661

1. ELECTION—MISTAKE—WHERE TWO MEMBERS, BOARD OF EDUCATION OF LOCAL SCHOOL DISTRICT WERE TO BE ELECTED—VOTERS ADVISED BY PRINTED DIRECTIONS ON BALLOT AT HEAD OF LIST OF SCHOOL BOARD CANDIDATES TO "VOTE FOR NOT MORE THAN THREE"—ALL BALLOTS ON WHICH MORE THAN TWO PERSONS FOR SUCH OFFICE WERE VOTED FOR, INVALID AS TO MEMBERS, BOARD OF EDUCATION—SUCH BALLOTS SHOULD HAVE BEEN REJECTED—ELECTION NULLITY—NO ONE ELECTED.

2. TWO MEMBERS, BOARD OF EDUCATION WHOSE TERMS EXPIRED FIRST MONDAY OF JANUARY, 1946, WILL CONTINUE TO HOLD OFFICES FOR FULL TERM OF FOUR YEARS, COMMENCING FIRST MONDAY IN JANUARY, 1946, AND UNTIL SUCCESSORS ELECTED AND QUALIFIED.

SYLLABUS:

1. Where two members of a board of education of a local school district were to be elected and the voters of said district were advised by the printed directions appearing on the ballot at the head of the list of school board candidates to "vote for not more than three", all ballots on which more than two persons were voted for for such office were, in so far as such office was concerned, invalid and should have been rejected, and where, in order to determine which persons were elected, the votes cast on such ballots were counted for the persons receiving them, the election was a nullity and no one was elected.

2. In such case the two members of the board of education whose terms will expire the first Monday of January, 1946, will continue to hold their respective offices for the full term of four years, commencing on the first Monday in January, 1946 and until their successors are elected and qualified.

Columbus, Ohio, December 31, 1945

Hon. James W. Williamson, Prosecuting Attorney
Wauseon, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

> "In January, 1946, two members of the board of education of one of our local school districts will have served the full term for which they were elected.
>
> Prior to the November, 1945, election, only one candidate for board member qualified by nominating petition. The qualified candidate's name was placed on the ballot for the November election and on the printed ballot there appeared under such candidate's name three blank spaces. Through inadvertence and mistake the local board of elections placed at the top under the title of the office the words, 'Vote for not more than three.'
>
> It is reported to me that all ballots on which votes were cast for not more than three persons were counted and the record shows the three persons receiving the highest number of votes were declared elected and certificates evidencing such election issued.
>
> It is reported that there were ballots on which votes were cast for less than three candidates.
>
> Your opinion is desired on the following questions:
>
> (1) Which, if any, of the three persons declared elected by the local board of elections were in fact elected and qualified to take office in January, 1946? (2) If none, what is the status

of the membership of the school board subsequent to January, 1946? (3) Can any remedial action be now taken by the board of elections?"

In Section 4785-144, General Code, it is provided:

"* * * A ballot shall not be considered invalid when a less number of candidates are voted for than are to be selected for any particular office; but if more persons are voted for than are to be selected for any particular office, then such ballots shall be invalid, but only in so far as that office is concerned. * * *"

In the instant case the number of persons to be selected was two. Therefore, under the above provisions, all the ballots on which votes were cast for more than two persons should have been declared invalid. Nor would the fact that the ballots contained directions to the voters which were incorrect authorize the counting of the votes on such ballots. Since the terms of only two of the members of the board in question will expire in January, obviously three new members can not assume office on such date.

While it might appear that the result of the election would have been correctly ascertained if such ballots had been rejected and only those on which not more than two persons were voted for counted, it seems to me that if this had been done the persons elected thereby might very well have been others than those who would have received the highest number of votes had the directions on the ballots been proper. Certainly, the consequence of erroneously stating on the ballot that not more than three could be voted for was to enlarge the voters' range of choice, and it is conceivable that if the voter had been advised that he was limited to voting for two persons his choice might have been entirely different. In other words, his vote might have been cast for different persons than any of those actually voted for by him. Be that as it may, however, the question of whether the ballots on which three persons were voted for should have been declared invalid and accordingly rejected and the balance counted is not before me and, conseqently, I express no opinion thereon. Even if I were to conclude that the ballots, at the proper time, should have been counted in such manner it would offer no solution to the present problem, unless, of course, it could be held that the ballots should now be re-opened and so counted. With respect thereto, however, your attention is directed to the case of The State, ex rel. Farnsworth v. McCabe, 66 O. App. 482, wherein it is held:

> "4. The only authority for a county board of elections opening and recounting the ballots from a precinct is, (a) under Section 4785-149, General Code 'on written demand of any candidate' made while canvass of the returns of that precinct is being made; and (b) under Section 4785-162, General Code, on timely application of any candidate or of five electors who voted at such election, recount of the votes for that candidate or other candidates for the same office may be had on compliance with the conditions prescribed in that and following sections."

Even if we were to assume that two persons were in fact elected, it would appear that there is no provision of law under which any action can now be taken to determine who such persons are.

I am, therefore, forced to conclude that since the result of the election was not correctly ascertained in November by the election officials and that such result can not now be determined, the entire election was a nullity.

I am not unmindful of the fact that such conclusion results in the disfranchisement of a large number of electors of the school district in question. Nor have I overlooked the provisions of Section 4785-102, General Code, which require that directions to the voters as to the voting for one, or two, or more be printed at the head of the list of school board candidates. Furthermore, I fully realize that the cardinal rule, as laid down by the courts of this state, is to give effect to the intention of the voter. However, it must be borne in mind that in the instant case, such intention is left in complete uncertainty.

On the other hand, it has been held that one who does not avail himself of the opportunity afforded by statute to object to irregularities in the ballot prior to election may not afterward raise objections thereto. See: Allen v. Glynn, 17 Col. 338, 29 Pac. 670; Bowers v. Smith, 111 No. 45, 20 S. W. 101.

In this regard, attention is called to Section 4785-115, General Code, which provides:

> "After the letting of a contract for the printing of the ballots, as herein provided, the board of elections shall secure from the printer printed proofs of the ballot, and shall notify the chairman of the local executive committee of each party or group represented on the ballot by candidates or issues, and post such proofs in a public place in the office of the board for a period of at least twenty-four hours, for inspection and correction of any errors appearing thereon. The board shall cause such proof to be read

with care and after correcting any errors shall return the corrected copy to the printer."

Under the above section a candidate for the office in question was given ample opportunity to discover the mistake in directions to the voters which were printed on the ballot and could have taken timely steps to correct the same. Having failed to do so, he can not now be heard to complain of the consequences of his neglect.

I shall now proceed to a consideration of your question regarding the status of the membership of the school board subsequent to January, 1946.

Section 4832-8, General Code, reads:

"The terms of office of members of each board of education shall begin on the first Monday in January after their election and each such officer shall hold his office for four years, except as otherwise provided by law, and until his successor is elected and qualified."

From the above, it will be noted that each member of the board holds his office for a term of four years and *until his successor is elected and qualified.*

In addition, there is another section that has bearing on the question, to-wit, Section 8 of the General Code, which reads:

"A person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

The above section is a general law and since it deals with the same subject as Section 4832-8, General Code, should be read and construed in connection therewith. When construed together, such sections provide that the term shall continue until a successor is elected and qualified, unless some provision of the Constitution prevents such continuation.

The only provisions of the Constitution of Ohio which relate to the terms of office of members of boards of education are contained in Section 2 of Article XVII and read:

"* * * the term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four (4) years as may be so prescribed."

Since it was held that the above provisions do not prohibit the extension of the term of a county engineer beyond the four year term for which he was elected (State, ex rel. v. Kirk, 134 O. S. 178), and inasmuch as I have concluded that no successors to the present members whose terms expire on the first Monday in January next were elected at the recent election, it would follow that such members will continue in office until their successors are elected and qualified.

This conclusion raises the further question of when such successors are to be elected, that is, should they be elected at the general election to be held in November, 1947, or at the general election to be held in November, 1949.

Section 10 of the General Code, which fixes the tenure of persons appointed to fill vacancies in elective offices and governs the election of successors to persons so appointed, provides:

> "When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. * * *"

Since no vacancies will exist in the case before us, the above section affords no direct answer to our question.

It will be noted, however, in connection therewith that said section reads "unless otherwise provided by law" etc. Therefore, in the absence of a special statute governing a particular office, the general provisions of the above section would control and the term of a person appointed thereunder to fill a vacancy can extend only to the next general election.

However, in Section 4832-10, General Code, we have a special statute dealing with a particular office. In said section, which deals with the filling of vacancies in boards of education, it is provided:

> "* * * A majority vote of all the remaining members of the board may fill any such vacancy for the unexpired term."

Here the General Assembly has provided "otherwise" by stating in express terms that a person appointed to fill a vacancy shall serve for the *unexpired term*. See Opinion No. 434, Opinions of the Attorney General for 1939,

page 545, wherein it was held that under similar provisions of law appearing in then Section 4748, General Code, a person elected by the remaining members of a board of education to fill a vacancy in such board was entitled to hold the office until the expiration of a period of four years from and after the time a person elected to the office would have taken it over, if one had been elected.

Therefore, if vacancies were to occur in the board in question in January, the persons named to fill such vacancies would hold office for the full unexpired term. In view of this, it seems to me to be entirely consonant to say that an elected member holding over because a successor was not elected, is entitled to hold the office for the full term of four years commencing on the first Monday in January, 1946. In other words, since the General Assembly has seen fit to except from the general provisions of Section 10, persons appointed to fill vacancies in boards of education by providing that such persons shall hold office during the full unexpired term, I find it difficult to bring myself to the conclusion that that body intended a person who was elected as a member of a board and who entered upon a new term by holding over to serve only until the next general election for members of boards of education.

Furthermore, it is always presumed that the General Assembly has a definite purpose in each of its enactments. When the General Assembly provided in Section 4832-10, General Code, that the remaining members of a board of education shall fill a vacancy for the unexpired term, it must have had a definite purpose in mind. Such provision is especially significant when it is borne in mind that in practically every instance the statutes providing for the filling of vacancies in elective offices are silent with respect to the duration of tenure of the appointees. In such cases, of course, the general provisions of Section 10 are controlling as to the election of the successor to the appointee. After careful consideration is given to the statutes dealing with the membership of boards of education, the purpose of the above provisions of Section 4832-10, General Code, becomes apparent. The General Assembly has expressly provided that the terms of all members of a board of education of a local school district shall not coincide. See Section 4832-13, General Code. Consistent with such provisions and to avoid a simultaneous expiration or commencement of the tenure of all of such members, the above provisions of Section 4832-10, General Code, were enacted. Consequently, to hold in the instant

case that the successors are to be eletced at the general election in 1947 would be to defeat the manifest object and purpose of the statute.

Consideration has been given to the case of State, ex rel. v. Secretary of State, 134 O. S., 352, decided October 5, 1938, wherein a writ of mandamus commanding the board of elections of Columbiana County to cause the names of certain persons who theretofore had filed declarations of candidacy for the office of county engineer, to be printed as party candidates for such office, on the ballots to be used in the general election to be held in November, 1938, was allowed. In said case, Lloyd C. Kirk, who was previously elected to said office in 1932 and whose term expired on January 3, 1937, was holding office as a holdover until his successor was elected and qualified. While the question in said case was similar to the one herein under consideration, that is, whether the successor to Kirk was to be elected in November, 1938, or in November, 1940, the fact that the writ was allowed therein can hardly be regarded as decisive of the question. Reference to the decision will disclose that no answer or other pleading was filed on behalf of the board of elections and that the board of elections directed its council to advise the court that it did not desire to defend the action and that it desired the writ to issue. Therefore, since the real question in the case was not brought to issue, I am constrained to the view that no point of law was decided thereby and consequently a precedent which should be adhered to was not established. Moreover, in said case the court was dealing with a single office where the question of coinciding terms was not present.

Therefore, specifically answering your questions, you are advised that, in my opinion, the action of the board of elections of your county declaring the three persons receiving the highest number of votes elected, was a nullity, and, consequently, none of such persons is qualified to take office, and that the two members presently serving, whose terms will expire on the first Monday in January, 1946, will continue to hold their respective offices for the full term of four years commencing on the first Monday in January, 1946, and until their successors are elected and qualified.

Respectfully,

HUGH S. JENKINS

Attorney General