mo. 45, 20 S. W. 101; Hope v. Flentge, 140 Mo. 390, 41 S. W. 1002; Sanders v. Lacks, 142 Mo. 255, 43 S. W. 653; State ex rel. v. Roberts, 153 Mo. 112, 53 S. W. 520; McKay v. Minner, 154 Mo. 608, 55 S. W. 866; Hehl V. Guion,

155 Mo. 76, 55 S. W. 1024; State v. Swearingen, 128 Mo. App. 605, 107 S. W. 1.)"

Therefore, we conclude that by applying the above test as contained in the decision, to Section 10313, R. S. Mo. 1929, the section is directory. But, assuming for the sake of argument, that the terms of the statute are not broad or comprehensive enough to include that class of electors who state that they do not know how to mark their ballots, and that if the judges of election assist them, that the same constitutes an irregularity, what is the result?

In the decision of State ex rel. vs. Arnold, 278 Mo. 672, it was held an election irregularity is not fatal to the validity of the whole return of the precinct unless made so by statute, or unless the irregularity is such as has probably prevented a free and full expression of popular will.

And again in the decision of O'Laughlin vs. City of Kirkwood, 107 Mo. 302:

"To annul the result of an election because of irregulations in conducting it, it must be shown that some mandatory statute was violated or that the election was conducted in such an irregular manner that the true sentiment of the voters was not expressed by it or that it was impossible to know whether the true sentiment was expressed."

Thus, it will be noted from the above decisions that the real test of an honest ballot cast by an elector, is that the true sentiment of the elector is shown by his ballot. Fraud vitiates almost every act of a human being, and likewise fraud will vitiate a ballot or an election. All the legal principles and decisions which we have offered assume that the elector is honest, and likewise the election judges. Again we say such irregularities will not void the election or the ballot of the elector who is unable to cast his ballot without aid. As was said in the case of Skelton and Brannock v. Ulen, 217 Mo. 383:

> "Irregularities committed by the judges and clerks at an election which are not shown to be fraudulent, or instigated by contestee, and in which he in no wise participated or derived any benefit from, and by which his vote was not increased, will not authorize the court to declare the whole vote at the precinct to be void."

Conclusion

We are of the opinion that when an elector states, under oath, that he cannot read or write, or that he is physically unable to mark his ballot, that the judges of election shall prepare his ballot. We are of the further opinion that by the Constitution of Missouri and the statutes governing the conduct of elections, it was the intention of the Legislature that every person who meets the constitutional requirements should have the privilege of voting, that when the Legislature used the expression "read or write" it meant by those words not the naked ability to read words or to write simple sentences, but, as contained in the definition of "illiterate," to include the uninstructed; that it comprehends the ability to consider "its contents or meaning," as was said in the case of U. S. v. Tod. 294 Fed. 820, 822, as follows:

> "Under Act Feb. 5, Sec. 3 (8 USCA Sec. 136), excluding aliens 'physically capable of reading,' but who cannot read any language, a deaf mute, though physically incapable of reading aloud, is not physically incapable of reading; 'reading' being the act practiced or art of perusing written or printed matter and considering its contents or meaning."

In recent years, our ballots have become larger with additional parties, constitutional changes and propositions, so that it requires more intelligence of the voters today than

of our forefathers. The layman may be able to read or copy the physician's book, the lawyer's brief or the philosopher's works, but be wholly unable to comprehend or understand anything he has read. Likewise, the elector may read names on the ballot, propositions and amendments and yet may understand none of it, and as a result he is in the same position so far as casting an intelligent vote or expressing his free choice is concerned as the person who is illiterate or cannot read or write. In reaching this conclusion, we are not unmindful of the decision of the Kentucky Supreme Court where a similar statute was under consideration in the early case of Major v. Barker, 99 Ky. 305. But after duly considering the same we are of the opinion that the decision has given the statute a narrow restricted interpretation which tends to throw barriers in the path of the voters rather than facilitate the act of casting a ballot. From a reading of the decisions of the Missouri Supreme Court, relating to interpretations of election statutes, we find that our Supreme Court has more liberal views than that of the Kentucky Supreme Court; hence, we decline to follow the ruling in the Major v. Barker decision.

We are, therefore, of the opinion that the judges may assist those electors who, by reason of illiteracy, physical disability or lack of instruction or understanding, are unable to cast their ballot. To hold otherwise may have the effect of disfranchising otherwise qualified electors.

II.

The following question has also been presented to this office:

> "The second point involved is this: the law states 'The voter may declare his choice of candidates to the judges having charge of the ballots, Etc.' We believe and insist that this declaration may take any one of the following forms: the placing of a sample ballot before the judges and the statement that he wants to vote this ticket, or the placing of a card with a list of candidates

> before the judges with the statement, I want to vote this ticket, or I want to vote this way, or I want to vote for these candidates, or that he may say to the judges, I want to vote for the Democratic candidates, or will you mark it for the Democratic candidates for me, or who are the Democratic candidates, I want to vote for them. In other words we believe that the statement that the voter may declare his choice of candidates, leaves it open to him to select the way in which he makes his declaration and that the judges of election are his agents for the purpose of marking it in the way he directs."

We shall include the answer to the above question in this one opinion so as to obviate the necessity of writing two opinions.

The section (10313) provides that when the voter makes the necessary declaration under oath as heretofore pointed out,

> "he may declare his choice of candidates to the judges having charge of the ballots, who, in the presence of the elector, shall prepare the ballot for voting in the manner hereinbefore provided * * * *. Such judges, after reading to the elector the contents of the ballot, shall, without leaving their respective positions, prepare such ballot as the elector may dictate."

It is clear that the said statute intends to guarantee to the illiterate or physically disabled voter the same freedom of choice that the literate and physically fit voter has. The literate and physically fit voter can mark his ballot in secret, and he therefore has complete freedom in making his choice of candidates. He is the sole judge of whom he is to vote for. To guarantee to a voter who, because of illiteracy or physical disabilities, has to call upon the judges of election for assistance in making out his

ballot, the same freedom of choice, it is necessary that such unfortunate voter be allowed to dictate whom he shall vote for. When the literate and physically fit voter enters his booth to make out his ballot in secret, no one can prevent him from taking out of his pocket a sample ballot already marked, or from using a typewritten list of the persons he desires to vote for, or from using any other data he has in his possession from which to make out his ballot. Therefore, it would seem clear that the illiterate or physically unfit voter should have the same right to use whatever data he has in his possession to enable him to have his ballot prepared as he wants it. To say otherwise would be to deprive the illiterate and physically unfit voter of equal privileges with his literate and physically fit brothers.

The statute says the judges "shall prepare such ballot as the elector may dictate." It does not say how or in what manner such dictation shall be made. A dumb man might dictate his choices one way, a blind man another, a deaf man still another. The statute gives him the right to dictate his ballot, and it does not limit him in his method of conveying to the judges how he wants to vote. Any way he has of making known to the judges how he wants to vote is not unlawful. The judges are his agents for the purpose of making his ballot.

Conclusion

It is, therefore, the opinion of this office that a voter who makes the declaration under oath provided for in Section 10313, R. S. Mo. 1929, can inform the judges of election in any manner he chooses, how he wants his ballot prepared.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

OWN:EG