

COUNTY OFFICES:

Tenure of office of persons appointed to fill various offices; tenure when elected to fill unexpired term.

November 21, 1938

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Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

This Department acknowledges receipt of your request for an opinion, dated November 1, 1938; said request being as follows:

"In keeping with our telephone conversation to today, we are asking for an opinion concerning a sheriff-elect; whether the Secretary of State Department will issue him a commission to take charge of the office immediately after the General Election on November 8, 1938, upon due notice from the county clerk that the vote has been canvassed and the result made known.

"In this particular case the sheriff now serving was appointed by the county court to fill an unexpired term of a sheriff, deceased.

"Also in this connection please advise whether a probate judge, who is filling an unexpired term by an appointment by the Governor, will hold office until January 1, 1939, or if the man elected will be entitled to his commission upon proper certification from the county clerk of the county from which he is elected. Then too, would this apply to a county clerk, a circuit clerk, the judges of the county court, prosecuting attorney and collector of revenue."

As your request asks for rulings on various offices and as the statutes governing the same must be applied to each individual office, it is necessary that we rule separately on each office.

I.

Sheriff Elected to Fill an Unexpired Term.

Section 11523, R. S. Mo. 1929, relates to vacancies in the office of sheriff, and is as follows:

"Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county court; if such vacancy happen more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold said office until the person chosen at such election shall be duly qualified, otherwise the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified; but while such vacancy continues, any writ or process directed to the said sheriff and in his hands at the time such vacancy occurs, remaining unexecuted, and any writ or process issued after such vacancy, may be served by any person selected by the plaintiff, his agent or attorney, at the risk of such plaintiff; and the clerk of any court out of which such writ or process shall issue shall indorse on such

writ or process the authority to such person to execute and return the same, and shall state on such indorsement that the authority thus given is 'at the request and risk of the plaintiff;' and the person so named in said writ or process may proceed to execute and return said process, as sheriffs are by the law required to do. Such election shall be held within thirty days after the vacancy occurs, and the county court shall cause notice of the same to be published in some newspaper published within the county, and if there should be no newspaper published in said county, shall then give notice, by ten written handbills, posted up in ten of the most public places in the county, for twenty days prior to the day of holding such election. Upon the occurrence of such vacancy, it shall be the duty of the presiding justice of the county court, if such court be not then in session, to call a special term thereof, and cause said election to be held in pursuance of the provisions of this section, and the election laws regulating general elections in this state."

Assuming that the person elected to the office of sheriff at the last General Election, which was November 8th, to fill the unexpired term, or that the vacancy occurred more than nine months and that a special election was held, we think the results in either event would be the same, and are of the opinion that the person elected either at the General Election or special election, according to the terms of the statute quoted supra, could assume the duties of the office as soon as proper certification of the results of the election are obtained and said person can duly qualify.

II.

Probate Judge.

The statutes relating to probate judge and vacancies are Sections 2047 and 2048, R. S. Mo. 1929. Section 2048 is as follows:

"When a vacancy shall occur in the office of Judge of probate, it shall be the duty of the clerk of the circuit court to certify the fact to the governor, who shall fill such vacancy by appointing some eligible person to said office, who, when qualified, shall continue in office until the next general election, when a successor shall be elected for the unexpired term."

Appointment to vacancy in the office of probate judge is authorized under Section 10216, R. S. Mo. 1929. Section 10216 is a general section empowering the Governor to fill different offices in cases of vacancies and when the statute governing the particular office relating to vacancies does not fix the time or refer to the time the appointee is to hold the office, then said Section 10216 governs the tenure of office. Section 2048, quoted supra, states that the person who is appointed by the Governor "shall continue in office until the next general election, when a successor shall be elected for the unexpired term."

We think that section fixes the time when the person elected to fill the unexpired term can assume office, and we are therefore of the opinion that a person elected to fill the unexpired term of the probate judge can assume his duties as soon after the general election as the official vote is ascertained and said person qualifies.

The above ruling with reference to probate judge relates only to the time of assuming office when a person is elected to fill an unexpired term. Therefore, it would be necessary to further rule on the question as presented in

your letter, as to the tenure of office of a person who fills an unexpired term, if the vacancy occurred during the last two years of the regular term.

The election to fill the office of probate judge is held every four years. This being the year of 1938, the office of probate judge throughout the State was included in the various offices for election. Section 2047, supra, makes provision for the election of a probate judge every four years and states that the person so elected "shall enter upon the discharge of his duties on the first day of January ensuing his election and continue in office for four years and until his successor shall be duly elected and qualified."

Assuming therefore, after the General Election of 1938, a person is appointed to fill the vacancy in the office of probate judge, the question arises, would such person hold the office until the November Election of 1938 or until January 1, 1939? The question of a short term and a long term election is to be considered. As the statute uses the expression, "shall continue in office until the next general election, when a successor shall be elected for the unexpired term," it might be argued that the unexpired term is the short term of approximately two months and that at the regular time for the election of probate judge, and such a condition exists, there should be a candidate for the short term and likewise a candidate for the long term.

A similar question relating to a vacancy in the office of the Prosecuting Attorney of the City of St. Louis was before the court in the case of State v. Schweitzer, 258 S. W. 435. We quote extensively from the opinion, as it will have a bearing on a number of other offices which are included in your inquiry, (l. c. 438-439):

"Said section authorizes the Governor to fill the vacancy until the next regular election for prosecuting attorney. Such regular election can mean only

the election for the full term of four years. State ex rel. v. Roach, 269 Mo. loc. cit. 508, 192 S. W. 745. If the vacancy and relator's appointment thereto had occurred prior to the election of 1920, there is no authority found under section 782 to elect any person for the remaining two-year term, because the election of 1920 would not have been the next regular election for said office. Only by holding that section 4786 applies in such case could the remainder of the regular term have been filled at the 1920 election. It is apparent that all of said sections must be construed together.

"The regular election for prosecuting attorney was for the four-year term, beginning January 1, 1923. Sections 702, 730, R. S. 1919. The prosecuting attorney elected in 1918 would have been entitled to hold office until midnight December 31, 1922. The person elected for the succeeding regular term would not have been entitled to take office, under ordinary conditions, until January 1, 1923, unless the fact that the appointee to fill the vacancy could only hold until the next regular election to fill such office would authorize the person elected for the regular term to take over said office prior to January 1, 1923. This is a question which is not before us, and upon which we express no opinion.

"It is exceedingly unlikely that the Legislature intended to provide for a separate election to fill an unexpired term of less than two months,

and such should not be held to have been its intention, unless the Legislature has clearly said so. Quite the contrary intent is evidenced in section 4786. Note how broad and sweeping is the language, 'Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office,' except, etc., such vacancy shall be filled by appointment of the Governor until the first Monday in January following. But, if the vacancy occurs prior to the election coming on before the regular election to fill such office, the vacancy from January 1st, following such prior election, to the end of the regular term shall be filled at such prior election. The section is all comprehensive in its scope and meaning, and no vacancy in any office not specifically excepted from its application can be filled in any other manner. Outside of the offices of lieutenant governor, state senator, representative, sheriff, and coroner, no offices are specifically excepted by the language of the section. The Constitution itself makes full provision in the case of vacancies in the offices named. Unless a clear contrary provision has otherwise been made by the Legislature, section 4786 applies to vacancies in all state and county offices to be filled by election. Such clear exception is noted in section 2374, R. S. 1919, whereby a vacancy in the office of judge of any court of record may be filled by 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.' Said section and

section 4786 were construed together in State ex inf. v. Amick, 247 Mo. 271, loc. cit. 291, 152 S. W. 591. Section 2111 makes a similar provision as to filling vacancies in the office of clerks of courts of record."

The above decision indicates that there is no such thing as a short term when applied to the facts which we are assuming, but states that the question is not before the court and express no opinion. However, the expression by the court, "It is exceedingly unlikely that the Legislature intended to provide for a separate election to fill an unexpired term of less than two months, and such should not be held to have been its intention, unless the Legislature has clearly said so," is highly significant that there should not be an election for a short term. The test appears to be in the wording of the statute relative to filling the vacancy in the particular office. The court in the Schweitzer decision states:

"Such clear exception is noted in section 2374, R. S. 1919, whereby a vacancy in the office of judge of any court of record may be filled by 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.'"

The statute relating to vacancies in the office of probate judge having a similar provision, we are of the opinion that when a person is filling an unexpired term for the last two years of the regular term of probate judge, said person holds the office until after the general election and relinquishes the same to the person who is elected to the short term. But if no person files for the office of probate judge for the short term, then said person so holding the appointment would not relinquish the office until January 1st, at which time the regularly elected person would assume office.

III.

County Clerk.

The section dealing with vacancies in the office of county clerk, is Section 11665, R. S. Mo. 1929, which is as follows:

"When any vacancy shall occur in the office of any clerk of a court of record 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 and qualified, unless sooner removed."

Section 10216, R. S. Mo. 1929, is a general section relating to the powers of the Governor to fill vacancies when there is no specific statute governing vacancies in a particular office.

Assuming as we did in the case of the probate judge in the first instance, that the vacancy occurred in the first two years after the regular election to fill the office of county clerk, it is our opinion that the person appointed will hold the office until the next general election, which will be approximately the middle of the term, and according to the terms of Section 11665, supra, the person elected to fill the office for the unexpired term can assume office as soon as the vote is determined and such person can qualify. But if the vacancy occur in the last two years of the regular term, then, according to the same logic as applied in the case of probate judge and according to the exception in the Schweitzer decision, there would be created the long and short term question. If no one filed for the short term, under the phrase, "for the remainder of the term," the person

so appointed would hold until January 1st, at which time the regularly elected county clerk would assume his duties, but if a candidate filed for the short term, being the time between the November Election and January 1st, the person elected for the short term could assume office immediately after the vote is ascertained at the November Election and as soon as he could qualify.

IV

Judges of County Court.

Vacancies in the county court are filled under Section 2075, R. S. Mo. 1929. The phrase "who shall fill such vacancy as provided by law," contained in Section 2075, refers to the power of the Governor under Section 10216, supra. Said section contains the following clause:

"* *; 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: * *"

Under Section 2073, R. S. Mo. 1929, it is provided that two district members of the county court shall be elected every two years and hold office until their successors are duly elected and qualified and that a presiding judge shall be elected every four years. Because Section 2075, R. S. Mo. 1929, relating to the vacancies in offices of county judges, uses the expression, "who shall fill such vacancy

as provided by law," and contains no other provision as to the tenure of office of county judges appointed, the provision for the tenure of office must be determined by Section 10216, quoted supra.

Applying the logic of the decision in the Schweitzer Case, we are of the opinion that in the case of two district judges holding appointments, that said district judges would continue in office until January 1st of the year in which the regularly elected judges would assume office. In the case of a presiding judge, if the vacancy occurred in the first two years, the person appointed by the Governor would hold office in accordance with the provisions of Section 10216, R. S. Mo. 1929, until the first Monday in January next following the first ensuing general election, at which time the person elected to fill out the unexpired term could qualify and assume office. It is our further opinion that the person elected for the unexpired term in accordance with the provisions of Section 10216 would hold office until January 1st, at which time the regularly elected presiding judge would assume office.

V.

Prosecuting Attorney

Section 11363, R. S. Mo. 1929, contains the provisions for filling vacancies in the office of prosecuting attorney, and is as follows:

"If any vacancy shall happen from any cause in the office of the attorney-general, circuit attorney, prosecuting attorney or assistant prosecuting attorney, the governor, upon being satisfied that such vacancy exists, shall appoint some competent person to fill the same until the next regular election for attorney-general, prosecuting attorney or assistant prosecuting attorney, as the case may be."

The office of prosecuting attorney is for a term of two years. Section 11363, quoted supra, uses the expression, "shall appoint some competent person to fill the same until the next regular election.

From the decision of State v. Schweitzer, from which we quoted extensively in our opinion relating to the office of probate judge, we are of the opinion that no short term exists between the November election in the case of a vacancy in the office of prosecuting attorney and appointment by the Governor and January 1st of the regular term, at which time the regularly elected prosecuting attorney assumes office. We base our conclusion on the following statement of the court in the Schweitzer Case, l. c. 439:

"It is our conclusion that no short or unexpired term existed between the November, 1922, election and January 1st following; that relator was appointed for the term expiring December 31, 1922, and thereafter until his duly elected and commissioned successor had qualified."

VI.

County Collector.

Section 10216, R. S. Mo. 1929, referred to frequently throughout this opinion, contains the following provisions:

"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."

We are unable to locate any specific section dealing with the appointment of a person to fill the unexpired term of a vacancy in the office of collector. Therefore, the general section relating to vacancies, quoted supra, governs the situation.

Section 9883, R. S. Mo. 1929, relates to the tenure of office of the collector, and is as follows:

"The offices of sheriff and collector shall be distinct and separate offices in all the counties of this state, and at the general election in 1906, and every four years thereafter, a collector, to be styled the collector of the revenue, shall be elected in all the counties of this state, who shall hold their office for four years and until their successors are duly elected and qualified; Provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector."

The expiration of the term is governed by Section 9902, R. S. Mo. 1929, which contains the following provision:

"The terms for which collectors are elected shall expire on the first Monday in March of the year in which they are required to make their last final settlement for the tax book which was to be collected by them."

This being the year in which a regular election is conducted for the filling of the office of collector, and Section 10216, supra, contains the provision:

"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."

therefore, we are of the opinion that a person appointed to fill the unexpired term of the collector would hold such office until March 1, 1939.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

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