

CIRCUIT CLERK: Circuit Clerk appointed by Governor "until next general election" relinquishes the office after the general election in November.

November 9, 1936.

11-10



Mr. Elmer Aven,
Circuit Clerk and Ex-officio Recorder,
Christian County,
Ozark, Missouri.

Dear Sir:

This department is in receipt of your letter of November 5, wherein you request an opinion based on the following facts:

"The circuit clerk and ex-officio recorder of this county died in July 1936 and I was appointed by Governor Park to serve until my successor is elected and qualified.

"At the election just past, I was defeated by a republican for this office and I am desirous of knowing if I am supposed to hold the office until first Monday in January or if he can force me to surrender the office at once."

We assume that the person elected on November 3 was elected to fill the unexpired term of Circuit Clerk and Ex-officio Recorder of Christian County, as the regular election for a four-year term for that office was held in 1934; the next regular election to fill a four-year term will be in 1938. We call this feature to your attention for the reason that it will have an important bearing on our ultimate conclusion.

There are two sections of the statute which bear on the question and they must be analyzed to determine which is applicable in the instant case. Section 10216, R.S. Mo. 1929 is what is commonly termed a general vacancy section, and is as follows:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election, at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

Whenever there is no specific section pertaining to a vacancy in any particular office, in most instances, with the exception as mentioned in the statute, Section 10216 is followed. However, when a vacancy occurs in the office of Circuit Clerk, Section 11665 must be given consideration, said section being as follows:

"When any vacancy shall occur in the office of any clerk of a court of record by death, resignation, removal, refusal to act or otherwise, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office, who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed."

Sections 10216 and 11665 appear to be contradictory as to the length of time of an appointment. Section 11665 contains the clause "who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed", while Section 10216 states: "continue in such office until the first Monday in January next following the first ensuing general election, at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term."

In the case of State ex inf. v. Koeln, 270 Mo. 174, it was held:

"The person elected at the preceding November election to fill an unexpired term does not take possession of the office immediately upon his election, nor until the next March, whether the Governor filled the vacancy by appointment prior or subsequent to such election."

Prior to 1921 there was a special section similar to Section 11665 which related to a vacancy in the office of Circuit Judge. The section was repealed in 1921, and in construing the effect of the section prior to its being repealed, the Supreme Court, in the case of State ex inf. v. Amick, 247 Mo. 271, said:

"This section, read together with Section 2374, R.S. Mo. 1919, enacted, at the same time, provided for the filling of vacancies in courts of record. It is held to give the latter provision the effect of a special statute, the term of a circuit judge appointed in 1911 to a vacancy in a term expiring in 1914 expired November 5, 1912 following the election of a judge at a general election."

In construing the effect of Section 10216 when considered with other special sections dealing with vacancies, the court in the case of State v. Schweitzer, 258 S.W. 1.c. 439, said:

"Reading together sections 13823, 782, 9168 and 4786, and giving full effect to each, we think the logical conclusion is that, when a vacancy occurs in the office of prosecuting

attorney for the St. Louis Court of Criminal Correction, the Governor shall appoint some competent person to fill the same until the next regular election for said office and until his successor shall be elected and shall qualify, but that the successor so elected cannot qualify for a term beginning earlier than January 1st following such election. Where such vacancy occurs before a general election, not the regular election to fill the office, the effect of Section 4786 would necessarily have to be considered. But that question is not in this case. The foregoing is the only conclusion which can be reached by giving effect to all of said sections of the statute without running counter to express provisions contained in one or more of them.

"It is our conclusion that no short or unexpired term existed between the November, 1922 election and January 1st following; that relator was appointed for the term expiring December 31, 1922, and thereafter until his duly elected and commissioned successor had qualified."

CONCLUSION

We are of the opinion that Section 11665, R.S. Mo. 1929 is a section special in nature and the general rule of law is to the effect that when two sections dealing with the same matter, one general in nature and the other special in nature, the special section takes precedence over the general section. If your successor was not elected to fill an unexpired term, then he could not qualify until January, 1937; therefore, you would hold the office until that time, using the logic and reasoning as contained in the Sweitzer decision wherein it states "where such vacancy occurs before a general election, not the regular election to fill the office, the effect of Section 4786 (10216) would necessarily have to be considered. But that question is not in this case.

It is therefore, the opinion of this department that your tenure of office under your appointment terminated at the general

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election held on November 3, 1936, and your successor is entitled to the office on the date he qualifies. To hold otherwise, it would be necessary to wholly disregard Section 11665 and to make the same a nullity.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

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