

ELECTIONS:  
COUNTY OFFICERS:  
COUNTY JUDGES:

Upon death of an elected county judge before assuming office incumbent does not hold over. An appointed judge holds office until the first Monday next following the first ensuing general election.



February 1, 1957

Honorable J. P. Morgan  
Prosecuting Attorney  
Livingston County  
Chillicothe, Missouri

Dear Mr. Morgan:

This is in answer to your letter of recent date requesting an official opinion of this office which reads:

"An opinion based on the following facts and question is requested by your office. Otis Hurst, a Democrat, is the present incumbent Associate Judge of the County Court from the Western District of Livingston County. At the last General Election one Ross Cooper, a Republican, was elected to take office on January 1, 1957. Mr. Cooper died last week.

"Will the incumbent hold over until the next General Election or will it be necessary to have a Special Election?

"It would be appreciated if the answer could be expedited due to the short period of time."

It is first necessary to determine just what statutes are relevant to the situation involved. It is, therefore, thought necessary to here quote from Section 49.050, RSMo 1949, which is as follows:

"The clerks of the county courts shall certify to the governor the names of the persons elected as county judges, and the governor shall thereupon commission all such persons as judges of the county courts for their respective terms for which they may have been elected."

Honorable J. P. Morgan

The next section, which it is felt could be involved in this question, is 49.060, RSMo 1949, said section reads:

"When a vacancy shall occur in the office of judge of the county court, such vacancy shall at once be certified by the clerk of said court to the governor who shall fill such vacancy as provided by law."

Article VII, Section 7 of the 1945 Constitution provides in regard to selection of officers that: "Except as provided in this Constitution, the appointment of all officers shall be made as prescribed by law."

Then Article VII, Section 12 of the 1945 Constitution provides:

"Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

In regard to the tenure of office it is necessary to quote from Section 105.010, RSMo 1949, which reads:

"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."

Further, in Chapter 105 at Section 105.030, it is provided that:

"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

Honorable J. P. Morgan

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." (Underscoring ours.)

The above quotations are submitted for the particular purpose of determining whether or not there is any specific difference between the question here involved and the question involved in the case of State v. Mouser, 284 S.W. 2d. 473, in which the circuit clerk-elect died following the election and prior to entering upon the duties of his office or qualifying. The point in that case which is of interest here is best illustrated by quoting at l.c. 477, where the court quotes from the case of Campbell v. Dotson, 111 Ky. 125, 63 S.W. 480, 481, which reads, in part:

"\* \* \* \* \*

"The term of county offices is fixed at four years. Elections are required to be held every four years to fill these offices. The persons elected enter upon the duties of their offices on the first Monday in January after their election. The term of the officer expires when the term of his successor begins. He holds until the election and qualification of his successor, so that there may always be an incumbent in the office to attend to the public business.\* \* \* \* \* The aim was simply to prevent an hiatus in the office in case the new officer for any reason failed to qualify. The constitution fixes a definite term for each of these offices, and fixes a definite time when the regular election to fill them shall be held. It also provides for filling vacancies, and requires that these shall be filled by election, except when the unexpired portion of the term is so short as to make this impracticable. The construction urged by appellant is wholly out of keeping with the spirit and purpose

Honorable J. P. Morgan

of the constitutional provision. It is true, appellant holds until the election and qualification of his successor. His successor was elected at the November election, 1897. The person elected having died before the time for him to take possession of the office, the term for which he was elected became vacant, just as much as if he had died after qualifying, but before the time for entering upon the duties of his office; and when Dotson was appointed to fill this vacancy, gave bond, and took the oath, appellant's successor had been elected and qualified, and therefore his right to the office ceased."

We believe that the same rule applies to your question as in this above case and that the incumbent does not hold over. It is believed that a successor to Mr. Hurst, since Mr. Hurst has served his entire term, will have to be appointed and will hold until the first Monday in January next following the first ensuing general election.

#### CONCLUSION

It is, therefore, the opinion of this office that where a county judge-elect dies between the time of his election and qualification for assuming office, the incumbent judge does not hold over but his successor must be appointed by the Governor to serve until the first Monday in January next following the first ensuing general election.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James W. Paris.

JWF:mw

Yours very truly,

John M. Dalton  
Attorney General