ELECTIONS: In Re: It is necessary in a locality where there is registration of voters for the judges of each political party to initial the ballots in a general election.

September 27, 1946

FILED
84

10-15

Honorable George A. Spencer
Prosecuting Attorney
Columbia, Missouri

Dear Mr. Spencer:

This will acknowledge receipt of your letter of recent date requesting an opinion of this department on the following question: Is it necessary, in a city where registration of voters is required, for an election judge from each political party to initial the ballots in a general election?

Section 11602, R. S. Mo. 1939, relating to elections in this state, reads, in part:

> "Ballots to be delivered to voter--to be marked how
>
> "* * * *One of the judges shall give the voter one, and only one, ballot, on the back of which two judges of opposite politics shall indorse their initials with ink or indelible pencil in such manner that they may be seen when the ballot is properly folded, and voter's name shall be immediately checked on the register list.* * *"

Section 11607, Laws of Missouri, 1941, page 363, also relating to elections reads, in part, as follows:

> "Ballots to be numbered-number to be concealed by sticker
>
> "* * *No judge of election shall deposit any ballot upon which the names or initials of the judges, as hereinbefore provided for, do not appear."

On the face of these two sections it would appear that there

is no question but that the initialing of the ballots by the judges of the political parties is required. However, the question has been raised as to whether or not the failure to follow the statute in this respect invalidates the ballots not so marked. The leading case on this question is Hehl v. Guion, (1900) 155 Mo. 76, 55 S. W. 1024. This case was an election contest case in which the court dealt directly with the duty of the election officials in initialing the ballots and the result of their failure to do so. The court held that the failure to initial the ballots did not necessarily invalidate them. There is significant language in this case regarding the duty of the judges with regard to the initialing of the ballots. At l. c. 83, the court said:

> "What was the design of the particular provision of the statute we are now discussing? Why did the legislature require that two judges should write their initials on the ballot with such material that it could not be easily erased? It was manifestly to secure the return to the judges of the same paper they gave to the elector. They had no right to look on the inside of the folded ballot, and therefore the only means of identification was that afforded by the initials. Without that mark the person offering to vote could impose another paper on the receiving judge and carry the official ballot away. And in furtherance of the same purpose the law imposed on the receiving judge the duty of examining the ballot when it was handed to him by the elector to see if the initials were on it, and forbade him depositing it in the box if it was not so marked." (underscoring ours.)

At l. c. 84, the court said:

> "* * *The statute does not say that a ballot not so marked shall not be counted. It addresses itself to the officer and says to him, examine the ballot to see if it is properly indorsed and if it is not so, do not deposit it. This duty is to be performed in the presence of the elector; he has the right, and it is a right usually exercised, to stay and see his

ballot deposited, or, if it is not deposited, to know why.* * *"(underscoring ours.)

At l. c. 85, the court said:

"* * *In the language of Blake v. C., in Grant V. McCallum, 12 Can. L. J. (N. S.), loc. cit. 114: 'It must also be borne in mind 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 to-morrow, 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 cases in which this court has held that a failure on the part of the election officers to observe any of such duties, would result in depriving an elector of his right to have his vote counted are those in which the statute expressly so declared. (West v. Ross, supra; Ledbetter v. Hall, supra; Gumm v. Hubbard, 97 Mo. 311.)" (underscoring ours.)

From the above it is clear that the court considered the initialing of the ballots a duty of the election judges but did not consider their failure to perform this duty so material as to disfranchise a voter. Its ruling is summed up at l. c. 82 as follows:

"We can not get rid of this provision of the statute by merely giving it a name, or classifying it, as mandatory or directory. If to say that it is mandatory means that unless its terms have been literally complied with the

> elector is to be deprived of his franchise and the candidate of a vote otherwise lawful, then it is not mandatory, and if to say that it is directory means that it may with impunity be disregarded by the election officer, then it is not directory.* * *"

Nehl v. Guion, supra, was followed and cited with approval in Gass v. Evans (1912) 149 S. W. 628, 244 Mo. 329, wherein the court said at l. c. 354:

* * * * * * * * *

> "We reaffirm and stand by the doctrine of the Bowers and Nehl cases and overrule the McKay case. In doing so we are not to be taken as palliating or justifying a slovenly performance of official duty. There are remedies open and ample for non-performance of or misfeasance in official duties. So, if their official acts open a way for fraud and wrong to corrupt an election, it may be followed and corrected in a contest. We are protecting an honest voter, who, doing no wrong himself, performs his own duty as a citizen, casts an honest vote and is entitled to have it counted unless the law itself raises an impassable obstacle, as held in the Bowers and Nehl cases."

These cases are the latest expression of the Missouri courts on this question.

Section 11608, R. S. Mo. 1939, requires that the registration number be placed on all ballots. The case of Timmonds v. Kennish, 149 S. W. 652, 244 Mo. 318, stated that Section 5899, R. S. Mo. 1909, which preceded the present Section 11602, R. S. Mo. 1939, applied where there was no registration number to go on the ballot and Section 5905, R. S. Mo. 1909, which preceded the present Section 11608, R. S. Mo. 1939, applied where the statutes did not provide for a registration number. The case was dealing with a situation wherein there were specific statutes regarding registration in the City of St. Louis. The conclusion from the language of the Timmonds case would seem to be that where a registration number was provided it would not be necessary for the judges to

initial the ballot but that in a locality where there was no registration number provided the judges would have to initial them. If the statutes were the same now as they were at the time of the decision in Timmonds v. Kennish, supra, this, of course, would mean that, in a locality where a registration number was provided under Section 11603, R. S. Mo. 1939, that the judges would not have to initial ballots. However, we do not think that the Timmonds case is now applicable since Section 11602, R. S. Mo. 1939 was amended in 1921. (Laws, 1921, page 308.)

The old section stated that "no other writing shall be on the back of the ballot, except the number of the ballot voted". Thus, this section excluded, by its terms, the addition of the registration number and created a conflict between that statute and the statute which required a registration number to be placed on the ballot. This was the reason for the holding as regards these two sections in Timmonds v. Kennish, supra, the court in that case seeking to harmonize the two laws.

The 1921 amendment changed this section and left out the requirement that no other writing should be on the back of the ballot except the initials of the judges and the number of the ballot voted. The amendment was made after the Timmonds case was decided and that case was probably the reason for the change noted above.

Therefore, at the present time there is no conflict between Sections 11602 and 11608, R. S. Mo. 1939, and this leaves the requirement of Section 11602 that the judges initial the ballots applicable where there is a registration number as well as where there is not.

In summary, we think it is the duty of the election judges to initial all ballots, although, from the above cases, a failure to do so would not invalidate the ballot if it had been otherwise properly voted.

CONCLUSION

It is, therefore, the opinion of this department that it is necessary in a locality where there is registration of voters for the judges of each political party to initial the ballots in a general election.

Respectfully submitted,

APPROVED:

SMITH N. CROWE, JR.
Assistant Attorney General

J. E. TAYLOR
Attorney General

SNC:mw