

OFFICERS: Vacancy filled in prosecuting attorney's office  
VACANCY: by circuit judge is only temporary.

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December 30, 1941

Honorable John A. Johnson  
Prosecuting Attorney  
Reynolds County  
Centerville, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of December 29, 1941, which is as follows:

"I respectfully request your opinion on the following facts:

"The Honorable Paul Chitwood, the former Prosecuting Attorney of Reynolds County, Missouri, during the month of August, 1941, accepted employment with the Federal Government. He was absent from his office at least ten days prior to August 31, 1941, and he submitted his resignation to Governor Donnell as Prosecuting Attorney of Reynolds County, to become effective on August 31, 1941. No one was acting as Prosecuting Attorney or discharging the duties of Prosecuting Attorney of Reynolds County until October 1, 1941, when Judge Edward T. Eversole, Judge of the Twenty-first Judicial Circuit of Missouri and Judge of the Circuit Court of Reynolds County, Missouri, acting upon the request and information of the Sheriff of Reynolds County, Missouri, and various other citizens, took cognizance of the fact that the office of Prosecuting Attorney of that county had in fact been vacant for more than thirty days.

"Judge Eversole, by order of court, appointed me Prosecuting Attorney of that

county. A certified copy of that order is here attached. I took the oath of office, and entered upon the duties of Prosecuting Attorney on October 1, 1941, and am at the present time discharging the duties of that office. I acted as Prosecuting Attorney during the regular November Term of the Circuit Court of Reynolds County, Missouri, and there are now pending four prosecutions in justice of the peace courts in that county as well as several criminal cases set for an adjourned term of the Circuit Court to be held upon January 6, 1942. I am still discharging the duties of Prosecuting Attorney of Reynolds County, Missouri, to the best of my ability.

"On December 15, 1941, Governor Donnell appointed Mr. John H. Chitwood, a Republican lawyer of Reynolds County, Missouri, as Prosecuting Attorney to fill the vacancy created by the resignation of Paul Chitwood. On December 22, 1941, Mr. Chitwood presented his commission, and also presented a claim for the salary of Prosecuting Attorney from December 15 to and including December 31, 1941.

"I respectfully submit the following questions upon the above statement of facts:

"1. As between Mr. Chitwood and myself, who is entitled to discharge the duties of the office and receive the salary of said office pending the decision of the Supreme Court of Missouri as to the person entitled to the office of Prosecuting Attorney of Reynolds County, Missouri?

"2. Who would be the proper person to bring an action to determine the person

entitled to the office of Prosecuting Attorney of Reynolds County, Missouri?"

The appointment of yourself as Prosecuting Attorney of Reynolds County by the circuit judge was made under authority of Section 12949, R. S. Missouri 1939, which provides as follows:

"If he be sick or absent, such court shall appoint some person to discharge the duties of the office until the proper officer resume the discharge of his duties."

The fee or salary to you for the time of your appointment is governed by Section 12950, R. S. Missouri 1939, which provides as follows:

"The person thus appointed shall possess the same power and receive the same fees as the proper officer would if he were present."

The appointment under the above two sections is merely a temporary appointment and the appointment was not made for a period such as an appointment made by the Governor in case of a vacancy. The appointment was merely made by the circuit judge until the Governor could act in the case of a vacancy. That it was only a temporary appointment and not for the unexpired term of the prosecuting attorney who resigned was held in the case of State v. Duncan, 116 Mo. 288, 1. c. 307, 22 S. W. 699, where the court said:

"\* \* \* Moreover, aside from statutory provisions, there exists an inherent power in a court, if there be no prosecuting officer in attendance, to appoint a temporary representative of the state. State v. Moxley, 102 Mo. loc. cit. 384, and cases cited. And the fact that in the absence of the circuit attorney, the trial court permitted another to represent him, was tantamount to an appointment."

Under the opinion above written by Sherwood, Judge, the court

specifically said that the lower court had the inherent power to appoint a temporary representative of the state.

The purpose of the enactment of Section 12949, supra, was to prevent a vacancy happening such as under the facts stated in your request which would prevent the enforcement of the criminal laws. It was so held in State v. Moxley, 102 Mo. 374, l. c. 384, where the court said:

"This section evidently refers to both the preceding sections. Under it the attorney appointed by the court to prosecute in the place of an absent, sick or disqualified officer has the same power to draw and to sign bills of indictment as the regular official. If this be not true then it must be confessed that there is a very lame place in our criminal practice.

"If the contention of defendant's counsel is to prevail, then, if a prosecuting attorney should be for any reason disqualified, all the wheels of criminal justice would be brought to a standstill for the reason that there would be no vacancy in the office that the governor could fill, and no power in the court to make a temporary appointee who could in all things discharge the duties pertaining to the office in question. The law does not intend any such absurdity, and will not permit such a failure of justice. And aside from statutory provisions, such as those quoted, the power thus to appoint a temporary representative of the state, one armed with full authority to discharge in full the office he temporarily fills, is of necessity an inherent power in courts of justice. The authorities abundantly sustain this view. White v. Polk County, 17 Iowa, 414; State v. Bass, 12 La. Ann.

862; Dukes v. State, 11 Ind. 557; State v. Johnson, 12 Tex. 231; 1 Bishop Crim. Proc., sec. 280."

Also, that such an appointment is only a temporary vacancy was held in the case of State v. Bobbitt, 270 S. W. 378, paragraph 9, where the court said:

"The last assignment of error in the motion for new trial is the action of the court in appointing Don S. Lamm to act as prosecuting attorney to conduct the prosecution. Mr. Lamm had been prosecuting attorney and had signed the information. The order appointing him as special prosecutor recited that the prosecuting attorney had resigned, and that the county was at that time without a prosecuting attorney, and that Mr. Lamm was appointed for that reason. It is said that nature abhors a vacuum. Likewise, vacancies in public office are not usually permitted to exist for a long time; but this appears to be an instance of at least a temporary vacancy. The statute apparently does not cover the exact situation. Sections 743 and 744, R. S. 1919, provide for the appointment of some person to perform the duties of such office, if the prosecuting attorney is sick or absent, with full power in such person to perform the duties of said office and collect the fees thereof.

"The power of the court to appoint some person to discharge the duties of the prosecuting attorney, in the event of a vacancy in such office, does not depend upon statutory provisions, but is inherent in courts of justice. State v. Moxley, 102 Mo. 374, loc. cit. 384, 14 S. W. 969, 15 S. W. 556; State v. Duncan, 116 Mo.

288, loc. cit. 307, 22 S. W. 699. In the absence of express statutory provisions, the court committed no error in making such appointment and in permitting Mr. Lamm to conduct the prosecution of the case."

An appointment in case of a vacancy for the full unexpired term of the office of prosecuting attorney must be made by the Governor in accordance with Section 12989, R. S. Missouri 1939, which provides 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."

Under this section it is mandatory that the Governor make the appointment. I am presuming that since you state in your request that John H. Chitwood was appointed by Governor Donnell on December 15, 1941, and that John H. Chitwood presented his commission and also presented a claim for salary that he has taken the oath as prescribed in Section 6, Article XIV of the Constitution of Missouri.

Therefore, in answer to your first question it is the opinion of this office that Mr. John H. Chitwood is the lawful Prosecuting Attorney of Reynolds County, Missouri.

As to your second question, this matter can either be tested by your filing a quo warranto proceeding against John H. Chitwood, who we hold is the lawful prosecuting attorney, or it may be filed by Mr. John H. Chitwood against you as an usurper of the office.

Respectfully submitted

APPROVED:

W. J. BURKE  
Assistant Attorney General

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VANE C. THURLO  
(Acting) Attorney General WJB:DA