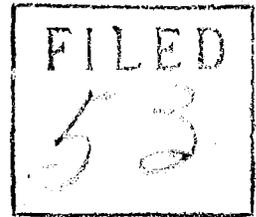


ELECTIONS: Failure to hold township elections on the date as provided by statute does not permit the holding of an election on a subsequent date not provided by law. The present incumbent officers continue to hold office and discharge their duties thereunder until their successors are duly elected or appointed and qualified.

April 24, 1947



Honorable Clinton Lindley
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Sir:

This is in reply to your letter dated March 29, 1947, in which you requested an opinion relative to the problem involved when a certain township fails or neglects to hold an election as provided for in Section 13944, R.S. Mo. 1939. Said letter reads as follows:

"In my official capacity as Prosecuting Attorney of Vernon County, Missouri, I would like an opinion from your office on the following set of facts:

"In Vernon County, Missouri, a County under Township organization, the Township Officials of Washington Township failed or neglected to provide for facilities for the Township election on March 25, 1947, and consequently no election was held or officers elected.

"The question has arisen as to what procedure should be taken for the election or appointment of new officers.

"Will you please advise me of your opinion as to the proper procedure?"

Section 13944, R.S. Mo. 1939, provides for township elections in all counties which have adopted township organization law, and reads as follows:

"The citizens of the several townships in all counties having adopted the township organization law of this state, who are qualified by the Constitution and

laws of this state to vote at general elections, shall assemble biennially on the last Tuesday in March at their usual place of voting, or at such place in their respective townships as they may have previously agreed upon, for the purpose of electing township officers and such other officers and transacting such other business as may be necessary."

It is to be noted then that the time when the township election in your case should have been held, in accordance with the statute, was on March 25, 1947. The township officials having failed or neglected to hold such election at that time, what consequences naturally follow?

The Legislature, in Article 4, Chapter 101, R.S. Mo. 1939, has provided for and set out how township elections are to be held. By so doing, the Legislature has delegated certain authority and imposed specific duties on those officials entrusted with ordering, calling and conducting an election. Therefore, by such specific delegated authority having been granted to these public officials by the Legislature, we feel that the following statement from 43 Am. Jur., page 68, is applicable: "In general, the powers and duties of officers are prescribed by the constitution or by statute, or both, and they are measured by the terms and necessary implication of the grant, and must be executed in the manner directed and by the officer specified. If broader powers are desirable, they must be conferred by the proper authority. * * *" Section 13944, R.S. Mo. 1939, supra, says that the citizens of the township, qualified to vote, "shall assemble biennially on the last Tuesday in March at their usual place of voting, or at such place in their respective townships as they may have previously agreed upon, for the purpose of electing township officers * * *." In State ex rel. Stevens v. Wurdeman, 295 Mo. 566, the court said at l.c. 586:

"* * * The statute says the defendant 'shall be entitled to be discharged' save in the two excepted situations, supra. Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute. * * * *"

Applying the above to the instant case, we find that by Article 4, Chapter 101, R.S. Mo. 1939, there is a specific provision for the election to be held, and to be held on a certain day; and there is

enumerated the various officials and their duties in carrying through the election at this designated time. We feel that such a statute in this case is subject to a mandatory construction as regards the time for holding the election.

The case of *The State ex rel. McHenry v. Jenkins*, 43 Mo. 261, involved the question of dispute as to who was entitled to the office of clerk of the county. The incumbent had been elected in 1864 for four years. The office had been declared vacant by an ordinance of 1865, and the present incumbent had been appointed for the remainder of the term. There was a failure to hold the election in 1866 as provided in the Constitution, and there was an attempt to remedy this by holding one in 1868. The court said at l.c. 265:

"In relation to relator's second claim, that the omission to hold an election in 1866 can be supplied by one in 1868, we can only say that it is a valid one if the law provides for any such election. But he has failed to show us any such provision, and it would be difficult to give legal validity to a volunteer election. No election can be had unless provided for by law. As the law makes no provision for the election of clerks in 1868, such election is wholly void and of no effect. This position has never been questioned. In *The State v. Robinson*, 1 Kansas, 17, a question was raised as to the validity of an election for governor, and it was held that the election under consideration was not provided for by law, that the person elected could not take the chair, and that the previous governor should hold over until the next general election. No case has been known where a volunteer election has been held valid, even though the term of the incumbent had expired."
(Underscoring ours.)

Applying this holding to our instant case, we find that there is no law providing for an election at any time other than "biennially on the last Tuesday in March."

The court, in the *Jenkins* case, supra, said at l.c. 265:

"But, as there was no such election, is there a vacancy? Or if not, who is the present

clerk? By the terms of the act creating the Kansas City Common Pleas, as well as by the constitutional provision, the clerk shall hold his term until the election and qualification of his successor. Thus there is no vacancy, and Mr. Vincent holds over."

Section 12, Article VII of the 1945 Constitution provides:

"Tenure of Office.--Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

In State ex rel. v. Brown and Barnett, 220 Mo. App. 468, the court said at l.c. 471:

"The law is well settled that where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. (State ex rel. Lusk, 18 Mo. 333; State ex rel. Stevenson v. Smith, 87 Mo. 158.) It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. (State ex rel. Robinson v. Thompson, 38 Mo. 192; State ex rel. v. Ranson, 73 Mo. 597.)"

Section 13962, R. S. Mo. 1939, reads as follows:

"Whenever any township shall fail to elect the proper number of officers to which such township may be entitled, or when any person elected or appointed shall fail to qualify, or when any vacancy shall happen in any township office from any cause, it shall be lawful for the township board to fill such vacancy by appointment, and the person so appointed shall hold the office and discharge

all the duties of the same during such unexpired term, and until his successor is elected or appointed and qualified, and shall be subject to the same penalties as if they had been duly elected: Provided, that any vacancy in the office of Justice of the peace or in the township board shall be filled by appointment of the county court."

This provision, however, cannot be directly applicable to the case as you present it, since there is at the present, according to the cases above quoted, no vacancies in any of the township offices, including the township board. As we observed in the Brown and Barnett case, supra, until the public officer's "successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy."

CONCLUSION

It is, therefore, the opinion of this department that in the case as presented by your letter where there is a failure to hold the election on the day provided for by statute, and where there is no provision for holding a substituted or subsequent election, the present incumbent officers continue to hold office and discharge their duties thereunder until their successors are duly elected or appointed and qualified. Such time as their successors might be elected would be at the next election, as provided for in Section 13944, R.S. Mo. 1939; and such time as their successors might be appointed would be in case a vacancy exists and appointment is made as provided for in Section 13962, R.S. Mo. 1939.

Respectfully submitted,

Wm. C. COCKRILL
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WCC:LR