1347.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND THE SOUTHWESTERN PORTLAND CEMENT COMPANY OF OSBORNE, OHIO, FOR CONSTRUCTION OF A SWITCH TRACK AT GRADE ACROSS INTER-COUNTY HIGHWAY NO. 525, GREENE COUNTY, OHIO.

COLUMBUS, OHIO, December 12, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date enclosing for my approval a proposed agreement between the State of Ohio, acting by and through G. F. Schlesinger, as Director of Highways and Public Works, and The Southwestern Portland Cement Company of Osborne, Ohio. This agreement grants a license to said company to lay a switch track at grade across Inter-County Highway No. 525, in Greene County, Ohio.

I have carefully examined the provisions of said contract and find that the same conforms to the requirements heretofore laid down by this department as to a contract of a similar nature.

I have reference to Opinion No. 78 addressed to the Director of Highways and Public Works on the 12th day of February, 1927, in which it was held:

> "1. The Department of Highways and Public Works may consent to the construction of a switch track across an inter-county highway or main market road upon such terms and conditions as will protect the interests of the traveling public.
>
> 2. In consenting to the placing of structures upon an inter-county highway or main market road, the Department of Highways and Public Works cannot bargain away its right to have such structures removed whenever, in the exercise of reasonable judgment, such structures become obstructions in the use by the traveling public of such road."

Finding that said contract properly protects the interests of the state in that it merely grants a license to lay said tracks in said highway, which is revocable at will, and is in all other respects in proper legal form, I am hereby approving the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1348.

ELECTIONS—STATUTORY PROVISION FIXING TIME FOR OPENING AND CLOSING POLLS, DIRECTORY, NOT MANDATORY—ELECTOR MAY VOTE WHEN WITHIN POLLING PLACE AT CLOSING TIME.

SYLLABUS:

The statutory provision fixing the time for opening and closing the polls on election day is directory and not mandatory. A duly qualified elector who presents himself or herself at the polling place and who is within the polling place at the hour for

closing the polls is entitled to vote even though the ballot should not be received by the voter at the hour of closing the polls.

COLUMBUS, OHIO, December 12, 1927.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion as follows:

> "We are enclosing herewith communication from Harrington, DeFord, Huxley & Smith for your consideration.
>
> The matter at issue it seems to us is of such great importance, in the absence of statutory provision directly controlling and in view of the fact that there appears to be no appeal from the decision of the probate court, as to warrant your opinion. As we understand the practice in Ohio, all electors who are within the polling places at the closing hour are permitted to cast their ballots. If the opinion of the probate judge in this case is to be regarded as the law in Ohio then many electors throughout the state will lose their vote under like circumstances."

Accompanying your letter, and to which you refer, is one from the law firm of Harrington, DeFord, Huxley & Smith, as follows:

> "By reason of the fact that you are State Supervisor of Elections, we wish to acquaint you with a situation which has arisen in Trumbull County and which will result in a wrong which is difficult of remedying, if not altogether hopeless of correction, by reason of the fact that our Supreme Court has held that neither error, appeal or quo warranto lies from the contest of a disputed election of the mayor of a village.
>
> At the recent November municipal election in the village of McDonald, Trumbull County, Ohio, there were six ballots being voted upon, one of which was the local municipal ballot covering the offices of mayor, clerk, treasurer and councilmen. One Roy Zellers had a majority of six votes for mayor over his competitor William Emmerling, the former having received two hundred forty-two (242) votes and the latter two hundred thirty-six (236) votes.
>
> The election of Roy Zellers was contested in the probate court, pursuant to the provisions of Section 5162, General Code, et seq., and three freeholders were selected to try the contest. At the trial of this contest it developed that at 6:15 P. M. the local McDonald election officials ran short of township ballots and upon instructions from the county board, proceeded to prepare some unofficial ballots. This required approximately three or four minutes in preparing each ballot so that when 6:30 P. M. arrived there were forty-two qualified voters within the polling place who had been waiting in line since approximately 5:15 P. M. for a chance to vote. At the hour of 6:30, the presiding judge locked the doors of the polling place, called off the voting temporarily and attempted to get into communication by telephone with the county board. It seems that at 6:50 this was accomplished and the presiding judge was advised by the county clerk, Mr. Dewey McVicar, that such electors could not vote. They, however, remained within the polling rooms until about 7:15, when they were conducted out of the rear door and their names taken by the presiding judge.
>
> After argument of counsel and before the case was submitted to the jury of free-holders, Probate Judge Joseph Smith charged the jury as shown on

the copy of the charge enclosed herewith, from which you will note that they were charged that unless the voter had a ballot in his hands by 6:30 he had lost the right to vote. As this was practically our entire case, the charge was in effect a directing of the jury to find in favor of the validity of the election and this they did at once.

We filed a motion for a new trial and a rehearing, which was argued November 30th and there is no doubt that the court will overrule and refuse the same, as he still contends that it is a matter of discretion with the county election board as to whether or not electors who are already within the polling place at 6:30 are to be allowed the right to vote. There is therefore nothing that can be done in the situation in view of the holding of *Pach* vs. *Goff*, 24 O. C. C. (n. s.) 561, which is cited in 23 Appellate 420 (155 N. E. 698), as affirmed by our Supreme Court 115 O. S. 588 (154 N. E. 810).

We have made an extensive search of the law but have failed to find any authority on the point that an elector once within the polling place by 6:30 is entitled to cast his ballot. The injustice of the present situation is readily apparent for the record shows that most of these forty-two electors had been waiting for a right to vote since 5:15 at least or had been in the polling place since 5:30; that the delay was not occasioned through any fault on their part but solely through the failure of the county election board to provide enough township ballots fo the village of McDonald whereby the election was slowed up and the right to vote terminated at 6:30 P. M. Especially is this unfortunate in view of the fact that the probate judge was really the person who tried the case and not the jury in view of his charge to the effect that 6:30 put an end to the election regardless of the fact that forty-two electors had been in the polling place for some time standing in line and waiting for the opportunity to vote.

We are wondering if we cannot have a ruling from your department upon this question or an opinion from the Attorney General upon request from your department, to submit to the probate judge as a last effort of securing a rehearing or new trial in this matter and so provide for relief in a situation which otherwise seems impossible under our present election laws. The McDonald election was certainly not the free will and expression of the people when forty-two qualified electors were denied the right to vote at a municipal election where the candidate about to be certified secured only a majority of six votes over his competitor.

We trust that the above information is sufficient to acquaint you with the situation and the need of some ruling or intervention by your department to at least prevent such a happening in the future. The Deputy State Supervisors and Inspectors of Election of Mahoning County have a ruling as follows:

'All voters in the polling place or in line within the 100 foot limit at 5:30 P. M. are allowed to cast their ballots, but nobody may be admitted after that hour.'

In citing this ruling to Probate Judge Smith he was very much surprised to think that any election board would violate the statutes and he further stated that he had never heard of any such ruling, all of which comes down to the fact that this case was tried by the court alone, who imposed his own opinion as to what the law is upon the jury of three freeholders."

Accompanying your letter is a typewritten copy of the charge of the court to the jury, evidently meaning the three freeholders designated in the statute to try the election contest. From this charge, the following language is taken:

"Upon the proposition whether or not an elector has a legal right to vote after entering the booth and before a request that the ballot be handed to him, if the time passes by and the hour of 6:30 is gone by and he has not been presented the ballot, I would say to you gentlemen he has lost his right to vote even though he be in the election precinct, because the statute says at that hour the election shall stop, it shall cease and his being present there and being deprived—unless they are being deprived by some undue indiscretion, some abuse on the part of the election officers depriving him of his right—but if the officers are going forward and exercising their right, performing their duty honestly and faithfully without fraud and simply time alone is the element, the clock stops the work, the citizen has no right to complain. Twelve hours there for us all; all have a right to vote any time we can. If we put it off to the last moment, we lose the right. In other words, as I see the question it is this: that to declare void and defeat that election held in the village of McDonald on that day there must have been some abuse on the part of the Deputy Supervisors of Election in this county or in the village of McDonald by which their rights were deprived them."

Section 5162, General Code, is as follows:

"Within ten days after the day of the election, any candidate or elector of the township may contest the election of a justice of the peace. Such candidate or elector must notify the probate judge of the county of such intention, specifying the points on which the contest shall be based. The probate judge shall give notice thereof to the person whose election is contested, stating the name of the contestor, the points on which he relies, and citing him or them to appear at his office on a day not more than fifteen days from the day of the election, but allowing such person five days' notice of the contest."

You say in your letter, "If the opinion of the probate judge in this case is to be regarded as the law in Ohio, then many electors throughout the state will lose their vote under like circumstances." In the letter accompanying yours to this office, it is stated, among other things:

"We are wondering if we cannot have a ruling from your department upon this question or an opinion from the Attorney General upon request from your department, to submit to the probate judge as a last effort of securing a rehearing or new trial in this matter and so provide for relief in a situation which otherwise seems impossible under our present election laws. The McDonald election was certainly not the free will and expression of the people when forty-two qualified electors were denied the right to vote at a municipal election where the candidate about to be certified secured only a majority of six votes over his competitor."

Let it be understood in the first instance that I am rendering you this opinion as your legal adviser and not with any thought of acting as a reviewing court in any manner whatever to the regularly constituted tribunal designated in the statute for trying contests of elections.

In the case of *Bach* vs. *Goff*, 24 O. C. C. (n. s.) 561, it is said:

"In a proceeding to contest the election of a mayor, which by the provisions of G. C. Section 5169 is to be contested in accordance with the provisions of this section to G. C. Section 5168, which govern proceedings to con-

test the election of a justice of the peace, it seems that the decision of the probate judge and the three freeholders is final, and is not reviewable on error; since they constitute a special tribunal for the trial of a contested election, and no specific provision is made for the judicial review of such proceedings."

Section 5165, General Code, provides how the contest shall be tried, as follows:

"On the same day that he issues the notice to the person whose election is contested, the probate judge shall issue summons to three freeholders of the county, not resident in such township, to appear on a day specified therein and try the contest. The summons shall be directed to the sheriff or a constable of the county and shall be served at least three days before the time appointed for the trial, and return thereof made at the time and place of the trial."

Section 5163, General Code, provides that:

"The jury of freeholders shall be sworn to try the contest on the evidence. No evidence shall be admitted which does not relate to the points set forth in the notice. When the trial is closed, the freeholders shall sign their decision, which shall be attested by the probate judge. * * * "

Section 5169, General Code, provides:

"The election of any municipal officer, except a member of the council, may be contested in the manner hereinbefore provided for contesting the election of justices of the peace, * * * ."

In the case of *State ex rel.* vs. *Wright,* 56 O. S. 540, it was held:

"A mayor of a municipal corporation who has been regularly elected to the office, is entitled to serve until his successor is qualified; and while he continues to so serve on account of a failure to elect his successor, there is no vacancy in the office, nor is the council authorized to make an appointment thereto."

On page 556 the court in announcing its decision said:

"Ordinarily, the trial and decision of a contested election case between two persons who were rival candidates for the same office, involves the hearing and determination of all questions, within the specified points of contest which affect the rights of the respective parties to the office in controversy, and necessarily a determination of those rights. It may be, in certain cases, that for lack of compliance with the law, *no valid election has been held;* or, that when the election has been purged of frauds and mistakes neither party has received the votes necessary to his election; and in either case, *the contest ends in simply setting aside the election.*"

In the case of In Re Contest of the Special Election at village of Chagrin Falls, 91 O. S. 308, the syllabus is as follows:

"The provision of the statute fixing the time for opening and closing the polls at an election is directory and not mandatory. (*Fry* vs. *Booth,* 19 Ohio St. 25, approved and followed.)

An election will not be invalidated by reason of the fact that the election officers, instead of closing the polls at 5:30 P. M. as directed by statute, kept the same open until 6:00 o'clock P. M., where there was no fraud or collusion and where there were not illegal votes cast after the time fixed by statute for closing sufficient to change the result of the election."

It was the contention of counsel for the contestant in that case that if after the legal time for closing the polls enough votes were cast to make different the result of the election from that result as computed from the votes cast at the hour the polls should have been closed according to law, then the election was void. It was alleged in the petition that had the polls been closed at 5:30 P. M., the result of the election would have been different.

On page 313, the court in its opinion said:

"Was the purpose of this election—the securing of a fair and honest expression of the will of the electors as to whether intoxicating liquors should be sold as a beverage in the village—interfered with? From aught that appears in the petition every elector in the village voted. No one was deprived of his vote. No illegal vote was cast. There was no impediment or obstruction to a fair expression of the will of the electors.

In *Fry* vs. *Booth,* supra, where the polls were closed 'for the hour spent at dinner,' the court says that a departure from a strict observance of the provisions of the statute as to keeping open the polls does not necessarily invalidate the election where it appears that no fraud has been practiced and no substantial right violated.

Where the polls closed at a time earlier than that fixed by law and qualified voters were thereby prevented from voting, and it could be shown that the result of the election would have been materially changed had the polls been kept open up to the time fixed by law, then it might be said that there was in interference with the free and full expression of the majority. But **keeping open the polls after the time fixed by law** and permitting no one to vote except qualified voters does not have that effect.

The failure of the election officers to observe this directory provision of the statute did not render the votes of qualified electors cast after the time fixed by law illegal. Those cast after the time fixed by law were as expressive of the will of the electors as those cast before.

It not appearing in the petition that there was fraud, or that illegal votes were cast after the time fixed by law for closing the polls, or that any substantial right was violated, or that there was any interference with a fair and honest expression of the will of the electors, a cause of action is not stated. The probate court was correct in sustaining the demurrer, and the judgment of the court of appeals is therefore reversed and that of the common pleas affirmed."

I desire to call your attention also to the provisions of Section 5042, General Code, governing the question of extra ballots. It provides:

"If no ballots have been delivered at a polling place before the opening of the polls, or if during the time the polls remain open extra ballots shall be required, the board of deputy state supervisors, upon a requisition in writing, signed by a majority of the election judges of such precinct, wherein the reason for demanding such ballots shall be given, shall supply them as

speedily as possible, and, if necessary, extra ballots may be printed for this purpose. Extra ballots so printed shall conform as nearly as possible to the original ballots and the printing and care of them shall be under the same provisions and penalties as the printing and care of other ballots. If neither the official ballots nor extra ballots so prepared are ready for distribution at any polling place, or if the supply of ballots is exhausted before the polls are closed, unofficial ballots may be used, so that no elector for lack of a ballot shall be deprived of his franchise."

The purpose of a popular election is to ascertain the will of the electors as to a given proposition submitted to them, or as to who shall serve them as officers. It is to obtain a fair and honest expression of the will of the electors. Where a substantial right is violated, there is not such a fair and honest expression of the will of the electors. In view of the fact that the one candidate had received only six votes for mayor more than his competitor, and that there were forty-two qualified electors within the polling place who had been waiting in line for more than an hour seeking a change to vote prior to 6:30 Eastern Standard time, it is my opinion that substantial rights were violated. It is true there is no showing as to how the forty-two voters would have voted. They might have all voted in favor of the one who had the majority of six votes on the face of the returns. They might have all voted in opposition to said candidate. But the fact remains that they were deprived of an opportunity to cast their vote. It is to be presumed that the votes of these forty-two qualified electors would be as expressive of the will of the electors as those that were cast before.

It is therefore my opinion that all qualified electors who were within the polling place at the time of closing the polls, even though they may not have had the ballots in their hands when the polls were declared closed, were entitled to receive and cast their ballots at the election.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1349.

MAGISTRATE—SECURITY FOR PAYMENT OF COSTS—MAY TAKE CHATTELS—EXECUTION AFTER FAILURE OF SECURITY.

SYLLABUS:

1. *Magistrate is authorized to take either chattels or choses in action, including a mortgage, as security for the payment of a fine and costs. In case of default of payment of fine, mayor has right to sell chattels and foreclose mortgage.*

2. *Where security for fine and costs fails, execution may be levied upon the property of the defendant, or, in default thereof, upon the body of the defendant.*

COLUMBUS, OHIO, December 12, 1927.

HON. EARL D. PARKER, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter which reads in part as follows:

"First: In 1923 the Mayor of the Village of Waverly, Pike County Ohio, upon a plea of 'Guilty,' imposed a fine of five hundred ($500.00) dollars.