

ELECTIONS: Parolees under Section 549.170, R.S. Mo. 1949, and persons discharged by certificate under Section 217.370, R.S. Mo. 1949, entitled to vote in Missouri.

January 25, 1951

Mr. John W. Oliver, Chairman
Board of Election Commissioners
County Court House
Kansas City 6, Missouri



Dear Mr. Oliver:

We are in receipt of your recent request for an official opinion on each of the following questions:

Question 1.

"Is a person qualified to vote in Missouri, who, in the absence of a pardon from the Governor, was under the age of 20 years when convicted of any crime in which reference is made in Section 4561, Mo. R.S. 1939, as revised in 1949?"

Section 4561, R.S. Mo. 1939 (Section 560.610, R.S. Mo. 1949) is worded as follows:

"Any person who shall be convicted of arson, burglary, robbery or grand larceny, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this chapter, shall be incompetent to serve as a juror in any cause, and shall be forever disqualified from voting at any election or holding any office of honor, trust or profit, within this state; provided, that the provisions of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years; provided further, that in all cases where persons have been convicted under this chapter the disqualification provided may be removed by the pardon of the governor at any time after one year from the date of conviction."

This statute excludes from voting at any election within the state persons convicted of certain crimes against property. It is provided, however, that the provisions of this law shall not apply to persons under twenty years of age at the time of conviction. This seems to answer your question. But another section of the law, the one defining voting

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qualifications, must be taken into consideration. This is Section 11469, R.S. Mo. 1939 (Section 111.060, R.S. Mo. 1949), which reads as follows:

"All citizens of the United States, including residents of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people. Each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides. No idiot, no insane person and no person while kept in any poorhouse at public expense or while confined in any public prison shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of a felony, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

This section makes no exception in favor of persons under twenty years of age. It prohibits from voting all persons convicted of a felony unless granted a full pardon. This means all felonies, including those embraced in Section 560.610. It seems, therefore, that these two sections are in some respects in conflict. For example, a person under twenty years of age convicted of grand larceny, without pardon, would be disqualified from voting under Section 111.060. But under Section 560.610 he would not be deprived of the right to vote.

When two statutes, dealing with the same subject, are inconsistent with each other, so that both cannot be applied, the latter act will be held as a substitute for the former one and will operate as a repeal of any portion of the former statute that may be in conflict with the latter enactment. This principle of law is sustained by the great weight of authority, *State ex rel Mo. Pac. Ry. Co. v. Pub. Serv. Comm.*, 275 Mo. 60, 204 S.W. 395; *Gasconade County v. Gordon*, 241 Mo. 569, 145 S.W. 1160; *Miners' Bank of Cartersville v. Clark*, 216 Mo. App. 130, 257 S.W. 139.

The proviso exempting persons convicted of felony under twenty years of age, incorporated in Section 560.610, was enacted in

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1899 (Laws of Mo. 1899, p. 165). The substance of Section 111.060 was enacted in 1879 (Section 5492, R.S. Mo. 1879). Section 560.610, therefore, is the latter enactment and holds validity over the former act insofar as the two are inconsistent.

CONCLUSION

A person being under twenty years of age when convicted of any crime to which reference is made in Section 560.610, R.S. Mo. 1949, without pardon from the governor, is not disqualified as a voter in Missouri.

Question 2.

"Is a person qualified to vote in Missouri, who, in the absence of a pardon from the Governor, was convicted of a felony or a misdemeanor connected with the exercise of the right of suffrage, but has received his final discharge under the provisions of Sections 4199 to 4211, inclusive, R.S. Mo. 1939?"

These sections, now incorporated in the Revised Statutes of Missouri, 1949, as Sections 549.060 to 549.180, provide judicial process for the release of persons convicted of crimes under the laws of the State of Missouri, giving the courts broad powers in matters of parole. Section 549.170 states that "Any person who shall receive his final discharge under the provisions of Sections 549.060 to 549.180, shall be restored to all the rights and privileges of citizenship."

The Constitution of Missouri, Article VIII, Section 2, gives all citizens over twentyone years of age, except those specifically excluded, the right to vote at all elections by the people. The right to vote, therefore, is a right or privilege of citizenship. Hence, it seems clear that any person who shall receive his final discharge under parole procedure should no longer be deprived of the right to vote.

Section 549.170, however, seems to be in conflict with Section 111.060, insofar as it provides a way in which a convicted person may be restored to the right to vote without having been granted a full pardon. But Section 549.170 was enacted in 1897 (Laws of Mo. 1897, p. 73), while Section 111.060 was incorporated in the Revised Statutes of Missouri, 1879, as Section 5492. Section 549.170, therefore, is the latter enactment and holds validity over the former act insofar as the two are inconsistent.

There is, moreover, a constitutional question involved. Some authorities hold that the parole system described above

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is an infringement upon the governor's pardoning power. They contend that the chief executive of the state is vested with exclusive authority to release persons convicted of crime, or to restore their rights of citizenship. The legislature, we are told, cannot invade the province of the governor by passing measures to establish parole authority and procedure. Neither can the courts take jurisdiction in such matters.

This doctrine is upheld in a decision handed down by the Supreme Court of Missouri in 1883. *State v. Grant*, 79 Mo. 113. In the course of that opinion the court said:

"I take it that when the statutes annex certain disabilities, the loss of certain civil rights, to the conviction of a crime, and a conviction of that crime thereafter occurs, that thereupon by force and operation of the law and of the judgment of conviction the disabilities become welded to the crime, forming thereby an indivisible integer incapable of separation by any exertion of legislative power. And this is especially true under a constitution such as ours. The position here taken is plainly this: That the pardoning power is vested by our constitution alone in the governor; that aside from the reversal of the judgment in a criminal cause, the only method of relief from the disabilities annexed to such judgment is by a full pardon of the offense, and that, while the crime itself remains unpardoned, the disabilities annexed thereto will remain unaltered and unaffected by any legislative act."

This opinion has never been followed as good law in Missouri. Under its injunction there could be no parole system in this state. There could be no release of convicts for good behavior during their terms of service. But as a matter of fact, the legislature has given us a great body of laws governing the authority and process of parole and the release of prisoners. And the courts by indirection have sustained these laws.

The contention that the governor's pardoning power gives him exclusive control over paroles, discharge of prisoners, restoration of citizenship, and other related subjects, is without foundation. Section 7, Article IV, Constitution of Missouri, 1945, reads as follows:

"The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole."

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It should be noted that this grant of power is by no means absolute. It does not include the power to parole. The function of parole, therefore, is not vested in the governor and may be established by legislative act. There is nothing in the Constitution to restrain the legislature from enacting laws for the purpose of rehabilitating and discharging convicted persons and prisoners and restoring their rights of citizenship. And the general assembly has full power to invest the courts and administrative bodies with proper authority to make these laws effective.

CONCLUSION

A person convicted of a felony or a misdemeanor connected with the exercise of the right of suffrage, having received his final discharge under the provisions of Sections 549.060 to 549.180, R.S. Mo. 1949, without pardon from the governor, is not disqualified as a voter in Missouri.

Question 1.

"Is a person qualified to vote in Missouri, who, in the absence of a pardon from the Governor, was convicted of a felony, but has received a certificate of discharge under the provisions of Section 9086, R.S. Mo. 1939?"

This section, now incorporated in the Revised Statutes of Missouri, 1949, as Section 217.370, reads as follows:

"Any convict who is now or may hereafter be confined in the penitentiary or the intermediate reformatory and who shall serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceable manner, without having any infraction of the rules of the institution or laws of the same recorded against such convict, shall be discharged in the same manner as if said convict had served the full time for which sentenced, and in such case no pardon from the governor shall be required; and in all cases of first conviction of felony the civil disabilities incurred thereby shall cease at the end of two years from such discharge under the three-fourths rule, and such convict shall thereupon be restored to all the rights of citizenship; provided, that he or she shall not have been indicted, informed against by the prosecuting or circuit attorney, or convicted of any other crime, during such period, and shall obtain a certificate to that effect from the board of probation and parole, whose duty it shall be, upon proper showing, to issue the same and keep a record thereof."

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This is known as the three-fourths rule and provides for the release of convicts on a record of good conduct without a pardon from the governor. It also opens the way, without pardon, for the restoration of all the rights of citizenship, including the right to vote.

This section, however, seems to be in conflict with Section 111.060, insofar as it provides a means by which a convict may be restored to the right to vote without having been granted a full pardon. But Section 217.370 was enacted in 1897 (Laws of Mo. 1897, p. 73), while Section 111.060 was incorporated in the Revised Statutes of Missouri, 1879, as Section 5492. Section 217.370, therefore, is the latter enactment and holds validity over the former act insofar as the two are inconsistent.

The constitutionality of this statute also may be challenged on the ground that it encroaches upon the governor's pardoning power. But such arguments cannot be sustained for the reasons given in our answer to Question 2. Moreover, the Supreme Court of Missouri in *State v. Austin*, 113, Mo. 538, 21 S.W. 31, stated that when a "convict was discharged under the three-fourths rule, no pardon from the governor was necessary." And other cases by indirection support the statute. *Ex parte Rody*, 348 Mo. 1, 152 S.W. 2d 657; *Ex parte Carney*, 343 Mo. 556, 122 S. W. 2d 888.

CONCLUSION

A person convicted of a felony for the first time, having received his discharge under the three-fourths rule provided in Section 217.370, R. S. Mo. 1949, having received his final certificate as proof of good behavior for two years after said discharge, and having thereupon been restored to all the rights of citizenship, without pardon from the governor, is not disqualified as a voter in Missouri.

Question 4.

"Does the term 'felony or misdemeanor connected with the exercise of the right of suffrage' include felonies and such misdemeanors defined under (1) the laws of the United States, or (2) under the laws of any other state?"

This is a reference to Section 111.060, R. S. Mo. 1949, supra, which provides that no person convicted of such crimes shall be permitted to vote unless granted a full pardon. The meaning of the terms in question is not clearly expressed in the text of the statute. No attempt is made, however, to confine such crimes to the laws of Missouri. Any such interpretation would work discrimination against the people of our own state. Evidently the legislature intended to include such crimes committed anywhere and under any jurisdiction. This meaning of the statute was sustained by the Supreme Court of Missouri in

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1943 in the case of State v. Sartorius, 175 S.W. 2d 787.

CONCLUSION

The terms "felony or misdemeanor connected with the exercise of the right of suffrage" include felonies and such misdemeanors defined under the laws of the United States or under the laws of any other state.

Question 5.

"If the above is answered affirmatively, does reference to 'a full pardon' relate to the pardoning power (1) under the United States, or (2) under the laws of any other state?"

This also is a reference to Section 111.060, R.S. No. 1949, in which "a full pardon" is required to restore the voting rights of a convicted person. By implication of the ruling in the case of State v. Sartorius, supra, it seems clear that the pardoning power of the jurisdiction in which the law is in force should apply in any case. The laws of the United States and of other states provide pardoning power and invariably the authority is vested in the chief executive.

CONCLUSION

The term "a full pardon" applies, not only to the laws of Missouri, but relates also to the pardoning power under the United States or under the laws of any other state.

Question 6.

"Does the conviction of a felony or of a misdemeanor connected with the exercise of the right of suffrage, after a full pardon for a prior similar conviction, forever exclude such person from voting?"

Section 111.060, supra, referring to a person previously found guilty, declares that "after a second conviction of felony or misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting." The wording of this statute is plain, and the meaning seems to be entirely clear. We fail to find any conflicting laws or contrary court decisions.

CONCLUSION

The second conviction of a felony or of a misdemeanor connected with the exercise of the right of suffrage excludes forever the person thus convicted from voting, even though he has received a full pardon for the prior similar offense.

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Question 7.

"Does the effect of conviction of a disfranchising crime continue after repeal of the law which declared the same to be a crime?"

The repeal of a criminal statute is not retroactive. It revokes the law but gives no relief to persons who have already violated it. This well-known principle is supported by the great weight of authority. *State v. Mathews*, 14 Mo. 101; *State v. Ross*, 49 Mo. 416; *State v. Walker*, 221 Mo. 511, 120 S.W. 1198.

CONCLUSION

The effect of conviction of a disfranchising crime continues after repeal of the law which declared the same to be a crime.

Question 8.

"When does a person become 21 years of age with reference to Section 11469, R.S. No. 1939?"

By accurate computation of time a person becomes twenty-one years of age on the twenty-first anniversary of his birth. But the law makes a peculiar exception to any such mathematical conclusion. "In determining when a person arrives at this age, most states have adopted the common-law rule that one is twenty-one years old on the day preceding the twenty-first anniversary of his birth." 18 Am. Jr. 215. This doctrine is clearly defined in *Erwin v. Benton*, 120 Ky. 536, 87 S.W. 291. The common-law rule seems to be the rule in Missouri.

CONCLUSION

A person becomes twenty-one years of age and eligible to vote in Missouri on the day preceding the twenty-first anniversary of his birth.

Question 9.

"What are the rules for determining when a person is an idiot or insane person?"

There is no distinction between persons of unsound mind, irresponsible person, idiots, or insane persons. In law these terms have the same meaning. But no definite set of rules has been formulated to define this meaning. There are many cases, however, bearing on the subject. *Heard v. Sack*, 81 Mo. 610; *Prentiss v. Ill. Life Ins. Co.*, 225 S.W. 695; *In re Crouse*, 140 Mo. App. 545, 120 S.W. 666; *Sampson v. Pierce*, 33 S.W. 2d 1039; *In re Bearden*, 86 S.W. 2d 585.

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CONCLUSION

An idiot or insane person is one whose mental condition reduces the individual to a total lack of understanding. To disqualify one from voting, there must be such mental impairment as to render the person incapable of understanding the ordinary affairs of life. A person whose mind is merely enfeebled by age should not be disqualified. Election officials should exercise discretion and caution when confronted with such questions.

It is our candid opinion that Sections 4210 and 9086, R.S. Mo. 1939 (Sections 549.170 and 217.370, R.S. Mo. 1949), are not unconstitutional and should be obeyed by administrative officers whose duties are involved. You are hereby advised to act in accordance with the conclusions herein made in answer to your questions.

Respectfully submitted,

E. A. TAYLOR
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APPROVED:

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