

**County Commissioner—Failure to File Oath and Bond
—Effect of.**

The failure of a County Commissioner to file his oath and bond within thirty days after receiving notice of his election creates a vacancy in the office.

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County Attorney,
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My dear Mr. Tyman:

You have submitted for my opinion the following statement of facts:

“E. W. Gile was elected in November, 1920, to the office of County Commissioner of Meagher County, for a six-year term, and was notified of election on November 22, 1920. Because of illness he was absent from the State, returning early in January, 1921, and filed his oath and bond on January 15, 1921. On January 15, 1921, the District Judge, considering that a vacancy existed in the office because of failure to

file oath and bond within thirty days of notice of election, appointed Mr. Gile to fill the vacancy, the former Commissioner having in the meantime tendered a resignation which was accepted. Mr. Gile thereupon qualified by filing a new oath and bond and has since acted as County Commissioner."

The question submitted is whether Mr. Gile holds the office by virtue of his election, or whether a vacancy in the office existed so that he holds the office by virtue of the appointment, and whether his term is under the appointment so as to require an election to the office at the next general election.

Section 432 of the Revised Codes of 1921 reads as follows:

"Whenever a different time is not prescribed by law, the oath of office must be taken, subscribed, and filed within thirty days after the officer has notice of his election or appointment, or before the expiration of fifteen days from the commencement of his term of office, when no such notice has been given."

Section 468 of the Revised Codes of 1921 reads as follows:

"Every official bond must be filed in the proper office within the time prescribed for filing the oath, unless otherwise expressly provided by statute."

Section 511 of the Revised Codes of 1921 reads, in part, as follows:

"An office becomes vacant on the happening of either of the following events before the expiration of the term of the incumbent: * * *

"9. His refusal or neglect to file his official oath or bond within the time prescribed."

The authorities have long been divided upon the question whether, under statutes similar to the above, the office becomes vacant ipso facto upon failure to file the required bond (Throop on Public Officers, Secs. 173-176; 29 Cyc. 1388.) However, our Supreme Court in *State ex rel. Bennetts v. Duncan*, 47 Mont. 447, 453, adopted the rule that the office immediately becomes vacant upon failure to file bond, the court using the following language:

"Giving to section 3234, *supra*, the force and effect which the legislature evidently intended it should have, we think that it should be construed to mean that the failure of the person elected or appointed to office to qualify within the time prescribed creates a vacancy in the office which may be filled by the appointing power. The courts are somewhat at variance in the construction of such statutes (Throop on Public Officers, sec. 173; 29 Cyc. 1388); but it seems to us inconceivable that when an office 'becomes vacant,' it may still be regarded as being occupied by a legal incumbent. The office of relator, therefore, must be deemed to have become vacant by his failure

to take and subscribe the official oath as required by the statute, unless the taking of the official oath at the time of his appointment for the probationary term was sufficient."

To the same effect is the decision of *Norton v. Lewis*, (Cal.) 168 Pac. 388, where in an exhaustive opinion, citing many authorities, it was held that the above statute is mandatory and that an office becomes vacant ipso facto by the failure to file bond within the time prescribed by law, and that the word "neglect" occurring in the statute means merely "fail."

It has also been held that where the person elected failed to file bond by reason of election contest or refusal to approve or file bond by other officers charged with that duty, the office did not become vacant. (See cases collected at *Annotated Cases*, 1915D, p. 415.) In the same volume, at page 414, cases from many states supporting the Montana and California rule are assembled.

This rule does not, however, include the case of mere failure to file bond because of private difficulties of the person elected, and while the rule is one of much hardship in cases of illness or difficulties which may have operated to prevent the person elected from qualifying in time, the law is settled by the above decisions. Moreover, the rule is in many cases a necessary one inasmuch as under any other an officer could fail to file his bond, and the office appearing to be vacant and the public service perhaps requiring that it be immediately filled, and a successor being appointed, the officer originally elected could come in and file his bond and lay claim to the office.

In *Winneshiek County v. Maynard*, 44 Iowa, 15, the state of facts was almost identical with those submitted by you, an officer having been appointed to fill the vacancy created by his own failure to qualify within the statutory time. It was there held that he occupied the office under the appointment, and that the bond given by bondsmen by virtue of his election, which was filed after his appointment, did not bind the bondsmen for his default to turn over moneys collected.

It cannot be overlooked that the Commissioner elect, himself regarded the office as vacant and accepted the appointment and filed bond, and therefore acted under the appointment. Under these circumstances it is doubtful if he could now assume a different position.

In view of the foregoing, your opinion to the effect that upon the failure of the Commissioner elect to qualify by filing his bond within the statutory time the office became vacant, and that he holds the office by virtue of his subsequent appointment and qualification, and that a successor to the office should be elected at the next general election, is concurred in.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.