

School Trustee—Absence From the District Creates a Vacancy—Effect of Acts Performed Upon Returning to the District.

Absence of a School Trustee from the school district for sixty consecutive days ipso facto creates a vacancy. The Trustee upon returning to the district and resuming the duties of Trustee will be treated as a defacto officer, and his acts will be valid until the vacancy is filled.

John B. Muzzy, Esq.,
County Attorney,
Stanford, Montana.

My dear Mr. Muzzy:

I have your letter in which you ask whether the absence of a School Trustee for more than sixty consecutive days ipso facto creates a vacancy in the office of Trustee.

Section 998 of the Revised Codes of 1921 provides, in part, as follows:

“Provided, that absence from the school district for sixty consecutive days, or failure to attend three consecutive meetings of the board of trustees without good excuse, shall constitute a vacancy in the office of trustee.”

The Supreme Court of this State in the case of *State ex rel. Bennetts v. Duncan*, 47 Mont. 447, in passing upon the statutes which provide for a vacancy, in the event that an officer failed to qualify within a specified time, held that the failure of the officer to qualify within the time specified by the statute ipso facto created a vacancy. The court, in speaking of this, said:

“The contention of counsel for defendant proceeds upon the assumption that the burden was upon the relator to show his title to the office, and that since he thus failed to show that he had qualified in conformity with the provisions of the

statute, the presumption must obtain that the office became vacant at the expiration of ten days after his permanent appointment. 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."

The Supreme Court in the case of *State ex rel. Chenoweth v. Acton*, 31 Mont. 37, had under consideration the question of when a vacancy occurs under the provisions of Section 1101 of the Political Code of 1895, now Section 511 of the Revised Codes of 1921, and, in speaking of that section said:

"Section 1101 of the Political Code provides that an office becomes vacant on the happening of certain events therein enumerated, neither of which relates to the contingency of a tie vote. In construing a section identical with 1101, *supra*, the court said in *Rosborough v. Boardman*, 67 Cal. 116, 7 Pac. 261: 'An office becomes vacant on the happening of any of the events enumerated in Section 996 of the Political Code, among which the event relied on in this case is not mentioned. The enumeration in the Code must be held to be exclusive,' Citing *People v. Tilton*, 37 Cal. 621; *Stratton v. Oulton*, 28 Cal. 45, and *People v. Bissell*, 49 Cal. 411."

It is my opinion that absence of a Trustee from the school district for sixty consecutive days ipso facto creates a vacancy.

You have also asked the following question:

"In the absence of any official action or notification of his absence, did his resumption of the duties of his office upon his return reinstate him so that his acts will be legal for the remainder of his former term?"

In 29 Cyc. 1389, after discussing the rule applied by the authorities with reference to the creation of a vacancy upon the failure of an officer to qualify, it is said:

"Finally, it is universally held, in order to uphold the validity of official action, that the rule with regard to *de facto* officers will be applied in case an official incumbent discharges official duties before taking the official oath or filing the bond."

And again in 29 Cyc., at page 1393, it is said:

"It would seem also that persons in actual possession of an office, whose possession is acquiesced in for a considerable time by the public, are defacto officers, although they do not possess color of title."

It is my opinion, therefore, that, in order to sustain the validity of the acts of the Trustee in question, he will be regarded as a de facto officer and his acts will be valid until such time as the County Superintendent fills the vacancy.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.