

OFFICE

Incumbent public officer entitled to retain office until successor elected or appointed and qualified.

September 24, 1948

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Honorable R. M. Gifford
Prosecuting Attorney
Sullivan County
Milan, Missouri

9.29

Dear Sir:

Reference is made to your letter requesting an official opinion of this office, reading as follows:

"During the year of 1940 a surveyor was elected and qualified in Sullivan County of the third class by virtue of Section 13190, R. S. Missouri 1939. At the general election in 1944 no person was nominated on any ticket and, therefore, no one was elected. The incumbent held over by terms of 13190 above cited.

"Page 1759, Laws Missouri, 1945, said Section 13190 was repealed and a new section of the same number was enacted.

"In the primary election of August, 1948, no person or persons were nominated for the office on any ticket and under our present laws such vacancies on the tickets cannot be filled. So no one will be elected county surveyor at the general election to be held in November, 1948, as provided by Section 13190, Laws of Missouri, 1945, page 1759.

"Such county surveyor is a member of the County Board of Equalization which office is rather important in itself.

"Will the present incumbent continue to hold over for a four year term beginning in January, 1949, or will the office be vacant?"

At the time of the election of the officer referred to in your letter of inquiry, there was in effect Section 13190, R. S. Mo. 1939, reading in part as follows:

"At the November election in the year 1868, and every four years thereafter, the qualified voters of each county shall elect some suitable person as county surveyor, who shall hold his office for four years, and until his successor is elected, commissioned and qualified. * * * * "

(Underscoring ours.)

Similarly, Section 5 of Article XIV of the Constitution of 1875 then provided:

"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 or appointed and qualified."

Also Section 12820, R. S. Mo. 1939, reads as follows:

"All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

It is our thought that under the constitutional and statutory provisions quoted supra, the officer elected at the general election in 1940 was entitled to remain as the incumbent thereof until such time as his successor was duly elected and qualified. Such was the holding of the Supreme Court of Missouri in Langston vs. Howell County, 79 S.W. (2d) 99, 336 Mo. 444, wherein the court said, l.c. 102:

" * * * It is said in 46 C.J. p. 968:
'The general trend of decisions in this country is that, in the absence of an express or implied constitutional or statutory provision to the contrary an officer is entitled to hold his office until his successor is appointed or chosen and has qualified.' * * * * "

Further, in discussing the nature of such holding over, the court said, l.c. 102:

" * * * During the time an officer so holds over, under the provisions of the constitutional and statutory provisions, supra, he holds the office as a de jure officer (46 C.J. p. 969) and by the same tenure, after the prescribed term, until the right of his duly chosen and qualified successor attaches. * * * * "

The constitutional and statutory provisions upon which such decision was predicated have been continued as Section 12 of Article VII of the Constitution of 1945, with Section 12820, R. S. Mo. 1939, remaining unchanged. It is noted that in your opinion request you refer to the repeal and re-enactment of Section 13190, R. S. Mo. 1939, by an act found in Laws of Missouri, 1945, page 1759. We do not believe that such repeal and re-enactment affects the opinion inasmuch as no new office was created and by further reason of the incorporation of the repeal and re-enactment bill of Section 13190a, reading as follows:

"In all counties of this state the terms of all persons holding the office of county surveyor at the time of the effective date of this act shall not be vacated, or otherwise affected thereby, and all the provisions of law relating to the office of surveyor shall remain in full force and effect for the period of the term of such persons holding the office of county surveyor at the time of the effective date of this act, unless otherwise provided by law. Otherwise the provisions of this article shall hereafter apply only to counties of Classes 2, 3 and 4."

CONCLUSION

In the premises, we are of the opinion that a county surveyor in a county of the third class, duly elected at the general election in 1940 and thereafter qualified and commissioned pursuant to such election, will remain in office until such time as his tenure is terminated by removal,

Hon. R. M. Gifford

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resignation or the election and qualification of a successor.

Respectfully submitted,

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APPROVED:

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