

Constable

Holding office until successor
is elected and qualified Sec 11748
Constitution of Missouri Sec 5 Art IV

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February 7th, 1933



Hon. C. P. Turley,
Prosecuting Attorney,
Van Buren, Missouri.

Dear Sir:

Your letter of January 28th in which you request the opinion of the legal department, has been handed to the undersigned for attention. In your inquiry you state the following facts:

" Section 11748, R. S. Mo. 1929, provides that constable who is elected shall serve until his successor is elected and qualified.

And the section further provides that in case of vacancy the court may appoint a constable who shall hold office until the next general election for constables. Does that imply that such appointed constable shall hold after the election until his successor is qualified? The practice here has always been for him to do so. I do not think that practice is correct."

Section 11748, R. S. Mo. 1929, provides for the election of constables and the tenure of their offices. This section particularly provides that in the election to be held in the year 1920 and each general election every two years thereafter, the qualified voters of each township in every county of this state shall elect a constable who shall be a resident of the township of the township for which he is elected, and who shall hold such office for two years, and until his successor be elected and qualified.

Section 11749, R. S. Mo. 1929, provides for the bond of such township constables.

Section 5, Article XIV of the Missouri Constitution provides that, in the absence of any contrary provisions, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified.

In reference to an officer holding over until his successor has been elected and qualified, we find from Mechen on public Office and Officers, the following in Section 397 of said authority.

"It is usually provided by law that officers elected or appointed for a fixed time shall hold not only for that time but until his successor is elected and qualified. Where this provision is found, the office does not become vacant upon the expiration of the term, if there is then no successor elected and qualified to assume it, but the present incumbent will hold until his successor is elected and qualified, even though it is beyond the term fixed by law."

In the case of State ex rel v. Seay, 64 Mo. 89, the court writing the opinion states:

"The law abhors vacancies in public office and great precautions are taken to guard against their occurrence. The policy of the law is to have someone always in place to discharge the duties of public offices, and in a doubtful case the construction of the law fixing the tenure of an office would be greatly influenced by that consideration; but where, as in this case, there is a casus omissus resulting from giving the language of the law the only construction of which it is fairly susceptible, the courts must leave it to the law-making power to make provisions to avoid such a consequence."

In 22 R. C.L. Section 258, in commenting upon the purpose and effect of authorization to hold over, we find this language:

"The purpose of constitutional or statutory provisions authorizing public officers to hold over is to prevent a hiatus in the government pending the time when a successor may be chosen and inducted into office. Where a constitutional or statutory provision exists permitting or commanding an incumbent of an office to continue in the discharge of his duties until his successor is qualified, the expiration of the official term not only does not create a vacancy, but the period between the expiration of his term and the qualification of his successor

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is as much a part of the incumbent's term of office as the fixed statutory period. This is true even where a person is elected his own successor. * * * *. The practical effect of a constitutional provision directing that public officers should hold over until their successors are qualified is that a public office does not actually become vacant in the sense that there is no incumbent to fill it except in the case of death. Nevertheless it has been said that when the legal term expires, the office becomes vacant in one sense, and the incumbent is authorized to continue in the discharge of his functions until the appointment and qualification of his successor by sufferance rather than from any intrinsic title to the office (Citing State v. Williams 222 Mo. 268.)"

In view of the above authorities, we are of the opinion that the constable is authorized by the provisions of the statute to hold office until his successor has qualified as provided by the sections hereinabove referred to, and this is true although the period for which the incumbent was elected has expired. The above cases and principles of law declared therefrom appear to be based upon the reasoning that under the imperative demand of necessity, the public, for whose benefit the office has been created, should at all times have an incumbent to discharge the duties incident to such office so that the public interest may not suffer from a neglect which would of necessity occur in the event of a vacancy.

Very truly yours,

Carl C. Abington
Assistant Attorney-General

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