

OFFICERS:

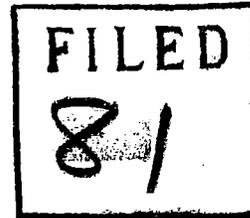
(Judge of county court holds over until
(successor is elected and qualified; no
(vacancy exists because judge-elect fails
(to qualify on account of illness; may
(qualify within reasonable time after
(physically able to perform duties.

COUNTY COURTS:

January 25, 1951

Honorable John F. Shelby
Representative, Bates County
House of Representatives
Jefferson City, Missouri

1-25-51



Dear Mr. Shelby:

We have your letter in which you request an opinion of this office concerning the presiding judge of your county. Your inquiry is as follows:

"In Bates County the Presiding Judge of the County Court died in June, 1950 and a successor, A. B. Cummins, was appointed by the Governor to fill the vacancy and duly qualified and has performed the duties of that office. In November, 1950, U. E. Norris was elected to this office, but since the election has been ill and in the Veterans Hospital at Wadsworth, Kansas. He has not been able to qualify, i. e., take the oath of office. In this situation I would like your opinion on the following questions:

"1. Does Mr. Cummins hold over until his successor is elected or appointed and qualified?

"2. In what time must Mr. Norris qualify to take this office?

"3. Does a vacancy now exist or will a vacancy exist at the end of thirty days from the date of the beginning of the term in the office so that the Governor may appoint a person to fill this office?

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"4. In case Mr. Norris must qualify within any definite time, can he take the oath of office at the Veterans Hospital in Wadsworth, Kansas?"

Your first question may be answered by the quotation of Section 12, Article VII, Constitution of 1945, which is as follows:

"Tenure of Office. Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

Similar provisions are found in the constitutions of many states and the courts of this and other states have uniformly construed such provisions as applicable to all state and county officers. The provision is certainly applicable to the office of presiding judge and Mr. Cummins having been duly appointed and qualified will hold over until his successor is elected.

The answer to your first question partially answers your third question. As Mr. Cummins holds over, there is no vacancy existing in the office of presiding judge. Your further inquiry as to whether a vacancy will exist at the end of thirty days from the beginning of the term of the office is doubtless prompted by the provisions of Section 476.280, RSMo 1949. This section is:

"Oath of Judges. Each judge shall, within thirty days after the receipt of his commission, and before entering upon the duties of his office, take the oath prescribed by the constitution of this state. A certificate of having taken such oath shall be endorsed upon his commission."

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This section is a part of Chapter 476, Title XXXII of the Revised Statutes relative to courts. In the previous revision this chapter has been entitled "Courts of Record." The first section of the chapter, 476.010, designates the courts of record as the supreme court, the courts of appeal, the circuit court, the existing courts of common pleas, the magistrate courts and the probate courts. Under the Constitution of 1875 the county court was a court of record. Under the Constitution of 1945 county courts are provided for in Article VI which concerns local governments. In Section 7 of Article VI it is provided:

"In each county there shall be elected a county court of three members which shall manage all county business as prescribed by law"

In *Rippeto, et al. v. Thompson*, 358 Mo. 721, 216 S. W. (2d) 505, the court said (1. c. 358 Mo. 726):

"Thus, it is clear under the new Constitution (1945) county courts are no longer vested with judicial power, are not now 'courts of record' and are not what we generally know as courts of law. 'County courts are no longer courts in a juridical sense, but are ministerial bodies managing the county's business.' *State ex r. Kowats v. Arnold*, 356 Mo. 661, 204 S. W. (2d) 254; *Bradford v. Phelps County (Mo. Sup.)*, 210 S. W. (2d) 996, *supra.*"

Thus it is clear that Section 476.280 does not apply to the office of presiding judge of the county court. No other statute is found in which any time is fixed for this officer-elect to take the oath of office.

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Your fourth question is fully answered by an opinion of this office, dated January 6, 1943, addressed to Honorable Llyn Bradford, Prosecuting Attorney, Phelps County, in which it is held that the person elected to the office of judge of the county court may take the oath of office before any person capable of administering oaths either within or without this state. Copy of that opinion is enclosed.

This leaves your second question, which is:

"In what time must Mr. Norris qualify to take this office?"

The Constitution provides, Section 11, Article VII, that, before taking office, all civil and military officers in this state shall take and subscribe an oath of office. Neither the Constitution nor any statute fixes a time or date by which the officer must take this office.

In 42 Am. Jur. 972, it is said:

"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."

Since we have no constitutional or statutory requirement fixing a time, it would seem that the officer may take the oath at any convenient or reasonable time although he cannot perform the duties of the office until he takes the oath.

In *Brown v. Tama County*, 122 Iowa 745, 101 American State Reports 296, the court holds that, except when prevented by sickness or inclemency of the weather, the officer is required to qualify before noon of the first Monday in January after his election, but this apparently is a provision of the statute of that state.

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In *People ex rel. Benoit v. Miller*, 24 Mich. 458, 9 American Reports 131, the court held that the relator (county treasurer-elect) was entitled to compensation from the date of the beginning of his term, although he had not qualified until the termination of an election contest apparently many months after the beginning of the term. Evidently the decision is not based upon any statute excusing the officer from qualifying during the pendency of the contest but upon the ground that it was unnecessary and useless for him to qualify until he could take over the office and perform the duties thereof.

It is believed, under the facts stated by you concerning the illness of Mr. Norris, the presiding judge-elect, that he is not required to take the oath of office at any definite time, but may qualify at least within a reasonable time after he is physically able to perform the duties of the office.

CONCLUSION

It is the opinion of this office, under your statement of facts, (1) that the incumbent presiding judge holds over until his successor is elected or appointed and qualified; (2) that the presiding judge-elect may qualify in a reasonable time after he is physically able to perform the duties of his office; (3) that no vacancy now exists or will exist at the end of thirty days in the office of presiding judge of your county, and (4) that the presiding judge-elect may take the oath of office before an officer qualified to administer oaths in or out of the State of Missouri.

Respectfully submitted,

WALDO P. JOHNSON
First Assistant Attorney General

APPROVED:

J. E. TAYLOR,
Attorney General.