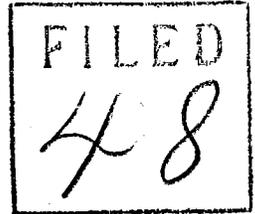


ELECTIONS: A canvasser, who has qualified, casting up the absentee votes is under the duty of certifying to the County Court the result of his canvass, and this is so regardless of the number of votes or whether there are any absentee votes.

November 19, 1946



Mr. John H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

This acknowledges your request, which is as follows:

"The county clerk as authorized by Section 1475 and 11476, Laws 1945, appointed two Republicans and two Democrats whose names had been given him by the committee of each party, to open, canvass, count and certify the absentee ballots.

"As I am informed by the clerk the Republican canvassers challenged the absentee ballots and refused to sign and certify the absentee vote and gave no reasons in writing why they refused to do so, but made oral objections in their challenges stating they were not entitled to vote as they were not residents of the county. The clerk also appointed one Republican and one Democrat to assist in casting up the vote of the election held on November 5, 1946, as provided by Section 11615, Laws 1945, which they did but as the two Republican canvassers selected to cast up the absentee ballots refused to certify the returns as to the absentee ballots, these votes were not counted in with the final vote. I find no statute which seems to apply to a condition as this, where the two Republican canvassers refused to sign and certify to the result of the canvass

as to the absentee ballots, but the two Democratic canvassers did sign the result.

"Section 4375, R.S. 1939, makes it a misdemeanor for any judge or clerk who shall fail to sign and deliver to the county clerk the statement required by law of his reasons why he refuses to sign the registry books, and other books, blanks and forms required, etc., shall be deemed guilty of a misdemeanor, etc.

"I will appreciate your opinion as to whether the two judges or canvassers appointed to cast up the absentee ballots violated any law in refusing to certify as to the result, if Sec. 4375 does not apply, and further, if the clerk should certify the result of the election to the secretary of state and include the absentee vote, yet in as much as the clerk will have to certify the result of the election before you can give me your opinion, it will perhaps be of little use as to that matter, but your opinion will be useful to me as to the failure of the two canvassers to sign and certify the result of the canvass of the absentee ballots."

Replying thereto, your inquiry seems to indicate that you desire an opinion from this office bearing on the failure of two of the canvassers, who were appointed along with two others, to cast up the absentee ballots and certify the results thereof to the County Court, and this opinion is in response to that inquiry.

The statutes have been revised and amended so much that it is not difficult to understand your troubles in running down this question. In the 1939 Revised Statutes it was the duty of the county clerk and two judges of the County Court, or two justices of the peace, in each county not having registration, to cast up the vote within five days after the election. Section 11615 provides:

"The clerk of each county court shall, within five days after the close of each election, take to his assistance two justices of the peace of his county, or two judges of the county court, and examine and cast up the

votes given to each candidate, and give to those having the highest number of votes certificates of election."

Section 11630, R.S. 1939, places that duty upon the Board of Election Commissioners in St. Louis and Kansas City, and other cities having registration. Said section is as follows:

"The powers and duties herein given to and imposed upon the clerks of the county courts of the several counties shall be exercised in reference to the city of St. Louis and to Kansas City, and to any other city hereafter having a registration of voters by the board of election commissioners of such city."

Section 11616, R.S. 1939, provides:

" * * * * it shall be the duty of the county clerk of such county, * * * * before certifying to the nomination or election of any candidate for a county office, * * * * to give to the candidate or candidates whose total vote, as certified by the judges of election is more or less than the number of votes actually cast for such candidate or candidates, as shown by the tally sheet of such precinct, the actual number of votes cast, for such candidate or candidates in the precinct or precincts in which such error, or errors, occurred, the certificate of the judges of election to the contrary notwithstanding."

Section 11618, R.S. 1939, prescribes the penalty for the last above-mentioned section.

The above last-mentioned two sections appear to more particularly apply to the precinct records and the duty of the County Court to record the true vote, as shown by the tally sheets of the various precincts.

Senate Bills Nos. 46 and 47, and House Bill No. 241, are next mentioned. Each of them has an emergency clause. Senate Bills Nos. 46 and 47 were approved July 27, 1945, and House Bill No. 241 was approved October 20, 1945. Senate Bill No. 46, in Section 11476, provides:

"In cases of elections wherein the county court or board of election commissioners as the case may be are not charged with the duty of canvassing the returns of such elections, the body or officials, charged by law with such duty for such elections, shall appoint not less than four disinterested persons, not more than one-half of whom shall be of the same political faith, * * * * not later than 6:00 o'clock p.m. of the day next succeeding the day of such election; * * * * to open, canvass, count and certify the votes cast by absent voters at such election, * * *"

The writer does not understand the reason for the enactment of Senate Bill No. 46, because it would seem only to apply in instances wherein the County Court or Board of Election Commissioners are not charged with the duty of canvassing the returns of the elections, and, as the writer understands the statutes, those are the only two bodies which are charged with such duty.

Since Senate Bill No. 47, next mentioned, contemplates that the County Court and Board of Election Commissioners are the two bodies in their respective spheres which so function, said section prescribes the duty of the county clerk issuing ballots to absent voters to receive and keep the said ballots, to make a list thereof, showing the precinct of claimed residence, and to publicly post it at least twenty-four hours before opening the ballots. Then it provides:

" * * * * Whenever the county court of any county, or the board of election commissioners, as the case may be, shall meet to canvass the votes according to law they shall first appoint not less than four disinterested persons, * * * * for the purpose of opening and counting said absentee vote, and the said persons so appointed shall take the oath prescribed for the regular judges of election, and shall at once proceed to open, canvass and count such votes, and having determined that such absent voter or voters are entitled to vote in the respective precincts wherein he or they offer to vote, and having been fully satisfied

thereof they shall certify to the county court, or to the election commissioners, as the case may be, the number of qualified votes to be counted for each of the respective candidates voted for in such election precinct, * * * * and shall forthwith make such certificate to the county court, * * * who shall tabulate such vote along with the other votes certified from the several precincts of the county and credit the same to the candidate * * * * for whom or for which said absentee votes were cast in arriving at the total result of the election * * * *

House Bill No. 241, in Section 11615, provides that "The clerk of each county court shall, within five days after the close of each election, select for his assistants one person from each of the two political parties casting the highest number of votes * * * * and examine and cast up the votes given to each candidate, and give to those having the highest number of votes certificates of election," and such persons shall be selected from party lists at least fifteen days prior to appointment, provided said lists are supplied, and on failure so to do, then the clerk names them.

House Bill No. 241 repeals Section 11615, R.S. 1939. Senate Bill No. 46 repeals Section 11476, R.S. 1939. Senate Bill No. 47 repeals Section 11475, R.S. 1939.

Section 11477, R.S. 1939, provides that the vote of an absent voter may be challenged "for good cause and the judges so appointed to open, canvass count and certify the votes of such absent voters shall have all the power and authority given by law to regular judges of election to hear and determine the legality of such ballot."

Section 11478, R.S. 1939, provides for the sealing, secrecy and safekeeping of such ballots.

Section 11480, R.S. 1939, provides the penalty for violation of Article 2 of Chapter 76, and says:

" * * * * If any person shall violate any provision of this article, or fail to comply with any provision hereof for which no other punishment is herein provided, such person shall upon conviction thereof, be deemed guilty of a misdemeanor."

Section 11503, R.S. 1939, requires judges of election to take an oath, which in part is as follows:

"I do solemnly swear that I will impartially discharge the duties of the present election according to law, * * * *"

Section 11506, R.S. 1939, places a penalty on failure of a judge or clerk to perform his duty, and provides:

"If any judge or clerk, after he shall have undertaken to perform the duties herein pointed out, fail so to do, he shall be fined two hundred dollars, to be recovered by civil action, in the name of the county, or by indictment, and in either case the fine shall go into the county treasury."

The particularly applicable law to the question here discussed appears to be in Senate Bill No. 47, which provides for the appointment of not less than four disinterested persons for the purpose of opening, canvassing and counting the absentee votes. This law further places the duty on them to "take the oath prescribed for the regular judges of election." It further places the duty on them to "proceed to open, canvass and count such votes, and having determined that such absent voter or voters are entitled to vote in the respective precincts wherein he or they offer to vote, and having been fully satisfied thereof they shall certify to the county court, * * * the number of qualified votes to be counted * * *" The only way the law provides for the information which they get from opening and counting the absentee votes, and their determination of how many absentee votes there are or that should be counted, is by the method set forth in said law, to wit, "and shall forthwith make such certificate to the county court." If it were not clear that such is their duty, any former doubt would be removed by reference to the provisions of said law thereafter following the above quoted portion, which reads, "who shall tabulate such vote along with the other votes certified from the several precincts of the county." The official information can be transmitted in only one way and that is by the way provided by the statute, to wit, "make such certificate."

It will not do to stand mute and do nothing. That would be a complete failure to perform the duty which the law casts on the official designated by law to cast up and certify the result.

It will not do to make oral declarations of protest or of approval of the votes because the statute requires the functioning party to "make such certificate." He is a judge of election, he has taken the oath of an election judge and the law charges him with the obligation to perform the statutory duties of an election judge, and one main duty of such judges is to certify the votes. If there are no votes that in his opinion are legal votes, it is his legal duty to so certify - to "make such certificate." It is just as much his duty to tell the County Court, in the way the statute provides and in the only way provided by law, what the absentee vote is when the total absentee vote is nothing as when it is one or two or a hundred; otherwise, there is a hiatus, there is a gap, the chain of communication is broken; it would be analogous to the case of the election judges in a precinct failing to certify the poll books after an election. Suppose the judges of a precinct were to fail to send in the poll books or were to fail to certify the vote in, but on the contrary would merely telephone in the vote. Would it be contended that they had performed their statutory duty as election judges? There is no greater duty on them than on those casting up the absentee vote to so certify.

Conclusion.

It is our opinion that where an individual is one of four who has been appointed to cast up the absentee vote in a given county where there is no registration, and he has qualified as such, it is his duty to sign a certificate certifying to the County Court the result of the casting up of said absentee vote. It does not necessarily follow that each of the four so appointed are of the same opinion and must each sign the same certificate, but if one or two of the four so appointed disagree with the others so appointed, it is his duty to certify his own views to the County Court, and his failure to do so is a violation of his duty as an election judge and he is subject to the penalty provided by Sections 11480 and 11506, R.S. 1939.

Yours truly,

DRAKE WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DW:ml