

OFFICERS  
LEGISLATURE

Person elected to fill vacancy in Legislature entitled to compensation from date of election.

FILED NO. 71

May 23, 1950



Honorable Elmer L. Pigg  
State Comptroller  
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"In the special election on April 4th two representatives were elected to fill out unexpired terms.

"Article III, Section 15, of the constitution provides that 'the oath shall be administered in halls of the respective houses etc.'

"My question is: Can the oath be administered any time or will they have to wait until the General Assembly is in session?

"I would like to have your official opinion as to when these two representatives may legally qualify."

Section 15 of Article III of the Constitution of 1945 provides:

"Every senator or representative elect, before entering upon the duties of his office, shall take and subscribe the following oath or affirmation: 'I do solemnly swear, or affirm, that I will support the Constitution of the United States and of the State of Missouri, and faithfully perform the duties of my office, and that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law.' The oath shall be administered in the halls of the respective

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houses to the members thereof, by a judge of the supreme court or a circuit court, or after the organization by the presiding officer of either house, and shall be filed in the office of the secretary of state. Any senator or representative refusing to take said oath or affirmation shall be deemed to have vacated his office, and any member convicted of having violated his oath or affirmation shall be deemed guilty of perjury, and be forever disqualified from holding any office of trust or profit in this state."

The elections to fill the vacancies which were held on April 4, 1950, were held pursuant to Section 14 of Article III, Constitution of 1945, which provides that writs of election to fill vacancies in either house of the General Assembly shall be issued by the Governor.

Section 15 of Article III, quoted above, is practically identical to Section 15 of Article IV of the Constitution of 1875. The 1875 Constitution, Section 16, Article IV, provided that the members of the General Assembly should be compensated on per diem basis for the sessions of the General Assembly. Consequently, under the 1875 Constitution, if a member of the General Assembly was to receive any compensation, there must of necessity have been a session of the Assembly.

Section 16 of Article 4 of the 1875 Constitution was amended on November 3, 1942, to provide that the members of the General Assembly shall receive a monthly salary of \$125.00 per month. The same provision is made by Section 16 of Article III of the Constitution of 1945.

The persons having been duly elected on April 4th to fill vacancies in the House of Representatives, the fact that the General Assembly is not in session so that the provisions of Section 15 regarding the place of taking the oath of office may not be complied with should not, we feel, deprive the person so elected of the compensation which the Constitution provides that he shall receive. The right of a public officer to the salary of his office is incident to the office, and he is entitled to such salary although he does not perform the duties thereof. (Luth v. Kansas City, 203 Mo. App. 110, 218 S.W. 901.)

As a general rule, constitutional provisions are regarded as mandatory not directory. (1 Cooley, Constitutional Limitations, page 159, 11 Am. Jur., Constitutional Law, Section 69, page 686) However,

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the courts of this state have recognized exceptions to the general rule insofar as the Missouri Constitutions have been concerned. In the case of *City of Cape Girardeau v. Riley*, 52 Mo. 424, the court considered the validity of an act which failed to follow the requirement of Article 4 of Section 26 of the Constitution of Missouri of 1865, that the style of laws enacted by the General Assembly shall be "Be It Enacted by the General Assembly of the State of Missouri As Follows:." The court in its opinion stated at l. c. 428:

"The enacting clause is certainly not of the essence of the law. It furnishes no aid in its construction, and its provisions are as clear and intelligible without it as they are with it. It is not material in indicating by what authority the law was enacted, for being passed in due form by both Houses of the Legislature and properly approved by the governor, with no allegation of suspicion attached to it, it comes before the courts bearing sufficient evidence that it is really and truly a law.

"To hold that a law supported by these sanctions was not valid because certain formal and immaterial words were omitted, would be sacrificing substance to mere form, which I think the court is not justified in doing."

Likewise, provisions requiring that all writs and processes run in the name of the state have been held merely directory, not mandatory. In the case of *Creason v. Yardley*, 272 Mo. 279, l. c. 285, the court stated:

"The foregoing authorities clearly hold that Section 38 of Article VI of our constitution (1875), requiring that all writs and processes shall run in the name of the state, is merely directory."

In the present situation the substantial matter involved is the taking of the oath. Refusal to take the oath results in disqualification to hold the office. We feel that the taking of the oath must be regarded as the mandatory provision, and that the place of taking the oath is, under the circumstances, directory only.

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CONCLUSION

Therefore, it is the opinion of this department that a person elected to fill a vacancy in either house of the General Assembly at a time when the General Assembly is not in session may qualify upon his taking the prescribed oath of office and filing the same in the office of the Secretary of State, and that the oath need not be administered in the halls of the General Assembly.

Respectfully submitted,

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APPROVED:

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Attorney General