

ELECTIONS:  
OFFICERS:

An officer may not be elected to another office during the term of his office, and if he is elected and enters upon the duties of such other office, a vacancy exists in the office held and an appointment to fill the vacancy is in order.

May 18, 1938

6-8



Honorable Harry J. Libby,  
Judge of Second Judicial Circuit,  
Shelbina, Missouri.

Dear Sir:

This is in reply to your request of May 12, 1938, for an official opinion from this department based upon the following letter:

"Mr. Robert E. Stone, with whom you are personally acquainted, is the present duly elected, qualified and acting Collector of the Revenue of Macon county, Missouri, having been elected at the General election for state and county officers held in November, 1934, and who qualified and took office for a term of four years expiring March 1st, 1939.

Mr. Stone desires to become a candidate in the State wide primary in August of this year for the democratic nomination for Clerk of the county court of Macon county, Missouri, the term of which office, if he be nominated and elected, will commence January 1, 1939, whereas, under the law his term of Collector of the Revenue will not expire until March 1st, 1939.

Mr. Stone understands of course that he cannot hold two offices at once

and the same time. He would like to obtain an Opinion from you about the following matters: (1). Whether if nominated and elected, County Clerk of Macon county Missouri, for the term commencing January 1, 1939, the present incumbent County Clerk can hold over until March 1, 1939, and he, himself hold the office of Collector until that time; or (2) whether if nominated and elected, he would have to resign his office as Collector of the Revenue, effective January 1, 1939, and let the Governor make an interim appointment of a collector, to serve from January 1, 1939 to March 1, 1939.

I am, of course, not in a position to advise him, and have suggested to him that he obtain an opinion from you, and I am therefore writing you, requesting that you give him an opinion on the above questions."

The office of the county clerk is the clerk of the court of record. Upon our research on the question which you have submitted, we find that the following sections apply: Section 11664, R.S. Mo. 1929, provides as follows:

"At the general election in the year eighteen hundred and eighty-two, and every four years thereafter, except as hereinafter provided, the clerks of all courts of record, except of the supreme court, the St. Louis court of appeals, and except as otherwise provided by law, shall be elected by the qualified voters of each county and of the city of St. Louis, who shall be commissioned by the governor, and shall enter upon

the discharge of their duties on the first Monday in January next ensuing their election, and shall hold their offices for the term of four years, and until their successors shall be duly elected and qualified, unless sooner removed from office."

Section 5, article XIV of the Constitution of Missouri provides as follows:

"In the absence of any contrary provision, 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."

Section 8, article XIV of the Constitution of Missouri provides as follows:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

Volume 46, Corpus Juris, page 969, section 111, quotes the rule on an office becoming vacant in the following language:

"\* \* \* \* Under a provision that officers shall hold over until their successors are 'elected' and qualified, the officer holding over is in all respects a de jure officer, and the expiration of the term does not produce a vacancy."\* \* \* \* \*

And in the case of State v. Brown, 274 S.W. 965  
l.c. 976, the rule is stated as follows:

"The law is well settled that, where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. State ex rel. Lusk, 18 Mo. 333; State ex rel. Stevenson v. Smith, 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires."

By the rule laid down in Corpus Juris, supra, and the case of State v. Brown, supra, the failure of the newly elected officer to qualify would not constitute a vacancy in the office to which he was elected, but the incumbent would be authorized to hold such office until a successor is duly elected and qualified. Section 11666 R.S. Mo. 1929 provides in part as follows:

"Every clerk, before he enters on the duties of his office, shall enter into bond, payable to the state of Missouri, with good and sufficient securities, who shall be residents of the county for which the clerk is appointed or elected, in any sum not less than five thousand dollars, the amount to be fixed and the bond to be approved by the court of which he is clerk, or by a majority of the judges of such court, in vacation."  
\*\*\*\*\*

Section 11668, R.S. Mo. 1929 provides as follows:

"The certificate of the election of any clerk, signed by the presiding judge of the county court, and the bond of every clerk, shall be deposited in the office of the secretary of state, with the approval of the court or judges indorsed thereon."

These sections contain the duties to be performed by the county clerk and the county court before the clerk is authorized to assume the duties of the office.

However, the failure of the newly elected official to comply with the foregoing requirements would not constitute a vacancy in the office of the clerk of the county court.

In the case of *Aiken v. Sidney Steel Scraper Company*, 197 Mo. App., 673, l.c. 681, the court said:

"The failure of a person duly elected or appointed to an office to take the prescribed oath or give a bond, as required, or either, does not, when he has proceeded to exercise the functions of the office, invalidate his acts so far as the public or third persons are concerned. As to them, his acts are as valid as though he were an officer de jure. His title to the office cannot be attacked collaterally, but only by direct proceedings in the nature of quo warranto. The failure to qualify constitutes a ground for ousting him from the office."

As stated in Section 11664, supra, the clerk shall enter upon the discharge of his duties on the first Monday in January next ensuing his election.

Your request includes the question of whether or not the provision, "that the clerk shall enter upon the discharge of the duties of the office on the first Monday in January next ensuing his election", is directory or mandatory.

On the question of mandatory and directory provisions of the statute the court in the case of Bituminous Paving Company v. McManus, 144 Mo. App. 593, l.c. 607, said:

"The distinction between mandatory and directory enactments has often been under consideration by the courts. Into which of these classes any given statute falls is to be determined by its character and purpose. If no substantial rights depend upon it and no injury can result from ignoring it, and the purpose of the Legislature can be accomplished in a manner other than as prescribed therein and substantially the same results obtained, then the statute will generally be regarded as directory."

\* \* \* \* \*

In the case of State ex rel. Attorney General, v. Churchill, 41 Mo. l.c. 43, the court said:

"It is stated that Jasper N. Norman was duly elected treasurer of the County of Laclede at the election in November, 1866, received his certificate of election, gave his bond, which was approved by the County Court and ordered to be filed, and took the oaths required by law, which were enclosed in his certificate or commission; but that a few days afterwards, on motion of the county attorney, the County Court made an order rescinding the approval of the bond, and declaring

it annulled, for the reason that it had not been offered and filed within ten days after the election, as required by the statute--G.S. 1865, ch. 38, section 5. The court also declared the office vacant and proceeded to appoint the defendant county treasurer, who gave the required bond, was duly qualified, and entered upon the duties of his office.

We think the court erred in this proceeding. 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. Lexdale, 1 Burr. 497; Sedgw. Stat. & 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. We are of the opinion that the orders of the court vacating the bond, declaring the office vacant, and appointing the defendant treasurer, should be regarded as having been done without authority of law and as mere nullities."\* \* \* \* \*

From the foregoing rules of construction the provisions of said Section 11664, supra, might be considered directory under certain circumstances, but, the court in the case of Louis S. Flatan v. The State ex rel. W. C.

Edwards, 56 Texas Reports, 93 l.c. 98, in discussing an exception to the general rule of such directory statute said:

"The term of office provided by the constitution is short, and such persons as seek office, and by the vote of the people are elected thereto, should not be dilatory in qualifying after they have been notified by certificate of election that the people have honored them by their confidence expressed through the ballot. The statute provides that a person elected to the office of sheriff shall give bond and take the oath of office within twenty days after notice of his election; and he that seeks an extension of the time provided by statute should show some extraordinary reason therefor.

The time prescribed by statute within which a person elected to an office shall qualify has been held to be directory in some of the other states, and so was held to be in this case upon former appeal. These rulings were no doubt made to cover such cases as might arise in which a person could not, for some good reason beyond his own control, qualify within the prescribed time, in order that the right of the person to qualify might not be destroyed without wrong upon his part, and that the wish of the people might not be lightly defeated; but it is not believed that the rule can be extended to cases in which there is neglect upon the part of an elected person.

In this case the certificate of election

issued to the relator on the 18th day of November, and from the 20th day of that month, after several adjournments made as alleged in the answer to enable him to perfect and present his bonds, on the 18th day of the December following he presented bonds which were adjudged by the court insufficient. These facts might be held to constitute neglect, and if so, as more than twenty days had elapsed after he received his certificate of election, it might well be held that the extension of time should not have been given. The plain words of the statute should have their full effect in reference to the time within which an elected person should qualify, in all cases in which there is neglect or refusal to qualify."

From this case if the officer fails to qualify for the office to which he is elected and such failure is brought about by his own negligent acts or omissions, then the statutes providing when he should enter upon his official duties should be construed as mandatory.

We fail to find where the Missouri courts have passed on this particular question, however, we believe the reasoning in the Texas case is good and we are following that ruling in arriving at our conclusions in this opinion.

#### CONCLUSION

From the foregoing this office is of the opinion that:

1. The present incumbent county clerk will hold his office until his successor is duly elected and qualified.
2. That the county collector, should he be elected to the office of county clerk would not be authorized to fail to qualify and enter upon the duties of the office of county clerk on the first Monday in January following

Hon. Harry J. Libby

-10-

May 18, 1938

his election because of the fact that he held the office of county collector the duties of which were so incompatible with the duties of the office of county clerk that he could not hold both offices at the same time, and for that reason he could not qualify until March first.

We are further of the opinion that if the county collector is elected to the office of county clerk that the office of county collector would become vacant at the time that the county collector qualifies and enters upon the duties of the county clerk, and that interim appointment of county collector to serve from the first Monday in January, 1939, to March 1, 1939, would be necessary.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

---

J. E. TAYLOR  
(Acting) Attorney General

TWB:DA