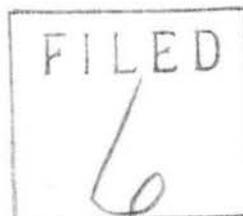


PROBATE COURTS: Nominee for Probate Judge of Pike Co. nominated by Democratic Party at primary was nominated for the regular term. County Democratic Committee should select some one to run for the special term.

10-13  
October 12, 1934.



Hon. Davis Benning,  
Prosecuting Attorney,  
Pike County,  
Louisiana, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

"I have been asked for an opinion by one of the county officials of this county regarding a matter in the recent primary election, relating to the office of Probate Judge, and as I am unable to arrive at a definite conclusion on the matter inquired about, I would greatly appreciate your opinion.

The situation is as follows: In November, 1932, Andrew J. Murphy, Jr. was elected Probate Judge of this county to fill out the unexpired term of Judge Blair which would have expired in December, 1934. In March, 1934, Judge Murphy resigned from his office and the Governor of this state appointed Vivian S. Smith to fill the vacancy, which under the decisions was until November 6, 1934 without any hold over. Three candidates filed their declarations for the office on the Democratic ticket for the August primary. One of the candidates designated in his declaration 'regular term', the other two merely filing for the office of Probate Judge.

Two questions have arisen--1st. Were there two terms to be filled in this election, namely, the short term from November 6 until January 1 and a long or regular term to begin January first? 2nd. If there were

two terms would it be presumed that a declaration without designating the term, was to fill the first vacancy or for the regular term and in the event that the two who filed without designation were candidates for the short term by reason of their failure to designate, and the County Clerk under one caption placed all three of the names on the ballot as candidates for nomination for the office of Probate Judge, what would be the effect upon the nomination for this office?"

Section 2047, R. S. Mo. 1929 provides in part as follows:

"At the general election in the year 1878, and every four years thereafter, except as hereinafter provided, a judge of probate shall be elected by the qualified voters in every county. Said judge shall be commissioned by the Governor and shall take the oath prescribed by the Constitution for all officers and shall enter upon the discharge of his duties on the first day of January ensuing his election and continue in office for four years and until his successor shall be duly elected and qualified."

Section 2048, R.S. Mo. 1929 provides as follows:

"When a vacancy shall occur in the office of judge of probate, it shall be the duty of the clerk of the circuit court to certify the fact to the Governor, who shall fill such vacancy by appointing some eligible person to said office, who, when qualified, shall continue in office until the next general election, when a successor shall be elected for the unexpired term."

Section 32, Art. VI of the Constitution of Missouri provides:

"In case the office of judge of any court of record shall become vacant by death, resignation, removal, failure to qualify or otherwise, such vacancy shall be filled in the manner provided by law."

It is apparent from a consideration of your letter that the voters of Pike County were not aware that there were two elections to be had in November of this year - one to elect a Probate Judge for the special or short term from November 6 until December 31, 1934 - and one to fill the general or long term from January 1, 1935 until December 31, 1938. Only one judge was nominated at the primary election, and the office for which he was nominated was simply designated "Probate Judge".

The question now before us is whether or not the nominee was nominated for the regular or long term or for the short term. A similar question, but one that is not exactly on all fours with the present case, was before the Court of Appeals of Kentucky in the case of Hobbs, et al. v. Upington, 89 S.W. 128. In that case, however, there were several candidates and the situation was solved by agreement among the candidates. The Court said:

"When the election was held in 1902 and five men were elected, without any indication as to which was to have the short term, the fact that Upington had received less votes than any of the other four was no reason for assigning him the short term period. The proper way of settling the dispute as to who was to take the short term would have been to cast lots. This, no doubt, would have been done, but for the fact that Hobbs agreed to take the short term if they would elect him president. By making this agreement he obtained the office of president and prevented the question being settled by lot as to who should have the short term. When he thus agreed to take the short term, and prevented the question being settled by lot he is estopped, after the expiration of the short term, to claim the long term. The agreement between the five men as to which should take the short term violated no public policy. On the other hand, the law favors the settlement of disputes. Hobbs, having agreed to take the short term, must abide his agreement, just as he would have been compelled to abide an agreement to determine the matter by lot if in the drawing he had drawn the short term." (Emphasis ours)

While this case is not determinative of the point here before us, we cite it as illustrative of the court's desire to

give effect to the intent of the voters and to permit the settlement of controversies of this nature in any reasonable manner.

This same rule is announced in *Murphy v. Spokane*, 117 P. 476, wherein it is said:

"The purpose of an election, whether for men or for measures such as the one before us, is to give effect to the voice of the people."

In order to give effect to the will of the voters, it is necessary to determine, if possible, what "term" the voters had in mind when they cast their votes for the nominee for Probate Judge of Pike County.

In the case of *State v. Superior Court*, 128 P. 1054, the Court said:

"The electors, as is said in *Cook v. Mock*, *People v. Thompson*, supra, and the other cited cases, were presumed to know when the regular term of their municipal officers expired. That was, as is said in *Lafayette v. State*, supra, knowledge of a matter of law of which courts would presume the people had full knowledge. It was not, as that court also says, an instance of a vacancy in office which would be a question of fact concerning which knowledge would not be presumed."  
(Emphasis ours)

This same rule was approved in the case of *Tillson v. Ford*, 53 Calif. 701 wherein the Court said:

"That case was decided upon the proposition that no special election can be held to supply a vacancy in a state office, under the provisions of the political code unless a proclamation shall be issued informing the voters that the vacancy exists; for, while all are presumed to know the law and the time when the full terms expire, the voters are not presumed to know the fact that an officer has resigned or died."

No notice having been given the voters in the instant case that there was to be a vacancy in office and a special term to be filled by election, there can be no presumption that the voters of Pike County knew of this condition, and the intent of the voters,

therefore, was evidently to elect a Probate Judge for the regular term of four years commencing January 1, 1935. The failure, however, of the voters of Pike County to elect a Probate Judge for the special term does not operate to continue the present appointee in office.

"Where one is appointed to fill a vacancy until the next general election, the fact that no successor was legally elected does not operate to continue him in office." 46 C.J. 978.

This precise question was before the Supreme Court in the case of State ex rel. v. Perkins, 139 Mo. 106, wherein the Court said:

"Besides the legislature, at the revising session of 1879, enacted section 3276, and retained section 7121, and therefore must be deemed cognizant of the difference between those sections, and intentionally used the limiting word 'until', and purposely refrained from using in section 3276 words granting the right to hold over after the expiration of a given time. Nay, more, they made express provision that the residue of the term should be filled by election. This amounts to the exclusion of a conclusion.

These considerations necessarily lead to the conclusion that Judge Crow's official term expired when the general election occurred in 1896, and could not be extended by reason of the fact that the commission he received from the Governor assumed to enlarge his official term (not only 'until the next general election' but 'until his successor qualified'. Mechem's Pub. Off., sec. 395; Hench v. State, 72 Ind. 297.

#### Conclusion

In view of the foregoing, it is the opinion of this department that the nominee for Probate Judge of Pike County, nominated by the Democratic Party at the primary election in August, 1934, was nominated for the regular term of Probate Judge

commencing January 1, 1935 and ending December 31, 1938, and that the voters of Pike County wholly failed to nominate any one on the Democratic ticket for the office of Probate Judge for the short term commencing November 6, 1934 and ending December 31, 1934.

It is further the opinion of this department that in view of the failure of the voters to nominate any one for this special or short term, the Democratic County Committee should select some one to run for the office of Probate Judge of Pike County for this special term.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

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