

'DULY ELECTED TO THE OFFICE
of JUDGE OF THE PROBATE COURT
(Unexpired term ending December
31, 1942)
within and for the County and state
aforesaid.

'In Testimony Whereof, I, T. H.
Hubbard

'Clerk of the County Court of
said County and State, have hereunto
subscribed my name and affixed the
seal of said Court.

'Done in office at Keytesville, this
9th day of November, A. D. 1942

(Seal)

T. H. Hubbard Clerk
Marvin G. Wilson D. C.'

"Your opinion, as soon as possible, is
respectfully requested on the following
question:

Should the Governor commis-
sion Mrs. A. C. Drace as
Judge of the Probate Court
in Chariton County, Missouri,
for an unexpired term ending
December 31, 1942?"

Section 2438, R. S. Missouri, 1939, reads 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 gov-
ernor 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 en-

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suing his election and continue in office for four years and until his successor shall be duly elected and qualified: Provided, that in all cases where the death of the judge-elect shall take place after his election and before he qualifies, the same shall constitute a vacancy in such office from and after the date which said judge-elect is required to qualify."

The foregoing section provides that a person elected for a full term shall be commissioned by the governor.

Section 2439, R. S. Missouri, 1939, provides for the election of a probate judge to fill out the unexpired term caused by a vacancy in that office, and reads 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."

It will be observed that in Section 2439 there is nothing said about the governor issuing a commission to the person elected as probate judge to fill out an unexpired term. However, Section 23 of Article V of the Constitution of Missouri provides as follows:

"The Governor shall commission all officers not otherwise provided for by law. All commissions shall run in the name and by the authority of the

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State of Missouri, be signed by the Governor, sealed with the Great Seal of the State of Missouri, and attested by the Secretary of State."

In view of the fact that the Constitution provides that the governor shall commission all officers not otherwise provided for by law, and in view of the fact that said Section 2438, relating to the election of a probate judge in a county, provides that such judge shall be commissioned by the governor, it seems to us that the law contemplates that anyone elected to the office of probate judge should receive a commission from the governor.

It might be suggested that since Section 11463, R. S. Missouri, 1939, does not require that the vote for probate judge in a county be certified to the secretary of state, and that Section 11466 of the statutes does not require the secretary of state to certify to the governor the name of the candidate who received the highest number of votes for the office of probate judge in a county, that the law does not contemplate that the governor should issue a commission to such candidate so elected. However, Sections 11463 and 11466 are general statutes relating to the duties of the county clerk and secretary of state with respect to certifying the results of elections, while Section 2438 is a special statute relating to the office of probate judge alone.

It is a general rule of statutory construction that where general statutes and a special statute relate to the same subject matter, the special statute will prevail as far as the particular subject matter comes within its provisions. (State ex rel. v. Smith, 334 Mo. 653, 67 S. W. (2d) 50.)

Following this rule of construction, we think the statute relating to the office of probate judge would prevail over the statutes relating to numerous officers in so far as the office of probate judge is concerned. In addition to this deduction, we have the constitutional provision above quoted which requires the governor to commission all officers not otherwise provided for.

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Furthermore, Section 1988, R. S. Missouri, 1939, provides in part as follows:

" * * * and every judge of any court of record shall be commissioned by the governor, and, whether elected or appointed, shall hold his office until his successor is elected and qualified."

The latter section may likewise be considered as a special statute relating to judges of courts of record, and since a probate court is a court of record, said statute would control as to that office as against the general statutes above referred to.

CONCLUSION

It is, therefore, the opinion of this office that the governor should issue a commission to Mrs. A. C. Drace as Judge of the Probate Court of Chariton County, Missouri, for the unexpired term ending December 31, 1942.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK:HR

PROBATE JUDGE: Supplement to opinion of November 18, 1942.

November 19, 1942

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

Since writing the opinion to you on November 18, 1942, with reference to the commissioning of Mrs. A. C. Drace as Probate Judge of Chariton County for the unexpired term ending December 31, 1942, it has been called to our attention that there was a further question in your mind which was not covered by the opinion. That question was as to whether Section 11509, R. S. Missouri, 1939, applied to the Chariton County situation, or whether Section 2439 applied. We, therefore, offer the following as a supplement to the opinion rendered on the 18th.

Section 11509, R. S. Missouri, 1939, reads as follows:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said general election a person shall

be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

By its terms the foregoing section is a general statute dealing with vacancies in state and county offices generally, with certain specified exceptions.

Section 2439, R. S. Missouri, 1939, which was set forth in the opinion of the 18th, is by its terms a special statute dealing specifically and solely with a vacancy in the office of judge of the probate court.

Under the well known rule of statutory construction pointed out in the opinion of the 18th, where a general statute and a special statute relate to the same subject matter, the special statute prevails over the general statute in so far as the particular subject matter comes within its provisions. Therefore, we must conclude that Section 2439 prevails over Section 11509 in so far as a vacancy in the office of probate judge is concerned.

CONCLUSION

For the above reasons, in addition to the reasons assigned in the original opinion of the 18th, it is the opinion of this office that the governor should issue a

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commission to Mrs. A. C. Drace as Judge of the Probate Court of Chariton County, Missouri, for the unexpired term ending December 31, 1942.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

HHK:HR