ELECTIONS:

JUSTICES OF THE PEACE:

Justices of the Peace can only be elected at "off-year" election. Error on ballot must be objected to before election.

December 12, 1938

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Honorable R. B. Oliver, III
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Sir:

We have received your letter of November 23, 1938, which reads in part as follows:

> "We have an unusual situation existing here in Cape Girardeau County which is as follows:
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> "Byrd Township in this County is entitled to three Justices of the Peace. For a number of years there have only been two active Justices in Byrd Township. The statute relating to Justices of the Peace requires that they be elected beginning with the year 1882 and every four years thereafter. This makes the election of Justices of the Peace to be held on what is known as the off-year election.
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> "In the off-year election of 1934, one Justice was elected and the second Justice held over until the general election in 1936 when he ran for Justice of the Peace at the general election. In my opinion, he was running to be elected in order to fill the unexpired term for which he had held over.
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> "The County Court after the general election issued a commission to this Justice for four years which, in my opinion, was an

error on the part of the County Court. At this year's election there were two Democrats and two Republicans who ran for the office of Justice of the Peace.

"On the printed ballot, instead of the words '3 to be elected,' the County Court through error wrote '2 to be elected.' The Justice who was elected in 1936 did not file for this year's election, he being under the impression that it was not necessary for him to run in that he held a four-year commission from the County Court which would expire in 1940. One of the Democratic candidates withdrew before the election leaving three names on the ballot. Of course, each one of the three received a number of votes at the election. The County Court is now in a quandry as to who they should declare as Justices of the Peace, the question being, whether the Justice who held a commission from the County Court from 1936 to 1940 is a qualified Justice of the Peace, or whether he should have run at the election this year.

"If this Justice is entitled to continue to act as Justice of the Peace until 1940, then do the two men receiving the highest number of votes at this year's election go in as Justices of the Peace? In the event the Justice who holds the Commission until 1940 is declared no longer to be a Justice of the Peace, do the three men who ran in this year's election take office as Justices of the Peace in view of the fact that the ballot had printed '2 to be elected' instead of '3 to be elected.'"

In this same connection we have received another letter from Edwin L. Kies, Clerk of the County Court of Cape Girardeau County, relating to the same situation. This letter reads in part as follows:

"On Sept. 1st. 1931, John G. Putz was appointed by the County Court to fill the unexpired term of F. C. Bertrand, resigned, to expire with the General Election to be held in November, 1934. At the General Election in November, 1934, two Justices of the Peace were elected in Byrd Township, one of which failed to qualify, and as this township is entitled to three Justices of the Peace, John G. Putz held under his old commission, together with E. L. Proffer the newly-elected Justice. Then in the General Election of 1936 John G. Putz was elected by the voters and commissioned for a term of four years, which would make his expiration fall in 1940. Now at the November Election of 1938, E. L. Proffer, (Republican) whose commission expired in 1938, together with Clyde Baugh, (Republican) and C. M. McWilliams (Democrat), were candidates for Justice of the Peace of Byrd Township, and at said election Clyde Baugh and C. M. McWilliams received the highest number of votes, but the question has arisen whether or not all three Justices of the Peace were to be elected, or if John G. Putz, commissioned in 1936 for four years, would hold until 1940.

"None of the above Justices of the Peace elected in November, 1938, have qualified, by reason of the fact that Mr. Proffer thinks he was elected at such election and Mr. Putz claiming an office until 1940."

Section 2138, R. S. Mo. 1929, provides as follows:

"Justices of the peace, as herein provided for, shall be elected at the general election to be held in eighteen hundred and eighty-two, and shall hold their offices for four years, or until their successors are elected, commissioned and qualified; but every justice of the peace now in office shall continue to act as such until the expiration of his commission, and until his successor is elected and qualified."

The meaning of this section is that justices of the peace are to be elected at what is commonly called the "off-year" elections. In other words, such elections occurred in the years 1930, 1934, 1938, etc.

The Supreme Court of Missouri construed Section 2138 in the case of State ex rel. Walker, Attorney General v. Powles, 136 Mo. 376. In that case the evidence showed that on the 9th day of August, 1889, Powles was appointed by the County Court of Howell County "a justice of the peace within and for said township of Howell to serve until the next general election." On November 14, 1892, in pursuance of an election held on November 8, 1892, Powles was appointed and commissioned a justice of the peace for the term of two years from said 14th day of November, 1892, "and until his successor in said office shall be duly appointed and qualified." At the general election held on November 6, 1894, three justices of the peace, not including Powles, were elected. Since Powles would not relinquish his office, proceedings in quo warranto were instituted. The only title set up by Powles to the office was such that he acquired by virtue of the appointment made by the County Court of Howell County on August 9, 1889. The court said, l. c. 381:

> "The term of the office to which he was appointed extended only to the general election in 1890, and by the terms of his commission, and under the law, could extend no longer than to the qualification of his successor elected at such election and duly commissioned in pursuance thereof. As has been seen, the term of office of justices of the peace in this state is four years. They are elected quadrennially at the general election for county officers and have been so elected ever since 1882. The first general election for county officers and justices of the peace occurring after the appointment of the respondent, by the county court, was in November, 1890, at which a successor to the respondent might have been elected, upon whose qualification the term of the respondent would

> have ceased. But it seems that no successor was chosen at that election, and as the respondent, under his appointment by the county court, was authorized to hold and exercise the functions of said office not only until the next general election of county officers, but until his 'successor was elected, commissioned and qualified,' he thereafter continued lawfully the incumbent of said office and authorized to exercise the functions thereof until a successor for him should be chosen at the next general election for county officers, and justices of the peace in November, 1894. State ex rel. v. Ranson, 73 Mo. 78.
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> "His successor was chosen at that election as hereinbefore stated, on the sixth, was duly commissioned on the eighth, of November, 1894, and thereafter respondent ceased to be a justice of the peace de jure within and for Howell township, Howell county, Missouri (State ex rel. v. Spitz, 127 Mo. 248), and since that time has been an intruder in, and usurper of the office aforesaid. As there was no law in force authorizing an election of justices of the peace in 1892, the respondent acquired no title to the office by virtue of that election, and the commission issued to him by the county court in pursuance thereof; nor does he make any claim by virtue of such appointment, and it goes without saying that his so-called appointment of justice of the peace of the city of West Plains on the seventh of May, 1896, affords no defense to this action. Judgment of ouster will therefore be entered against the respondent and writ issued accordingly."

It is apparent then that the election of John G. Putz as justice of the peace at the general election in 1936 was a nullity.

It appears, however, that Putz was properly appointed to the office of justice of the peace by the county court on September 1, 1931. At the "off-year" election in 1934, when justices of the peace were properly to be elected, it appears that a successor to Putz, if one was then elected, did not qualify and was not commissioned. Putz, under those circumstances, properly held over until his successor was "elected and qualified." Consequently, under the facts which we have received and as we understand the same, Putz was therefore a duly qualified and acting justice of the peace under his 1931 appointment at least until the time of the November election in 1938.

Under the terms of Section 2138, the year 1938 was a proper year to elect justices of the peace. Therefore, if the office occupied by Putz was filled in the 1938 election by a person other than himself, such elected person is the only one entitled to be commissioned for the office. It appears that Byrd Township is entitled to elect three justices of the peace and that there were at least three names of candidates on the ballot in the 1938 election; that at least three candidates received votes. Consequently, the three candidates receiving the highest number of votes for justice of the peace were properly elected and should be commissioned by the county court unless the error appearing on the ballot to the effect that only two were to be elected instead of three was such an error as to nullify the election of one or all three of the candidates.

Section 10306, R. S. Mo. 1929, provides as follows:

> "Whenever it shall appear by affidavit that an error or omission has occurred in the publication of the names or description of candidates nominated for office, or in the printing of the ballots, the circuit court of any county, or the judge thereof in vacation, or if the circuit judge is then absent from the county, a judge of the county court, may, upon application by any elector, by order, require the clerk of the county court to correct such error, or to show cause why such error should not be corrected."

The effect and meaning of Section 10306 was discussed in the case of Bowers v. Smith, 111 Mo. 45, in which an election contest was involved. In that case the plaintiff claimed that no election had actually been held because the official ballots printed by the county clerk contained (among others) the names of the nominees of the Union-Labor party and that that political party had not polled three per cent of the entire vote at the last previous general election as required by law. In discussing the question as to the effect of an error on the ballot and when the same could be attacked, the court said, l. c. 54:

> "It is declared to be the duty of the county clerk to provide the ballots, and that all others than those printed by him according to the provisions of this law 'shall not be cast or counted in any election.' The plain meaning and purpose of this expression can be seen from the context in the section in which it occurs and that which next follows. Revised Statutes, 1889, secs. 4772-3. The design is to preclude the voter and his party friends from supplying his own ballot (as was the former practice), and to compel him to use only that furnished by the state, through the county clerk. The latter is directed to print no other names on the voting papers than those of the candidates nominated according to the provisions of that law. The title of the original act (Session Acts, 1889, p. 105) and its opening lines show that uniformity in the printing and appearance of the ballots is one of the main objects aimed at. The prohibitions above noted are inserted to further that object; but they give no countenance to the notion, advanced by the plaintiff, that their purpose or effect is to nullify the result of every election at which the county clerk may make some error in publishing or printing the names on the only ballots that can be used.

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"The suffrage is regarded with jealous solicitude by a free people, and should be so viewed by those intrusted with the mighty power of guarding and vindicating their sovereign rights. Such a construction 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.

"Or, as a very able judge once tersely said: 'All statutes tending to limit the citizen in his exercise of this right (of suffrage) should be liberally construed in his favor.' Owens v. State ex rel. (1885), 64 Tex. 509.

"It is proper, and often necessary, to consider the effect and consequences of a proposed interpretation of a law to ascertain what is probably its true intent. State v. Hope (1889), 100 Mo. 361; 8 L. R. A. 608. The consequences which would inevitably follow the acceptance of the reading proposed by the plaintiff are so far-reaching and disastrous that they constitute a vigorous argument against adopting it.

"More than that, section 4778 clearly discloses a legislative design to provide for the correction of just such errors as we are considering, at the instance of any elector (including every one interested) before the election. The process is so summary that the inference is irresistible that the errors it is designed to reach should be rectified by prompt action then, so as not to subject voters to the risk of losing their votes by reason of those errors.

"'Sec. 4778. Whenever it shall appear by affidavit that an error or omission has occurred in the publication of the names or description of candidates nominated for office, or in the printing of the ballots, the circuit

> court of any county, or the judge thereof in vacation, or if the circuit judge is then absent from the county, a judge of the county court, may, upon application by any elector, by order, require the clerk of the county court to correct such error, or to show cause why such error should not be corrected.'
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> "In connection with this section, it should be remembered that, 'at least seven days before an election,' the county clerk is required to cause the list of nominations, 'arranged in the order and form in which they will be printed upon the ballot,' to be published in the newspapers as provided in sections 4768-9. Thus every one in interest is apprised of the names of all candidates, as determined by the clerk, at least one week before election day, to the end that steps may be taken, if desired (as indicated by the language quoted), to supply any omissions or to correct other errors in that list as published. If full effect be given to that section, the injustice and unfairness which otherwise would result in the practical working of the statute will be avoided.
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> "This 'ballot reform law' was intended to improve the methods for giving expression to the popular will in the choice of public officers. It should be construed so as to promote, not destroy, the great objects in view in its passage."

Again, in the case of Nance v. Kearbey, 251 Mo. 374, l. c. 381, the court said:

> "It might be determined by considering whether (absent a pre-election challenge, as here) in an election contest an official ballot, published, printed and voted, as was

this, can be challenged (absent fraud in the election and absent any fatal irregularity in election officers in handling the ballots)--challenged and those who voted it disfranchised, merely because of alleged imperfections or errors in judgment of the county clerk in printing the ballot, including its caption.

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"Election laws must be liberally construed in aid of the right of suffrage. (State ex rel. v. Hough, 193 Mo. l. 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, because of a disregard of mandatory statutory safeguards.

"The uppermost question in applying statutory regulation to determine the legality of votes cast 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. l. c. 353; Hehl v. Guion, 155 Mo. 76.) 'Such a construction' (says this court, speaking through Barclay, J., in Bowers v. Smith, 111 Mo. l. 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 endeavor 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.'

"(b) The Australian ballot law in force in this State for a generation, for the first time took away from a political party and electors the right to print, circulate, handle and vote their own ballot, and gave the preclusive right and made it the preclusive duty of the county clerk to print an official one. This official ballot passes through strictly official channels to election officers, thence to the hands of the voter for an instant only when in the act of exercising the right to vote, from thence it goes back to the election officers to be numbered, deposited, counted or rejected. From thence onward such cast ballot remains in official custody inviolate and secret except it be produced for purposes prescribed by the law. The voter from beginning to end had nothing to do with it except he could erase a name and substitute another in the voting booth, that is, he has left him a natural right to scratch (out or in). We should expect, therefore, in such a statutory scheme, ex necessitate rei, a pre-election plan for correcting official errors of judgment causing imperfections or irregularities in ballots so officially promulgated. So long as political parties or electors prepared their own ballots, the fault or blame for irregularities rested with them. But when the government took over that function, such fault and blame rested with officials. It is obvious that any election law permitting officials, either by design or inadvertence, to print irregular official ballots and foist them on voters and

thereby disfranchise them by wholesale without their own fault, nolens volens, would be a harsh and indefensible statute. It would make of the law a gigantic trap to catch the unwary voter by the heel. The remedy provided by such statute would be worse than the disease it was intended to cure in the body politic. Nay, the unclean spirit, ostensibly cast out, walking through dry places, seeking rest and finding none, would return with seven other spirits more wicked than himself and finding rooms all swept and garnished would enter in and dwell there, so that the last state of the law would be worse than the first. (Luke xi: 24-26.) 'It must be borne in mind' says Blake, V. C., in Grant v. McCallum, 12 Can. L. J. (N. S.) l. c. 114, 'that if the court lightly interferes with elections on account of errors of the officers employed in their conduct, a very large power may thus be placed in the hands of these men. That which arises from carelessness to-day may be from a corrupt motive tomorrow, and thus the officer is enabled, by some trivial act or omission, to serve some sinister purpose, and to have an election avoided, and at the same time to run but little chance of the fraudulent intent being proved against him.'

"The dangers pointed to by the vice chancellor are held by this court of stiff significance. (Hehl. v. Guion, 155 Mo. 76; Gass v. Evans, 244 Mo. l. c. 354.)

"The Australian ballot law, a reform act, was not built on such disturbing and indefensible lines. Contra, it provided plans and contemplated proceedings to correct irregularities in ballots before election in order that a timely remedy might be applied before the event, that is, before it was too late."

After reciting the statute relative to the pre-election right to challenge the correctness of the ballot, which statute is now Section 10306, the court in the above case said further, l. c. 387:

> "The right to contest an election is a statutory right. So, the condition created by the preclusive power in the county clerk to publish a list of candidates and print an official ballot is purely a statutory condition. Now, the general rule is that remedies expressly provided by statute to enforce rights created alone by statute are preclusive. Hence, when the Bowers-Smith case decided that those statutory remedies must be followed and if not followed the objections, if any, to the ticket were waived, it but proceeded on the broad analogies of the law as well as on those rules of interpretation applicable to election laws as such.
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> "The question whether the pre-election right to challenge irregularities in nominations, as well as in the officially promulgated ballot, is preclusive, has been ruled in several jurisdictions agreeably to the views herein before announced. For example: In Allen v. Glynn, 17 Colo. 338, the holding was to the effect that where public officers are entrusted with the preparation of ballots and ample provision is made for the corrections of errors before election, the general rule is that it is too late after they have been voted to interpose objections to the ballots for mere irregularities in the printing thereof."

In the instant matter it does not appear that any pre-election challenge was ever made in connection with any error in the 1938 ballot in Byrd Township. After the election, as will be noted by the above cases, any objection to any error made by the county clerk in preparing the ballot, comes too late. The error made by the county clerk did not nor could it have changed the fact that there were three justices of the

peace to be elected. Undoubtedly the three candidates for such offices receiving the highest number of votes in the 1938 election were elected. The particular error made in assembling and printing the ballot could not have the effect of disfranchising the voters. The election laws must be liberally construed in aid of the right of suffrage.

CONCLUSION

It follows, therefore, that Justice of the Peace Putz held his office, under his 1931 appointment by the county court, until his successor had been elected and qualified. Since no one was elected and qualified to such office at the 1934 election, Putz held over until a successor could be elected and qualified at the 1938 election. The 1936 election of Putz was a nullity and gave him no right whatsoever to the office for any period of time. The error on the 1938 ballot informing the voters that two justices of the peace were to be elected instead of three did not void the election and the three candidates receiving the highest number of votes at such election were duly elected and should be commissioned by the county court.

Respectfully submitted

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APPROVED:

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