SCHOOLS: School election where a majority of voters favored annexation not held invalid because order of board of school directors calling election not set out in minutes.

SCHOOL ELECTIONS:

OPINION NO. 37

April 9, 1947

FILED 37

Mr. Lane Harlan
Prosecuting Attorney
Boonville, Missouri

Dear Mr. Harlan:

This is in reply to your letter of March 31, 1947, requesting an opinion from this department, which reads as follows:

"With regard to our conversation this morning here are the facts as I understand them to be. School District No. 32 of Cooper County known as the Lowland School District voted to annex with the Wooldridge School District, District No. 34. The election was held pursuant to Section 10484 R.S. Mo. 1939. This was in response to a petition signed by sixteen or seventeen residents of the district. None of the members of the school board of the district signed the petition. After the petition was signed and presented to the board of District No. 32 notices were posted and an election was held. The election carried by a small majority. On election day a clerk of the election was elected who counted the ballots and the clerk of the election then certified the result to the County Clerk. This was sometime along in the middle of February.

"The contention seems to be that no formal order of the board is contained in the minutes with regard to ordering such an election. In fact no minutes were kept of the meeting and I understand it has been the practice of that board not to keep any minutes of its proceedings.

"There is the case I mentioned to you this morning in 54 Missouri Appeals 202 which seems to indicate that failure to show the minutes would render the election void.

"Saturday our County Treasurer, Mr. Laurence White,

received a letter from Schaumburg and Martin to the effect that the election was void and that there was no merger or consolidation and that any interference on his part would subject him to liability.

"The basic question seems to me to be whether or not said election was valid. If the election was valid then the school board of District No. 32 is no longer in existence and it necessarily follows that it has no authority to issue warrants for payment of funds.

"However, if the election was void then there had been no merger or consolidation, the board of District No. 32 still retains its legal entity and it necessarily follows that it does have authority to issue warrants.

"My view on the subject, if it may be of any assistance, is that the election is valid because the petition was signed and presented to the members of the board of District No. 32. By the above enumerated section it is mandatory that the board upon presentation of the petition call a special election. It is reasonable to deduce from that I believe that the function of the board's ordering a special meeting is purely ministerial and that the refusal of the board to order one would either subject the board to dismissal or would not invalidate an election held pursuant to notices posted properly and signed by the clerk of said board with regard to the election. The fact that the notices were posted and were signed by the clerk of the board would possibly indicate that the order was in due form. Certainly it is being presumed that an administrative official will act lawfully thus the mere presence or absence of the minutes would not per se invalidate the election.

"The case up here can I believe be distinguished on the facts from the case cited in 54 Missouri Appeals because in that case as I understand the facts there had been no minutes of the board and that the clerk of the board himself had initiated all proceedings.

> "Mr. White, of course, is in the position of not knowing how to proceed. If he fails to issue a warrant on District No. 32 and the election was void he will be subjected to liability. If on the other hand he honors a warrant issued by District No. 32 and the election was vaild he will again be subjected to liability.
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> "My interest in the case is concerned only with the liability of Mr. White, our County Treasurer."

The specific question for consideration is whether an election decreeing the annexation of one school district to another should be held invalid because the order of the board of school directors calling such an election was not formally set out as minutes of the board meeting. We think not. The statute under which this election was held was Section 10484, R. S. Mo. 1939.

It appears that no minutes were kept of the meeting of the board of directors. Consequently, there was no record of an order of the board at that meeting and in fact it has evidently been the practice of the board not to keep minutes of its proceedings at any of the board meetings. Section 10484 does not expressly require such minutes to be kept, but the general statutes relating to meetings of school directors do require that some record be kept of the proceedings. However, we believe that the question submitted can be resolved without going into the question of the failure of the board of directors to keep a record of any of its proceedings.

We submit that there is a presumption that public officers properly perform their duties when there is no record present and in absence of a contrary showing. This rule is set out in the case of Henry v. Dulle, 74 Mo. 443, at pages 450, 451 and 452:

> " * * * The position taken by counsel that under the above section a resolution adopted by the board of education of a city attaching territory outside of its corporate limits for school purposes, remains inoperative till the secretary of the said board transmits copies of the same to the clerk of each township affected thereby, and till the township clerks perform their duty under the section, is not maintainable. The statute does not so declare, and such a construction of it would put it in the power of the secretary of the board and

> township clerks to nullify the action of the board, by failing to perform the ministerial duties imposed upon them by the statute.* * *
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> " * * * the presumption may be justified and indulged that the secretary of the board of education of Jefferson City did his duty in certifying the resolution of the board to the township clerk, and that the township clerk acted upon it and made the sub-districts of the township to conform to it. School Directors v. School Directors, 73 Ill. 255; State ex rel. v. Board of Education, 64 Mo. 54; Long v. Joplin M. & S. Co., 68 Mo. 431. * * *"

This view is supported in the case of State v. McKown, 290 S.W. 123, page 126:

> " * * * It was the duty of the clerk to sign the notices. The presumption obtains in the absence of evidence to the contrary that he performed this duty. * * *"

Therefore, we must assume that the district school directors in their meeting properly performed their duty and made the required order calling said election.

Our attention is directed to the case of State ex rel. White v. Lockett, 54 Mo. 202, where it was held that the vote on the question of annexation was without authority and amounted to nothing as the relators failed to show that the board of directors authorized the vote and that the notices were posted in obedience to the order of such board. That case cannot be taken as authority in the present case, as there was no pretense there that the board met and took any action as a board. A petition was circulated to the directors as individuals but no unified action was taken. In the case at bar the school directors met and considered the proposition at a regular meeting. However, no record was made of an order calling an election.

We find this statement in theabove case:

> "Even though the proof offered had shown a meeting of the directors of the district for the purpose of taking action on the petition, the action of the board thereon could only have been shown by the record which the statute required the clerk of the board to make."

This statement is obiterdictum and cannot be given weight or considered as authority.

In Decker v. School District No. 2, 101 Mo. App. 715, we find this statement at page 119:

> " * * * It seems to us that when all the members of a school board meet at some place in the district, whether in obedience to notice or by accident, they may if they choose, hold a board meeting and proceed to transact any ordinary business pertaining to the district and that a failure on their part to make and preserve minutes of their proceedings will not affect the rights of a party with whom they have made a valid settlement at such meeting.
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> "The evidence conclusively shows that, in making the settlement of plaintiff's account with him, they did not act individually but collectively and as the board of directors of the school district, and we think the district is conclusively bound by their action on that occasion."

There it was held that even though no record was kept of the action of the school board this fact will not effect the rights of someone who has relied on such action. This case is analogous to the case at bar where the majority of the voters favored annexation and have relied on the action of the school board and the election proceedings.

In Peter v. Kaufmann, 38 S. W. (2d) 1062, minutes of the school board meeting were recorded, but there was no mention of a formal order of the board calling an election. It was said at page 1064:

> "As to the plaintiff's contention that no proper notice had been given embodying these propositions to be voted on at the annual meeting in April, 1927, at which meeting these levies were voted, his contention seems to be only that the school board did not specifically order notices to be posted embodying these propositions to be voted on.
> * * * *
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> "It is true that the minutes of the board meeting on March 1, 1927, do not show a formal order of the board directing the secretary of the board to post these notices or prescribing what the notices should contain, but we decline to hold that this is a fatal defect.
> * * * * * * *"

We believe that also under the ruling of this case the absence of a formal order incorporated in the minutes should not effect the validity of the election or the will of the majority of the voters.

Section 10484 by its terms requires the board of directors to order an election as it provides that the directors "shall order a special meeting for said purpose." We believe that this provision is mandatory leaving no discretion to the directors.

57 C. J. pages 549, 550, Section 4 referring to the word "shall" says:

> " * * * It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, * * * * * * * * *"

The word "shall" is also construed to be mandatory in the case of State v. Wurdeman, 246 S. W. 189, page 194:

> " * * *Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute. * * *"

We submit that the recording of the order that is complained of as being omitted from the formal record is merely a ministerial duty, while the election is actually called by giving notice as provided by Section 10418, R. S. Mo. 1939 and that this notice is a mandatory requirement.

In the case at bar notice was actually given and the election proceeded in the regular and proper manner, thus the board's function was sufficiently performed and further there has been a substantial compliance with the statutory requirements and formalities especially in view of the fact that the majority of residents voting in the election favored annexation. The important thing is for the voters to be notified of the election and of the proposition to be voted upon.

In Mason v. Kennedy, 89 Mo. 23, election notices were filed by the clerk and properly posted but did not describe the entire territorial boundaries of the new district. The court held that as the voters

were informed of the proposition to be voted upon that was sufficient.

And in Tucker v. McKay, 131 Mo. App. 728 the court held that even though the clerk failed to make a full and complete record this should not defeat the will of the voters when they have approved the proposition. It was said there that minutes and records of a meeting were evidence to be considered but were not conclusive and that they may be aided or contradicted by parol evidence.

School laws are liberally construed and proceedings thereunder are generally upheld even though all formalities and technicalities have not been observed. In 56 C. J., page 340, Section 213, it is said:

> " * * * Irregularities or informalities in an order or resolution made or adopted by a board of education, or of directors, trustees, or the like, of a school district or other local school organization, do not affect its validity where the intention is manifest."

The case of State v. Begeman, 2 S. W. (2d) 110, holds that if there is enough present to show regularity in a school election it should not be overthrown because of the failure to comply with certain technicalities. In this case it is said, l.c. 111, 112:

> "In the first place, it is the salutary law that our courts must give a liberal construction to the working of the school laws. Indeed, the section of the statute, supra, requires no records to be kept of many of the jurisdictional prerequisites, and the fair presumption is indulged that preliminary steps have been complied with when the county superintendent entertains jurisdiction on appeal. State ex rel. v. Andrea, 216 Mo. 617, 116 S. W. 561; School District v. Chappel, 155 Mo. App. 498, 135 S. W. 75.
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> "In the latter case, this court held that it is our policy not to require extreme technical compliance of the school laws, but only a substantial compliance with the statutes, and that the efforts of laymen who carry into effect the laws pertaining to schools is accomplished when a substantial compliance has been had. As said in School District v. School District, 181 Mo. App. 583, 164 S. W. 688, technical niceties should be brushed aside, and we should rather

> 'seek to effectuate the beneficent spirit revealed, in aid of the efforts of well-meaning laymen. Because of this, substantial compliance will suffice.'
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> "And, so, while it does not appear from the records actually preserved by the superintendent in the case at bar that the petitions for the change were signed by the requisite number of resident taxpayers, it is not denied by the school district that such a petition did exist, and in fact it was proffered as evidence in the trial of this case. The return itself disclosed such facts. The pleadings disclosed that there was an election, resulting in opposite views of the respective districts, and an appeal was taken to the superintendent. The return shows that Morris was a resident taxpayer of school district No. 46, and one of the ten qualified voters of said district who petitioned for a change of boundaries. The petition for a writ of certiorari shows the petition, duly signed by the requisite number of residents, was presented, calling for a vote of the two districts on the proposition, and also shows how the districts voted on same. We think therefore that we have enough here to show a regularity in the election of the districts and in the appeal to the superintendent of schools."

This view is also taken in the case of State v. McKown, 290 S. W. 123, at page 126:

> "As to the contention of the impropriety in addressing the petitions to the board of directors, it may be said generally, that if error, it was devoid of prejudice. The boards of directors constitute the legal administrators, charged with the management and control of matters relating to the district; and, in the absence of a statute on the subject, it was a reasonable conclusion, especially in the minds of laymen, that petitions seeking to effect a change in the districts should be addressed to these boards. Regardless, however, of what may have prompted this action, the clerks found no difficulty in promptly complying with the duties imposed upon them by the statute. Informalities in proceedings of this character, especially in regard to the public schools, are entitled to little consideration, if the material portions of the governing statute are complied with.

School Dist. v. New London School Dist., 181 Mo. App. 589, 164 S. W. 688, and cases. Although the proceedings may be informal if conceived in honesty, and thus conducted, they will not be set aside. School Dist. 14 v. School Dist. 27, 195 Mo. App. 504, and cases 507, 193 S. W. 634."

It is assumed that the school directors performed their mandatory duties in connection with calling the election particularly in view of the fact that said election was actually called. The statutory procedure was substantially complied with and the residents of the school district have expressed favor of the proposition for which the election was called.

CONCLUSION

Therefore, in view of the foregoing authorities, it is the opinion of this department that a school election, where a majority of the voters favor annexation, should not be held invalid because an order of the board of school directors calling said election was not formally set out as minutes of the board meeting.

Yours very truly

David Donnelly
Assistant Attorney General

APPROVED

J. E. TAYLOR
Attorney General