ELECTIONS:- Number of Judges to a Precinct.

October 10, 1936 10/17

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Honorable C. W. Meyer
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

We are in receipt of your letter of October 6, 1936, requesting an opinion, which reads as follows:

> "The County Court is putting it up to us like this: The last general election being in an off year there were a number of precincts where less than three hundred votes were cast, but this year the registration in some of these precincts was almost double three hundred. Now the Court wants to know whether they may appoint additional Judges and Clerks in some of these precincts where they have every reason to believe the vote in the general election will exceed three hundred, the registration being greatly in excess of three hundred.
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> "My own personal opinion is that in these matters it is never safe to disregard the statutes, or in other words that the statutes should be closely followed, except where an emergency exists, or to save unreasonable work on the part of the Election Board and undue delay of election returns. At any rate I trust I have stated clearly the question of the County Court and we would greatly appreciate an opinion from your office upon the proposition indicated."

Section 10206 R. S. Missouri 1929, provides for the appointment of four election judges to a precinct, same to be appointed by the County Court. This section also provides the method to be followed in receiving and counting the ballots by all judges and clerks.

Laws of Missouri, 1933, p. 238, Section 10208 provides:

> "In all precincts in this state that at the last preceding general election cast three hundred or more votes, at the same time and in the same manner as judges of election are appointed or elected, two additional judges of election for each such election district in the state shall be appointed or elected; three of the judges shall be taken from the political party that polled the largest number of votes at the last preceding general election and three of the judges from the party that polled the next largest vote. The judges of election shall designate two of their number, not of the same party, whose duty it shall be to have charge of the ballots and to furnish them to the voters in the manner hereinafter provided."

Laws of Missouri, 1933, p. 239, Section 10211, provides:

> "In all precincts casting less than three hundred votes in the last general election, the judges shall appoint two clerks, and in all precincts casting three hundred or more votes in the last preceding general election, the judges shall appoint four clerks. The clerks, before entering on the duties of their appointment shall take an oath or affirmation, to be administered by one of the persons appointed or elected judges of the election, that they will faithfully record the names of all the voters; said clerks shall also take the oath above prescribed for judges to be administered at the same time and in the same manner heretofore directed."

Prior to the Session Acts above quoted, the Statutes made it possible to place six judges and four clerks in any precinct election district at a general election. At that time many county courts in Missouri were prone to hold down county general election expenses by appointing only four judges and two clerks, in spite of the existing laws allowing six judges and four clerks. In the case of Sanders vs. Lacks, 142 Mo. 255, an attempt was made to invalidate an election because of the desire of a County Court to save election expenses, and at the same time keep the official personel in an election district down to a number that could handle the voting in a precinct, and at the same time not be in each other's way. In that case the Supreme Court refused to invalidate the election, even though the County Court failed to avail themselves to the power of the then existing Statute and appoint six judges and four clerks, and at l. c. 263, the Court said:

> "Popular elections involve the exercise of one of the most cherished rights of the citizen in a free government. But the right of suffrage must needs be exercised under conditions which do not always admit of a rigid observance of every technical requirement of law. The judges of election who manipulate the machinery necessaary to record the expression of the voters' will are usually laymen, unfamiliar with legal technicality, and often wholly innocent of that sense of the importance of matters of mere form which often seems to possess a strange facination to some learned minds. Election judges are drawn from the great body of the people. They serve for a short while. In the main they do their best to faithfully perform their duties under the law. But they are often guilty of omissions and oversights in attempting to follow the strict letter of the law. In dealing with those lapses the courts have promulgated a practical general rule which seems to have a direct bearing upon the appeal at bar. That rule is thus stated by the most eminent American text writer of the law of this subject, viz: 'if the

> statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, that statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not delcare that their performance is essential to the validity of the election, then they will be regarded as mandatory, if they do, and directory, if they do not, affect the actual merits of the election.' McCrary, Elections (4 Ed.) sec. 225. The use of the terms 'mandatory' and 'directory' in this connection is, no doubt, sanctioned by usage in the law of elections by ballot. The terms are sometimes misleading and not strictly accurate; but they are convenient to point out the distinction between two general classes of irregularities, and they are sufficiently well understood to keep their places in the literature of the subject in hand."

## CONCLUSION.

We are of the opinion that in precincts where three hundred persons or less voted in the last general election, the county court's duty is to appoint four judges and two clerks. The Statute is plain in its mandate, and a county court can not assume powers not given them by the Constitution and Statutes. We know of no way that more than four judges in a precinct of three hundred or less voters at the preceding general election could be legally paid by the County Court for election services.

We are not holding in this opinion that an election would be invalid in a precinct where a county court arbitrarily appointed more than the statutory number of judges and clerks. Absent evidence of irregularities in the precinct effecting unfair election result, the Sanders case, supra, seems to hold that such conduct of county judges would not invalidate an election and disfranchise voters who were not at fault themselves.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

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