

ELECTIONS: Time of calling of special
COUNTY COURTS: election, upon proper presentation
COURTHOUSE AND JAIL BONDS: of petition, vested in the County
Court.

December 29, 1945



Honorable Llyn Bradford
Prosecuting Attorney
Phelps County
Rolla, Missouri

Dear Sir:

Your letter of November 26th, 1945, requesting an opinion from this department, reads as follows:

"Recently, a group of citizens of Phelps County, taxpayers, and in all other respects qualified under the statute as petitioners, submitted a petition to the County Court, asking for a special election to be held in this County, for the purpose of letting the people vote on a proposed bonded indebtedness in the sum of \$400,000, for the construction of a new Court House and County Jail. The statute requires such petition to be signed by at least 100 taxpaying citizens of this County, and there were nearly 400 that signed this petition. The petition specifically asked the County Court to order a special election, but notwithstanding that fact, the County Court made an order for such election to be held at the next Primary Election date in August, 1946. * * * One member of the County Court, together with a number of the petitioners, have requested that I obtain from you an opinion as to the validity of the order of County Court in delaying the election until the next Primary. * * * I would appreciate your views on this question. * * * * *"

The applicable part of Section 3292, R. S. Mo. 1939, dealing with the calling of special elections to determine whether an indebtedness for the construction of a courthouse and jail, appears as follows:

"Whenever it may become necessary for any county in this state to incur an indebtedness in excess of the income and revenue provided for in one year, for the purpose of building a court house or jail, or for the purpose of repairing or rebuilding a court house or jail partially destroyed by fire, earthquake, storm or in any other manner, or to establish in any city or village in any county a public county hospital wherein persons other than the indigent infirm may be treated, it shall be lawful for any number not less than one hundred of the qualified voters of such county who are taxpayers therein to present to the county court of such county a petition in writing setting forth the object and purpose for which the indebtedness is desired to be incurred, and whether it is desired to issue bonds in evidence of such indebtedness, or to pay the same in a given number of years, to be stated in the petition, by the direct levy of taxes at a rate over and above the amount limited in section 11 of article 10 of the Constitution of the state of Missouri, and asking that an election be held to authorize the incurring of such indebtedness or the levying of such taxes. Upon the presentation of such petition it shall be the duty of the county court of such county at any term thereof to order that an election be held for the purpose set forth in the petition, which order shall, among other things, specify the time, place and purpose of the election. Such an election may be a special election.

or it may be held on the day of any primary or general election authorized to be held by the laws of this state: * * * * *"

(Emphasis ours.)

Historically, provisions similar to the above section, 3292, originated in the Laws of Missouri 1879, pages 193 and 194, pars. 2 and 3, later appearing in Sections 852 and 853, R. S. Mo. 1889.

Section 852, R. S. Mo. 1889, provided in part as follows:

"* * * Upon the presentation of such petition it shall be the duty of the county court of such county, at a regular term thereof, to order a special election for the purpose set forth in the petition. * * * * *"

Section 853, R. S. Mo. 1889, in part contained this proviso:

"Provided, that such election may be held at the same time of holding the general election for state and county officers. * * * * *"

The above quoted parts of Sections 852 and 853, R. S. Mo. 1889, continued in our Missouri laws until their revision in the Laws of Missouri 1919, page 172, and Laws of Missouri 1921, page 162, wherein the provisions as set forth in Sections 852 and 853, supra, were combined as they appear today in Section 3292, R. S. Mo. 1939, and the same provision as contained in Section 3292, supra, provides that:

"* * * Upon the presentation of such petition it shall be the duty of the county court of such county at any term thereof to order that an election

be held for the purpose set forth in the petition, which order shall, among other things, specify the time, place and purpose of the election. Such an election may be a special election, or it may be held on the day of any primary or general election authorized to be held by the laws of this state: * * * * *

In the case of State ex rel. Witmer, et al. v. Conrad, et al., 147 Mo. 654, l. c. 660, the Supreme Court of Missouri, in a mandamus action to compel the county court to call a special election on the proposition to incur an indebtedness to build a jail, in construing the duty of a county court to call such special election, held as follows:

"Though it is true as asserted in appellants' first contention, that the time for calling an election as provided for under section 852, supra, is vested in the county court, it by no means follows that because the petitioners designate a time within which they desire an election to be held as prayed for in their petition filed with the county court (for such election), the county court could make that an excuse for failing to order an election that otherwise should have been ordered.

"That request or suggestion in relators' petition neither served to divest the county court of its authority to fix the time when the election should be held, nor did it furnish a legal justification for the court's action in absolutely refusing to call an election, made imperative by said action when the requisite number of qualified voters and taxpayers petition for same. It is not the suggestion of the petition without the range of the statute, but the request and prayer thereof within the compass of the law, upon which the court must make its final order.

"The petition could not have been so framed as to have taken from the county court their discretion as to when the election should be held, nor to have relieved the court from the duty of ordering an election, if the petition stated the requisite jurisdictional facts, and was signed by the requisite number of petitioners.

"Nor does the right in the judges of the county court to fix and name the time for the calling of an election under section 852, supra, imply the right to refuse arbitrarily to fix or name any date whatever, and thus by refusal defeat an election, that should have been called.

"That discretion is purely ministerial, and when the jurisdictional facts in the petition have been set out and made to appear, and upon which the court has exercised its judicial functions, it can not withhold the exercise of a ministerial discretion to defeat its judicial finding."

In the above case the Section 852 referred to is Section 852 of the Revised Statutes of 1889, which we have quoted above in the body of this opinion, and it was plainly held that the discretion as to when the election should be held is vested in the county court. The court further held that the section did not imply the right of the court to refuse arbitrarily to fix or name any date whatever, and thus by refusal to defeat the purpose of the section.

However, it must be realized that the Legislature has purposely given this discretion to the county courts and the reason for the discretion may have been based upon the fact that, during certain seasons of the year, especially in rural sections, weather conditions, or other conditions that the court may recognize, might prevent a large number of the qualified voters from participating in the special election. Also, the county's financial condition, of which

the county court necessarily has superior knowledge, might make it advisable to hold the special bond election at the same time as a primary or general election in order that the court may keep the costs of elections within the amounts set out in their budget.

CONCLUSION

Therefore, it is the opinion of this department that the County Court is acting within its powers when, upon proper presentation of a petition, to call a special election to vote upon a proposed bonded indebtedness for the construction of a new courthouse and county jail, it orders such election to be held at the next primary election date.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AVO:CP