PROSECUTING ATTORNEY: Officer elected for a term, and
PUBLIC OFFICERS: until successor is elected, holds office until the election of a properly qualified successor.

September 8, 1941

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Honorable Forrest C. Donnell
Governor of the State of Missouri
Capitol Building
Jefferson City, Missouri

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Dear Governor Donnell:

We are in receipt of your request for an opinion concerning the existence of a vacancy in the office of Prosecuting Attorney in Shannon County, Missouri, and your power to make an appointment to such office. You have submitted, in connection with your request, a statement, briefs on behalf of each of the parties concerned and the resignation of one A. E. Orchard as Prosecuting Attorney of Shannon County. We quote the following portions of the statement received, which are necessary to a decision on the question:

> "At the August Primary Election, held in the year 1940, A. E. Orchard was the only candidate on the Democratic Ticket for the Office of Prosecuting Attorney for Shannon County, Missouri, and was duly nominated for said office.
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> "At the General Election of the same year he was duly elected to the said office, being the only candidate on either ticket in said election. Was certified, and by the then Governor, L. C. Stark, commissioned and prior to the 1st day of January, 1941, took the oath of office and qualified as Prosecuting Attorney for said Shannon County, Missouri, however, he did fail, at the October Examination of the Bar Board, to make a satisfactory grade, and was not admitted to the practice of law in this state.

> "J. Ben Searcy, who was regularly elected, commissioned and qualified as Prosecuting Attorney for said county at the General Election held in the year 1938, has, since the 1st day of January, 1941, continued to function as Prosecuting Attorney for said Shannon County, Missouri; there being no proceeding instituted to try his right to do so.
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> "Mr. Searcy was, until the first of June of this year, the only resident Attorney, in active practice, in Shannon County. * * * "

The resignation of A. E. Orchard, also submitted, is as follows:

> "At the last general election held in this state, I, the undersigned, was elected to the office of Prosecuting Attorney, of Shannon County; that before I was elected I took the bar examination and failed to receive my license to practice law, hence could not exercise the functions of said office; I received my commission from the Governor and qualified by taking the oath of office and having my commission recorded in the County, and since I cannot exercise my duties as said Prosecutor, I am taking this means of informing you that I desire to resign, my resignation to take effect upon the receipt of this letter."

Your authority to fill a vacancy in the office of Prosecuting Attorney in any county in the state is set out in Section 12989, R. S. Mo. 1939, which is as follows:

> "If any vacancy shall happen from any cause in the office of the attorney-general, circuit attorney, prosecuting attorney or assistant prosecuting attorney,

> the governor, upon being satisfied that such vacancy exists, shall appoint some competent person to fill the same until the next regular election for attorney-general, prosecuting attorney or assistent prosecuting attorney, as the case may be."

Your decision, under the above section, as to whether or not a vacancy exists may be reached from any information which you may have from any source, but is not conclusive on the parties and is subject to judicial review. While not necessary to the question at hand, we believe that the judicial definition of your powers to determine whether a vacancy exists may be of some assistance. In State ex rel. Attorney General v. Seay, 64 Mo. 89, l. c. 98, we find the following interpretation:

> " * * * Hence, that provision of the constitution that 'the governor, upon being satisfied that a vacancy exists, shall issue a writ of election, etc.,' confers no judicial authority, but merely for convenience authorizes him to determine that question, because the public service might suffer if a vacancy could not be filled until after a judicial investigation be had. He determines it upon ex parte testimony or information that is not technically testimony at all, and surely it was not intended that the rights of incumbents were to be conclusively determined by the governor, by the discharge of the duty imposed upon him by that section."

The present incumbent of the office of Prosecuting Attorney of Shannon County was elected under the provisions of Section 12934, R. S. Mo. 1939: -

> "At the general election to be held in this state in the year A. D. 1880, and every two years thereafter, there shall

> be elected in each county of this state a prosecuting attorney, who shall be a person learned in the law, duly licensed to practice as an attorney at law in this state, and enrolled as such, at least twenty-one years of age, and who has been a bona fide resident of the county in which he seeks election for twelve months next preceding the date of the general election at which he is a candidate for such office and shall hold his office for two years, and until his successor is elected, commissioned and qualified." (Italics ours)

Another provision of the statutes deals with the term of office of the various prosecuting attorneys in the state, which is Section 12988, R. S. Mo. 1939, being as follows:

> "The attorney-general, prosecuting attorneys, the circuit attorney, the prosecuting attorney and assistant prosecuting attorney for the city of St. Louis shall be commissioned by the governor, and shall hold their offices until their successors are elected, commissioned and qualified." (Italics ours)

The underlined portions of the two sections above quoted leave no doubt as to the intention of the Legislature with regard to the term of office of the prosecuting attorneys in the state. The term may expire only when a successor has been elected, commissioned and qualified.

Under the facts as submitted, it becomes necessary to determine whether or not a successor to the present incumbent, who was elected at the 1938 general election, has been elected, commissioned and qualified. A. E. Orchard has never been possessed of a license to practice as an attorney at law in this state according to the statement and briefs submitted, and we fail to find his name enrolled as an attorney in the Public Records of the Supreme Court of the State of Missouri.

These are requirements which each prosecuting attorney must possess under Section 12934, supra.

From the statement of facts submitted and the resignation of Mr. Orchard, it is apparent that he never at anytime attempted to exercise the duties of the office, and it is further apparent that the present incumbent has at all times fulfilled those duties. It is admitted that the present incumbent possesses all the necessary qualifications. While we find no authority in which the exact facts here presented were determined, there are numerous authorities in Missouri which decide that the election of a person who does not possess the necessary qualifications for an office has no right to hold that office. In State ex rel. Snyder v. Newman, et al., 91 Mo. 445, the relator was a candidate for Mayor and the respondents were the City Aldermen who withheld a certificate of election to relator on the ground that he had not been a resident of the city for one year next prior to his election, as required by the statutes. A writ of mandamus was sought, which was denied in the following language by the court, l. c. 451:

> "The election of a person to an office who does not possess the requisite qualifications, gives him no right to hold the office. 1 Dill. Mun. Corp. (3 Ed.) sec. 196. As, by reason of his disqualifications, the relator was not entitled to hold the office, surely he has no right, at the hand of the court, to be armed with a certificate of election -- evidence of title to that to which he has no right."

This quotation was approved in State ex rel. v. Roach, 246 Mo. 70.

To the same effect is the following paragraph in 46 C. J. 950:

> "Where the legislature has fixed the qualifications for an office pursuant

> to its authority so to do, the electors cannot select one not possessing the qualifications prescribed, and one who is not eligible is not regarded as elected to office, although he may receive the highest number of votes cast and is in possession of a certificate of election, although it has been held that his election is not affected but merely his right to hold the office. One who has been elected to an office, but who is ineligible cannot recover the office from another."

Among the authorities there cited is Jenness v. Clark, 21 N. D. 150, 129 N. W. Rep. 357, Volume 27, Ann. Cases 1913 B, 357. In that case the appellant's term of office as Superintendent of Schools expired on the first Monday of January, 1909, and respondent, who was the successful candidate at the preceding general election, obtained a certificate of election, duly qualified and was in possession of the office, discharging the duties thereof. The following portion of the court bears directly on the question at hand, Ann. Cases, l. c. 676:

> "In the light of such admission, can it be said that a successor to plaintiff has been elected and qualified so as to terminate her right to the office?
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> "Appellant's counsel contend that, because of respondent's ineligibility to hold the office, his election was void, and that consequently plaintiff's right to the office still continues, and will continue until a qualified person has been elected and has qualified. That such election was void, we entertain no doubt. Such is practically the unanimous voice of the authorities. 23 Am. & Eng. Enc. of Law (2d ed.) 338 and cases cited; Sheridan v. St. Louis, 2 Ann. Cas. 480,

and cases cited in note on page 485 (183 Mo. 25, 81 S. W. 1082). The election being a nullity, it inevitably follows, assuming the constitutionality of Section 764, Rev. Codes 1905, which we will hereafter consider, that appellant is entitled to continue in the office until such time as her successor shall be elected and qualified, unless by some act on her part she has relinquished her right thereto. This court in State v. Fabrick, 16 N. D. 97, 112 N. W. 74, expressly so held, citing numerous authorities. Our sister state of Minnesota has likewise so held. Taylor v. Sullivan, 45 Minn. 309, 11 L. R. A. 272, 22 Am. St. Rep. 729, 47 N. W. 802. Respondent's counsel contend that appellant, in her amended complaint, admits that respondent was duly elected and has duly qualified; but we do not thus construe such pleading. On the contrary, such complaint expressly alleges facts showing respondent's ineligibility to hold the office at all times mentioned therein. If he was ineligible, as the demurrer admits, then, as we have above decided, no election took place, as the same was a nullity. Respondent's ingenious argument regarding the meaning of the word 'qualified,' as used in the statute, is somewhat misleading, in that it assumes that his right to the office was alone dependent upon the act of qualifying. It is no doubt true, as argued by counsel, that the meaning of the word 'qualified,' as thus used, merely refers to the taking of the required oath of office and giving an official bond as required by statute where that is necessary. Something more than the act of qualifying is required, however, to entitle respondent to the office. He must have first been elected thereto."

Appended to the foregoing case is a note containing a number of authorities to the same effect, and a portion of which we herewith set out, 677, 678:

> "The right of the incumbent of a public office, the term of which is fixed at a definite period and 'until his successor is elected and qualified,' to hold over after the expiration of his term if it appears that the person elected as his successor is ineligible to the office, has been recognized in a number of cases. Taylor v. Sullivan, 45 Minn. 309, 47 N. W. 802, 22 Am. St. Rep. 729, 11 L. R. A. 272; Hoskins v. Brantley, 57 Miss. 814; State v. Hays, 91 Miss. 755, 45 So. 728; Richards v. McMillin, 36 Neb. 352, 54 N. W. 566; State v. Fabrick, 16 N. D. 97, 112 N. W. 74. See also State v. Boyd, 31 Neb. 682, 48 N. W. 754, 51 N. W. 602, reversed on other grounds in 143 U. S. 135, 12 S. Ct. 375, 36 U. S. (L. ed.) 103. And see the reported case. In Taylor v. Sullivan, supra, the court said: 'By this proceeding, the relator seeks an adjudication as to the right of the respondent to hold the office of county attorney of Stearns county, for which office he received a majority of the votes cast at the general election in 1890. The point of contention is whether the respondent was legally elected, and can hold the office under such election, he being of foreign birth, and having never declared his intention to become a citizen of the United States until after such election. The contention that the relator has no such private interest in the matter as justifies him to invoke a decision upon it is not sustained. The relator was elected to the office at the election in 1888, qualified and entered upon the discharge of its duties. He is still the incumbent of the office, unless he has

> been superseded by the respondent, or unless a vacancy has occurred by force of the statute. The term of office for which the relator was elected was 'two years, and until his successor is elected and qualified.' Gen. St. 1878, c. 8, section 210. If the election of the respondent was not legally authorized, the relator would continue to hold the office by force of this express provision of the statute.' * * * "

The above views express the great weight of authority.

We are aware of that line of cases in Missouri and other jurisdictions which expresses the view that even though a candidate for office may not possess the statutory qualifications at the time of his election, if such requirements are met before the candidate actually takes office, his title is valid.

The latest case of this character in Missouri is State ex inf. Mitchell v. Heath, 132 S. W. 2nd 1001. In that case, determined by Division No. One of the Supreme Court, the respondent was elected School Director, but had not paid the state and county tax within one year next preceding his election as required by the statute. The respondent did, however, after his election and before the time of actual qualification by taking the oath, pay a state and county tax. Judge Hyde held the respondent entitled to the office in the following portion of the opinion, l. c. 1005:

> "In view of our method of assessing and collecting property taxes and the time when common school elections are held, we think it contemplated the payment of the current taxes payable during the calendar year preceding the school election since no other property taxes could become due between the end of that year and the school election. We, therefore, hold that the reasonable construction of

> the statutory requirement, 'shall have paid a state and county tax within one year next preceding his * * * election,' is that a person, to be eligible to serve as a common school director, shall have paid the state and county tax which was due and payable within the calendar year next preceding his election. See Sec. 655, R. S. 1929, Mo. St. Ann., Section 655, p. 4899. We further hold that a person, who owns taxable property and owes taxes on it which are due and payable during the calendar year preceding his election, would be eligible to take the office of common school director if he pays such taxes at least prior to the time prescribed for taking his oath of office. It follows that the statute did not prevent respondent from taking office under the circumstances shown by the agreed facts.
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> "The judgment is affirmed."

While this case apparently is a departure from the hard and fast rule that an election is void where the candidate does not possess certain statutory qualifications, it can have no application to the facts at hand because there is no contention that Orchard received his license prior to his taking the oath and attempted qualification. We think these cases support the view that the successful candidate must possess the statutory qualifications before taking the oath of office, and, in the absence of such qualifications, the oath is a nullity. Since Orchard did not possess the requirements fixed by Section 12934, we are forced to the conclusion, under the above authorities, that he could not have obtained the office from the present incumbent in a direct proceeding for that purpose. Since Orchard possessed no valid title, his attempted resignation is ineffective and does not create a vacancy.

We next consider whether a vacancy exists which would authorize an appointment because of the expiration of the

term of two years, for which Searcy was elected, and the status of his title to the office by reason of his holdover after the expiration of such term.

The earliest decision on this point appears to be State v. Lusk, 18 Mo. 333. In that case the respondent had been elected to the office of Public Printer for a term of two years and until his successor was elected and qualified. At the expiration of the term two years later, no successor was elected, and the Governor appointed the relator to fill the office. The following portions of the opinion express the views of the court:

> " * * * The fifth section provides that 'the public printer to be elected at each session of the general assembly shall hold his office for two years commencing on the first day of May next thereafter, and until his successor shall be elected and qualified; and the public printers thereafter elected, shall hold office for two years and until their successors shall be elected and qualified.' * * *
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> "These provisions of the act are the only ones which materially affect the question in the present case. In behalf of the State, it is claimed that the office became vacant on the first of last May, in consequence of the failure of the assembly to elect a public printer, and as the office itself continued to exist, the governor, under the ninth section of the fourth article of the constitution, was entitled to fill it by appointment. That section is in these words: 'When any office shall become vacant, the governor shall appoint a person to fill such vacancy, who shall continue in office until a successor be duly appointed and qualified according to law.'
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> *

"It is next insisted that, as the act itself directs that the person elected by the assembly should hold the office for two years and until a successor should be elected and qualified, the office was not vacant, so as to authorize the governor to fill it by appointment.

* *

"It is insisted for the State, that the term for which the office is to be held is two years, and that the additional time, 'until a successor is elected and qualified,' is added, merely to prevent the office being without some person qualified to discharge its duties, and does not prevent its being considered vacant for the purpose of its being filled by executive appointment.

* *

"That the governor has no power to displace the person elected by the general assembly, is certain, for no such power is hinted at in the law. He cannot displace him during the two years, because the office has been conferred upon him for that time absolutely, and the governor has no control over the office. He cannot remove him after the two years, because the same law that protects him for two years, protects him equally after that period, against every person but a regularly elected and qualified successor. The successor, to whose claims he must yield, is a successor elected under the law, and qualified as the law requires.

* *

"The law providing for the choice of a successor in its own mode, excludes others, and it continues the incumbent in office until that mode is pursued.

* * * * * * * * * * * * *

> "Regarding the respondent, Lusk, as in office under the statute, and that there was no vacancy which the governor was authorized to fill by appointing Tredway, the demurrer of the State to the plea of Lusk ought, in my opinion, to be overruled, and judgment should be given thereon for the respondent Lusk."

Shepard's Citator states that the Lusk case, above cited, was overruled in State ex rel. Attorney General v. Thomas, 102 Mo. 85. However, an examination of that decision discloses that it was overruled in part only, and the part affected does not concern the question at hand. The Thomas case modifies the Lusk decision by stating that where there is a provision in the law for a special election, a vacancy may occur in an office where there is a holdover incumbent. The following quotation summarizes the decision, l. c. 92:

> "The case just cited, while it plainly decides the point mentioned, necessarily decides, also, that there is a vacancy in an office notwithstanding there is a holdover incumbent, and a vacancy which may be filled, provided there is a law for the election of his successor. * * "

In State ex inf. Hulen v. Brown, 274 S. W. 965, this question was under discussion, and the Lusk case was followed by the court in the following portion of the decision, l. c. 967:

> "The law is well settled that, where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. State ex rel. Lusk, 18 Mo. 333; State ex rel.

> Stevenson v. Smith, 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. State ex rel. Robinson v. Thompson, 38 Mo. 192; State ex rel. v. Ranson, 73 Mo. 78."

Again, in Langston v. Howell County, 79 S. W. (2d) 99, in which the contention was made that Langston's term of one year had expired and his office was therefore vacant, the court decided in favor of Langston's continuation in office in the following language, l. c. 102:

> "Langston's official term was fixed at one year, but upon the expiration thereof, no successor having been appointed, his right to hold such office, and his title thereto, continued until the right of a duly appointed and qualified successor attached."

In some of these cases the language of the court may be confusing because of the use of the words "elected" and "appoint" in the same sentence, which might give rise to the belief that an elective office might be filled after the expiration of the term by appointment. However, we think this was clearly decided in State ex inf. Major v. Williams, 222 Mo. 268, where the court approved the following language from the case of Johnson v. Mann, l. c. 285:

> "'The provision of the Constitution mainly, if not solely, relied on by counsel for petitioner, is the twenty-fifth section of the sixth article. It simply provides for the holding over by the incumbent after the expiration of his term, until his successor shall qualify. The plain, unequivocal import of this section of the Constitution is, that when the regular term expires, the office becomes in the

> eye of the Constitution, vacant, but with authority to the incumbent, already qualified, to continue by virtue of such previous qualification, made effective for the purpose by the Constitution, to discharge the functions of the office until he is succeeded in the way preferred by the people, as pointed out in the Constitution made by them, and in the laws made in pursuance of that instrument." (Italics ours)

In other words, if the office was originally filled by appointment, it may be filled by appointment at the expiration of the term. But if the office was filled by election and the incumbent is to hold until his successor is elected, as is the case at hand, the office must be filled by election. This proposition is very clearly stated in State ex inf. Crow v. Smith, 152 Mo. 512, l. c. 517, as follows:

> "The appointment of defendant by the judges named was expressly predicated upon the theory that a failure to elect a successor to Haughton at the regular election in 1898, ipso facto, created a vacancy in that office. This is a misapprehension of the law in the State. Whatever may be the rule in other States, under their constitutions and statutes, it has been the settled law in this State ever since the decision in State v. Lusk, 18 Mo. 333, that the failure to elect a successon to an office at the regular time for holding an election for that office, does not create a vacancy in such office, and does not, therefore, authorize any one to appoint a successor, and that if a person is so appointed as such successor he acquires no title. (State ex rel. v. Ranson, 73 Mo. l. c. 91, 94 and 95; State ex rel. v. McCann, 81 Mo. 479; State ex rel. v. Manning, 84 Mo. l. c. 663; State ex rel.

v. Smith, 87 Mo. l. c. 160; State ex rel. v. McCann, 88 Mo. l. c. 390; State ex rel. v. McGovney, 92 Mo. l. c. 430; State ex rel. v. Powles, 136 Mo. l. c. 381.)

CONCLUSION

It is therefore the conclusion of this department that the election of Orchard, who at no time was possessed of the qualifications necessary to his holding the office of Prosecuting Attorney, did not terminate the office of the incumbent since he could not have recovered the office by any legal action, having no right to hold the same.

It is the further opinion of this department that since the present incumbent was elected for a definite term, and until his successor is elected, commissioned and qualified, and since the present incumbent has continuously held the office and exercised all the duties in connection with same, that there is no vacancy in the office of Prosecuting Attorney of Shannon County, Missouri, which may be filled by appointment.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RLH:VC