

ELECTIONS:
SPECIAL, FOR STATE
REPRESENTATIVES AND
SENATOR:

Governor can set election dates in election writs and cannot amend or supplement them. If sheriffs change dates set, an irregularity is created, but House of Representatives and Senate respectively may affirm results of elections.

October 17, 1942



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

Dear Sir:

Your request of October 16, 1942, for an opinion upon the following is acknowledged:

"The Governor has issued writs of election to fill the following vacancies:

- (a) 13th Senatorial District
- (b) Representative from Ralls County
- (c) Representative from Third Representative District of Jasper County

"The writ of election for (a) and the writ of election for (b) each directs that the election be held on October 28, 1942, and the writ of election for (c) directs that the election be held on October 27, 1942.

"QUESTIONS:

"1. May the election in (a), (b) and (c) be legally held on November 3, 1942, instead of on the dates designated in the writs, provided the sheriff in (a), (b) and (c) changes the date for the election in (a), (b) and (c)?

"2. May the Governor legally by an amendment of each of the above mentioned writs, or by withdrawing the original writs and the issuance of new writs, direct that each of the abovementioned elections be held on November 3, 1942?"

Inasmuch as the system of elections in the United States is not of common law origin but is entirely statutory, and the exercise of the right of suffrage is controlled solely by constitutional and legislative provisions, the questions submitted depend upon certain statutes and constitutional provisions of Missouri. 18 American Jurisprudence, Sec. 2, p. 179; Taylor v. Buckham, 178 U. S. 548, 44 L. Ed. 1187; State ex rel. Ellis v. Brown, 33 S. W. (2d) 204, 1. c. 107; State ex rel. Edwards v. Ellison, 196 S. W. 751, 271 Mo. 123.

"The system of elections in the United States is not of common law origin. The subject is entirely statutory, and the exercise of the right of suffrage is in all states regulated by constitutional and statutory provisions. These provisions vary widely in the different states, and it has been a common occurrence that as a result of statutory changes, different systems and rules have at different times prevailed within the same state. * * * * "

18 American Jurisprudence,
Sec. 2, page 179.

In State ex rel. Ellis v. Brown, 33 S. W. (2d) 104, 1. c. 107, 326 Mo. 627, the following is stated:

" * * * It is true that the right of suffrage is not a natural or inherent right, if there be any such, but is purely conventional. It is not, however, conferred by the Legislature but by the organic law. As no privilege is granted by the statute in question, the rule of construction invoked is without application."

Section 14 of Article IV of the Constitution of Missouri provides:

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

Section 17 of Article IV of the Constitution of Missouri is, in part, as follows:

"Each house shall appoint its own officers; shall be sole judge of the qualifications, election and returns of its own members; * * * *"

Section 12859, R. S. Missouri, 1939, is as follows:

"Whenever the governor shall receive any resignation or notice of vacancy, or when he shall be satisfied of the death of any member of either house, during the recess, he shall, without delay, issue a writ of election to supply such vacancy."

Section 12860, R. S. Missouri, 1939, is as follows:

"When any vacancy shall happen in the senate, for a district composed of more than one county, the writ of election shall be directed to the sheriff of the county first named in the law establishing the district; and when such vacancy shall happen in a senatorial district, which shall have been divided or altered after the general election next preceding the occurrence of such vacancy, the writ of election shall be directed to the sheriff of the county first named in such old district; and when any vacancy shall happen in either house, for any county which shall have been divided after the general election next preceding the occurrence of such vacancy, the writ of election shall be directed to the sheriff of the old county."

Section 12861, R. S. Missouri, 1939, is as follows:

"The sheriff to whom any writ of election shall be delivered shall cause the election to supply such vacancy to be held within the limits composing the county or district at the time of the next preceding general election, and shall issue his proclamation or notice for holding the election accordingly, and transmit a copy thereof, together with a copy of the writ, to the sheriff of each of the counties within which any part of such old county or district may lie, who shall cause copies

of such notice to be put up, and the election to be held accordingly, in such parts of their respective counties as composed a part of the old county or district for which the election is to be held, at the last preceding general election; and the returns shall be made and the certificate of election granted in all things as if no division had taken place."

It appears that each of the writs of election heretofore issued to fill the designated vacancies set the election day, while the statute, Section 11492, supra, clearly provides that the Governor shall mention in the writ how many days' notice the sheriff shall give of the special election, not less than ten. Section 12861, supra, provides that the sheriff, upon receipt of a writ of election, shall call the election to supply such vacancy, and shall issue his proclamation or notice for holding the election accordingly, and that notices shall be posted. These provisions are upon the same subject-matter, to-wit, special elections to fill vacancies in the General Assembly, and should be read together and harmonized. In re Rosing's Estate, 85 S. W. (2d) 495, 337 Mo. 544; State v. Mangiaracina, 125 S. W. (2d) 58, 344 Mo. 99; State ex rel. Henning v. Williams, 131 S. W. (2d) 561, 345 Mo. 22; State v. Gomer, 101 S. W. (2d) 57, 340 Mo. 107; State ex rel. Central Surety Ins. Co. v. Commission, 153 S. W. (2d) 43.

No statutory or constitutional provision, in express terms, authorizes the Governor to set the day of the elections.

Section 14 of Article IV of the Missouri Constitution is similar, in effect, to Article I, Section 2, Clause 4, of the United States Constitution, and decisions arrived at under the Federal constitutional provision are persuasive here. It will be noticed, by a comparison of the State and Federal constitutional provisions, that the phrase "writs of election to fill such vacancies" appears in each of the constitutions.

In 20 C. J., Sec. 86, page 101, the following is stated:

"Under another provision that, when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies, the power carries with it the power to fix the time and place of holding such elections, where they have not been fixed by law. The time of such an election is a matter of executive discretion with which the courts will not interfere."

In the case of John Hoge, Clarke & Hall Contested Election Cases, H. of R., page 135, the Governor of the State of Pennsylvania issued a writ of election on October 22, 1804, to supply a vacancy in the House of Representatives. The election was directed to be held on November 2, 1804, and the sheriff did not proclaim the election until October 31. Mr. Hoge received the most votes at the election, and when his seat was contested, the following was ruled:

"Where the Legislature of a State have failed to 'prescribe the times, places, and manner' of holding elections, as required by the constitution, the Governor may, in case of a vacancy, in his writ of election give notice of the time and place of election; but a reasonable time ought to be allowed for the promulgation of the notice. In this case the notice was short, (in effect only two days,) yet as the time prescribed was a day fixed for a general election, to wit, of electors for President and Vice President, it was held to be sufficient."

Watson's treatise on "Constitution of the United States", page 199-200, states:

"Where the legislature of a State fails to prescribe by law the time of an election to fill a vacancy in Congress, the Governor may fix the time in his writ of election.
* * * * "

Thus, it appears that the Governor, having been given the right to issue the writs of election, has the implied authority to fix the date of the elections in the writs.

The contention may be advanced that, inasmuch as the Governor is directed to issue writs of election, and may fix the date of such elections therein, he may later change the election dates by additional or supplemental writs of election, and on the theory that he has control of the writs. This contention in all probability would be supported by an argument that the writs are similar to a judicial writ, which is always under the control of the court that issued it until the writ is completely executed.

Such an argument would apparently be unsound, by virtue of the decision of the Supreme Court of Missouri in the case of State ex rel. Attorney General v. Seay, 64 Mo. 89, l. c. 98, in which it was ruled:

" * * * that provision of the constitution that 'the governor, upon being satisfied that a vacancy exists, shall issue a writ of election, etc.,' confers no judicial authority, but merely for convenience, authorizes him to determine that question, because the public service might suffer if a vacancy could not be filled until after a judicial investigation be had. * * *"

The Supreme Court of Illinois in the case of People ex rel. Dever v. Sweitzer, 314 Ill. 330, 145 N. E. 648, had before it an action in mandamus to compel a county clerk to print notices of the election in conformity with a writ of election issued by the Governor to fill a vacancy in the office of Judge of the Superior Court. The vacancy was occasioned by the resignation of a judge as of December 5, 1923. The writ recited the vacancy by reason of the resignation of the judge on December 5, 1924, and called a special election for November 4, 1924. The clerk refused to take cognizance of the writ upon the ground that it was void because an election could not be held to fill a vacancy where the vacancy did not exist. The Governor then issued a second writ, which was endorsed "Writ of election to correct typewriter error in date of resignation in original". The court held, l. c. 650:

"* * * The issuance of the second writ was but a correction of the first, and does not constitute the issuance of a new writ. That it merely corrected the first writ to speak the truth is not controverted, as it nowhere appears that Judge McDonald did not, in fact, resign on December 5, 1923."

It is to be noted, however, that two judges dissented upon the ground that the first writ was ineffective and the second writ was wholly void.

It is apparent that, inasmuch as the decision is based upon the theory that the second writ was not in reality a writ of election but a correction of the first as to a mistake of fact, that court would not have held good a second writ which would have amounted to a change in substance. Undoubtedly the change of the day of election by a second writ would be a change in substance. It is to be borne in mind that the statute of Illinois required the Governor to set the election day in his writ, and that there is no statutory or constitutional provision in Missouri that authorizes the Governor to issue a second or amended writ of election.

A review of the history of the various enactments in this State with reference to special elections discloses that under the Territorial Laws of 1814, in issuing writs of election to fill vacancies in the Territory's representation in Congress, the Governor fixed a day certain for the election in the writ of election, and directed the sheriff of the county to order an election, which was to be conducted as general elections were conducted. The language of the Constitution of 1820 was the same as that which now appears in Section 14 of Article IV, quoted above.

In 1822, by "An Act regulating elections", the General Assembly provided:

"5. The governor of this state when he issues a writ of election, to fill any vacancy that may happen, which vacancy is to be filled by an election of the people, shall mention in said writ how many days notice the sheriff of the county or district shall give of said election."

The General Assembly in 1822 did not carry forward provisions similar to those in the Territorial Act of 1814, and subsequent legislation has not supplied like provisions. In 1855 the language had been changed to that now contained in Section 11492, R. S. Missouri, 1939, except that the number of days was five. In 1879 this had been changed to ten days, as it is now.

When the Governor issues a writ of election to fill a vacancy, as he does not act judicially, he apparently is in an analogous position with a trustee who exercises his powers and cannot later exercise further authority in the matter. Once the writ of election is issued, the Governor's authority evidently ceases and his duties are completed. This being true, the Governor may not issue a supplemental or amended writ of election for the same

vacancy. He is but perhaps a conduit conveying an authorization to the sheriff to proclaim an election, and his authority ceases when the sheriff receives the writ.

Since we have ruled that the Governor has the authority to fix the date of the special elections in the writs of election, and since the writs of election have been issued for dates other than November 3, 1942, it is the opinion of this department that the sheriffs would not be authorized to change the dates for holding those elections.

Our research of the authorities would indicate that the sheriffs should follow the writs of election as to the date upon which the elections are to be held. It is to be noted, however, that no punishment is provided in the event the sheriffs do not do so; neither is there any statutory or constitutional provision which would tend to destroy the effect of the elections if they were held on dates other than specified in the writs.

We are dealing here with special elections for members of the House of Representatives and State Senate. By virtue of Section 17 of Article IV of our Constitution, those bodies are the sole judges of the qualifications, election and returns of their own members. Those respective bodies, namely, the House of Representatives and the Senate, might affirm, as is their right, the results of the elections even though they were held on different dates than named in the writs, and based upon the following rule:

"The authorities sustain the proposition that where an election held by a municipal corporation 'Clearly expresses the will of the voters, the courts are disinclined to set it aside because of a departure from a statutory provision as to the time of holding it even if this be regarded as mandatory; and so if it does not appear that the holding of an election on a day different from

the day fixed by law was induced by any corrupt or fraudulent motives, that it was the result purely of mistake and no one was prevented from voting thereby, the court may in the exercise of its discretion refuse to consider an attack upon its validity.' 9 R. C. L. p. 998, sec. 19; 20 C. J. 101, 102, sec. 87; State ex rel. v. Tolan, 33 N. J. Law 195."

Rainwater v. State, 187 So. 484,
121 A.L.R. 981, l.c. 985.

See, also, People ex rel. Comerford v. Miller, 314 Ill. 474, 145 N. E. 685.

CONCLUSION

It is, therefore, concluded that if the sheriffs to whom the writs of election are directed would change the dates of the elections specified in such writs to November 3, 1942, after giving the required days' notice prior to said November 3rd, an irregularity would result, but if the elections were regular in all other respects, then the House of Representatives and Senate respectively might properly affirm the results of such elections, as those bodies, by the Constitution of Missouri, are made the sole judges of the qualifications, election and returns of their respective members.

It is further the conclusion of this department that the Governor, having issued writs of election for special elections to fill vacancies in the House of Representatives and the Senate, may not amend such writs

Hon. Forrest C. Donnell

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or issue new writs and thereby change the date of the election designated in each of such writs.

Respectfully submitted

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