

PROBATE JUDGES: Probate judge appointed by the governor holds office until the next general election, and in the event of his defeat for the unexpired term relinquishes the office after the general election.

December 7, 1940

Honorable Harry Wooldridge
Prosecuting Attorney
Cooper County
Boonville, Missouri

Dear Sir:

This department is in receipt of your letter of November 29, 1940, wherein you make the following inquiry:

"I have the question of when the newly elected Probate Judge should take office. The present Probate Judge was appointed by the Governor about a year and a half ago, and was defeated in this election for the unexpired term.

I am of the opinion that Section 10216 R. S. Mo. 1919 govern, and therefore the newly elected official should take office on the first Monday in January. I am told that the Republican lawyers say this section does not apply in this instance and their man can take over the office immediately.

I would appreciate hearing from you in regard to this matter."

Section 2047 R. S. Mo. 1929, deals with the election

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of probate judges. Section 2048 refers to the vacancies in the office of probate judge, and is 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."

We are primarily concerned with the clause "shall continue in office until the next general election". Does it mean that the person who is elected to the office of probate judge assume his office on January first as provided in Section 10216, or after November fifth or as soon as he is able to qualify? We think Section 10216 is a general section covering all situations wherein there is not a special section governing vacancies when they occur in a particular office. Section 2048, quoted supra, must be considered a special section governing vacancies in the office of probate judge. The general rule supported by decisions is to the effect that when two sections dealing with the same subject matter, one general in nature and the other special in nature, the special section takes precedence over the general section. (State ex. inf. vs. Amick 247 Mo. 271) A similar situation refers to the circuit and county clerks. The statutes governing vacancies in those offices have the same clause as contained in the section relative to vacancies in the office of probate judge. In the case of State ex. inf. vs. Amick mentioned above, a controversy arose over a similar clause as contained in the statute relative to probate judges. The section has since been repealed, but the court passed on the question of when the circuit judge elected to fill an unexpired term assumed his office, and it is therefore applicable to the question which you present.

After an attempt to harmonize the sections dealing with vacancies in the office of circuit judge and setting forth the requirements of statutory construction, the court concludes as follows, l.c. 294:

"We are clearly of the opinion that upon both principle and authority respondent's term of office expired on the date following the general election held on November 5, 1912."

Other decisions which bear on the question are State ex. inf. vs. Koeln 270 Mo. 174 and State vs. Schweitzer 258 S. W. l.c. 439.

CONCLUSION

In view of the language of Section 2048 and the construction as placed upon it by the courts, we are of the opinion that the probate judge elected at the last general election to fill the unexpired term can assume office upon qualifying any time after November 5, 1940.

Respectfully submitted

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APPROVED:

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