

**ELECTIONS:
ABSENTEE BALLOTS:**

An absentee ballot which is obtained at a time more than thirty days preceding the election at which it is cast may be counted if otherwise in conformity with the absentee voting law.

October 21, 1952

F I L E D

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Honorable Robert L. Hoy
Prosecuting Attorney of
Saline County
Marshall, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office which request reads as follows:

"I am writing to request an opinion on the construction of Section 112.020 relating to the time during which applications may be made for absentee ballots.

"Section 11.471 Revised Statutes 1939 provided as follows:

'Any elector . . . expecting to be absent . . . may, not more than thirty no less than five days prior to the date of such election, make application in person or by mail to the County Clerk . . .'

"This section was revised in 1944 and again in 1949 and at present reads as follows:

'Any elector . . . expecting to be absent from the county . . . may, within thirty days next before the date of such election and up to six o'clock p.m. on the day before any election make application in person or by mail to the County Clerk . . .'

"Please inform me if an absentee ballot for which application was filed with the County Clerk on a

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date prior to thirty days preceding the primary election set for August 5, 1952 is a valid ballot and may be counted by those charged with the responsibility of canvassing the absentee ballots."

Section 112.020, RSMo 1949, to which you referred provides in part as follows:

"Any elector is defined in the foregoing section expecting to be absent from the county of his residence on the day of such election, or expecting to be prevented through illness or physical disability from personally going to the polls to vote on election day, and who shall attach to his application a certificate of illness or disability attested to by a licensed physician or duly accredited practitioner of Christian Science may, within thirty days next before the date of such election and up to six o'clock p.m. on the day before any election, make application in person, or by mail, to the county clerk, or where existing, to the board of election commissioners, or other officer or officers charged with the duty of furnishing ballots for such election in his voting precinct, for an official ballot for said precinct, to be voted at such election.
* * *"

No provision is made that an absentee ballot obtained other than in the exact manner prescribed in the above section shall be voted, nor is there any provision to the effect that failure to comply with the requirements regarding the time in which an application for an absentee ballot is submitted or obtained shall effect the validity of the ballot.

Rules for the construction of election laws were laid down by the Supreme Court in the case of Nance v. Kearbey, 251 Mo. 374, 1.c. 383. The court in that case stated:

"First: Election laws must be liberally construed in aid of the right of suffrage. (State ex rel. v. Hough, 193 Mo. 1.c. 651; Hale v. Stimson, 198 Mo. 134.) The whole tendency of American authority is towards liberality to the end of sustaining the honest choice of electors. (Stackpole v. Hallahan, 16 Mont. 40.) The choice of electors must be judicially respected, unless their voice is made to speak a lie, or a result radically vicious,

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because of a disregard of mandatory statutory safeguards.

"Second: The uppermost question in applying statutory regulation to determine the legality of votes case and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction. (Gass v. Evans, 244 Mo. 1.c. 353; Hehl v. Guion, 155 Mo. 76.) 'Such a construction' (says this court, speaking through Barclay, J., in Bowers v. Smith, 111 Mo. 1.c. 55) 'of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official should never be adopted where the language in question is fairly susceptible of any other. (Wells v. Stanforth (1885), 16 Q.B. Div. 245.)' Again (pp. 61-2): '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 endeavors 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."

In view of the absence of any statutory declaration that the irregularities referred to by you are fatal, we feel that under the rules above prescribed, the matter referred to in your opinion request should not render invalid an absentee ballot properly mailed by a person legally entitled to cast such absentee ballot.

CONCLUSION

Therefore, it is the opinion of this office that an absentee ballot cast by a person legally entitled to vote the same may be counted although such ballot may have been obtained more than thirty days prior to the election, Section 112.020, RSMo 1949, relating to time of application being directory only.

Respectfully submitted,

APPROVED:

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