NOTES

STATE EX REL MURPHY V. LANDWEHR[1]

This decision is upon a petition for a writ of prohibition growing out of attempted prosecutions for fraudulent returns by election officers at the primary election held in St. Louis in August, 1920. The Grand Jury, under instructions of the court, were investigating the alleged fraudulent returns, and the Circuit Attorney had applied to Judge Landwehr for a *subpoena duces tecum* against the Board of Election Commissioners to produce before the Grand Jury the following: "The ballot boxes, ballots and the official returns and statements made by the judges and clerks of election to the Board of Election Commissioners, used and made in and in connection with the primary election held in the City of St. Louis, Missouri, on the 3rd day of August, 1920, in the 24th Precinct of the 27th Ward."

The point of the decision is that inasmuch as the judges and clerks in this particular precinct, according to a stipulation filed by counsel in the case, had signed the following certificate appearing at the end of the poll books, namely, "It is hereby certified that the number of voters voting at this election amounts to..... Number of votes rejected..... Why rejected..... Given under our hands and seals this.....day of August, 1920," that the *subpoena duces tecum* required the Election Commissioners to return under this subpoena the poll books as well as the ballot boxes, ballots and official returns and statements. This because the court held that the words "official returns and statements" made by the judges and clerks of election included the above quoted certificate. The court's argument then was that this certificate, being a part of the poll book, could not be detached

1. 234 S. W. 656. Mo. Supreme Court.

without defacing the poll book, and therefore the poll book would have had to have been produced under the order, and with the poll books and ballots, before they, the Grand Jury, could have ascertained how each voter in this precinct voted, something which the court had, in the prior case of State Ex rel. Feinstein,[2] decided could not be permitted.

This latest decision of the Supreme Court seems to be open to this criticism: The primary election law nowhere provides that the judges and clerks shall sign any such certificate as is referred to in the stipulation filed in this case, although there is such requirement in the law applicable to general elections. The only provision of the primary law applicable to St. Louis is Section 5007, which is as follows:

"The precinct judges and clerks of election shall immediately after the canvass of the ballot cast, on blanks to be provided for that purpose by the Election Commissioners, make full and accurate returns of the votes cast for each candidate to the Board of Election Commissioners."

It is not quite clear how any importance can be attached to the fact that the judges and clerks saw fit to sign a certificate which the law does not require. The real question was what would the Board of Election Commissioners be expected to produce under the call for "the official returns and statements made by the judges and clerks of election." The obvious answer is such official return and statement as the law provided should be made. It does not even appear that the Board of Election Commissioners knew that this certificate had been signed. But if they had, they also knew that it was not a statement and return required by law, the statute showing clearly what the statement and return was to contain. The certificate is not even designated as a statement and return. It is unreasonable to suppose that the trial judge intended or the Board of Election Commissioners could have supposed that under this *subpoena duces tecum* they were called upon to produce a document which not only was not a statement or re-

2. 231 S. W. 982.

turn within the language of the statute, but was not even designated as such, and moreover was not required by the law. And this is especially so when we remember that in the prior case of State *Ex rel,* v. Hartmann, the Supreme Court had distinctly held that the poll books could not be used if the ballots were also before the Grand Jury.

It is unfortunate that the Supreme Court did not settle this matter by saying that while the language of the subpoena seemed broad enough to include this certificate, that it could not be supposed that the trial court intended to do what the court in the Hartman case held could not be done, and that the Supreme Court would express the opinion that the subpoena must not be construed as including the certificate. It is manifest that if the court had done that, the Election Commissioners would not have produced the poll books, nor the trial court permitted their production.

There seems to be no reason why the Circuit Attorney cannot proceed with the Grand Jury investigation and, if necessary, ask for a subpoena calling for the ballot boxes, ballots, statements and returns of judges and clerks of election, excepting, however, any certificate, statement or return contained therein or attached to any poll book.

It may be well worth while to consider whether the act of July 29, 1921 (Laws of Missouri 1921, Extra Session, p. 68), will not apply to the investigation of frauds committed at the August, 1920, primary, so as to enable the court now to issue a *subpoena duces tecum* for all the books and papers provided by the new act, namely, "Primary election ballots, ballot boxes, poll books, the tally sheets and other returns from any election precinct."

In this connection, the following cases may be read with interest, and perhaps, profit:

Ex parte Bethurum, 66 Mo. 545; State v. Johnson, 81 Mo. 60; O'Brien v. Allen, 108 Mo. 227; Cooley's Constitutional Limitations, 7th Ed., p. 381.

H. G.