

OFFICERS:
COUNTY CLERK:

County clerk who holds over after January 1, 1950, holds office until his successor is appointed and qualified or until 1952, when his successor is elected and qualified.

March 11, 1952

Honorable Friend B. Greene
Prosecuting Attorney of
Shannon County
Eminence, Missouri



Dear Sir:

Reference is made to your recent request for an official opinion of this department which request reads as follows:

"Willard Swiney was elected as County Clerk of Shannon County, at the General Election held for the year 1950. He did not qualify - his Commission was never delivered to him.

"Robert L. Cowan, the incumbent held over, as County Clerk, under the provisions of Section 51.020 RS 1949.

"Under these circumstances your opinion is asked as to whether Cowan's term will expire on the 31st day of December, 1952 or December 31st 1954."

Section 51.020, RSMo 1949, provides for the election and term of office of county clerks as follows:

"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 B. Greene

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."

(Underscoring ours.)

Section 12, Article VII, of the Constitution of Missouri, 1945, provides as follows:

"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."

Section 105.010, RSMo 1949, provides:

"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."

Under the provisions of Section 12, Article VII, of the Constitution, Section 51.020 and Section 105.010, RSMo 1949, the person who held the office of county clerk in 1950 and who now fills that office, holds the office because his successor elected at the general election in 1950 failed to qualify.

The general rule of law in such cases is found in 46 C.J., Officers, Section 111, page 969 as follows:

"In many states it is provided by the Constitution or by statute that officers shall hold over after the expiration of their terms until their successors are elected or appointed and have qualified. Under a provision that officers shall hold over until their successors are "elected"

Honorable Friend B. Greene

and qualified, the officer holding over is in all respects a de jure officer, and the expiration of the term does not produce a vacancy."

See also 43 American Jurisprudence, Public Officers, Section 161, pages 19 and 20.

The above rule is adopted by the courts of this state. In *State ex inf. Hulen v. Brown*, 274 S. W. 965, 220 Mo. App. 468, the Kansas City Court of Appeals said at page 967 (S.W.):

"The law is well settled that where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. *State ex rel. Lusk*, 18 Mo. 333; *State ex rel. Stevenson v. Smith*, 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. *State ex rel. Robinson v. Thompson*, 38 Mo. 192; *State ex rel. v. Ransom*, 73 Mo. 78.

"The law under which appellants were appointed fixed their terms of office at one year, and contemplated that at the end of that time new appointments would be made. But, since the appointing power might not be properly exercised, to prevent a vacancy the law provided for the incumbents to hold over until their successors were appointed and qualified. This is a wise rule as applied to public officers, for thereby the public is protected from possible evils naturally attendant upon a situation wherein neglect and waste might result. This contingency, as contemplated by law, enters into every such appointment, and it must be concluded that the time an incumbent holdover the designated period is as much a part of his term of office as that which precedes the date when the new appointment should be made. The authorities are uniform on this rule, and we think there can be no question about it."

Honorable Friend B. Green

In the case of Langston et al. v. Howell county, 79 S.W. (2d) 99, the appointment of a county highway engineer for a period of one year was considered. In that case a new highway engineer was not appointed after the expiration of the one year term. The Supreme Court of Missouri held, even in the absence of language in the appointment to the effect that said appointment extended until a successor was appointed and qualified, that said county highway engineer was entitled to hold his office until his successor was appointed and qualified.

We feel that it is necessary to here point out that the term vacancy, as used in the portion quoted from C. J., supra, and in the case of State ex inf. Hulen v. Brown, supra, is intended to mean an absolute vacancy where no one is or could occupy the office and discharge the duties of said office. It does not mean a vacancy in the sense that the office should, as provided by law, be filled by appointment or election notwithstanding the fact that the incumbent is holding over.

Section 51.090, RSMo 1949, provides the proper procedure in case of a vacancy in the office of clerk of the county court and reads as follows:

"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."

Section 105.030, RSMo 1949, provides for the filling of vacancies in any state or county office originally filled by election 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

Honorable Friend B. Greene

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."

In the case of State of Missouri ex rel. Bothwell v. Green, 352 Mo. 801, a county collector was elected at the general election in 1942 for a term to commence March 1, 1943. Said collector died December 25, 1942, before the expiration of his current term and before he had qualified for the succeeding term. On December 30, 1942, the governor made an appointment to fill the vacancy created by the collector's death for the term ending March 1, 1943, after March 1, 1943, the appointee held over in office and the question presented to the court was whether the appointee could hold over until a successor was elected at the general election in 1946, or until the general election in 1944, a question almost parallel to the one presented here. The court in its decision stated that Section 11509 R.S. Mo. 1939, now Section 105.030, RSMo 1949, quoted above, must be read in conjunction with the statute on collectors. Stating that there was clearly a vacancy (as distinguished from absolute vacancy, since the appointee was here occupying the office), the court said:

"Applying the provisions of Section 11509 to this case we find: a vacancy occurred upon the death of Greer, the vacancy was filled by the appointment of Hazel Palmer, her term under the appointment expires at the day designated for the beginning of the term, that is March 1, after the first ensuing general election, namely the general election to be held in November, 1944; and her successor should be elected to serve the remainder of the term at the general election in November, 1944.

* * * * *

Honorable Friend B. Greene

"The legislative policy for filling vacancies has been described by the learned Judge White in *State ex inf. Barrett v. McClure*, 299 Mo. 688, 253 S. W. 743. That case construed Section 11509 and held it plainly provided an election may be had for an unexpired term and the governor would have no authority to make an appointment which would conflict with such provision. Judge White then stated: 'Originally special elections were provided for to fill vacancies, so as to cut short the tenure of appointees. Apparently the expense and trouble of having special elections to fill vacancies caused the legislature in 1879 to provide for vacancies to be filled by appointment until the next succeeding general election. This shows that the legislative policy of the state has been to fill a vacancy for an elective office by election as soon as practicable after the vacancy occurs.'"

Since Section 51.090, supra, is a statute dealing only with vacancies in the office of clerk of the county court, we believe that it should receive the same interpretation as Section 105.030, (11509 R. S. Mo. 1939) in the *Bothwell* case. Especially enumerated in Section 51.090 as grounds for a vacancy to be filled by appointment are "death, resignation, removal, refusal to act, or otherwise." It is a familiar rule of statutory construction that in arriving at the intention of the legislature an act should be considered as a whole. *State ex rel. McKittrick v. Caroline Products Co.*, 346 Mo. 1049, and the obscurity of a word or phrase may be removed by reference to associated words. *O'Malley v. Continental Life Insurance Co.*, 335 Mo. 1115. The terms death, resignation and removal denote an absolute vacancy not one which must be determined by court action. Construing the term "refusal to act" with the preceding terms, we believe that it was intended to mean a refusal to qualify, since Section 51.270 provides that a refusal to act when in office shall constitute a misdemeanor for which the clerk can be removed by proper proceeding under Section 51.250.

Therefore, having determined that under Section 51.090, a vacancy exists in the office of clerk of the county court of Shannon County, we are of the opinion that the incumbent now holding over will hold the office until his successor is appointed, qualified and commissioned or until a successor is elected, qualified and commissioned at the general election held in 1952 by virtue of Section 51.090.

Honorable Friend B. Greene


CONCLUSION

Therefore, it is the opinion of this department that the incumbent county clerk now holding over in office by virtue of a vacancy created by the county clerk's elect refusal to qualify will remain in office until such time as his tenure is terminated by the appointment and qualification of a successor under the provisions of Section 51.090, or until his successor is elected at the general election held in 1952, commissioned and qualified.

Respectfully submitted,

D. D. GUFFEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

DDG:hr