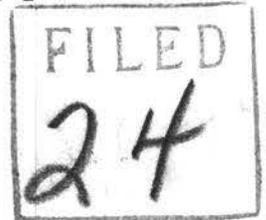


ELECTIONS: In re terms of senators elected to fill vacancies caused by resignation of State Senators.

July 10, 1942



Honorable Forrest C. Donnell  
Governor of Missouri  
Capitol Building  
Jefferson City, Missouri

Dear Governor Donnell:

This is in reply to yours of the 8th, wherein you submitted two questions to this department, as follows:

"(a) What will be the term of office of the person who shall be elected on Tuesday, August 4, 1942, to supply the above mentioned vacancy in the membership in the First Senatorial District of the State of Missouri?"

"(b) What will be the term of office of the person who shall be elected on Tuesday, August 4, 1942, to supply the above mentioned vacancy in the membership in the Twenty-sixth Senatorial District of the State of Missouri?"

Under Section 5 of Article IV of the Constitution of Missouri, Senators are elected for a period of four years. This section also provides that the State be divided into convenient senatorial districts.

Section 10 of said Article IV, provides as follows:

"The first election of Senators and Representatives, under this Constitution, shall be held at the general

election in the year one thousand eight hundred and seventy-six, when the whole number of Representatives, and the Senators from the districts having odd numbers, who shall compose the first class, shall be chosen; and in one thousand eight hundred and seventy-eight, the Senators from the districts having even numbers, who shall compose the second class, and so on at each succeeding general election, half the Senators provided for by this Constitution shall be chosen."

By this section the odd numbered senatorial districts will elect senators at the General Election in 1944. Also by this section the even numbered senatorial districts will elect senators in 1942.

As you state in your letter, writs of election have been issued by you to two senatorial districts, numbered 1 and 26. These writs were issued under the provisions of Section 14 of Article IV of the Constitution, which is as follows:

"Writs of election to fill such vacancies as may occur in either house of the General Assembly shall be issued by the Governor."

We think the answer to your inquiry will depend upon the meaning of the word "vacancies" in said Section 14. In other words, does it mean a vacancy in the office or a vacancy in the term. Our Supreme Court, in *State ex Inf. Hadley v. Corcoran*, 103 S. W. 1044, 1049, 206 Mo. 1, held that the word "vacancy" at common law means a vacancy in office and not in the term. But it also held in this case that the word "vacancy" when used in written Constitutions with reference to a public office sometimes signifies an unexpired term. *Words and Phrases*, Permanent Edition, Vol. 43, page 610.

Reviewing the Corcoran case, supra, the court, at l. c. 19 of Missouri Reports, quoted from an Oregon case as follows:

"In this country, where written constitutions prevail, the great majority of public officers are elective, having a fixed term, for a prescribed number of years, with varying provisions as to filling vacancies. The term of an office is said to be a fixed period prescribed for holding the office (People ex rel. v. Brundage, 78 N. Y. 407) and is the estate or interest which the incumbent has in it. (a Bla. Com. 144.) When a vacancy happens by death, resignation, or removal, the term is gone, and the office reverts, as at common law, not to the king, but to the people, to be again filled, upon like conditions, for the full term prescribed, unless by express provision or manifest intent the Constitution has limited or restricted the term of the new incumbent. Whether, therefore, the vacancy is in the office as at common law, and reverts to the people to fill for the full term prescribed; or, so to speak, the vacancy is in the term, and limited to filling for the unexpired portion thereof, is made to depend upon the intent of the framers as expressed in the Constitution. But when the Constitution fixes a definite term of office, as for six years, without any limitation or reference whatever to unexpired terms, when a vacancy occurs, the common law acceptance, meaning a vacancy in office, must be received and applied in the construction, and, when filled, the incumbent is vested with a full term of six years."

The principles announced in the Oregon case were followed by the court in the Corcoran case, supra, as quoted above. Apply-

ing the principles announced in this case and referring to the aforesaid Constitutional provisions, it will be seen that the framers of the Constitution have fixed a four year term for State Senators and they fixed the time when this term begins and when it ends. We think that by doing so the vacancy referred to in said Section 14 is a vacancy in the term and not in the office.

In the case of State ex rel. Brown v. Spitz, 127 Mo. 248, at l. c. 252, the court said:

"The distinction to be found in the multitude of cases to be found on the question of filling vacancies seems to be this: Those cases which hold that one elected to fill an office which has become vacant takes for a full term are based either upon constitutional or statutory provisions which provide only for the length or duration which the incumbent may hold the office, whereas in every instance, so far as our research goes, in which the constitution or statute definitely and certainly prescribes not only the duration of the term but a fixed time for its beginning and ending, the holding has been that the incumbent's right to the office, whether he was elected to serve the whole term or to fill a vacancy therein, terminates with the fixed time prescribed for the ending of said term.\* \* \* \* \*"

Applying the foregoing rule here the term of the person who is elected at the special election by virtue of the writ of election would end at the time fixed by the Constitution for the expiration of same.

In the case of State ex rel. McHenry v. Jenkins, 43 Mo. 261, an election to fill a vacancy at a time other than that prescribed by statute was considered. At l. c. 265, the court, in speaking of the validity of such an election, said:

"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. \* \* \* \* \*

Our Constitution makes provision for the election of senators in certain years. It makes no provision for the election of such senators in any other years, except in case of a vacancy. Following the principle announced in the Jenkins case, supra, an election, except a special election, of a senator in any year other than the year prescribed by said Article IV, Section 10 of the Constitution, would be void and of no effect.

Our attention has been called to State ex rel. Asotsky v. Hicks, 346 Mo. 640, and especially to the provisions of Laws of Missouri of 1873, page 43, Section 1, which is as follows:

"1. In all cases of vacancy in any office, the length of the term of which is over two years, the vacancy shall be filled by the election of some person to the office at the first general election after such office becomes vacant."

The court, in the Asotsky case, held that that section was still in full force and effect even though it had not been carried down by the revisors. However, we do not think this

July 10, 1963

section is applicable here, because it is in conflict with the special election section of the Constitution providing for special elections to fill vacancies in the office of State Senators; and also because it is in conflict with the provisions of Section 10 of said Article IV of the Constitution, which fixes the time for election of senators. In support of this statement, in the case of *Gilkeson v. Mo. Pac. Ry. Co.*, 121 S. W. 138, 222 Mo. 173, the court, in effect, held that the construction of a statute which brings it in conflict with the Constitution will nullify it as effectually as if it had in the first instance been enacted in conflict therewith.

#### CONCLUSION

Following the principles hereinbefore announced, it is the opinion of this department that the vacancy in the office of State Senator in the two districts referred to in your request are vacancies in the term. That being the case the vacancy which will be filled by the special election in Senatorial District No. 1 is for the term ending in 1944, and the vacancy which will be filled by the special election in Senatorial District No. 26 is for the term ending in 1942.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney-General

APPROVED:

---

VANE C. THURLO

(Acting) Attorney-General

TWB:CP