

SHERIFF'S BOND:  
STATUTES:

The provisions of the Missouri statutes relating to the giving of a bond by a sheriff elect is to be construed as simply directory and would not by their own force create a vacancy in office.



December 8, 1952

12-9-52

Honorable James L. Paul  
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Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads in part as follows:

"Please furnish me with and \* \* \* opinion if Sections 57.020 and 57.040 of Revised Statutes of the State of Mo. 1949 construed together are mandatory or directive.  
\* \* \*"

Sections 57.020 and 57.040, RSMo 1949, deal with the official bond of a duly elected sheriff and the failure to give such bond. Said sections read as follows:

"57.020. - Sheriff to give bond. - Every sheriff shall, within fifteen days after he receives the certificate of his election or appointment, give bond to the state in a sum not less than five thousand dollars nor more than fifty thousand dollars, with sureties approved by the circuit court, conditioned for the faithful discharge of his duties; which bond shall be filed in the office of the clerk of the circuit court of the county.

"57.040. - Failure to give bond, effect. - If any sheriff fail to give such bond within the time prescribed, the office shall be deemed vacant."

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It is noted that Section 57.020 provides that a duly elected sheriff is to give bond to the state, conditioned upon the faithful performance of his duties, within fifteen days after receiving his certificate of election. Is such a statute considered by itself mandatory or directory or would it receive a like interpretation when considered with Section 57.040? This question must be resolved by the construction of our statutes. Such provision as Section 57.020 have almost universally been held to be simply directory. Mechem on Public Officers. In the case of State ex rel. Attorney General v. Churchill, 41 Mo. 41, the Supreme Court of Missouri, in considering a treasurer elect's right to office where he had failed to give bond within ten days after the election as required by statute, stated the rule as follows:

"\* \* \*The bond was not void, nor voidable, merely because not presented and filed within the ten days. This provision of the statute is directory only. The matter of time was not essential to the validity of the bond, nor a condition precedent to the party's title to the office. The time not being of the essence of the thing required to be done here, it was not material.- Rex v. Lexdule, 1 Burr. 497; Sedgw. State. & Const. Law, 368-74. When a sheriff was required to give bond within twenty days after his election, it has been held that the statute as to the time of giving the bond was directory merely, and that the failure to give the bond within that time did not forfeit his title to the office - People v. Holly, 12 Wend. 481.  
\* \* \*"

What effect then would be given to Section 57.020 and 57.040 considered together? In this regard we have been unable to find any Missouri case passing directly upon this point and an examination of persuasive authority from other jurisdictions reveals a diversion of opinions, with, however, a tendency toward a directory interpretation. Such is indicated by the following found in 42 Am. Jur., Public Officers, Section 124, page 970:

"\* \* \*It may be said, however, that official bonds are intended for the benefit of the public, and that requirements of the law as to the time of filing them should not be taken as mandatory unless clearly so. In

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numerous cases they have been construed as directory merely. A statute has been held directory merely which provided that an office shall become vacant on failure to furnish a bond within a specified time, or that upon such failure the person chosen for the office shall be deemed to have refused it.  
\* \* \*

See also Mechum on Public Officers where the rule is stated as follows:

\* \* \* These provisions as to time, however, though often couched in most explicit language are usually construed to be directory only and not mandatory.

\* \* \* \* \*

"A fortiori is this so, when the failure was through no fault of the officer.

"Even though the statute expressly provide that upon a failure to give the bond within the time prescribed, the office shall be deemed vacant and may be filled by appointment, it is generally held that the default is a ground for forfeiture only and not a forfeiture ipso facto. \* \* \*."

(Mechum, Public Officers, Chap. VII, Secs. 265, 266, page 166.)

In the case of State ex rel. Lysons v. Ruff, 16 L.R.A. 140, the Supreme Court of Washington considered a similar question under statutes substantially the same as the two sections here in question and reasoned as follows:

"In determining the force of these statutes, this well-settled rule must be borne in mind, that forfeitures are abhorred by the courts, and that, when it is reasonably possible so to construe the law as to avoid a forfeiture, such construction will be adopted. If, as we have seen, the first section above quoted is clearly declaratory when standing alone, the last section above quoted might be held to have been enacted in view of such construction of said first section,

and the Legislature to have intended in said last section by the words 'within the time fixed by law' not within fifteen days, as named therein, but within the time which the court would hold to be covered by said section when construed as declaratory, and not mandatory. With such a construction of section 3063 all difficulty would be done away with, and there would be nothing in it to change the rule of construction which would otherwise obtain as to said section 2708. Said section 3063 is found within the chapter relating to the filling of vacancies, and provides what facts shall be sufficient to authorize the proper authority to exercise its powers in that regard. But it does not follow that the person elected has lost all right by reason of his failure to qualify. The object of such provision will be fully accomplished by holding that such failure to qualify does not in itself work a forfeiture of the right to the office, but simply authorizes the proper authority to declare such forfeiture, and fill the office by appointment. By the construction force would be given to every word in said section 3063, and the usual construction preserved as to the other section in question. Thus construed, the proper authority would at any time after the expiration of the fifteen days prescribed by the statute have the power to declare a vacancy, and at once fill the same by appointment, and, this having been done, the right of the person elected to the office would be determined and ended; but until such action was taken the person elected could, by qualifying within any reasonable time after notice of his election, make perfect his title."

Under the above cited authority and referred rules of construction, we are of the opinion that the Appellate Courts of this State would be prone to interpret the statutes considered as being simply directory and that the same would not create a vacancy ipso facto, although non-compliance with said sections might give cause to a proper authority to declare said office vacant under a proper proceeding. Such is at least, impliedly indicated in the case of State ex rel. Jackson v. Howard Co. Ct., 41 Mo. 247, where the court, by way of dictum, said:

"It is very probable that if the petitioner had duly received his certificate of election, and had then wholly failed to present any bonds at all, whereby the office might have become practically vacant, the court might have the jurisdiction to declare it vacant and appoint another; \* \* \*."

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CONCLUSION

Therefore, it is the opinion of this office that Sections 57.020 and 57.040, RSMo 1949, requiring a sheriff elect to give bond within fifteen days after receipt of his certificate of election, and declaring that said office shall become vacant on failure of said sheriff to give bond within the time required, would be construed as simply declaratory rather than self-executing, although non-compliance might be cause for a proper authority in an appropriate proceeding to declare said office vacant.

Respectfully submitted,

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APPROVED:



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