

ELECTIONS:

JUSTICES OF THE PEACE:

TERMS:

) Justices of the Peace who are appointed to
) fill a vacancy hold office until the next
) general election for county officers and
Justices of the Peace, which is on each
quadrennial period after November 1882.

December 1, 1938

Hon. M. Ralph Walsh
Prosecuting Attorney
St. Louis County
Clayton, Missouri

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Dear Sir:

We have a letter from Mr. Philip A. Foley, Attorney at Law, Clayton, Missouri, requesting an opinion on a certain statement of facts, and requesting that we direct this letter to you. It appears from his letter that Mr. Ryan, who is the justice of the peace interested in this question, brought your letter to this office and we are therefore sending this opinion to you. The statement upon which the request is based is as follows:

"On July 15, 1935, the County Court of St. Louis County entered an order subdividing Central Township into three Townships, viz., Normandy, Clayton and Jefferson Townships. (The action of the Court was held valid by the Supreme Court in the case of State ex rel. Tegethoff, 89 S.W. (2d) p. 667).

"There were three Justices of the Peace already elected in Central Township prior to the time of its subdivision and under the provisions of Section 2150 R.S. Mo. 1929, such Justices rightfully continued to act, because it so happened that they fell into the new Townships. This left only one Justice to be appointed by the County Court in each of the respective Townships.

"The County Court did, on the 31st day of July, 1935, appoint an additional Justice for the respective Townships. One James

Ryan was appointed Justice of the Peace of Jefferson Township, St. Louis County, was duly qualified and commissioned. At the next general election of County officers, which was in November 1936, Ryan was duly elected to succeed himself, qualified, and was given a commission for four years which would expire in 1940, or until his successor was duly qualified.

"In August 1938, the Election Board declared that they were going to put his office of Justice of the Peace for Jefferson Township on the ballot in the primary and also at the general election of 1938, in spite of the fact that Ryan was elected in 1936 and commissioned for four years. He filed for said office, was nominated in the primary, and defeated by his Republican opponent in the general election of November, 1938."

When Central Township in St. Louis County was subdivided and offices of justices of the peace were created for each of the subdivisions of said township, there was a vacancy in each of these offices formed by such subdivision.

In State ex rel. vs. Boecker, 56 Mo. l. c. 21, on the question of the creation of a vacancy when an office is created, the Court said:

"There is no technical nor peculiar meaning to the word 'vacant,' as used in the Constitution. It means empty, unoccupied, as applied to an office without an incumbent. * * * An existing office without an incumbent is vacant, whether it be a new or an old one."

In Words & Phrases, Volume 8, p. 7261, a vacancy is defined as follows:

"It has been held that a 'vacancy' may exist when an office is created and no one has been appointed to fill it; and it has been said an existing office without an incumbent is vacant, whether it be a new or an old one."

Pursuant to the formation of the new justices of the peace districts in St. Louis County the County Court appointed Mr. Ryan as a justice of the peace to fill one of these vacancies. Under Section 2150 R.S. Missouri 1929, the justices of the peace in the township before it was subdivided continued in office until their commissions expired. Section 2150 provides as follows:

"When a township shall be divided, and any justice of the peace of the original township shall fall into the new township, he shall continue to discharge the duties of justice of the peace until his commission expires as if the township had not been divided."

Therefore, their term did not expire until the November election 1938, because they were elected under the statute which provides for justices of the peace to be elected in 1882 and every four years thereafter. The County Court by virtue of the provisions of Section 2140 R.S. Missouri 1929, appointed Mr. Ryan to fill the vacancy in the office caused by the creation of the office on account of the subdivision of Central Township. Section 2140 R.S. Missouri 1929, provides as follows:

"When a vacancy occurs in the office of justice of the peace, the county court of the county in which such vacancy occurs may supply the same by the appointment of

some person competent and qualified, who shall hold his office until the next general election of county officers, and until his successor is elected, commissioned and qualified."

This section provides that such appointee shall hold the office until the next general election of county officers and until his successor is elected, commissioned and qualified. The next general election after Ryan's appointment was in 1936. At that election he was elected and was commissioned by the County Court for a term of four years pursuant to Section 2144 R.S. Missouri 1929, which is as follows:

"Justices of the peace are to be commissioned by the county court, and shall hold their offices for four years, and until their successors are elected and qualified.

Section 2138 R.S. Missouri 1929, which was Section 2807 of the 1879 statutes, is as follows:

"Justices of the peace, as herein provided for, shall be elected at the general election to be held in eighteen hundred and eighty-two, and shall hold their offices for four years, or until their successors are elected, commissioned and qualified; but every justice of the peace now in office shall continue to act as such until the expiration of his commission, and until his successor is elected and qualified."

From a comparison of Sections 2144, 2138 and 2140, there seems to be a conflict in the provisions of these sections. However, under the general rule of construction these statutes should be construed so as to give effect to all of them if possible. Mr. Ryan claims that because he was elected at the General Election in 1936 and commissioned by the County Court for a term of four years that the election in November of 1938 to fill this office was a nullity. The Legislature in 1935, Laws of Missouri 1935, at page 210, amended Section 2136 which applies to justices of the peace, by adding a new section thereto known as Section 2136a. This section is as follows:

"In all municipal townships which have been divided, or may hereafter be divided, into justice of the peace districts and in which the boundary of the municipal township is or may be extended beyond the boundaries of said justice of the peace districts, the county court of the county in which said township is or may be located is authorized and empowered to appoint and commission not to exceed two additional justices of the peace for such township when, in the opinion of said county court, there is need for such justices of the peace, who may maintain their offices at any convenient place in said township and who shall take the same oath and have the same duties, qualification and jurisdiction as other justices of the peace of such township. The justices of the peace first appointed under this section of the statute shall hold office till the general election day in 1938, and all other justices of the peace thereafter appointed hereunder shall hold office for a term of four years: Provided that said office shall terminate at any time the aforesaid justice of the peace districts are extended so as to include all of the territory of such township. Each justice of the peace appointed under this act shall have authority to appoint a constable who may appoint not to exceed three deputies, which constable and deputies shall hold office at the pleasure of the appointing justice of the peace, and shall take the same oath and possess the same qualification, and have the same duties and authority and give the same bonds as other constables and deputies in said township. Said justices of the peace and constables shall, in lieu of salary, be

allowed the same fees for services as is provided for justices of the peace and constables in Section 11777 and 11779 respectively of Article 2, Chapter 84, Revised Statutes of Missouri 1929. All acts or parts of acts in conflict herewith, to the extent of such conflict, are hereby repealed."

Shortly after this section was enacted Central Township was subdivided and it seems that it was by virtue of the provisions of this section that the township was subdivided. It will be noted from a reading of this amended law that the law-makers had in mind the provisions of Section 2138 R.S. Missouri 1929, as to when the election of the new justices of peace would be held, for in this amended law it is provided that the justice appointed should hold until the November election 1938, which was the time provided by Section 2138 R.S. Missouri 1929 for election of justices of the peace. The Supreme Court of Missouri in a number of cases has had Section 2138 under consideration. In State ex inf. vs. Smith, 152 Mo. 512, 518, the Court in speaking of the opinion in State ex rel. vs. McCann, said:

"In McCann's case, 81 Mo. 479, Mullery was appointed in 1879 to fill a vacancy, for an unexpired term ending in 1882, and until his successor was elected and qualified. Upon the theory that an appointee to the office of justice of the peace could only hold until the next regular election, McCann was elected to the office at the regular election in 1880; Mullery refused to surrender the office, McCann attempted to exercise the functions of the office. On quo warranto, McCann was ousted, and it was held that a person appointed to fill a vacancy in the office of justice of the peace, held title until the next regular time for electing justices of the peace, so as to secure uniformity of tenure, and that an election at any other time was invalid and therefore conferred no title upon the person elected."

And at l. c. 521 of the said Smith case, the Court further said:

"Inasmuch as the Act of 1891 provided that there should be an election for justice of the peace, in St. Louis, at the regular election of 1894 'and every four years thereafter,' and inasmuch as there was in legal intendment no election held in the fourth district in St. Louis for justice of the peace in 1898, there has been no successor yet elected for Haughton, and as the purpose of the lawmakers is that there shall be uniformity in the time of electing all justices of the peace, and as there is no special statute covering cases like this, it follows that there can be no legal election held to elect a successor for Haughton until the regular election in the year 1902, and that he has a right to continue to hold the office of justice of the peace for the fourth district, in the city of St. Louis, until a successor is elected at that time, and thereafter duly qualifies, by virtue of his appointment until his successor is duly elected and qualified."

In speaking of the latter clause of Section 2138, formerly Section 2807 R.S. Missouri 1929, the Court in State ex rel. Harvey vs. Manning, 84 Mo. l. c. 663, said:

"The latter clause of section 2807 applied to an existing state of things, and has ceased to be operative having accomplished all it was designed to effect. It continued in office justices of the peace who had been elected or appointed under the former law, until the election required by the first clause of the section, in 1882. It can have no application to any justice of the peace elected in 1882, or appointed subsequently."

In Mr. Foley's statement he indicates that the entire section 2138, formerly 2807, was passed to clear up a deplorable condition existing at the time of its passage. From a reading of the reported cases on this section we think that his statement would only apply to the latter clause of said section and we are justified in this view by the case of State ex rel. Harvey vs. Manning, supra.

In State ex rel. vs. Powles, 136 Mo. 376, the Court in speaking of the terms of justices of the peace elected in this state, at l. c. 381, said:

"As has been seen, the term of office of justices of the peace in this state is four years. They are elected quadrennially at the general election for county officers and have been so elected ever since 1882. The first general election for county officers and justices of the peace occurring after the appointment of the respondent, by the county court, was in November, 1890, at which a successor to the respondent might have been elected, upon whose qualification the term of the respondent would have ceased. But it seems that no successor was chosen at that election, and as the respondent, under his appointment by the county court, was authorized to hold and exercise the functions of said office not only until the next general election of county officers, but until his 'successor was elected, commissioned and qualified,' he thereafter continued lawfully the incumbent of said office and authorized to exercise the functions thereof until a successor for him should be chosen at the next general election for county officers, and justices of the peace in November, 1894. State ex rel. vs. Ranson, 73 Mo. 78."

The 1935 Act which authorized the division of Central Township is very plain on this question and it states that the first appointed justices of the peace shall hold their offices until the General Election Day in November, 1938. The Constitution provides that they shall hold their office until their successor is elected and qualified.

CONCLUSION

From the foregoing authorities we are of the opinion that the election and commissioning of the justices of the peace for a term of four years, in 1936, was a nullity and that Mr. Ryan, by virtue of his appointment at the time that Central Township was subdivided, was authorized to hold his office until the General election day in 1938, at which time his successor should be elected, commissioned and qualified for a term of four years. If no successor was elected in November, 1938, then he would remain in office until a successor is elected and qualified.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED

J. E. TAYLOR
(Acting) Attorney General

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