

ELECTIONS: - Cities or counties that have registration of voters may not take advantage of Sec. 10389, i.e., has to appoint two judges and two clerks--such cities or counties are governed by the General Election Law.

April 27, 1934

Mr. Thomas J. Lysaght
413 Francis Street
St. Joseph, Missouri



Dear Sir:

This is to acknowledge your letter to Governor Park which was referred to this department for answer. Your letter in part reads as follows:

"I desire to call your attention to Sec. 10389--in reference to number of judges and clerks necessary to serve at special elections. The question is, where registration is held--is it necessary to have full quota of Judges and Clerks. (6 Judges and 4 Clerks) I am so anxious to have these bonds carry and if successful--want no cloud on their legality. I am suggesting, that you have the Attorney General--give an opinion at once, in reference to the interpretation of this section."

I.

Section 10389 R. S. 1929 pertains to special elections when same are called for the purpose of amending the constitution or to vote on the proposition to revise or amend the constitution. The section is quite lengthy and we will only quote those parts pertinent:

"Whenever a proposed amendment to the Constitution* * *shall be submitted to the voters at a special election, said election shall be conducted in the manner provided by law for general elections and said propositions shall be sub-

mitted, voted on, and returns certified and the results proclaimed in the manner provided by law in case such propositions are submitted at a general election: Provided that it shall not be necessary to hold said election with booths for the voters and that said election shall be conducted by two judges and two clerks at each polling place, one judge and one clerk to be selected from each of the two parties which cast the highest and next to the highest number of votes for governor at the last general election; except that in cities and counties where registration of voters is now provided for by law that said special elections shall be held in accordance with the provisions of law now in effect applicable to the holding of elections in said cities and counties: * * *"

The above section was enacted July 8, 1921 by the General Assembly in extra session, laws of Missouri, 1921 extra session, p. 182. It contained an emergency clause which provided among other things the following:

"And whereas the Governor has called a special election for the same date for the purpose of submitting certain proposed constitutional amendments, and whereas there is no law governing the manner of holding such special election, there is an emergency within the meaning of the constitution."

At a special election held August 2, 1921 the constitution was amended, Article IV, Section 44b, referred to and known as the "Bonus to soldiers' and sailors' amendment", said election was held in accordance with Section 10389 supra,--so much then for the history of said statute.

II.

The city of St. Joseph is a city of the first class. Laws 1931, p. 209 provides for registration of voters in the cities of first class, thus the city of St. Joseph is a city

where registration of voters is provided by by law.

III.

Laws of Missouri 1933-34 extra session, p. 174, provides the following:

"At the general election to be held on the Tuesday next following the first Monday in November, 1934, or at a special election to be called by the Governor, in his discretion, prior to such general election, there shall be submitted to the electors of ~~this~~ State, for their approval or rejection, an amendment to the Constitution of the State of Missouri, adding to Article IV thereof, between Section 44c and Section 45, a new section to be known as Section 44d, to read as follows:"

On April 10, 1934 an opinion was written by this department to W. M. Morris, Clerk of the County Court of Grundy County, wherein it was held that the election to be held on May 15 was a special election at which a question of public policy would be submitted to the people, namely, that of bonding the state.

On April 12, 1934 this department rendered an opinion to Hon. Gordon Weir, Prosecuting Attorney at Greenfield, Missouri, in which we held that in counties where there was no special law providing for registered voters, that section 10389 supra, applied, namely, it being necessary in such counties to appoint only two judges and two clerks at each polling place for the bond election to be held on May 15.

IV.

Section 10223 R. S. Mo. 1929 provides as follows:

"Such special election, except as provided in the preceding section, shall, as near as possible, be conducted in the same manner, and be governed by the same laws, as a general election."

Section 10206 R. S. Mo. 1929 in part provides as follows:

"In all counties in this state, four judges of election shall be appointed by the county court for each election precinct in each of said counties;"

Laws of Missouri 1933 p. 238, section 10208 provides in part as follows:

"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;* * *"

Laws of Missouri 1933, p. 239, Section 10211 provides in part as follows:

"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.* * *"

CONCLUSION

From the foregoing it is our opinion (1) that four and/or six judges and two and/or four clerks as the case may be should be appointed as judges and clerks in the city of St. Joseph for the special election to be held on May 15; (2) that in the county of Buchanan if registration is not necessary then only two judges and two clerks; (3) wherever a registration of voters is provided then the general election laws apply so far as judges and clerks of elections are concerned, and the reverse is that if no registration is provided then only two judges and two clerks, same to be selected in accordance with Section 10389 supra.

V.

In this opinion we do not comment on the equities or attempt to express an opinion as to why the legislature made a distinction between counties (cities) having registration and those not having same. We have based our conclusion solely upon the statute. Assume, however, that some cities that provide registration of voters do not in all particulars follow the general election laws, then does such invalidate the entire election. We do not express an opinion concerning same, however, we do quote hereinafter from cases for whatever deductions and conclusions the reader or readers of this opinion may draw therefrom.

In *Fahey v. Hackmann*, State Auditor, 237 S. W. 752, the Supreme Court of Missouri en Banc in passing upon the Soldier's Bonus Bonds said the following (l. c. 757).

"Counsel for plaintiff next contends that the amendment to article 15 of the Constitution of Missouri in the year 1920 was not constitutionally submitted to nor ratified by the voters of the state at the general election held November 2, 1920, because the proposed amendment was not published in a newspaper in Pettis county for four consecutive weeks preceding November 2, 1920, but was published in said county for three weeks only preceding said day."

l. c. 760:

"This precise question was decided in the case of *State ex rel. v. Winnett*, supra, where the Supreme Court of Nebraska held that such an omission did not render the amendment invalid, and in my opinion that opinion properly declared the law, and, if followed, would necessarily lead to the conclusion that the publication in the case at bar was in substantial compliance with the constitutional mandate, and that the amendment is valid, and is in full force and effect. But there is another reason

why the amendment in question should be upheld, and that is that if the entire vote of Pettis county should be eliminated from the entire vote of the state or counted against the proposed amendment, still the amendment would have something like 75,000 majority in its favor, so under no circumstances can it be said that the failure to give the full required publication in that county could have or did affect the final vote as cast throughout the state."

In State ex rel City of Marshall v. Hackmann, State Auditor, 203 S. W. 960, l. c. 963 the Supreme Court of Missouri en banc said:

"The effect of the doctrine announced in that case is that, absent fraud or a mandatory statute, an election like the one under review will not be set aside for mere irregularities in the method of voting, such as relate to furnishing booths, the duties of the judges of election, and the certification of the result of the election."

Also in State ex rel city of Memphis v. Hackmann, State Auditor, 202 S. W. 7, l. c. 14, the Supreme Court en banc said:

"It is urged that the opening of the polls at 7 instead of 6 o'clock a.m., as required by the statute, constituted such an error as to invalidate the election. The force of this contention depends upon whether the statute is mandatory or directory. Ordinarily it is held to be directory, especially where the omission is unsubstantial and there was no evidence of resultant injury. For example, it has been held that a delay of an hour or an hour and a half in opening the polls will not affect the validity of an election, especially where there is no evidence that any one was deprived of the right of voting. People v. Prewett,

124 Cal.7, 56 Pac. 619; Packwood v. Brownell, 121 Cal. 478, 53 Pac. 1079; Pickett v. Russell, 42 Fla. 116, 634, 28 South. 764; Graham v. Graham (Ky.) 68 S. W. 1093; Marks v. Park, 7 Leg. Gaz. 70; Cleland v. Porter, 74 Ill. 76, 24 Am. Rep. 273. In the absence, therefore, of any injury resulting from a failure to open the polls at the time designated in the statute, we hold the same, as applied to the facts in this case, to be directory, and overrule respondent's contention."

In Breuninger et al v. Hill et al, 210 S. W. 67, 1. c. 71, the Supreme Court of Missouri en banc said:

"Aside from this, the law governing the appointment of judges and clerks is clearly directory, and courts will not nullify the result of votes honestly cast and counted, although the statute has not been strictly complied with. Sanders v. Lacks, 142 Mo. 255, 43 S. W. 653."

Yours very truly

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APPROVED:

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