

**LEGISLATURE:** There is a vacancy at present in the office of Representative from Cape Girardeau County, and Governor should issue writ of election to fill such vacancy.

January 14, 1949

Honorable J. S. N. Farquhar  
Member, House of Representatives  
Jefferson City, Missouri

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Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"As you, of course, know Mr. Goodwin was elected on the Democratic ticket from Cape Girardeau County as a member of the Legislature, but before he qualified he died; and I would appreciate it if you would advise me if I am to serve the full two years, or if it is necessary to hold a special election."

We believe the case of State ex rel. vs. Thomas, 102 Mo. 85, to be decisive of the question of whether or not there is a vacancy in the office of Representative from Cape Girardeau County. In that case, a person was elected Marshal of St. Louis at a special election. At the time of the special election, there was an incumbent holding over after his term of office had expired, and the incumbent was holding over because no valid election had been held prior to the special election. The court said, l.c. 91:

"\* \* \* An office is vacant within legal intendment, and for all purposes of election or appointment, as well when the official term of the occupant has expired, as in case of his death, resignation or removal.\* \* \*"

The court further said, l.c. 92, commenting on the case of State vs. Jenkins, 43 Mo. 261:

"\* \* \* The case just cited, while it plainly decides the point mentioned, necessarily decides, also, that there is a vacancy in an office notwithstanding there is a hold-over incumbent, and a vacancy which may be filled, provided there is a law for the

election of his successor. As already pointed out there is no such impediment in the case before us. Ordinance 1089 is adequate and ample."

In the case of State ex inf. Crow vs. Smith, 152 Mo. 512, the Supreme Court, in commenting on the Thomas case, said, l.c. 520:

" \* \* \* The case of State ex rel. v. Thomas, 102 Mo. 85, decided that the charter and ordinances of St. Louis, expressly provided for a special election in the exigencies present in that case."

We believe that the Thomas case was decided on the general ground that a vacancy existed which could be filled by election and not on any special charter or ordinances of St. Louis. We believe this position is substantiated by the Supreme Court of this state in the case of State ex rel. Bothwell vs. Green, 180 S.W. (2d) 12, where the court said, l.c. 14:

"Other cases relied on do not sustain respondent's contentions. State ex rel. Crow v. Smith, 152 Mo. 512, 54 S.W. 221, 47 L.R.A. 550, is decided on the same ground as the Dabbs case which was overruled, as we pointed out, by the Amick case and for that reason should not be followed. \* \* \* \*"

In the Dabbs case, referred to in the Green opinion, supra, such case being State ex inf. vs. Dabbs, 182 Mo. 359, it was held that where a circuit judge was appointed to serve until a specified date and until his successor was elected and qualified, and the person elected to succeed him died on the day after election and before qualifying, that no vacancy existed and that the appointee served an additional full term of six years.

The Amick case (State ex inf. vs. Amick, 247 Mo. 271), referred to in the Green case, supra, as overruling the Dabbs case, attempted to distinguish the Dabbs case in the main opinion but the concurring opinion of four judges holds that it should be specifically overruled. We believe that it was overruled on the specific point that a vacancy cannot exist where a person is elected but dies before qualifying. The court said, l.c. 295:

" \* \* \* By refinement it might be distinguished, but I think the case wrong on principle, as well as under the statutes and Constitution, and should be so dealt with in the case at bar. \* \* \* "

The case of State ex rel. vs. Seay, 64 Mo. 89, which held that where a circuit judge was elected and qualified but died two days before his term of office began that a vacancy existed because the incumbent successor had been elected and qualified, was strongly relied on in the Dabbs and Smith cases which, as pointed out supra, are held to be overruled by the Amick case. We believe the reasoning of the Seay case also to be overruled insofar as it holds that when a person dies after election but before qualification, no vacancy can exist.

The case of State ex rel. vs. Thomas, which we held supra correctly to state the applicable law, was cited approvingly in State ex rel. vs. Green, cited supra, where the court said, l.c. 14:

" \* \* \* State ex rel. Tredway v. Lusk, 18 Mo. 333, was overruled by State ex rel. Attorney General v. Thomas, 102 Mo. 85, 14 S.W. 108. \* \* \* \* "

Section 12 of Article VII of the Constitution, providing that "except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified," and Section 12820, R. S. Mo. 1939, providing that "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," mean only that until such time as a successor is elected or appointed and qualified that the incumbent holds over to avoid the interruption of the functioning of the office, but does not mean that no vacancy exists which may be filled when the term of office has expired.

In the case of State ex rel. vs. Thomas, cited supra, the Supreme Court said, l.c. 91:

"The fact that the incumbent remains clothed with official authority, in furtherance of a wise provision of public policy and of

public law, cannot enlarge the boundaries of his official term, or arrest the operation of the power of appointment or of election. Of course, these remarks are subject to the conditions that the law has provided for filling the office in one of the modes mentioned, and that, therefore, the election or appointment cannot be classed as voluntary."

It is therefore our view that a vacancy exists at present in the office of Representative from Cape Girardeau County.

Section 14 of Article III of the Constitution of Missouri, provides as follows:

"Writs of election to fill vacancies in either house of the general assembly shall be issued by the governor."

It is our view, therefore, that a method for filling the vacancy in the office of Representative from Cape Girardeau County is provided for and that the Governor should issue a writ of election to fill such vacancy.

#### CONCLUSION

It is the opinion of this department that a vacancy exists at present in the office of Representative from Cape Girardeau County and that the present incumbent will continue to serve only until such vacancy is filled. It is further the opinion of this department that the Governor should issue a writ of election to fill such vacancy.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

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