ELECTIONS: Where more votes are cast than names on the poll books, the illegal votes, if any, could be thrown out, but this would not necessitate throwing out entire vote of the precinct.

B-24

November 22, 1934.

FILED 11

Hon. Hampton Tisdale,
Prosecuting Attorney,
Cooper County,
Boonville, Missouri.

Dear Sir:

This department is in receipt of your letter of November 14 relating to the recent general election in Cooper County, which is as follows:

> "Some irregularities occurred in the recent election in Cooper County upon which some of the defeated candidates and the Chairman of the Democratic County Committee have requested an opinion.
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> No. 1. In Boonville Precinct No. 2 eleven more votes were cast for the offices of Presiding Judge, Judge of the Western District and Representative than there appeared names on the poll books. This irregularity appeared only in connection with these three offices. Would it be possible to throw out the entire precinct in case of a contest on this ground?
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> No. 2. In Clear Creek Precinct there were sixteen more votes cast for all offices than there appeared names on the poll books. In case of a contest, could this entire precinct be thrown out upon that ground?
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> The Republican candidate for County Clerk was elected by thirty-three votes and the Republican candidate for Representative by sixteen votes. In case either or both of the above named precincts were eliminated the result would mean the election rather than the defeat of these two officers. I am therefore, at their request asking for an official opinion in this matter.

The section dealing with contests of elections of Presiding Judge and Judge of the Western District is Section 10339, R.S. Mo. 1929, which is as follows:

> "The several circuit courts shall have jurisdiction in cases of contested elections for county and municipal offices, and in all cities now having or hereafter attaining three hundred thousand inhabitants, the said circuit courts shall have jurisdiction in cases of contested elections for justices of the peace, and in cases of contested elections for seats as directors in the boards having charge of the public schools and public school property, and the county courts in contests of township offices; but no election of any such school director, of any county, municipal or township officers, shall be contested unless notice of such contest be given to the opposite party within twenty days after the votes shall have been officially counted; the notice shall specify the grounds upon which the contestant intends to rely, and if any objection be made to the qualifications of any voters, the names of such voters and the objections shall be stated therein, and the notice shall be served fifteen days before the term of court at which the election shall be contested, by delivering a copy thereof to the contestee, or by leaving such copy at his usual place of abode, with some member of his family over the age of fifteen years; or, if neither such contestee nor his family can be found in the county, and service cannot therefore be had as aforesaid, it shall be a sufficient service of such notice for the contestant to post up a copy thereof in the office of the clerk of the court wherein the contest is to be heard."

Section 10346, R.S. Mo. 1929 deals with election contests of a representative or a state senator, and is as follows:

> "If any candidate of the proper county or district contest any election of any person proclaimed duly elected to the senate or house of representatives, such person shall give notice thereof, in writing, to the person whose election

> he contests, or leave a written notice thereof at the house where such person last resided, within forty days after the returns of the election to the clerk's office. The notice shall specify the names of the voters whose votes are contested, the ground upon which such votes are illegal, and a full statement of any other ground upon which such election is contested, and the name of the justice of the peace who will attend to the taking of the depositions, and when and where he will attend to take the same."

While you have stated two questions in your letter, an answer to one will automatically answer the other, as they are practically the same, and in a condensed form your inquiry is: Can a contest be based on the fact that there were more votes cast in certain precincts than there were names on the poll books and if such contest were successful, could the entire vote of the precincts be thrown out.

It is the opinion of this department that if a contest were instituted, it would necessitate examining the ballots and comparing them with the poll books. A similar question was before the Supreme Court in the case of Windes v. Nelson, 159 Mo.51. The Court said (l.c. 74-76):

> "On the recount the ballots cast were examined and compared with the poll books, and a report made to the court of the result. In this way it was disclosed how every voter in Camden County voted, and the secrecy of the ballot was destroyed. No objection was made to this proceeding by either party and therefore, the legality of the proceeding is not open to review in this case. But I cannot permit the fact to pass unnoticed. In my judgment there is no law in this state that permits such a practice. The Constitution (Sec. 3 Art. 8) provides that all elections shall be by ballot, which necessarily implies secrecy, but adds: 'Provided, that in all cases of contested elections the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law.' But an examination of the statutes of this state will show that

the legislature has never prescribed any such regulations or safeguards. Those so far prescribed do not go to the extent of allowing the secrecy of the ballot to be thus destroyed. So that, while the Constitution has made it possible for the Legislature to do so, the Legislature has, in my judgment, wisely refused to exercise this power or to destroy that secrecy. Every election of late years, in large cities, has been followed by an election contest, and the conduct of those cases shows that in a very large majority of instances such cases were not begun in good faith to change the result of the election as declared by the election officers, but for the ulterior purpose of ascertaining how the individual voters exercised their franchise with a purpose to intimidate them thereafter. The wisdom and the necessity of the secret ballot is more apparent today than it ever was before in the history of the world. The benefits of a secret ballot were recognized even in the days of Rome, for we find that Cicero in his defense of Plaucius said, 'The ballot is dear to the people, for it uncovers mens faces and conceals their thoughts. It gives them the opportunity of doing what they like and of promising all they are asked.' Judge Cooley in his work on Constitutional Limitations (6 Ed.), p. 762, says: 'The system of ballot voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases, and that no one is to have the right, or be in position, to question him for it, either then or at any subsequent time. The courts have held that a voter, even in case of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others who may accidentally, or by trick or artifice, have acquired knowledge on the subject should not be allowed to testify to such knowledge, or to give any information in the courts on the subject. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it; his ballot is absolutely privileged; and to allow evidence

> of its contents when he has not waived the privilege is to encourage trickery and fraud, and would in effect establish this remarkable anomaly, that, while the law from motives of public policy establishes the secret ballot with a view to conceal the elector's action, it at the same time encourages a system of espionage, by means of which the veil of secrecy may be penetrated and the voters' action disclosed to the public.'"

Section 10343, R.S. Mo. 1929 sets forth the manner of trying a contested election and is as follows:

> "Every court authorized to determine contested elections shall hear and determine the same in a summary manner, without any formal pleading; and the contest shall be determined at the first term of such court that shall be held fifteen days after the official counting of the votes, and service of notice of contest, unless the same shall be continued by consent, or for good cause shown."

Construing this section, along with a number of other sections pertaining to election contests, the Court in the case of State ex rel. v. Oliver, 163 Mo., l.c. 694, said:

> "In that case, Marshall, J., in delivering the opinion of the court, after quoting the foregoing constitutional and statutory provisions, said:
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> 'Thus it will be seen that while Section 7044 authorizes the court before which any contested election may be pending to order the clerk of the county court (in St.Louis, the Board of Election Commissioners) "to open, count, compare with the list of voters and examine the ballots in his office" and to certify the result of such count, comparison and examination to the court, it gives no such right to any one except the clerk--not even to the parties or their attorneys. The subsequent sections emphasize this feature and show that it is not simply a casus omissus but that it was deliberately and intentionally so framed. Thus, section 7046 provides that the ballots shall be opened in the presence of the parties and

their attorneys, "and after swearing them not to disclose any fact discovered from such ballots except such as may be contained in the clerk's certificate." It will be noted that the oath of secrecy relates only to what may be discovered from the ballots and does not impose any secrecy as to what is shown by a comparison of the ballots with the voting lists.

But this is not all. Section 7047 requires the clerk to permit the contestor and the contestee and their attorneys "to fully examine the ballots" and further that the clerk "shall make return to the writ .... of all the facts which either of said parties may desire, which may appear from the ballots affecting or relating to the election for the office in contest."

So that up to this time the legislature has only given the parties or their attorneys the right to fully examine the ballots and to require the clerk to certify all the facts which either of the parties may desire which appear from the ballots. No right has been given them to compare the ballots with the voting lists. Such a comparison would disclose how the elector voted and thereby lift the veil of secrecy without his consent to the parties and their attorneys and they would be under no obligation not to disclose the information so obtained, for their oath of secrecy is limited by the statute "not to disclose any fact discovered from such ballots" -- not from such a comparison. And if the contention of respondents that the term "ballot" employed in Section 7046 includes such a comparison of the ballots with the voting lists, be true, then it necessarily follows that the veil of secrecy would be lifted, not only to the eyes of the parties and their attorneys, but also to the whole world, for Section 7047 requires the clerk to permit the parties and their attorneys to fully examine the ballots, and to make return "of all the facts which either of said parties may desire which may appear from the ballots." So that under such a construction the clerk could be required by the parties to certify to the circuit court and thus make a public record of every fact that appears from the ballots and from a comparison of the ballots with the voting lists, and in this manner a

perpetual public record would be made of how every elector voted. And this is precisely what the circuit court ordered to be done in this case. That this is not the true or literal meaning of the law is conclusively shown by the fact that the parties and their attorneys are required to be sworn not to disclose any fact discovered from the ballots. If ballots include voting lists, then what useful purpose would be subserved by swearing the parties to secrecy when all the facts so discovered would be made matters of public record in the circuit court by the return of the clerk? And yet the prime purpose of voting by ballot is to preserve inviolate the secrecy of the vote.'

These views, thus expressed, necessarily condemn paragraphs 1 and 2 or the order made in this instance.

Nor is there any provision made or permission given in the sections of the statute quoted, for any of the parties or their attorneys to make notes; and in doing this they could easily go further. If they are allowed to make notes, it is easy to see that no one could prevent them from stating therein 'as to what political party any voter voting at such election voted for.' And it is also easy to see that they, having made notes containing such prohibited facts, the clerk would have no authority to supervise them; look over their shoulders, and see that they did not have and did not take such contraband matter out of his office.

The only rights the contestor or contestee or their attorneys can assert under the law, are those granted them under sections 7046 and 7047, which include the right named in the latter section, that of having 'the clerk to make return to the writ, under his hand and official seal, of all the facts which either of said parties may desire, which may appear from the ballots, affecting or relating to the election for the office in contest.' All things else are tabooed. When the clerk has done his office as in these two sections provided, the chapter is closed and the function ended."

The above decisions are quoted for the purpose of showing that in all probability in a contest the poll books and ballots could not be compared; however, these cases have apparently, though not directly, been overruled, as shown in the case of Gantt v. Brown, 238 Mo. 560, wherein the Court said (l.c. 575-578):

> "By the preceding section the poll books are required to be put into the ballot boxes. Under Section 6228, supra, the commissioners are to securely keep such ballot boxes (contents, ballots and poll books). They are not to inspect them (meaning the contents, not the mere naked boxes) nor permit anybody to inspect them, 'except upon order of court in case of contested elections', etc. In such excepted cases what are to be inspected? Most certainly, the contents of those boxes, and this includes both ballots and poll books. Not only so but the commissioners in other cases are to securely keep them for twelve months, or until such time 'when it shall be necessary to produce them(not the naked boxes, but the contents, the ballots and poll books) at the trial of any offense committed under this article.' Now where do these ballots and poll books go? To a plain ordinary court of justice. For what purpose do they go? That they may be used in evidence on the trial of a cause. Not only so, but by the last clause of the section these ballots and poll books must be kept in tact even after the expiration of twelve months providing a contest or prosecution is intended. Kept for what? Certainly not in seclusion and for no purpose as held in the Spencer case and cases following its trend.
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> But even this is not all. Section 5939, R.S. 1909, reads: 'Either house of the General Assembly, or both houses in joint session, or any court before which any contested election may be pending, or the clerk of any such court in vacation, may issue a writ to the clerk of the county court of the county in which the contested election was held, commanding him to open, count, compare with the list of voters and examine the ballots in his office, which were cast at the election in contest and to certify the result of such count, comparison and examination, so far as the same relates to the office in contest to the body or court from which the writ is issued.'

This section has long been on the books and is discussed in the Spencer case. That discussion, however, does not meet with our views. In that case the return to be made by the officials under the order of the court must be confined to what is shown by the ballots themselves and not a return showing the result of an examination of the ballots, and the comparison of those ballots with the poll books. The plain reading of the statute is emasculated by the Spencer and Montgomery Cases. The statute commands the clerk (1) to open, count and compare the ballots with the list of voters and examine the ballots; and (2) 'to certify the result of such count, comparison and examination so far as the same relates to the office in contest to the body or court from which the writ is issued.' Now, what result shall the clerk certify? The result of an examination of the ballots only, as said in the Spencer case? We say No. The statute speaks for itself. The statute says, 'The result of such count, comparison and examination.'

The Spencer case and those following it eliminated from the statute the result of the comparison of the ballots with the poll lists, and in this thwarted the clear legislative intent as expressed by the statute.

Going further, we find still another section which throws light upon the question. Section 5905, R.S. 1909, insofar as applicable to the point in hand is concerned, reads: 'And the ballots, after being counted, shall be sealed up in a package and delivered to the clerk of the county court or corresponding officer in any city not within a county, who shall deposit them in his office, where they shall be safely preserved for twelve months; and the said officer shall not allow the same to be inspected, unless in case of contested election, or the same become necessary to be used in evidence and then only on the order of the proper court, or a judge thereof in vacation, under such restrictions for their safe-keeping and return as the court or judge making the same may deem necessary; and at the end of twelve months, said officer shall publicly destroy the same by burning, without inspection.'

This section goes to the ballots themselves. It is a part of the general election laws. Section 5911, discussed supra, left one of the poll books open for public inspection. Both sections are in the same article. In the quoted portion of section 5905, supra, note the language, 'or the same become necessary to be used in evidence.' Used in evidence how? 'Under such restrictions for their safe-keeping and return as the court or judge making the same may deem necessary.'

If this section does not disclose a legislative intent to the effect that the ballots themselves can be used in evidence in proper cases, I have misconceived what I take to be unequivocal language. In truth and in fact this section contemplates that the ballots upon the order of the court may be taken from the legal custodian and used in evidence. At least it does contemplate that the legal custodian can be called upon/produce them for use in evidence before the court. Of course the court must arrange for the safe-keeping and return of these ballots after they have been used in evidence, but that this is a clear provision for their being used in evidence there can be no doubt.

In determining the legislative intent the whole body of the law must be considered, and not selected portions thereof. We have, therefore, taken up some sections not discussed in the Spencer case. An examination of this body of laws as applied to the State at large and as applied to the city of St. Louis convinces us that the Legislature never intended to deprive a contestant of his right to show fraud by the best evidence, and never intended to hermetically seal the evidence of fraud in the ballot boxes and pool books, as is done by the Spencer and Montgomery cases, supra, and perhaps in a more modified form in some succeeding cases.

We have no doubt that if it becomes neces-

> sary in the progress of these cases for this court to inspect certain of the ballots, we would be acting within the Constitution and statutes to send for them, or direct our commissioner, under proper restrictions, to procure for us the needed information.
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> We shall not go further. Upon the questions discussed herein the Spencer and Montgomery cases, supra, and those following them, are overruled. The charges of fraud are thereby rendered susceptible of proof, if fraud in fact exists, and the question of a prima facie showing of fraud is out of present consideration. This permits the case to be tried as other cases, as a whole, leaving the parties litigant to decide for themselves whether or not the evidence introduced thus far proves fraud. That question we will determine when the case is submitted for our decision."

A more recent case, which seems to decide the question conclusively, is that of State ex rel. Phillips v. Barton, 300 Mo. 76. The Court said (l.c. 89-90):

> "This court has more than once had the question of the extent of this examination under consideration. In State ex rel. Young v. Oliver, 163 Mo. 679; State ex rel. Funkhouser v. Spencer, 164 Mo. 23, and Montgomery v. Dormer, 181 Mo. 5, what is now Section 4911 was given a cramped and narrow construction in holding that it granted no authority for a comparison of the ballots with the voting lists. These rulings the court held in Gantt v. Brown, 238 Mo. 560, were not in harmony with the purpose of the statute, and that the enforcement of the rule as thus announced would render contests of elections nugatory. The limitation upon the right of examination in the cases cited is held to prescribe a procedure, the tendency of which is to foster rather than expose fraud and thus defeat the purpose for which the law was enacted. These cases, therefore, are as they should have been, under the wholesome interpretation given to the statute in Gantt v. Brown overruled. The rule announced in the latter case is to the effect that where, as here, fraud is charged in good faith in an election

> contest, that the ballots and poll books should be opened for the purpose of showing whether fraud, be it actual or legal, has been committed; that the mode and manner of proof should be as broad as the charges, and any available evidence tending to estqblish or disprove the charge is competent. Not only, says the court, are the balance and pool books admissible in evidence, but a witness may testify as to how he voted, as tending to show fraud or no fraud; that when a ballot is examined having a certain number, the party challenging it as fraud is entitled to an examination of the ballot to determine from the corresponding number thereon who cast it. The statute (now section 4880, R.S. 1919) so provides, and there is nothing in the Constitution to inhibit the admission of this character of testimony. On the contrary it is expressly provided (section 3, article 8, Missouri Constitution) 'that in all contested elections the ballots cast may be counted, compared with the lists of voters, and examined under such safeguards and regulations as may be prescribed by law.' The legal prescription referred to, has, so far as the matter at issue is concerned, been definitely drawn in the contest election statute. Not only from its terms but from the illuminating interpretation given to it in Gantt v. Brown, no difficulty should be encountered in complying with it."

As to the authority of the Circuit Court to go behind certificates of election, the same is decided in the case of State v. Caster, 12 S.W. (2d), l.c. 465-466, wherein the Court said:

> "Our decision, upon the question of which certificate the county clerk should use in making up his abstract, could in no sense determine the actual facts concerning the correctness of the vote shown by such certificate. That is an inquiry peculiarly appropriate to an election contest. In that proceeding the circuit court may go behind any and all certificates of the election officials and open the ballot boxes and recount the ballots themselves and declare the result accordingly.
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> Could this court have been permitted promptly to settle the legal question involved in the

amended petition, our alternative writ would not have been abused, a certificate of election could have issued without undue delay, and then, if so advised, the candidate denied such certificate could have taken whatever steps he deemed advisable. But the appointment of a commissioner would mean a long drawn out controversy in this court with the same ultimate effect of our final decision, to-wit, the determination as to which candidate should receive the certificate of election. Such determination would not prevent an election contest, if the losing party could, or decided to, institute an election contest thereafter."

CONCLUSION

In view of the above decisions, it is the opinion of this department that if the petition and notice be in proper form, the question of the apparant illegality of the election in the precincts you mentioned in your letter, i.e., the poll books containing less names than the ballots cast, could be inquired into and the votes, if any, found to be illegally cast could be thrown out; this, however, would not necessitate throwing out the entire vote of the precincts, as the court on the recount could determine the proper vote of the precincts and thus the vote as determined by the court would be the legal vote of said precincts.

Respectfully submitted,

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