

PROSECUTING ATTORNEY:
OFFICERS :

A tenure of a holdover prosecutor ends when his successor, after election and after a commission is issued, takes the oath of office.

March 3, 1943



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

Dear Sir:

This will acknowledge receipt of your letter of March 1, 1943, which is as follows:

"Under date of December 12, 1942, your office kindly furnished me with an opinion regarding my status as prosecuting attorney of Reynolds County. The effect of this opinion was that I was in office until my successor had been chosen and qualified.

"Today, John A. Johnson, the father, and attorney of John A. Johnson has filed notices on the County Clerk and County Treasurer to the effect that John A. Johnson was elected prosecuting attorney at the last general election in 1942, and is entitled to the salary of such office; that no county warrants for salary are to issue except upon the order of John A. Johnson. A copy of this notice is enclosed for your consideration.

"John A. Johnson has been in the United States Army, presumably for the past several months in Australia. It appears that he has taken the oath of office, and that his commission is to be sent to the Reynolds County Clerk for recordation within a few days, but that he is not now, nor is he likely to be in Reynolds County for a long time in the future.

"Mr. Johnson was elected at the general election of 1942, and I would like it understood that I do not wish to make any effort to deny

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him the office if he is the legally the prosecuting attorney. If you should hold that he is now the prosecuting attorney, then I do not propose to do any further work, as he is entitled to the pay and should do his own work. However, it appears that he was sworn in (if such is actually the case) in order to draw the salary and will not and cannot give the office his own personal attention.

"Your opinion on this matter will be appreciated at your earliest convenience."

In answering your inquiry, we need only to add very little to our opinion to you of December 12, 1942. In that opinion we held that under your appointment to the office of Prosecuting Attorney of Reynolds County, you were entitled to hold the office until a successor was duly elected and qualified. It now appears that Mr. John A. Johnson was elected as your successor at the general election held in November 1942. To date, however, it is not known whether Mr. Johnson has qualified.

After an election is held for prosecuting attorney, the clerk of the county court is required to transmit to the Secretary of State the votes given for each candidate. (Sec. 12937 R.S. Mo. 1939) The Secretary of State then compares the votes given for the respective candidates and certifies to the Governor the person elected (Sec. 12938 R. S. Mo. 1939). Upon the basis of this certification the Governor then issues the commission to the person elected (Sec. 12998 R.S. Mo. 1939). The Secretary of State affixes the seal of the State to said commission and countersigns the same (Sec. 12996 R.S. Mo. 1939). Said officer also keeps a register of said commission (Sec. 12995 R. S. Mo. 1939). Upon receipt of the commission, the prosecutor elect must, before entering upon the discharge of the duties of the office, take the oath prescribed by the Constitution (Sec. 6 Art. 14, Mo. Const.).

The taking of the oath seems to be the last act necessary in order to entitle a prosecutor elect to enter upon the discharge of the duties of the office of Prosecuting Attorney. While it seems to have been the custom for such commission to be

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recorded with the county clerk (you mention such in your letter) or with the recorder of deeds (See Sec. 13161 R. S. No. 1939), we are unable to find any statute which requires that to be done, or makes such a prerequisite to entering upon the discharge of the duties of the office.

CONCLUSION

It therefore is our opinion, that when it appears that John A. Johnson has had a commission issued to him by the Governor and has taken the oath of office prescribed by the Constitution, your tenure as prosecuting attorney of Reynolds County, under appointment by the Governor, is at an end. The mere fact that Mr. Johnson will not and cannot give the office his personal attention due to his presence in Australia on military duty, does not seem to have any bearing on the question. State ex inf. McKittrick v. Wilson 166 S.W. (2d) 499 (Mo. Sup.).

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

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