

COUNTY CLERK:

Expiration of term of office of one appointed by the Governor to fill vacancy in the office of county clerk, who shall hold office between the next general election, when the regular term should be filled, and the beginning of such regular term.

JOHN M. DALTON

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June 19, 1953



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J. C. Johnsen

Honorable Phil M. Donnelly
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnelly:

This will acknowledge receipt of your letter of June 2, 1953, in which you ask for an opinion from this office as follows:

"Under Section 51.090, RSMo 1949, should I appoint a person to fill a vacancy in the office of clerk of the county court caused by the death or resignation of a person whose term expired December 31, 1954; when would the term of the person appointed by me to fill such vacancy expire?"

"If it expires on the date of the general election held in 1954, how is the office to be filled between that date and January 1, 1955, the beginning of the regular term of the person who will be elected at the 1954 general election?"

In this connection the Constitution of Missouri, 1945, provides as follows:

"Article IV, Sec. 4--The governor shall fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified."

"Article VII, Sec. 7--Except as provided in this Constitution, the appointment of all officers shall be made as prescribed by law."

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Pursuant to the authority contained in the above provision of the Constitution the Legislature has enacted two statutes pertaining to the filling of vacancies by appointment by the Governor. The general statute which covers vacancies in all elective offices with enumerated exceptions is found in Section 105.030, RSMo. 1949, and reads as follows:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election; provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office, until such other date."

The enactment specifically applying to the office of county clerk, which was first enacted by the Legislature in 1945, is found in Section 51.090, and reads:

"When any vacancy shall occur in the office of clerk of the county court by death, resignation, removal, refusal to act, or otherwise, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office, who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected or appointed and qualified, unless sooner removed."

The office of clerk of the county court is established and the terms thereof set out by Section 51.020, RSMo. 1949, which provides as follows:

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"At the general election in the year 1946, and every four years thereafter, the qualified electors of the county at large in each county in this state shall elect a clerk of the county court, who shall be commissioned by the governor and who shall hold his office for a term of four years and until his successor is duly elected or appointed and qualified. Each clerk of the county court shall enter upon the duties of his office on the first day of January next after his election; provided, that the term of office of persons holding the office of clerk of the county court at the time this section shall take effect shall not be vacated or affected thereby."

Also pertaining to the term of office of both officers elected and those appointed under the provisions of the Constitution of Missouri, 1945, we find the following in Article VI, Section 10 and Article VII, Sec. 12:

"Article VI, Sec. 10.--The terms of city or county offices shall not exceed four years."

"Article VII, Sec. 12--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."

Pursuant to the authority in these last above quoted provisions the Legislature enacted a general provision concerning the terms of office of officials of this state. Section 105.010, Mo. RS 1949.

"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."

From the above statutory provision, it is seen that the general statute concerning the filling of vacancies in elective offices, Section 105.030, presents a clear, concise and all-inclusive system which provides for all anticipated contingencies in connection with a vacancy in an elective office, whereas the statute which concerns specifically the office of county clerk, Section 51.090, leaves several questions to be answered.

According to the established canons of statutory construction these two statutes should be read together and if they are not compatible that one pertaining to the specific subject involved should govern. See State ex inf. Major v. Amick, 247 Mo. 271(En Banc, 1912.)

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Section 51.090, RSMo. 1949, provides that a person appointed to fill the vacancy by the Governor "shall discharge the duties thereof until the next general election at which time a clerk shall be chosen for the remainder of the term." From this it appears that the Legislative intent was that the Governor's appointee should hold office only until the time of the next general election. This conclusion is buttressed by the determination of the Supreme Court that the word "until" is a word of limitation and that when it is used the court is not justified in the construction of the statute authorizing a longer holding of the office by the appointee. See State ex rel. v. Perkins, 139 Mo. 106, (Division 2, 1897) where the Court said:

"Section 3276, it will be noted, uses the preposition 'until.' This is a restrictive word, a word of limitation; this is its ordinary and usual meaning, and under our statutory provisions (R.S. 1889, Sec. 6570), as well as under the general rule of construction, this is the meaning which should be ascribed to it. This is the ordinary meaning of the term as has been expressly adjudicated. Webster v. French, 12 Ill. 302; Abel v. Alexander, 45 Ind. 523; People v. Walker, 17 N. Y. 502; Nichols v. Ramsel, 2 Mod. 280; Wicker v. Norris, Cas. Temp. Hardw. 116. See, also, Kendall v. Kingsley, 120 Mass. 94.

"Besides, the legislature, at the revising session of 1879, enacted section 3276, and retained section 7121, and therefore must be deemed cognizant of the difference between those sections, and intentionally used the limiting word 'until,' and purposely refrained from using in section 3276 words granting the right to hold over after the expiration of a given time. Nay, more, they made express provision that the residue of the term should be filled by election. This amounts to the exclusion of a conclusion."

The case of State ex rel. v. Amick, supra, considered the situation arising from a vacancy of circuit judge wherein a statute of similar import to that we are here considering was involved. The statute, Section 3869, RSMo. 1909, reads as follows:

"Sec. 3896. If the office of the judge of any court of record of this State shall become vacant

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from death, resignation, or from any other cause, such vacancy shall be filled by the appointment of the Governor until the next general election held after such vacancy occurs, when the same shall be filled by election for the residue of the unexpired term."

After careful consideration, the Supreme Court decided that under its provisions the term of the judge appointed by the Governor to fill a vacancy expired on the day after the general election at which one was elected to fill the residue of the unexpired term. The court stated at l.c. 294:

"We are clearly of the opinion that upon both principle and authority respondent's term of office expired on the day following the general election held on November 5, 1912.

"The questions involved are legal propositions about which minds of honest men might and have heretofore differed, and this proceeding has presented a favorable opportunity for this court to finally settle that vexed question."

The same conclusion was expressed by the Supreme Court in the case of State ex rel. v. Perkins, 139 Mo. 106, (Division 2, 1897) and by the Kansas City Court of Appeals in Aiken v. Sidney Steel Scraper Co. (1917) 197 Mo. App. 673, 678, 198 S.W. 1139, (See also opinion to Honorable James P. Hawkins by the Attorney General under date of November 12, 1940).

The above conclusion is not in contradiction to the decision of the Missouri Supreme Court in the case of State ex inf. v. Schweitzer, 258 S.W. 435, (En Banc 1924) since that case concerned an entirely different statute applying to prosecuting attorneys and in that case the court cited with approval the Amick case, *supra*. Likewise the case of State ex rel. Hostetter, 137 Mo. 636, 39 S.W. 270, which deals with vacancies in the office of county clerk, is not authority for a holding contrary to that here expressed since in that case the successor did not qualify until January 4 following the election and the court based its decision upon the question of whether or not a woman could qualify to fill the office and did not consider the possibility of the incumbent's term having ended at the date of the general election. Also the case of State ex inf. v. Herring, 208 Mo. 708, 106 S.W. 984, (Division No. 2, 1907) considered the filling of a vacancy under a statute which was the forerunner of our present statute, Section 105.030, as applied to the vacancy in the office of county collector and does not require a holding different to that set out above.

In the general election to be held in 1954, the regular term for the office of county clerk is to be filled. The person who is

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elected to such regular term at such general election cannot assume his duties prior to the first day of January next after his election since such is the commencing date of his regular term as specifically provided by Section 51.020, quoted above, and since if he were to enter upon the duties of his office sooner such action would be in contravention of Article VI, Section 10 of the Constitution of Missouri, 1945, above quoted. See State ex inf. v. Herring, 208 Mo. 708, supra.

Thus it would appear that under the constitutional and statutory provisions so far considered the term of the person appointed to fill the vacancy by the Governor will expire on the day after the general election held in 1954, and the term of office of the person elected to fill the regular term at such election will not begin until the first day of January, 1955. It would appear from the statute that it was the contemplation of the Legislature that at such general election in 1954 one should be elected to fill the short term from the date of such election to the first of the following year. The statute, Section 51.090, specifically provides for filling the vacancies by appointment of the Governor until the next general election "at which time a clerk shall be chosen for the remainder of the term." No provision of the Constitution or statutes has been found which would prohibit either the Governor's appointee or the candidate for the regular term from being a candidate for this short term and likewise there is nothing to prevent the Governor's appointee from being a candidate for the regular term.

The constitutional and statutory provisions quoted at the first of this opinion providing that all officials including those appointed to fill vacancies by the Governor shall serve until their successors are appointed or elected and qualified, do not change this conclusion since it appears to be the meaning of Section 51.090 that a successor for the remainder of the term shall be elected at the general election in 1954. These provisions would allow the appointee to continue in office until such successor qualified and if there were no one elected for the short term between November 1954, and January 1, 1955, the one previously appointed by the Governor could hold over and act during such time even though the official term would have ended on the day after the general election in 1954.

It also appears that during said period he would at least be a de facto officer and his actions during such period would be legal. See Aiken v. Sidney Steel Scraper Co., supra, where the Court of Appeals said, lc. 679, 680:

"But the question remains, whether having acted, unchallenged, his acts are not valid, under the rule relating to de facto officers. We think, undoubtedly, in all official actions had by him in the few weeks between the election

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and the first Monday in January, 1917, which were not objected to on the ground that he was not clothed with official authority, his acts are valid. * * *

CONCLUSION

For the reasons above given it is the opinion of this office that the term of one appointed by the Governor to fill a vacancy in the office of county clerk would expire at the date of the general election to be held in 1954; that he can remain in office until his successor is elected and qualified; that the statute requires that a successor for the remainder of the term be elected at such election to serve from the date thereof until January 1, 1955; and that the person elected at such election for the regular term cannot qualify and enter upon the duties of such office until January 1, 1955.

This opinion, which I hereby approve, was written by my assistant Mr. Fred L. Howard.

Yours very truly,

JOHN M. DALTON
Attorney General

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