

ELECTIONS:
JUSTICES OF THE
PEACE:

Error of county clerk does not prevent placing name of candidate on the ballot when he was the only candidate for that office.

August 21, 1942

Hon. W. Oliver Rasch
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of August 6, 1942, which reads as follows:

"Prior to March 5, 1942 four men, namely Norval W. Welsh, F. P. Johnston, W. G. Donnegan and Ben Matthews filed their declarations as candidates for Justice of the Peace for Joachim Township, Jefferson County, Missouri, on the Democratic Ticket. All their names appeared on the ballot for the primary election with the instructions to vote for three. Ben Matthews received the lowest vote.

"In Joachim Township there are two incorporated cities, namely Crystal City with a population of 3417 and Festus with a population of 4620. The population is shown in the Official Manual of Missouri 1941-1942 page 1041.

"Welsh and Matthews are residents of Crystal City, Johnston of Festus and Donnegan of Herculaneum.

"Matthews contends that Joachim Township is entitled to four Justices of the Peace, that he was nominated in the Primary Election and that his name should be placed on the ballot as a candidate in the general election. He bases his contention upon Section 2522 R. S. Mo. 1939.

"Please give me your opinion if Joachim Township is entitled to four Justices of the Peace and if Matthews' name should be placed on the ballot for the general election as a candidate."

The first question, "Is Joachim Township entitled to four (4) Justices of the Peace?" This involves construction of Section 2522 R. S. Mo., 1939, which reads as follows:

"Each municipal township except as otherwise provided by law, shall be entitled to two justices of the peace, to be elected and commissioned in the manner hereinafter provided; but in case there shall be in any such township an incorporated town or city having a population of over two thousand inhabitants, and less than one hundred thousand inhabitants, said town or city shall be entitled to one additional justice of the peace, who shall be a resident of such town or city; * * *."
(Underseoring ours.)

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The reason for the Statute, supra, is set out in the case of State ex rel Hazel et al. v. Watkins, 253 S. W. 781, 1. c. 782, in which the court said as follows:

" * * * The law providing for additional justices in a township was enacted for the purpose, no doubt, of providing for the necessities of the more populous communities, and the communities remote from a justice of the peace, and also to provide for each township a sufficient number of justices of the peace to take care of the justice of the peace litigation arising therein. This purpose, we think, should have some consideration in disposing of the question before us."

Therefore, it seems it was undoubtedly the intention of the Legislature to provide for an additional justice in an incorporated city with a population of over two thousand. We call your attention specifically to the portion of the Section, supra, which is as follows:

" * * * who shall be a resident of such town or city; * * * * ."

Therefore, the Legislature evidently intended for each town as designated above to be entitled to a justice to reside in the city.

Your second question is, "Should Matthews' (who was the fourth man in a three man contest) name be placed upon the ballot for the general election as a candidate for the office of Justice of the Peace?" We again refer you to the citation on construction of Statutes as set out above.

Section 11543, R. S. Mo., 1939, reads as follows:

"The list of nominations published by the clerks of the county courts of the respective counties shall be arranged in the order and form in which they will be printed upon the ballot, the size of type, squares and emblems used, spacing and blank lines to be as prescribed by law for the official ballot: Provided, that the names of nominees for township offices shall not be printed in the notice authorized by this section, but such notice as to township offices shall be in the following form:

"For justice of the peace ___ twp.,
(One or two to elect, as the
case may be)

"For constable _____ twp.,

Provided, that said notice shall be a copy of the ballot to be voted, except for the blank space in the township officers: Provided further, that at the end of each party ticket the names of the nominees for township

offices shall be published, set solid, paragraphing only for each township."

The primary ballot, as we understand it, in this case was printed setting out four names with the instructions to vote for three as provided in the Section set out above.

We are assuming that Matthews, the candidate for one of the four offices of justice of the peace, received some votes, even though he received less than any one of the other three candidates for said offices.

Since we have held that Joachim Township is entitled to four justices of the peace, and since, according to your request there were only four candidates for the four offices, it is our opinion that the candidate Matthews should be placed upon the general election ballot.

Section 11569 R. S. Missouri, 1939, reads as follows:

"The person receiving the greatest number of votes at a primary as the candidate of a party for an office shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot at the following election."

This section is mandatory, and, since there are four offices to be voted upon, and since only four candidates filed for the four offices, each candidate received the "greatest

number of votes" at the primary as a candidate for the office of justice of the peace.

It is true that the county clerk erred in stating upon the official ballot that only three of the candidates should be voted upon, yet, errors of election officials cannot void the voters who voted for Matthews as justice of the peace.

In the case of Bradley v. Cox, 271 Mo. 438, John H. Bradley, now Commissioner of the Supreme Court of Missouri, Division No. 1, was a contestant against Argus Cox, for the office of Judge of the Springfield Court of Appeals. The election was very close, and, upon examination, it appeared that in Maries County 1311 votes were cast for a man by the name of Arch A. Johnson, who was not the Democratic Nominee for Judge of the Springfield Court of Appeals. The court, in that case, held that even though the county clerk had placed the wrong name in the ballot, as a Democratic Nominee, for Judge of the Springfield Court of Appeals, the error of the county clerk should not void the 1311 voters who voted for Arch A. Johnson, who was not a nominee, and ruled that the votes should be cast for John H. Bradley. If the votes had not been counted for John H. Bradley, the contestee, Argus Cox would have been elected. The court, in arriving at that opinion, first said: (l. c. 451)

" * * * This court is, however, committed, as are all courts, to the principle that the disfranchisement of voters is not favored. We will not give to any law such a construction 'as would permit the disfranchisement of large bodies of voters because of an error of a single official' in any case in which the law in question 'is fairly susceptible of any other.' * * * * *"

And, further said, at l. c. 453:

"The statutory provision that ballots other than those the county clerk prepares and causes to be printed shall not be cast or counted means, simply, that no ballot shall be cast or counted except those officially prepared. It does not mean if any error occurs in printing such ballot the ballot shall be thrown out." (Underscoring ours.)

Also, in the case of Gass v. Evans, 244 Mo. 329, l. c. 354, the court said:

" * * * The reasoning of VALLIANT, J., in the Hehl case is unanswerable. His interpretation of the statutes, following BARCLAY, J., in the Bowers case, is so broad, so wise and so close as to leave nothing more to be said. During a consideration of the question from the standpoint of statutory law, precedent and natural justice, he quoted from a Canadian case pointing the dangers lurking in any other view. 'It must also be borne in mind,' says BLAKE, V. C., in the case borrowed from (Grant v. McCallum, 12 Can. L. J. N. S. l. c. 114), '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 today may be from a corrupt motive tomorrow, 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.' That excerpt aptly states the sum of the matter in a nutshell."

Also, in the case of *Bowers v. Smith*, 111 Mo. 45, l. c. 64, the court said:

"We conclude that a reasonable and natural construction of the law forbids us to repudiate, for any such reasons as have been presented, the three thousand votes cast in Sedalia in 1890.

"If for every error of a county clerk, or harmless irregularity in election procedure, citizens, having no control over either, are to lose their right of choosing public officers, the 'reform ballot act,' instead of being found an improvement of the machinery of popular government, will justly be denounced as a 'snare to entrap the unsuspecting voter.' *Gumm v. Hubbard* (1889), 97 Mo. 319. Such a result, however, was never contemplated in its enactment, and should not be brought about by a narrow and technical reading of it.

"Where any particular construction which is given to an act leads to gross injustice or absurdity, it may generally be said that there is fault in the construction, and that such an end was never intended or suspected by the framers of the act.' *PECKHAM, J.*, in *People ex rel. v. Board of Canvassers* (1891), 129 N. Y. 395.

"While it is well enough to insist on a proper and strict performance of duty by officers conducting elections, we are not of the number of those who imagine that such performance will be promoted by disfranchising the whole body of electors in any locality where errors, such as

are here charged, occur. The legislature has not plainly declared such a purpose, and we think it should never be imported into a statute by construction."

Also, in the case of *Nance v. Kearbey*, 251 Mo. 374, l. c. 383, the court said:

" * * The uppermost question in applying statutory regulation to determine the legality of votes cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction. (*Gass v. Evans*, 244 Mo. l. c. 353; *Hehl v. Guion*, 155 Mo. 76.) 'Such a construction' (says this court, speaking through BARCLAY, J., in *Bowers v. Smith*, 111 Mo. l. c. 55) 'of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official,* * * * *'."

Other states have followed the same reasoning as the Appellate Courts of this State, and ruled, that the mistake of an election officer should not void the will of the people. In the case of *Raymer v. Willis*, 42 S. W. (2d) 918, (Ky.), which is a Kentucky case, the court said at l. c. 921:

"Where election officers fail to do their duty in this or any other respect, or shall willfully perform

it in such a way as to hinder the objects of the law, they may be punished by fine and imprisonment. But it is a general rule of election law that, if the statutes do not expressly declare that non-compliance with a specified procedure shall result in throwing out the precinct or other district, a noncompliance that does not affect the fairness and equality of the election or the ascertainment of the true result will not vitiate the election. 9 R. C. L. 1091, 1092; Marilla v. Ratterman, 209 Ky. 409, 273 S. W. 69; Muncy v. Duff, 194 Ky. 303, 239 S. W. 49; Craig v. Spitzer, 140 Ky. 465, 131 S. W. 264, and cases cited. Cf. Stewart v. Wurts, 143 Ky. 50, 135 S. W. 434. To hold otherwise would be to subordinate the substance to the form, the end to the means. It is a transcendent rule that the right of suffrage will not be destroyed by irregularities or derelictions on the part of officers charged with the duty of conducting the election fairly and honestly, unless their misbehavior was such as to render impossible of judicial determination the will of the people as expressed at the polls."

CONCLUSION

It is, therefore, the opinion of this office that Joachim Township, was, and is, entitled to four justices of the peace, by reason of the fact that there are two

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incorporated cities in the township with a population of over two thousand each.

It is further the opinion of this department, that since there were only four candidates for the four offices of justice of the peace, then, all four candidates should be placed upon the ballot as candidates at the general election, even though in the primary the voters were erroneously limited to vote only for three of the four candidates.

Respectfully submitted

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