

ELECTIONS: Duty of Judge to assist illiterate voter.

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Honorable Joe C. Welborn
Prosecuting Attorney
Bloomfield, Missouri

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Dear Sir:

We have received your request for an opinion of this department which request is as follows:

"At the recent primary election certain illiterate voters attempted to vote with the assistance of marked sample ballots. These ballots were in a generally similar form to the official ballots. The ballots had been marked and the voters took the ballots to the election judges, told the judges they were illiterate, and told the judges they desired to vote according to the way that the ballot was marked.

"In one particular precinct two of the judges refused to assist the voters and informed the voters that they could not use the marked ballots. The judges proceeded to call the names of the various candidates off to the voters and required the voters to speak back to the judges, the names of the persons for whom he wished to vote. In several instances, the voter stated that he wanted to vote according to the way his sample ballot was marked, but the judge refused to look at the same ballot, and refused to let the voter use the sample ballot. In at least one instance, an illiterate voter, because he was not permitted to use his sample ballot, refused to vote, and because he insisted upon using his sample ballot was prevented from voting by the judges.

"Previous to the date of the election, I had prepared a

written opinion stating that the judges should help the voters to vote and to permit them to use the sample ballot, if they so desired, or to use any other memorandum or card which they desired in preparing their ballots.

"I would like to know whether or not the judges, by their action in preventing the voters from using the sample ballots, and particularly in the case where the voter was prevented from voting entirely, have committed a misdemeanor and whether or not the judges would be liable for prosecution for their action."

Section 11606, R. S. Mo. 1939, provides as follows:

"Any elector who declares under oath to the judges of election having charge of the ballot that he cannot read or write, or that by reason of physical disability he is unable to mark his ballot, may declare his choice of candidates to the judges having charge of the ballots, who, in the presence of the elector, shall prepare the ballot for voting in the manner hereinbefore provided: Provided, however, that the provisions of this section shall not be construed to allow any judge or judges of any election to enter a booth for the purpose of assisting any elector in preparing his ballot. Such judges, after reading to the elector the contents of the ballot, shall, without leaving their respective positions, prepare such ballot as the elector may dictate."

The Supreme Court of this state has held on several occasions that election laws are to be construed liberally in aid of the right of suffrage. See *Nance v. Kearbey*, 251 Mo. 374, 158 S.W. 629; *Gramling v. Lawrence*, 353 Mo. 1028, 185 S.W.(2d) 818. The section in question was so construed by the Supreme Court in the case of *Hope v. Flentge*, 140 Mo. 390, 41 S.W. 1002. In that case the court was considering the effect of the failure on the part of the judges to require the oath specified in the section above quoted and also the effect of a judge's entering the voting booth with a voter. Speaking on this question, the court said (140 Mo., l.c. 403-405):

"It will be observed that the notice of counter contest nowhere charges that the electors named therein fraudulently accepted assistance without having previously taken the required oath nor that as a matter of fact they could read or write

or were not so disabled they could not mark their ballots. We are asked to hold that the failure of the judges to require such a preliminary oath shall disfranchise the ignorant voter whose illiteracy compels him to call upon them for assistance. Though too ignorant to mark out his own ballot, he is required to instruct the judges in their duties by insisting they must first administer the oath to him. While this statute requires the judges to assist any elector who declares under oath that he can not read or write, it does not say they shall not assist others that they know of their own knowledge can not read or write. Such cases must often occur, and while the judges should require the oath if they are doubtful of the elector's inability, still it would be a harsh construction to rule that they were guilty of conduct which should disfranchise the voter if they failed to require such oath when they well know he could neither read nor write. When it is remembered that our election judges are required to be chosen from the opposing political parties and our precincts are small, the opportunities for fraud in a voter thus assuming ignorance are so very slight that we can not believe the legislature could have intended to attach such a penalty for the simple act of aiding a voter to cast his ballot without requiring him to declare under oath what they already knew beforehand. Suppose an elector with both arms cut off, or afflicted with palsy, or blindness, presents himself, and asks to have his ballot prepared by the judges, are we to say that the judges must go through the empty form of administering the oath as to his physical disability? I think most clearly not. But in any event the mere failure of the officer to perform some prescribed duty, in the absence of any fraud or imposition practiced upon the voters, will not deprive him of his ballot unless the language of the statute allows no other alternative. We think the court correctly held the evidence inadmissible under the allegations of the notice in the

counter contest.

"V. Again it is urged that the court erred in not permitting the contestee to show that in the case of certain electors the Democratic judges went into the booths and assisted certain electors therein named. Section 4784, a part of which has already been copied, contains this proviso: 'Provided, however, that the provisions of this section shall not be construed to allow any judge or judges of any election to enter a booth for the purpose of assisting any elector in preparing his ballot. Such judges, after reading to the elector the contents of the ballot, shall, without leaving their respective positions, prepare such ballot as the elector may dictate.' Acts 1893, p. 164.

"Here again was a positive violation of the law. The judges had no right in the booths and yet there is no allegation that this misconduct was in furtherance of a design to unduly influence these electors, or that they were in fact imposed upon, or any advantage taken of them by the judges. The judges rendered themselves amenable for a violation of the law, but the question here is, shall this unlawful action of the judge disfranchise the illiterate voter for whose protection the statute made provision? Must he suffer because those designated by the law to instruct him violate the law? To so hold would establish a precedent which unscrupulous partisan officials might seize upon to nullify a perfectly fair and honest election. It is a sound distinction of the law which disfranchises a voter for his own failure to obey the plain and positive rules adopted to secure an honest expression of the will of the people, and that which refuses to punish him for the neglect or misconduct of an officer, over whose conduct he has no control, as to some provision which the legislature has not deemed of sufficient importance to declare a noncompliance therewith shall avoid the election or render a ballot illegal and void.

This objection can not, for these reasons, be sustained."

This statement shows that the section in question should be so construed as to preserve the right of a person to vote and not to deny him such right by rigid, arbitrary construction.

In the situation which you have presented, the election judge, by demanding that the prospective voter recite orally the names of the persons for whom he wished to vote, in effect deprived such person of his right to do so. Obviously this section was designed to aid a class of voters whose intelligence or faculties are limited. They are individuals who may easily be frightened by the proceedings at a polling place, particularly by an obviously hostile judge.

The statute does use the word "dictate" in speaking of the voter's indication of his choice, but we feel that to require this word to be given a strictly technical meaning in this section would be wholly contrary to the applicable rules of construction referred to above. In addition, the word "dictate" has been held to be synonymous with "direct". In re Hall's Estate, 51 N.Y.Supp. (2d) 375, 377, 183 Misc. 858. Certainly a request that the judge mark a ballot in accordance with a sample ballot presented by a voter is an adequate direction to the judge.

The courts of this state have not considered the effect of a judge's failure to comply with this section. Courts of other states have held that the duty imposed upon judges of election by a statute similar to this is mandatory. See Shaw v. Burnam, 186 Miss. 647, 191 So. 484. Section 4359, R. S. Mo. 1939, provides:

"If the judges and clerks of any election, or any of them, shall willfully neglect, refuse or omit to perform any duty enjoined or required of them by law with respect to holding and conducting such election, receiving and counting out the ballots and making proper return thereof, or shall inspect or read any ballot voted, or disclose the name or names of any of the candidates or persons voted for by any voters at such election, shall be deemed guilty of a misdemeanor."

We feel that the refusal on the part of an election judge to mark a ballot for an illiterate voter in the circumstances described by you amounts to a failure to perform a duty imposed

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upon him by law and is therefore a violation of the section just quoted. Such would seem to be particularly true in the case presented by you in which the judge refused to assist the voter, although he was advised by you as prosecuting attorney that he was required by law to do so.

CONCLUSION

Therefore, we are of the opinion that under Section 11606, R. S. Mo. 1939, upon the presentation by an illiterate voter of a marked sample ballot which the voter states indicates the manner in which he wishes to vote, the election judge is charged with the duty of marking the ballot for such voter according to such sample ballot, and that the failure of the judge to do so is a misdemeanor under Section 4359, R. S. Mo. 1939.

APPROVED:

Respectfully submitted,

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