

PROSECUTING
ATTORNEY:

Term of office continues until suc-
cessor has qualified.

December 12, 1942

Honorable Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri

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Dear Mr. Chitwood:

This will acknowledge receipt of your letter
of December 9, 1942, requesting an opinion as follows:

"Two years ago I was elected prosecuting at-
torney of Reynolds County, Missouri. I
served in this office until September 1, 1941,
when I resigned to take a position with the
U. S. Engineers in connection with the clear-
ing of certain land titles in the Clearwater
Flood Control and Reservoir Area. Because of
the war and the government's policy of reduc-
ing personnell in all activities not directly
related to the war effort, I was given an hon-
orable discharge July 1, 1942.

"About October 1, 1942, I was appointed by Go-
venor Donnell to fill out my own unexpired
term as prosecuting attorney of Reynolds Coun-
ty, made vacant by the resignation of my fa-
ther who was in very poor health. I have been
serving in said office until the present time.

"Mr. John A. Johnson, was elected to this of-
fice at the November general election 1942, al-
though he was at that time and now is in the
United States Army, presumably in Australia.
It is very evident that Mr. Johnson will not
be present to take over the duties of this of-
fice on January 1, 1943.

"In view of these facts and also similar recent cases (although the facts are not the same as in the instant case) I was wondering if my commission, which is in the regular form would be sufficient to entitle me to proceed with the duties of the office of prosecuting attorney of Reynolds County, after the 1st of January 1943; and if so, whether or not I would be entitled to exercise those privileges until Mr. Johnson's return from the army.

"Your opinion in this matter is requested at the earliest possible date. I have no intention of trying to usurp an office to which I am not legally entitled, and I am sure that the Reynolds County Court would not want to issue county salary warrants to me unless I was legally entitled to them."

Section 12820, Article 1, Chapter 83, R. S. Mo., 1939, applies to all terms of office and is as follows:

"All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

Section 12934 makes provision for the election of prosecuting attorneys, and the filling of a vacancy in the office of prosecuting attorney is provided for by Section 12909, which is here quoted:

"At the general election to be held in this state in the year A. D. 1880, and every two

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years thereafter, there shall be elected in each county of this state a prosecuting attorney, who shall be a person learned in the law, duly licensed to practice as an attorney at law in this state, and enrolled as such, at least twenty-one years of age, and who has been a bona fide resident of the county in which he seeks election for twelve months next preceding the date of the general election at which he is a candidate for such office and shall hold his office for two years, and until his successor is elected, commissioned and qualified."

The Constitution of Missouri, Section 11, Article V, relates to all vacancies in office:

"When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

and Section 11509 applies to filling vacancies in office which have not been otherwise provided for. This general section and Section 12989, supra, follow closely the provisions of Section 11, Article V of the Constitution, and in the case of State ex inf. Hadley v. Herring, 208 Mo. 708, this constitutional provision is discussed at local citation 728:

"The framers of our Constitution when they drew section 11, article 5 thereof, were considering vacancies in public offices; they foresaw that for various reasons such vacancies were inevitable, and in order to prevent and provide for

these vacancies as far as possible in order that the public good should not suffer thereby, they framed this section, and gave to the Governor the power to fill these vacancies when they were not otherwise provided for by law. When this vacancy occurred in the office of collector of the revenue in Chariton county, the condition existed which authorized the Governor to fill it by appointment. Whether we look to section 11 of article 5 of the Constitution or to section 7028, Revised Statutes 1899, for authority to fill the vacancy, we find that it is vested in the Governor. The obvious purpose in conferring this authority upon the Governor was to prevent any interregnum in the office, and to have some person always authorized to discharge its duties. The language of the Constitution is: 'He shall appoint a person to fill such vacancy.' Giving these words their natural significance, and it has often been held that the word, 'vacancy' has no technical meaning, but must be understood with reference to the context in which it is found, they import that the appointee of the Governor would be entitled to hold the office until the end of the term in which the vacancy occurs. And when the additional words of the section, to-wit: 'Shall continue in office until a successor shall have been duly elected or appointed and qualified according to law,' are considered, we think the obvious purpose was to extend the appointee's tenure after the end of the term in which the vacancy occurred until everything has been done which is required by law to give title to the office to another person. * * * * *

The case of State ex inf. Barrett v. Schweitzer, 258 S. W. 435, was a case quite similar to the case stated

in your letter. The following quotation is taken from this case at local citation 449:

"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 re-lator was appointed for the term expiring December, 31, 1922, and thereafter until his duly elected and commissioned successor had qualified."

The sections of the statutes referred to in the above quotation are now respectively Sections 2243, 12989, 12820 and 11509 R. S. Mo., 1939. Section 2243, supra, has no bearing on your question as it applies to officers of the city of St. Louis, but the others are

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pertinent.

CONCLUSION

It is apparent from the foregoing that the prosecuting attorney whether elected or appointed will serve until his successor has been chosen and has qualified.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

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