

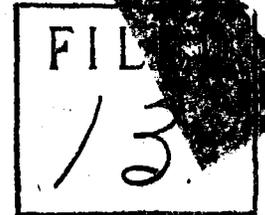
ELECTIONS:

of Excelsior Springs must hold a primary election before holding a special election.

BOND ISSUES:

a vacancy in the city council. The city may the proposition of issuing revenue bonds to a municipally owned light plant at the same time the special election is held to fill the vacancy in the city council.

May 23, 1946



Honorable L. Madison Bywaters
Prosecuting Attorney
Clay County
Liberty, Missouri

6/3

Dear Mr. Bywaters:

This will acknowledge receipt of your letter of recent date, requesting an opinion of this department on the following questions:

"1. In a city operating under the city manager form of government is it necessary in a special election called to fill a vacancy on the city council to have a primary election.

"2. At the time of the special election for the purpose of filling a vacancy on the council is it legally possible for such a city to also submit to the voters a proposition to vote revenue bonds for the purpose of acquiring a municipally owned electric light plant."

For convenience, we are discussing question one in a separate Part One of this opinion, and question two in Part Two of this opinion.

Part One

We think question one of your letter is answered by an examination of the following sections of the Revised Statutes of Missouri, 1939. These sections are found in Art. VIII, Chap. 38 of the Revised Statutes of Mo. 1939, dealing with elections held in third class cities having the city manager form of government.

Section 7081, R. S. Mo. 1939, providing for the city council in such cities, provides in part as follows:

"* * *Should a vacancy occur in the office of councilmen by death, resignation or otherwise, a special election shall be

called by the council in proper form for the purpose of filling the vacancy, * * *"

Section 7082, R. S. Mo. 1939, provides in part as follows:

"(1) Candidates to be voted for at all general and special municipal elections at which the officers are to be elected under the provisions of this article, shall be nominated by a primary election, and no other names shall be placed upon the general ballot except those nominated as hereinafter prescribed. * * *"

Section 7082, R. S. Mo. 1939, specifically provides that candidates to be voted for at "all general and special municipal elections at which the officers are to be elected under the provisions of this article" are to be nominated in a primary election. The election to fill a vacancy in the council is a special election under the provisions of Art. VIII, Chap. 38, Revised Statutes of Mo. 1939, made so by that part of Section 7081 above quoted. The language of these sections is clear and unambiguous, and in our opinion, requires that the city conduct a primary election before holding a special election to fill a vacancy in the city council.

Part Two

The constitutional and statutory provisions pertinent to the discussion of question two of your letter are set out below.

Article VI, Section 27, of the Constitution of 1945, provides as follows:

"Any city or incorporated town or village in this state, by vote of four-sevenths of the qualified electors thereof voting thereon, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any revenue producing water, gas or electric light works, heating or power plants, or airports, to be owned exclusively by the municipality, the cost of operation and maintenance and the principal and interest of the bonds to be payable solely from the revenues derived by the

municipality from the operation of such utility."

In the very recent case of State ex rel City of Fulton v. Forrest Smith, State Auditor, decided at the January, 1946, call of the September Term of the Supreme Court of Missouri, and not yet reported, it was held the above Constitutional provision is self-executing, that it needed no legislation to make it effective and, further, that revenue bonds voted pursuant to said constitutional provision were properly authorized in an election under Sections 7368--72 R. S. Mo. 1939. These sections are reenacted by House Bill 689 with the same provisions relative to the questions arising here, State ex rel City of Fulton v. Forrest Smith is final, there having been filed no motion for rehearing.

Section 7369, page 4, House Bill 689, provides in part as follows:

"For the purpose of testing the sense of the voters of any incorporated city, town, or village, whether organized under the general laws of this state or by special charter or by constitutional charter, upon a proposition to incur debt as authorized in the preceding sections, the council, board of aldermen or trustees, as the case may be, shall order an election to be held of which they shall give notice signed by the city clerk. * * *"

Section 7081, R. S. Mo. 1939, provides in part as follows:

"* * * Should a vacancy occur in the office of councilmen by death, resignation or otherwise, a special election shall be called by the council in proper form for the purpose of filling the vacancy, * * *"

The first legal proposition raised by question two is whether the holding of the special election to fill a vacancy on the council at the same time that an election is held to vote on the proposition of acquiring a municipally owned electric light plant is prohibited by any constitutional provision. The only pertinent constitutional provision is Section 27 of Art. VI, which is quoted above in this opinion. That section provides only that the city may issue bonds when such action has been approved "by vote of four-sevenths of the qualified electors thereof voting thereon". Thus, all that is required by the constitution is that a vote be had on the proposition, and that a certain portion of the qualified

electors voting on the proposition assent to the action. We find nothing in this constitutional provision which, in any way, prohibits the holding of another election at the same time that the bond proposition is voted upon. As a matter of fact, the cases hold that the holding of a special election on the same day as a primary or general election complies with constitutional provisions requiring an election on a special proposition "to be held for that purpose", meaning the purpose for which the special election is being held. *Morgan v. City of Los Angeles*, (1920 Cal.) 187 P. 1050; *Fox v. Seattle* (1906 Wash.) 86 P. 379; *City and County of San Francisco v. Collins* (1932 Cal.) 13 P. (2d) 912; *American Smelting and Refining Co. v. Tacoma* (1942 Wash.) 129 P. (2d) 531. The same type of provision was contained in Art. X, Sec. 12, Constitution of 1875. The new constitution changes this provision by leaving out the words "to be held for that purpose." If such elections meet the test under a provision similar to that of the Constitution of 1875, they would, in our opinion, satisfy the requirements of the Constitution of 1945. It has also been held that such elections met the constitutional requirements where the constitution required merely that an election be held. *Furste v. Gray* (1931 Ken.) 42 S. W. (2d) 889. This in effect is what is provided in the present constitution.

The second legal proposition raised is whether the holding of the two elections at the same time are prohibited by the statutory provisions above set out. If they are not, then it would appear that they could be held at the same time, since the procedure for holding each is specifically set out in the statutes, and all that is necessary is that said procedure be complied with in each case.

Strictly speaking, there are two parts of the second legal issue. One is whether the statutes relating to the voting of the bonds prevent the bond election from being held in connection with another election and two, whether the statutes regarding the election to fill the vacancy prohibits that election being held in connection with another election.

We have found no Missouri cases dealing directly with either of these points, but the language and holdings of some Missouri cases seems to indicate what would be the attitude of the Missouri court on these questions.

In *State ex rel. City of Memphis v. Hackman*, 273 Mo. 670, the Supreme Court of Missouri, in a case dealing with an election in a city of the fourth class for the purpose of voting a bond issue to acquire a municipal light plant, the court said: (l.c. 690)

"In State ex rel. Mercer County v. Gordon, 242 Mo. l.c. 624, we had occasion to make a concrete application of the foregoing canon of construction in discussing a like contention to that made by respondent in the instant case, in which we said, in effect, that the spirit of the modern rulings was not to construe laws governing special elections, as in the case at bar, with the utmost strictness, but if it appears that everything has been done to afford the voters a free and fair opportunity to vote yes or no on the proposition submitted, in the absence of the violation of a mandatory statute or the doing or omission to do something which deprives the voters of a free and fair opportunity to express their will, such an election will be upheld."

In State ex rel. Kansas City v. Orear, 210 S. W. 392, the court had before it the question of whether or not the percentage of votes necessary to approve a bond issue of the City of Kansas City, where the special election to vote the bonds was held at the same time as the general election, was sufficient. There were two bond issues voted upon. The court held a bond issue for fire protection was valid, and that a bond issue for a municipal ice plant was invalid, but the holding as to the ice plant bonds was based upon the fact that the city could not lawfully engage in the ice business. The court in the Orear case did not discuss the question of holding a special election along with a general election, but held bonds voted on at such time were valid.

The case of State ex rel. City of Marshall v. Hackman, 274 Mo. 551, dealt with the validity of an election at which bonds were voted to build or purchase an electric light plant in a city of the third class. In that case it was contended that the special bond election should have been held on a general election day, since Section 9545, R. S. Mo. 1939, provided that the special election should be held as in the case of other elections in such municipalities. Section 9545 was the same as Section 7369, R. S. Mo. 1939, which latter section has not been changed with regard to the provisions pertinent to this discussion by House Bill 689. The court in that case said: (l.c. 562)

"* * *The provision with reference to such special elections (viz. such elections shall be held and the judges thereof appointed as in case of other elections in such municipalities, R.S. 1909, Sec. 9545, supra) only requires similarity as to the method and manner of holding the two kinds of elections; it does not

necessarily imply that they can only be held on the same date. ***"

* * * * *

"***In cases wherein this court has passed upon the exercise of such powers, it was not thought indispensable that such elections should be held on the date prescribed by law for the general elections in such towns and cities. ***" (Underlining ours)

From the above Missouri cases we think that an election which is fair and gives the people an opportunity to vote on the issue, should be held to be a valid bond election, and that the language in State ex rel. City of Marshall v. Hackman, impliedly authorized the holding of a special election to vote municipal bonds on the same day as an election for the election of public officers of the city.

However, it is not necessary to rely solely on the Missouri authorities. Cases in other jurisdictions have directly ruled upon the questions necessary to be determined in this opinion. With regard to the permissibility of holding bond elections on the same day as other elections are held, the weight of authority is that this is proper.

One of the earliest cases dealing with this question was Fox v. Seattle, (1906 Wash.) 86 P. 379. In that case the court specifically considered the question, and said: (l.c. 380)

"***This is, in effect, providing a special election for the submission of questions of this kind, and if all the requirements of a special election are met, as we understand they were met in this case, by giving proper notice, etc., the fact that for the sake of economy the election was held on the same day that a general city election was held, and that the same ballots were used, does not make it a general election, or take it out of the provision of the Constitution above quoted, viz., that such proposition must be submitted at an election to be held for that purpose; but that the election on the special proposition, being so held, is merely an incident not affecting in any manner its distinct purpose or character. ***"

This case was followed by a line of California cases in which the same question was raised. In Morgan v. City of Los Angeles, 187 P. 1050, the Supreme Court of California was called upon to decide on whether it was necessary that two-thirds of those voting on the bond issue, or two-thirds of those voting in the primary election at which the bond issue was also voted upon, was necessary to pass the bond issue. In determining this question the court refused the consolidation of the special bond election, and said that such consolidation was authorized by a statute of California. However, the court did not base its decision upon the statute, but upon other cases, including Fox v. Seattle, supra, in holding that a primary election did not alter the nature of the bond election as a special election, and that such bond election was a valid one.

In view of this holding, it is not surprising that the California court later made the same ruling with regard to a bond election which was held on the same day as a primary election, in a case where there was no statute specifically authorizing consolidation. *City and County of San Francisco v. Collins* (1932) 13 P. 912. The court in that case said: (l.c. 914)

"* * * The second objection is that the special election called under the provisions of section 4088 of the Political Code could not lawfully be consolidated with the August primary election (see Deering's Gen. Laws 1931, vol. 1, p. 1095, Act 2264, Sec. 1), and that for the same reason it could not be held on the same date, with the same precincts. A sufficient answer is that although the elections are to take place on the same date and in the same precincts, they have not been consolidated and are not confused. Separate provision is made for inspectors, judges of election, and clerks; ballots are to be used for the special election, as distinguished from voting machines at the primary election; and the returns are to be separately canvassed. The elections are obviously distinct and separate. See *Morgan v. City of Los Angeles*, 187 Cal. 301, 187 P. 1050; *Mead v. City of Los Angeles*, 185 Cal. 422, 197 P. 65."

In the very recent case of *American Smelting & Refining v. Tacoma School Dist. No. 10*, (1942 Wash.) 129 P. (2d) the Supreme Court of Washington held that it was proper to combine a special election which dealt with tax propositions with a general municipal election. The court referred to its earlier decision in *Fox v. Seattle*, supra, and said: (l.c. 534)

"The holding of this court, in the *Fox* case, supra, with reference to the distinctive character of special elections, though held in conjunction with general elections, is supported by the general weight of authority. * * *" (Cases cited)

The reasons for the holding of the great majority of the courts, that bond elections may be held at the same time as general elections, is, we think, well stated in *State v. Dade* (1940) 198 So. 102, wherein the Supreme Court of Florida held that bond issues in such cases were valid. The court said: (l.c. 104)

"* * * Obviously, such elections were allowed to be held simultaneously because of convenience and economy, and the county commissioners are to be commended in exerting their authority thus to curtail expense and accommodate the voters. Another incentive for holding joint elections is, doubtless, the probability that one would prove a drawing card for the other and that the number of electors attracted to the polls would therefore be increased."

Other cases holding that the character of a special bond election is not changed by the reason of it being held on the same date as a general election or a primary election are: Board of Education v. Woodworth (Okla.) 214 P. 1077; Norton v. Coos County (1925 Oregon) 233 P. 864; Nyce v. Board of Commissioners of West Norriton Township (1935 Penn.) 179 Atl. 584.

With regard to the permissibility of holding special elections to elect municipal officers on the same day as other elections are held, there is less pertinent authority. However, those cases dealing with the question clearly indicate that such procedure is proper.

The facts in the case of Furste v. Gray, (1931 Kentucky) (2d) 889, were very similar to the situation presented here. In that case a statute provided for a special election to fill a vacancy created in either branch of the General Assembly of the State of Kentucky. This special election was called to fill a vacancy in the office of State Senator, and the writ of election fixed the time for holding this special election on the same date as the general election. The court said: (l.c. 891)

"* * * True, the time for holding the special election may by the writ be fixed for the same day as the general election, that being in the discretion of the officer issuing the writ, but it is no less a special election, and the issuance of the writ no less prerequisite to its validity."

In Duquette v. Merrill (1935 Me.) 42 Atl. 254, the statutes in Maine provided that vacancies in the office of County Treasurer are to be filled at the next biennial election. There was to be a primary election to nominate the candidates for the office at the biennial election. If the vacancy occurred after a regular primary election, then a special primary election could be ordered by proclamation of the Governor. No such

regular or special primary election was held in this case. The petitioner claimed that he was duly elected County Treasurer to fill the vacancy by reason of the fact that at the biennial election his name was written on many of the ballots. The petitioner contended that the failure of the officials to hold a primary election did not nullify the right of the voters to cast their ballot, and to make their choice of a candidate to fill the office. The court considered the question of notice to the voters as being one of the questions in the case, and since a certain type of notice was required for special elections, the court first considered whether the filling of a vacancy in such case would be a special election. In that regard the court said: (l.c. 255)

"Although it was a general election that was held September 11, 1944, yet, assuming a vacancy in the office of County Treasurer, and the right and duty of the electorate to fill that vacancy at the time of the general election, yet as to such office it was a special election, as there would be no one to be elected except for the vacancy and by the provisions of the statute the election would not be for the regular term of four years but for the unexpired term of two years. That such election is held at the same time and place with the general election, does not change its character."

There is, in our opinion, no statutory prohibition against the holding of an election to fill the vacancy in the council under Sections 7081, 7082 and 7083, Revised Statutes of Missouri, 1939, for the reason that the nature of such election, as a special election, is not changed. From the above authorities it is clear that it is not changed, and this, together with the cases which we have cited deal more particularly with bond issue elections and in which we have found no mention of any objection with the holding of elections for the selection of officers at the same time as general elections are held, we think, clearly indicates that general elections, as to the selection of officers, may be held on the same day as a special election to vote on a bond

In summary, there is nothing in the constitution or the statute which expressly and specifically prohibits the holding of a bond election for the acquisition of a city light on the same day as an election to fill a vacancy in the council of a city of the third class, nor prohibiting the holding of an election to fill the vacancy on the same date as a general election. Section 7081, R. S. Mo. 1939, provides that an election to fill the vacancy shall be a special election.

The provisions of House Bill 689, relating to the voting on bond issues provides only that the bond issue shall receive two-thirds of the vote of the qualified electors voting thereon. House Bill 689 does not, therefore, provide even that the bond election shall be a special election. However, we should consider it so, under the authority of State ex rel. City of Marshall v. Hackman, supra. In both situations, the cases have held that the nature of the special election is not changed by reason of its being held on the same date of another election, and the cases have upheld the validity of elections of both types which were held on the same date as another election.

CONCLUSION

It is, therefore, the opinion of this department that (1) in a city operating under the city manager form of government, it is necessary that a primary election be held before a special election which has been called to fill a vacancy in the city council; (2) the city may legally submit to the voters a proposition to vote revenue bonds for the purpose of acquiring a municipal light plant at the time of the special election for the purpose of filling a vacancy on the city council.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
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