COUNTY CLERK: Appointee to fill vacancy serves until general election only.

November 12, 1940 11/20

FILED 38

Honorable James P. Hawkins
Prosecuting Attorney
Dallas County
Buffalo, Missouri

Dear Sir:

This will acknowledge receipt of your letter of October 25, 1940, in which you ask for an opinion as follows:

> "Please give me your opinion on the following matter: We will elect on November 5, 1940," a county clerk of this county to fill an unexpired term due to the death of the clerk elected in 1938. "When will the person elected take office? There seems to be two views on it, one group says January 1940 while the other says as soon as the official count is made."

The question requires a consideration of two sections of the statute. Section 10216 R. S. 1929, a general section authorizing the governor to fill vacancies, is 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."

Section 11665, which is a special section applying to clerks of courts of record except the Clerk of the Supreme Court and the St. Louis Court of Appeals, reads 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."

It will be observed that the general section providing that the appointee shall serves until the first Monday in January next following the first ensuing general election, and a special section provides that the appointee shall serve until the next election, which seems to be a conflict in the provisions of these two statutes. In the case of State

ex inf. W. W. Major vs. W. K. Amick 247 Mo. 271, the Supreme Court had before it for construction Section 5828, R. S. 1909, which was the same as Section 10216, R. S. 1929, and Section 3896, R. S. 1909, a special section applying to the vacancy existing in the office of the circuit judge of Buchanan County which contains the same provision relating to the appointee holding office until the next general election as is found in Section 11665. In discussing the matter, the Supreme Court of Missouri, at l. c. 289, and following, said:

> "If these two statutes are consistent and can stand together, then it is the duty of the court to harmonize rather than to hunt for conflict of statutory provisions in pari materia.
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> In discussing this canon of statutory construction, the Supreme Court of the United States, in the case of Frost v. Wenie, 157 U. S. 58, used this language; ' It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court--no purpose to repeal being clearly expressed or indicated-is, if possible, to give effect to both. In other words, it must not be supposed that the Legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute.'
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> And in the case of State ex rel. v. Patterson, 207 Mo. l. c. 144, this court used the following language: 'All consistent statutes relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively and construed together as though they constituted one act. This is true where the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session or on the same day. (Sutherland, Statutory Construction, sec. 283.) And 'a statute must be construed with

reference to the system of which it forms a part. And statutes on cognate subjects may be referred to, though not strictly in pari materia.' (Id., sec. 284)'

In the case of Humphries v. Davis, 100 Ind. l.c. 284, the Supreme Court of Indiana, speaking through Elliott, J., said: 'A statute is not to be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction. It is proper to look at other statutes, to the rules of the common law, to the sources from which the statute was derived, to the general principles of equity, to the object of the statute, and to the condition of affairs existing when the statute was adopted. (Citing authorities). . . 'Construction has ever been a potent agency in harmonizing the operation of statutes with equity and justice.' Statutes are to be so construed as to make the law one uniform system, not a collection of divers and disjointed fragments. When this principle of construction is adopted, 'an actment of to-day has the benefit of judicial renderings extending back through centuries of past legislation.' (Bishop, Written Laws, sec. 242b.) 'A statute,' says the author just referred to, 'must be construed equally by itself and by the rest of the law. The mind of the interpreter, if narrow, will stumble.' 'The completed doctrine, resulting from a bringing together of its parts, is, that all laws, written and unwritten, of whatever sorts and at whatever different dates established, are to be construed together, contracting, expanding, limiting and extending one another into one system of jurisprudence as nearly harmonious and rounded as it can be made without violating unyielding written and unwritten terms.' (Bishop,

Written Laws, secs. 113a, 86)'

If we observ and give force and effect to the foregoing rules of construction in interpreting sections 3896 and 5828, then we must read them together-that is, read the one into the other as one enactment. (State ex rel. v. Patterson, supra, l.c. 148)

And by so doing sections 5828 and 3896 would read substantially as follows: Whenever any vacancy shall occur in any state or county office 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 continue in office until the first Monday in January next following the first general election: Provided, that if the office of the judge of any court of record in this State shall become vacant, such vacancy shall 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.

By so reading and construing those two sections together, we eliminate all seeming conflict that exists between them and harmonize all the laws of the State regarding vacancies in state and county offices and the mode of filling same, and at the same time give full force and effect to the plain and clear meaning of the Legislature as expressed in the two sections, which is always the main object to be obta ned in construing any statute.

Laws should be so construed as to give their intent paramount effect.

There is another rule of statutory construction, which, if followed in the interpretation of these two sections of the statute, the conclusions reached would be the same as before stated. That rule is stated in the case of Ruschenberg v. Railroad, 161 Mo. 70, in substantially the following language:

Where ther are two acts and the provisions of one

> apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that if standing alone it would include the same matter, and thus conflict with each other, then the former act must be taken as constituting an exception to the latter or general act, and not a repeal of the former, and especially is this true when such general and special acts are contemporaneous."

And, again at l.c. 294, the Supreme Court said:

> "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."

Section 11666 requires giving of bond by clerks of the courts of record, and Section 11669 directs the issuance of a certificate of election and the taking and filing of an oath of office.

CONCLUSION

It is the opinion of this department that the term of office of the appointee terminated upon the election of a person to fill the vacancy at the general election held on November 5, 1940; that the person so elected should take over the duties of the office immediately on qualifying by taking the prescribed oath and filing the required bond.

Respectfully submitted,

W. O. JACKSON
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APPROVED:

Covell R. Hewitt
(Acting) Attorney General