

ELECTIONS: Members of police force not permitted to be within voters' booths during progress of election, and not entitled to be within polling places unless requested by judges of election.

October 21, 1942

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Mr. H. D. Allison
County Clerk
Buchanan County
St. Joseph, Missouri

Dear Sir:

Your request of recent date for an opinion from this department is acknowledged. It is partially as follows:

"Are members of the police force permitted to stay inside a polling place or within 100 feet of such polling places on election day? In the past election, the police were stationed in many of the election booths just as a means of intimidating the voters; they were not called in to settle any disturbances. If the police are allowed to be within the booths, would the Sheriff and his deputies also have the same privilege in a County Election."

The term "polling place" is not synonymous with "booth". The words "polls" and "polling place" mean the place to which voters go to cast their ballots. Adams v. Corwin, 195 N. Y. S. 41, l. c. 42, 118 Misc. 701.

Section 11600, R. S. Missouri, 1939, is in part as follows:

"All officers upon whom is imposed by law the duty of designating the polling places, shall provide in each place designated by them a sufficient number of places, booths or compartments, which shall be furnished with such supplies and conveniences as shall enable the voter conveniently to prepare his ballot for voting, in which compartment the electors shall mark their ballots, screened from observation, and a guard so constructed that only persons within the said rail can approach within five feet of the ballot boxes, or the places or compartments herein provided for. The number of places or compartments shall not be less than one for every one hundred and fraction of one hundred electors who voted at the last preceding general election in the district; in cities having registration, the number shall be one for every hundred or fraction of one hundred names registered. * * * * *

Thus, an election booth is a place, booth or compartment in the polling place for the use of the voters in marking their ballots, "screened from observation".

In substance, two questions are submitted, namely: (1) May members of the police force stay inside a polling place or within 100 feet of it on election day, and (2) if policemen are allowed within the booths, may the sheriff and his deputies likewise enter the booths during the progress of the election.

The system of elections in the United States is entirely statutory, and the exercise of the right of suffrage is controlled solely by constitutional and legislative provisions. Taylor v. Buckham, 178 U. S. 548, 44

L. ed. 1187; State ex rel. Ellis v. Brown, 33 S. W. (2d) 104, 1. c. 107; State ex rel. Edwards v. Ellison, 196 S. W. 751, 271 Mo. 123.

The questions asked will be answered in inverted order.

I.

Your second proposition is, in effect, if policemen are allowed within the booths during the progress of an election, may the sheriff and his deputies likewise enter the booths.

Section 9 of Article II of the Missouri Constitution is as follows:

"That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

Section 3 of Article VIII provides:

"All elections by the people shall be by ballot. Every ballot voted shall be numbered in the order received and its number recorded by the election officers on the list of voters opposite the name of the voter who presents it. All election officers shall be sworn or affirmed not to disclose how any voter shall have voted: Provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the

violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted, compared with the list of voters and received as evidence."

Section 4 of Article VIII provides:

"Voters shall in all cases except treason, felony, or breach of the peace be privileged from arrest during their attendance at elections, and in going to and returning therefrom."

The framers of the Constitution, in certain and definite terms, by these provisions, provided for the secret, free and uncoerced expression of the right of franchise.

The Legislature has enacted definite provisions to further the constitutional requirements. Section 11600, supra, provides for a guard rail in front of the screened booths and ballot boxes so that only persons within the rail may approach within 5 feet of the boxes and booths. This section then states:

" * * * No persons, other than electors engaged in receiving, preparing or depositing their ballots, shall be permitted to be within said rail, except by authority of the judges of election, and except as is now by law otherwise provided. * * *
* * * "

Section 11604, R. S. Missouri, 1939, prohibits more than one person from occupying a booth at one time. Judges and clerks of the election are not even allowed to enter an election booth to assist an illiterate voter in preparing his ballot. Section 11606, R. S. Missouri 1939. In addition, the election officials are required to keep secret how all persons voted.

These provisions are clear and certain and must be given effect as written. *St. Louis Amusement Co. v. St. Louis County*, 147 S. W. (2d) 667, 347 Mo. 454. They are mandatory and should be strictly followed. *State ex inf. McKittrick v. Stoner*, 146 S. W. (2d) 891, 1. c. 894.

The allowance of more than one person in a voting booth, be he an official or a private individual, cannot be too strongly condemned. The presence of an officer in a voting booth at any time other than when he is actually preparing his individual ballot would tend, we believe, to destroy the sanctity of the ballot and the untrammelled right of suffrage.

CONCLUSION

It is, therefore, concluded that, while preparing his ballot, no person other than the individual voter may be in a booth at any one time during the election's progress.

II.

Your second question has been stated as follows: May members of the police force stay inside a polling place or within 100 feet of it on election day?

Section 11493, R. S. Missouri, 1939, provides:

"All judges, clerks and voters shall be free from arrest, except for felony or breach of the peace, in going to, attending on and returning from election.

In Section 11494, R. S. Missouri, 1939, the following appears:

"The constable shall attend the elections in his township, and perform such duties as are enjoined on him by law, under the direction of the judges."

Section 11495, R. S. Missouri, 1939, is as follows:

"The judges of the election shall preserve good order and punish any disorderly person for contempt by fine not exceeding twenty dollars, at their discretion, and commit the offender to the jail of the county until the fine imposed be paid."

Section 11628, R. S. Missouri, 1939, provides that in case the judges of election are not present at the time fixed for opening the polls, the voters present to the number of ten or more may proceed to elect judges to act at such poll, and by Section 11600, supra, it is provided that no persons, other than electors, while receiving, preparing and depositing their ballots, shall be permitted within five feet of the rail in front of the ballot boxes and booths, without authority of the judges.

The statutory provisions indicate that the Legislature intended that the judges of election should be in charge of the election in their respective polls. The constable is required to be in attendance at the election "and perform such duties as are enjoined on him by law,

under the direction of the judges." (Underscoring added.) Section 11494. The judges are required to preserve order and are authorized to punish disorderly persons by a fine and commit such persons to jail until such fine is paid. Section 11495. The ballots are delivered to the judges. Section 11598. They may authorize persons other than electors engaged in receiving, preparing and depositing their ballots to be behind the guard rail. Section 11600. And evidently the election cannot proceed until the judges are present and qualified. Section 11628.

A cardinal rule of statutory construction in this state is that the legislative intent should be ascertained and given effect, if possible, from the words used in the statute. *Artophone Corporation v. Coale*, 133 S. W. (2d) 333, 345 Mo. 344; *State ex rel. McKittrick v. Carolene Products Co.*, 144 S. W. (2d) 153, 346 Mo. 1049; *Wallace v. Woods*, 102 S. W. (2d) 91, 340 Mo. 452; *Cummins v. Kansas City Public Ser. Co.*, 66 S. W. (2d) 920, 334 Mo. 672; *Rust v. Missouri Dental Board*, 155 S. W. (2d) 80. Furthermore, statutes on the same subject are to be read together and harmonized. *In re Rosing's Estate*, 85 S. W. (2d) 495, 337 Mo. 544; *State v. Mangiaracina*, 125 S. W. (2d) 58, 344 Mo. 99; *State ex rel. Henning v. Williams*, 131 S. W. (2d) 561, 345 Mo. 22; *State v. Gomer*, 101 S. W. (2d) 57, 340 Mo. 107; *State ex rel. Central Surety Ins. Co. v. Commission*, 153 S. W. (2d) 43.

While the words "election officers" and "election officials", by virtue of Section 11627, R. S. Missouri, 1939, include, among others, "city marshal or police officer when on duty taking part in the conduct of any * * * election, * * * as required by the provisions of this article", yet no statute requires police officers to be present at the election nor gives such officers a single duty to perform.

The District Court of Pennsylvania in the decision of *Police at Polls*, 3 Pa. Dist. Rep. 243, in passing upon statutes providing that police officers, constables and deputy constables, "now required by law to be present at the polls," remain within the voting room, and preserve order therein, and when no other statutory provisions

required police officers to be present at the polls, held, l. c. 244:

"The draughtsman of the Acts of 1891 and 1893, being, in all probability, aware of this provision of the Act of 1839, seems to have taken it for granted that it embraced police officers as well as constables, for which there is no warrant whatsoever. As police officers are the chief instruments for the preservation of order in cities, he was evidently under the impression that police officers were required by existing laws to be present at elections in cities to preserve the peace, while in rural localities he no doubt thought that the same functions were to be performed by constables. Of course there is no foundation for this.

"I need not stop now to argue that the mere recital in a law of another law which is supposed to exist, but which in point of fact has no existence whatever, does not amount to a legal enactment. It would be superfluous to waste time on the discussion of such a proposition. An enactment is an enactment. It must be made by appropriate enacting words, and is never left to stand upon mere inference and surmise, especially where the inference and surmise are altogether false and unfounded in fact.

" * * * * In like manner the provisions with regard to the presence of police officers at the polls, in the Acts of 1891 and 1893, not being in the nature of enactments requiring their presence

there, but mere recitals or statements of facts which have no existence, but which are founded in a total mistake of fact, there being no such existing laws, it cannot be pretended that they have the force of enactments.

"An erroneous assumption in an Act of Assembly that a law exists which has no existence whatever, except in the imagination of the draughtsman of the Act, can by no theory of sound reason, or legitimate construction, be held to be a law itself. The people of this state are not left at the mercy of such loose legislation as that would be. If they were they would be no better off than were the subjects of that ancient tyrant whose decrees were posted so high above their heads that they could not read them.

"The conclusion is, that neither by virtue of the Acts of 1891 and 1895, nor by any other existing law, are police officers required to be present at the polls."

While the question of police officers being present at the polls on election day has apparently never been passed upon by the appellate courts of Missouri, the rule has been stated as follows:

"In the absence of statute there is no authority for the presence of police officers at the polls, except for the purpose of casting their own votes or, in cases of actual necessity, for the purpose of preventing the commission of offenses or of preserving the public peace." (29 C. J. S., Sec. 200, page 287.)

In *Police at the Polls*, supra, the Pennsylvania Court ruled, l. c. 244-245:

"Fortunately there is no necessity ordinarily for their presence there. If they are required at any poll for the preservation of the public peace, or the prevention of crime, they can be dispatched thither, at very short notice, in sufficient numbers, by the head of the department, to make their presence there effective and decisive. Unless they are required for those purposes, it is more consistent with the character of our institutions, and with the requirements of art. 1 of the constitution of Pennsylvania that 'elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage,' that the elections should be conducted without the presence of any officers, military or civil, other than those appointed by law for the holding and conducting of elections. It is a pregnant fact, illustrative of the jealousy of the people against the presence of either soldiers or civil officers other than the election officers at the polls, that while the Act of July 2, 1839, prohibits the presence of troops at election places, the Act of March 24, 1877, prohibits the presence of sheriffs' deputies at the polls also.

* * * * *

"We are therefore of opinion that the director of public safety is under no obligation of law to detail policemen

for the several election divisions of Philadelphia on election day, and that the police officer has no business at the polls, except to cast his own vote, or to preserve order, in case his presence there is rendered necessary for that purpose. Nor is his presence in the poll when the vote is counted required by any law, unless his services are invoked by the election officers to prevent the commission of offences, or to preserve the public peace."

The Supreme Court of Kentucky in the case of Scholl v. Bell, 125 Ky. 750, 102 S. W. 248, l. c. 259, declared:

" * * * The statute has designated the persons who shall have charge of the conduct of an election, and the members of the police force are not included among their number. We know of no law which demands, or even justifies, their participation in the conduct of an election, nor has the able counsel for the contestees referred us to any.

"The conduct of an election under the supervision of either military or police authority has never been sanctioned by our courts, nor approved by our people. On the contrary, whenever the occasion has presented itself, it has been uniformly held that an election conducted under the supervision of the military power is not a 'free and equal' election; and the record in this case shows that the conduct of an election under police supervision is not less repulsive. * * * * *"

Section 11625, R. S. Missouri, 1939, contains the following:

" * * * No person whatever shall do any electioneering on election day within any polling place, or within one hundred feet of any polling place. * * * * "

This proviso throws little light upon the question, but a part of Section 4369, R. S. Missouri, 1939, is worthy of note. It is as follows:

" * * * or any person who shall approach within one hundred yards of any polling place during the time any election therein is being conducted or the votes therein being canvassed or returned, carrying concealed or deadly weapons, or who shall then and there exhibit the same for the purpose of intimidating any voter, or display any deadly weapon or make use of the same; * * * * shall be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for not less than two years nor more than five years."

This statute does not exempt policemen from its terms and would apparently apply unless such police were summoned by the election judges to assist the judges in maintaining good order and to enforce the law.

Mr. H. D. Allison

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CONCLUSION

It is, therefore, concluded that the judges of election are in charge of the election in their respective polls and are responsible for the good order and peace in and about the polls, and authorized to punish those who do not maintain the peace and keep good order.

It is further concluded that policemen and other peace officers, except constables, at times other than when they are actually voting, should not be present at the polls unless summoned by the judges of election to maintain the law and good order.

Respectfully submitted

VANE C. THURLO
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

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