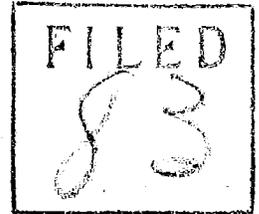


COUNTY CLERKS Will not vacate their office until the first
Monday in January, 1947.



December 30, 1946

12/31

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. B. W. Ragland,
Chief Clerk

Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion of this department, reading as follows:

"Section 2, Senate Bill No. 483, enacted by the 63rd General Assembly, provides for the election of clerk of the county court, and 'that said clerk shall enter upon the duties of his office the first day of January next after his election.' This section also provides 'that the term of office of persons holding the office of the clerk of the county court at the time this act shall take effect shall not be vacated or affected thereby.'

"We request your official opinion as to when the present county clerk will vacate his office."

Senate Bill 483 of the 63rd General Assembly, effective July 12, 1946, which establishes the office of clerk of the county court, provides in Section 2 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 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 act shall take effect shall not be vacated or affected thereby."

It will be noted that although this section provides that the clerk of the county court shall take office the first day of January, this provision is limited by a proviso. In construing the effect of provisos the Supreme Court in State ex rel. Crow v. City of St. Louis, 174 Mo. 125, stated at l. c. 145-146:

"* * * 'A proviso is something engrafted upon an enactment, and is used for the purpose of taking special cases out of the general act and providing specially for them. * * * * * The proviso should be confined to what immediately precedes, unless a contrary intent clearly appears; and should be construed with the section with which it is connected. * * *'"

And further, in Brown v. Patterson, 224 Mo. 639, the court stated at l. c. 658:

"* * * The purpose of a proviso is not to create new rights or make new law or to take away old rights existing under the law or to repeal a part of existing substantive law, but to restrict or restrain the preceding portion of the statute of which it forms a part. * * *"

Applying these rules of statutory construction, we are of the belief that the clerks of the county courts, elected in November, 1946, may take office on January 1, 1947, only if their taking of office will not affect the term of those holding office on the effective date of Senate Bill 483. These officers were elected and assumed the duties of their office under Section 13283, R. S. Mo. 1939, which provides:

"At the general election in the year eighteen hundred and eighty-two, and every four years thereafter, except as hereinafter provided, the clerks of all courts of record, except of the supreme court, the St. Louis court of appeals, and except as otherwise provided by law, shall be elected by the qualified voters of each county and of the city of St. Louis, who shall be commissioned by the governor, and shall enter upon the discharge of their duties on the first Monday in January next ensuing their election, and shall hold their offices for the term of four years, and until their successors shall be duly elected and qualified, unless sooner removed from office."

It is clear that a term of office has been fixed by the above statute. In the case of State ex rel. Rumbold v. Gordon, 238 Mo. 168, it is stated at l. c. 177:

"* * * So, agreeably to the same end, it is good doctrine that the maxim, That is certain which can be made certain (Id certum est, etc.) is applied in resolving any doubt on whether a term is granted. Thus, if the beginning is certain, and if the end can be made certain by reference to some mentioned certainty, a term is granted. * *"

Therefore, their term of office would run from the first Monday in January of 1943, to the first Monday in January of 1947. As we have noted before, the proviso in Section 2 of Senate Bill 483 prohibits the taking of office of a new county clerk from affecting the term of the county clerk now in office.

Hon. Forrest Smith

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Conclusion

It is, therefore, the opinion of this department that the clerk of the county court who held office on July 12, 1946, will not be relieved of his duties until the first Monday in January, 1947.

Respectfully submitted,

PERSHING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PW:EG