

COUNTY AUDITOR: (1) May presently resign effective on day named;  
(2) Governor can <sup>not</sup> make prospective appointment effective on day named in resignation; (3) Form of resignation.

SHERIFF: (4) Has authority to select bailiffs to attend upon court;  
(5) Forbidden to enter into special contract as to compensation.

November 19, 1940

11/27



Mr. S. J. Shepherd  
Auditor, Buchanan County  
Courthouse  
St. Joseph, Missouri

Dear Mr. Shepherd:

You have orally requested that we furnish you an opinion on the following facts:

- (1) Can the present Auditor of Buchanan County, who has been elected to the office of Sheriff, resign presently but not to take effect until a day named?
- (2) If the answer to question one is in the affirmative, can the Governor make a prospective appointment effective on the day named?
- (3) Can the circuit judges select the bailiffs for their respective courts, or does the sheriff determine who is to be selected?
- (4) May a sheriff enter into an agreement to be paid a stipulated sum monthly for mileage in serving summons?

You have further requested that we submit to you a form of resignation.

I

Section 12200, R. S. Mo. 1929, relates to the office of county auditor and provides that the Governor

may fill vacancies occurring by resignation:

"At the general election in the year 1902, and every four years thereafter, a county auditor shall be elected by the qualified voters of such counties, who shall be commissioned by the governor and shall enter upon the discharge of his duties on the first Monday in January next ensuing his election, and shall hold his office for the term of four years, and until his successors shall be duly elected and qualified, unless sooner removed from office; and when any vacancy shall occur in the office 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 an auditor 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."

There can be no doubt of the right of a county auditor to resign his office. The Supreme Court in the case of State ex rel. v. Bus, 135 Mo. 325, l. c. 331, said:

"Whatever doubt may exist in some jurisdictions as to the right of a public officer to resign his office without the concurrence of the officer or body which has the power to act upon it, all doubt is removed in this state by a constitutional recognition of the right. The constitution (sec. 5, art. 14) declares:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected and qualified."

46 C. J., Section 130, page 979, in discussing prospective resignations, states as follows:

"A prospective resignation, even though accepted, does not take effect until the day named; \* \* \*"

In the case of State ex rel. Berry v. McGrath, 64 Mo. 139, a judge of the circuit court transmitted his resignation to the Governor in July, 1876, which resignation was expressed to take effect on the 31st day of December, 1876. The court, in holding that its acceptance prior to December, 1876, would not vacate the office, said (l. c. 141):

"Now, notwithstanding the fact that Judge Henry's resignation was transmitted to the governor in July, 1876, he continued to be judge of the 27th Judicial Circuit until the 31st day of December, 1876. On that day, and not before, did his resignation take effect, no matter when it was accepted by the governor. From that day, and not before, did his office become vacant. As the relator claims to have been elected prior to that time, he was elected before any vacancy existed and without authority of law."

In answer to your first question, it is our opinion that you may presently resign from office and that same will not take effect until the day named.

II

46 C. J., Section 64, page 952, in discussing prospective appointments to fill vacancies in public office, states that:

"The general rule is that a prospective appointment to fill a vacancy sure to occur in a public office, made by an officer who, or by a body which, as then constituted, is empowered to fill the vacancy when it arises, is, in the absence of a law forbidding it, a valid appointment, and vests title to the office in the appointee."

The above rule would permit a prospective appointment to fill a vacancy, absent a law forbidding it.

Section 11, Article V, of the Missouri Constitution, provides when the Governor may fill vacancies in office:

"When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

Under the above section the office must be vacant in order to authorize an appointment by the Governor. The question then is - When does the office become vacant so as to authorize it to be filled by the Governor?

The court in the case of State ex rel. Boecker, 56 Mo. 17, l. c. 21, said:

"In this latter case the judge who wrote the opinion of the court, in defining what a vacancy is, and when it happens, says: 'There is no technical nor peculiar meaning to the word 'vacant,' as used in the Constitution. It means empty, unoccupied, as applied to an office without an incumbent. \* \* \* An existing

office without an incumbent is vacant, whether it be a new or an old one.'

"In *Biddle vs. Willard* (10 Ind., 62), it was held that to constitute a complete and operative resignation, there must be an intention to relinquish a portion of the term of an office, accompanied by the act of relinquishment. 'Hence,' says the court, a 'prospective resignation may in point of law, amount but to notice of an intention to resign at a future day or a proposition to so resign, and for the reason that it is not accompanied by a giving up of the office, possession is still retained and may not necessarily be surrendered till the expiration of the legal term of the office, because the officer may recall his resignation; may withdraw his proposition to resign. He certainly can do this at any time before it is accepted, and after it is accepted he may make the withdrawal by the consent of the authority accepting where no new rights have intervened.'"

Vacancies in office clearly cannot take effect until the day named in the prospective resignation, no matter when accepted. Until such date then, there is no vacancy for the Governor to fill, and any attempt to fill the office by a prospective appointment would be clearly contrary to the above constitutional provision.

In answer to your second question, it is our opinion that the Governor cannot make a prospective appointment effective on the day named in your resignation.

III

Section 11518, R. S. Mo. 1929, provides in part as follows:

"Every sheriff \* \* \* \* \* shall attend upon all courts of record at every term \* \* \* \* \*"

Section 1870, R. S. Mo. 1929, provides in part that:

"The several sheriffs shall attend each court held in their counties \* \* \* \* \*"

Section 11513, R. S. Mo. 1929, provides that deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit court:

"Any sheriff may appoint one or more deputies, with the approbation of the judge of the circuit court; and every such appointment, with the oath of office indorsed thereon, shall be filed in the office of the clerk of the circuit court of the county."

Section 11514, R. S. Mo. 1929, provides the powers and duties of deputy sheriffs:

"Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

57 C. J., Section 114, page 771, in discussing the duty of the sheriff to attend upon the court, states that:

"It is the duty of the sheriff when he cannot attend to such duties in person, to appoint deputies to attend upon the terms of the court, and when such deputies are put in charge of juries the term 'bailiff' is applied to them."

We have been unable to find any constitutional or statutory provision which would authorize circuit judges to select their own bailiffs. The extent of their authority is to approve the appointment of deputies selected by the sheriff.

In answer to your third question, it is our opinion that the sheriff has authority to select any deputy, approved by the judge, to attend upon the court as bailiff, provided the latter has fully qualified.

IV

13 C. J., Section 378, page 441, provides in part as follows:

"The rule is well-settled that where fees or salaries are established for services of public officers, the policy of the law forbids special contracts as to compensation between them and the public. \* \* \* \*"

Section 11789, R. S. Mo. 1929, provides in part as follows:

"For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip... .10"

\* \* \* \* \*

"\* \* No mileage fees for serving any writ, summons or other legal process

"shall be collected unless the sheriff shall actually travel the distance for which he makes such charge: \* \* \* \* \*

Section 11792, R. S. Mo. 1929, provides that:

"Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held: Provided, that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

It is readily apparent that the statutes contemplate that sheriffs be paid "for each mile actually traveled" in serving summons, and not on a monthly basis.

In answer to your fourth question, it is our opinion that a sheriff is forbidden to enter into an agreement to be paid a stipulated sum monthly for mileage in the service of summons.

V

In the case of State ex rel. v. Boecker, 56 Mo. 17, l. c. 21, the court, in holding that since the Governor had authority to make the appointment in the case of a vacancy, the resignation should be addressed to him and not to the county court, said:

"As by the terms of the law, the Governor alone has the authority to make the appointment in case of a vacancy, it would seem to follow, that in order to make the resignation operative, it should be addressed to him. This is unquestionably the general principle, that when power is bestowed upon a particular officer, when a vacancy occurs, to fill the same by appointment, that the resignation should be sent to him that he may accept it, and then proceed to the discharge of his functions in the premises. The County Court had no jurisdiction over the matter whatever. There is no authority empowering it to take any steps or authority in the case. The resignation placed on file in the records of the court, was a paper not legally or rightfully there, and had no more effect than if it had been retained in the possession of the defendant."

And in the case of State ex rel. Kirtley v. Augustine, 113 Mo. 21, l. c. 24, the court, after again stating the above rule, points out that no particular form is required for the resignation:

"And the authority to fill the vacancy being with the governor, here likewise rests the power to accept the resignation. In order then to create a vacancy in the office held by Augustine his resignation must have been lodged with the governor, and by the governor accepted. There being no particular mode pointed out by statute or by the Constitution, this resignation may be in writing or by parol. No

particular form is required. It is only necessary that the incumbent evince a purpose to relinquish the office--that this purpose be communicated to the proper authority, and that this resignation be accepted either in terms, or something tantamount thereto, such as appointing a successor, etc. Edwards v. United States, 103 U. S. 471-474; The People v. Board of Police, 26 Barb. 502; Mechem on Public Offices and Officers, sec. 414, et seq."

\_\_\_\_\_, 1940

Honorable Lloyd C. Stark  
Governor of Missouri  
State Capitol  
Jefferson City, Missouri

Dear Sir:

You are hereby advised that I will resign, vacate and surrender the office of Auditor of Buchanan County, Missouri, the \_\_\_ day of \_\_\_\_\_, 1940.

We are of the opinion that the above form of resignation is sufficient.

Respectfully submitted,

MAX WASSERMAN  
Assistant Attorney-General

APPROVED:

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COVELL R. HEWITT  
(Acting) Attorney-General

MW:Eg