

**ELECTIONS- (Prosecuting Attorney) Must have resided in county twelve months prior to general election before name can be placed on ballot.**

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September 9, 1938

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Honorable Robert P. Maclay  
Clerk of County Court  
Washington County  
Potosi, Missouri



Dear Sir:

We have your request for an opinion dated September 8th, which request reads as follows:

"I have a question I am going to be faced with in the near future which I would like your opinion on.

"Between the first and the fifteenth of July, 1938, one John Smith, attorney at law, moved into Washington County, Missouri, from Crawford County, Missouri. On or about the 31st day of August, 1938, the Republican Central Committee met here and nominated said John Smith for prosecuting attorney on the Republican ticket.

"Up to the present time his certificate of nomination has not been filed in my office, but no doubt will be in the near future. John Eversole, the Democratic nominee, has informed me that he expects to file his written objections to the nomination as soon as said certificate of election is filed with me under and by virtue of section 10247, R. S. Mo. on the grounds that Smith does not meet the requirements of a prosecuting attorney as set out in Section 11309, R. S. Mo., having resided in Washington County less than one year next preceding the date of the general election at which he is a candidate for office."

In answer to your request for an opinion, we call your attention to that portion of Section 11309, R. S. Mo. 1929, which provides in part as follows:

"At the general election \*\* there shall be elected in each county of this state a prosecuting attorney, \*\* who has been a bona fide resident of the county in which he seeks election for twelve months next preceding the date of the general election at which he is a candidate for such office. \*\*\* "

The next general election will be held November 8, 1938, and under this statute it is necessary that any candidate for the office of prosecuting attorney must have been a bona fide resident of the county from November 8, 1937 to November 8, 1938. The term "bona fide resident" means residence within the county, with intent to make it the person's domicile. *Starr vs. Starr*, 78 Pa. S. Ct. 579, 583.

To become a bona fide resident, it is necessary that the person actually establish a residence, with an intent to make that his home. *Hess vs. Kimble*, 81 Atl. 363, 364, 79 N. J. Equity 454.

It is, therefore, apparent that John Smith, who has lived in Washington County since July, 1938, is not eligible to become a candidate for prosecuting attorney, and even if he received a majority of the votes cast in the general election of 1938, he could not obtain a certificate of election because of his ineligibility.

In *State ex rel. Thomas vs. Williams*, 99 Mo. 291, the city charter of St. Louis required candidates to have a residence of two years. In that case, the relator moved to St. Louis in September, 1887 and the election in which he was a candidate was held in April, 1889. The relator, among other things, was refused a certificate of election, and applied for a writ of mandamus to compel the recorder of voters of the city of St. Louis to issue him a certificate of election as marshal of that city. The Supreme Court decided that he was not entitled to a certificate of election because of his ineligibility.

It is now well established that the election of a disqualified person gives him no right to hold the office or claim a certificate of election, and mandamus will not lie in his behalf to compel the issuance of a certificate of election. Throop, Public Officers, Section 82; State ex rel. Snyder vs. Newman, 91 Mo. 445; State ex rel. vs. Coffee, 59 Mo. 67; State ex rel vs. Boal, 46 Mo. 528; State ex rel. vs. Meek, 129 Mo. 439; People vs. Sheffield, 47 Hun (N. Y.) 481.

Since the Legislature has seen fit to limit the election of prosecuting attorneys to those persons (1) duly licensed to practice law, (2) at least twenty-one years of age, (3) who have been a bona fide resident of the county for twelve months, these qualifications are mandatory and must be possessed by the person who offers himself as a candidate.

In State ex rel. vs. McSpaden, 137 Mo. 628, 1.c. 635, the Supreme Court said:

"Within the limitations imposed by the organic law, the legislature has the power to prescribe the qualifications requisite to office-holding, and it is not the proper function of any court to nullify any of them. The choice of the people for such an office must be confined to those persons who by law are designated as qualified to take the office and discharge its duties. The wisdom and good policy of such enactments are matters for the consideration of the lawmaking department of the government."

While the central committee of a political party has authority to fill vacancies on its ticket which exist after the holding of a primary, the filling of those vacancies must be done in accordance with the state law. Objections may be filed to the nomination of any person within three days. These objections in this case will be filed with the county clerk. In the event an objection is filed, it becomes your duty to forthwith mail a notice thereof to the

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candidate or candidates effected thereby. It then becomes your duty to pass upon the validity of such objections, and if a certificate of nomination is filed in your office, nominating John Smith for the office of prosecuting attorney, it becomes your duty, under the law, to refuse to place that nomination on the ballot for the November election, because of his lack of residence, as heretofore pointed out. In the event you should fail to so refuse to file such certificate of election, you will be subject to a mandamus order of the circuit judge. Section 10247, R. S. Mo. 1929.

It is, therefore, the opinion of this office that a person is ineligible to be a candidate for the office of prosecuting attorney unless he has lived within the county twelve months prior to November 8, 1938; that the filing of a certificate of nomination by a central committee to fill a vacancy is a nullity and of no force and effect, and should be ignored by you. A person who does not possess the necessary statutory qualifications is ineligible to become a candidate for that office.

Respectfully submitted

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney General

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