

CONSTABLE AND OFFICERS: May constable qualify who failed to take the prescribed oath within the time provided by statute.

February 8, 1945

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Mr. Paul J. Clay  
Clerk of the County Court  
St. Francois County  
Farmington, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of February 5, which request reads as follows:

"We have a Constable in Pendleton Township, St. Francois County, who was duly elected to succeed himself, in the last General Election of 1944. He is now asking to qualify for this office. Please advise if this is proper or should he have qualified in the ten day period following the election last November. Thanks for your immediate attention to this inquiry."

The general rule regarding the time when an officer shall take an oath is laid down in Volume 42, American Jurisprudence, Section 125, page 972, which reads in part as follows:

"The time within which the officer may take the oath of office may be fixed by law, and it is usually provided that the oath shall be taken and subscribed before the officer enters upon the discharge of the duties of the office. Whether the oath may be taken after such time depends on the mandatory or directory character of the requirement. If mandatory, the officer must be sworn within the time allowed. \* \* \* "

The Courts in this State have held that there is no universal rule in all circumstances for distinguishing between

directory provisions and mandatory provisions, but that the primary object is to ascertain the legislative intent and that those provisions that do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance, are directory. In so holding the Court said in State ex rel. Ellis v. Brown, 33 S.W. (2d) 104, l.c. 107:

" \* \* \* There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory."

Section 11370, pages 325, 326 and 327, Laws 1941, provides constables shall hold their office until their successors are elected and qualified.

Section 13374, Revised Statutes 1939, provides the County Court shall appoint some person as constable when a vacancy exists.

Section 13371, Revised Statutes 1939, provides that every constable shall give a bond to the State within ten days after his election.

We are unable to find any statute which provides what the result shall be if certain conditions prior to the constable qualifying are not fulfilled.

Section 6, Article XIV, requires all officers, before entering upon official duties, to take and subscribe to an oath. A constable has been held to come within the provisions of this section of the Constitution. Section 6, Article XIV, reads as follows:

"All officers, both civil and military, under the authority of this State, shall, before entering on the duties of their respective offices, take and subscribe an oath, or affirmation, to support the Constitution of the United States and of this State, and to demean themselves faithfully in office."

In *State v. Heath*, 132 S.W. (2d) 1001, l.c. 1003, this Court quoted approvingly from former decisions holding that statutes fixing time when a school officer must qualify are, as a general rule, regarded as directory instead of mandatory, unless there is contained in the statute express provision to that effect. In so holding the court said:

" \* \* \* This court has said: 'If a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory.' *State ex inf. McAllister ex rel. Lincoln v. Bird*, 295 Mo. 344, 244 S.W. 938, 939. Likewise, it is said: 'Statutes fixing the time within which school officers must qualify are, as a general rule, regarded as directory to the extent that mere delay in qualifying within the time prescribed does not, of itself, cause a vacancy in the office, unless there is contained in the statute an express provision to that effect.' 56 C. J. 309, Sec. 182; see also 46 C. J. 962, Sec. 95; \* \* \* ."

Also in *Schafly v. Baumann*, 108 S. E. (2d) 363, l.c. 366, the Court said:

" \* \* \* The general rule and its limitations, likewise recognized in the cited cases, are stated in 59 C. J. 1078, Sec. 634: 'A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, and made with a view to the proper, orderly, and prompt conduct of business, is usually directory, unless the phraseology of the statute, or the nature of the act to be performed and the consequences of doing or failing to do it at such time, is such that the designation

of time must be considered a limitation on the power of the officer."

In the instant case, since the elected constable is succeeding himself in office and under the law it is the duty of the constable to hold said office until his successor is duly elected or appointed and qualified, apparently the newly elected constable is acting upon the theory that any duties performed subsequent to his being notified of his election to said office, and prior to his qualifying to said office, were performed in the capacity of constable holding office until his successor has been duly elected or appointed and qualified.

In view of the foregoing authorities holding that such statute is merely directory and not mandatory, and also in view of the fact there is no mandatory provision in the statute for forfeiture of his office or for appointing some one to replace him for failure to qualify within the ten day period, we conclude the constable-elect may now qualify by taking and subscribing to the oath.

Respectfully submitted,

AUBREY R. HAMMETT, JR.  
Assistant Attorney General

APPROVED:

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HARRY H. KAY  
(Acting) Attorney General

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