

PROSECUTING ATTORNEY:

Prosecuting attorney-elect cannot assume office prior to January 1 if he is leaving December 15th, nor can he appoint a deputy under such circumstances. The present prosecuting attorney can continue to hold office until his successor qualifies and assumes office.

December 13, 1940

Honorable John A. Eversole
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Sir:

You submit to this department for an official opinion questions based on the following facts:

You are now the Prosecuting Attorney of Washington County. You were not a candidate to succeed yourself and the lawyer who was elected at the November election has been called into the Naval Reserve Officers of the United States Government and will report for active duty the middle of December. The questions to be answered are: Can your successor now qualify before leaving; if so, can he appoint an assistant to take active charge of the office in his absence? If he cannot qualify at the present time, do you hold over or does a vacancy exist?

The election of a prosecuting attorney and his qualifications in counties such as Washington are prescribed by Section 11309, R. S. Missouri 1929, which is as follows:

"At the general election to be held in this state in the year A. D. 1880, and every two years thereafter, there shall be elected in each county of this state a prosecuting attorney, who shall be a person learned in the law, duly licensed to practice as an attorney at law in this state, and enrolled as such, at least twenty-one years of age, and who has been a bona fide resident of the county in which he seeks elec-

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tion for twelve months next preceding the date of the general election at which he is a candidate for such office and shall hold his office for two years, and until his successor is elected, commissioned and qualified."

Of course, the above section governs the election of your successor-elect. The term of your office, and likewise for the successor-elect, is governed by Section 11310, R. S. Missouri 1929, which is as follows:

"Prosecuting attorneys elected under the provisions of this chapter shall enter upon the discharge of their duties on the first day of January next after they shall have been elected."

The decision of State ex inf. Barrett, Attorney General, ex rel. Oakley v. Schweitzer, 258 S. W. 435, involved the question of long and short term and the question of a vacancy in the office of the prosecuting attorney of the City of St. Louis, but we think it is clearly an authority to the effect that you hold your present tenure of office until midnight of December 31, 1940, and that your successor, provided he should succeed you, would then be entitled to assume office on the first day of January, 1941. We refer you to a portion of the decision, l. c. 439:

"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. * * * * *

Irrespective of the decision by the court, we think that Section 11310, supra, is very plain in its terms to the effect that you hold the office until January 1, and that your successor cannot take over the office until that time, for the general rule is stated in 46 Corpus Juris, page 965, to this effect:

"The term of office begins from the time, if any, fixed by law, not necessarily from the date of appointment or qualification. * * * * *

Even assuming that he has his commission and possesses all the other qualifications, we think that the commission that he may receive at the present time will have no effect or bearing on his status with respect to assuming the duties of the office before leaving the county.

The decision in the State of South Carolina, State v. Billy, 11 S. C. L. 356, is cited for the purpose of showing the present office of a commission and its origin--

"Regarding, then, the common law, we easily perceive why a commission may be essential under the English government. There, in a word, it is at once the expression of the royal will, and the partial delegation of his power. There, for the purposes of his office, the officer is the agent of the king, and the commission is his letter of attorney, wherein he finds his power, of what kind, and to what extent. But take away the reasons, and the same consequences do not follow. In this country the officer derives no power from the

chief magistrate. In this State, indeed, he has not much to spare; and the commission becomes the mere certificate of election, or the formal annunciation of appointment."

Section 104, page 966 of Volume 46 Corpus Juris, referring to commissions, is as follows:

"Since an elective officer has title to his office from the people, not from the executive commission or other formality, his term may begin, notwithstanding his failure to receive a commission."

Hence, we are of the opinion that even though your successor-elect receives his commission at the present time, which appears to be about the only formality other than taking the oath necessary for a prosecuting attorney provided he possesses the statutory qualifications, no bond being required, to assume his office, yet the commission would not entitle him to assume office in the face of the express contrary provisions of the statute being January the first.

When the statute fixes the time when a term shall begin the term cannot begin prior to such time. *Brown ex rel. Gray v. Quintilian*, 121 Conn. 300.

If he will not be in the county to assume office on January the first, there is no provision or authority whereby he can take over the office by proxy or deputy. Section 11336, R. S. Missouri 1929, entitles every prosecuting attorney in the state to appoint one assistant. Section 11337, R. S. Missouri 1929, expressly gives the authority to the prosecuting attorney, by writing, to make the appointment. Deputies and assistants derive their power from their principal or superior. Since the prosecuting attorney in the instant case must appoint the assistant, it naturally follows that the prosecuting attorney cannot appoint an assistant until

such time as he legally assumes office. In other words, if the prosecuting attorney-elect cannot assume office until January 1, and is leaving the county before that time, he is not legally in office and cannot breathe legal authority into an assistant which he himself does not possess.

There are constitutional provisions which have a bearing on the questions; for instance, Article XIV, Section 4, Constitution of Missouri--

"No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

Another pertinent provision is Section 18 of Article II--

"That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

We cite the above provisions of the Constitution as prospective barriers which might confront your successor-elect in the event that he would assume office and be absent from the county on military duties.

We next consider the question of your status. The general rule of law supported by unanimous decisions is that an officer holds his office until his successor is elected, commissioned and qualified. Section 11309, R. S. Missouri 1929, contains that provision. It is almost idiomatic that the law abhors vacancies and no vacancy exists as long as any person is in a particular office.

In the decision of State ex inf. Hulen v.

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Brown, 274 S. W. 965, and the decision of State ex inf. v. Williams, 222 Mo. 268, the holding is to the effect that an incumbent holds office until the office is filled by someone else who is duly elected and qualified.

Therefore, we are of the opinion that you are entitled to hold the office of prosecuting attorney until your successor qualifies and assumes the office and no vacancy will exist unless you resign or abandon the office.

Respectfully submitted

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APPROVED:

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