

**County Commissioner, Election Of to Fill Vacancy. Vacancy in Office of County Commissioner, Election to Fill. Term of Office, Commencement of on Election to Fill Vacancy. Office, Term of When Elected to Fill Vacancy. Appointment to Fill Vacancy, Term Of.**

A person elected to fill a vacancy in the office of County Commissioner takes office immediately upon filing his bond and oath of office.

November 27, 1912.

Hon. John Larson,  
County Commissioner,  
Marysville, Montana.

Dear Sir:

I am in receipt of your letter of November 25th, submitting the question:

“When does a person elected to fill a vacancy in the office of county commissioner take office?”

I understand the statement of facts to be that in 1908, Moses Root was elected county commissioner for the term of six years from and after the first Monday in January, 1909. Subsequently, Mr. Root died and his successor was appointed to fill the vacancy for the entire unexpired term under the provisions of Section 2883 of the Revised Codes; that thereafter you were regularly elected at the general election held November 5th, 1912, as county commissioner for the then unexpired portion of the term for which Mr. Root had been elected in 1908, the question now being, when do you enter upon the discharge of the duties of your office.

The provisions of our state constitution having direct relation to this question are contained in Sections 4 and 5 of Article XVI, and Section 34, Article VIII. Said Section 4 provides for the election of county commissioners and fixes the term of office; and said Section 5, among other things, provides that appointments to fill vacancies in county offices, except county commissioner, shall be filled by the board of county commissioners; and said Section 34 of Article VIII provides that a person appointed to fill a vacancy shall hold his office until the next general election and until his successor is elected and qualified; while a person elected to fill a vacancy shall hold for the remainder of the unexpired term.

The code provisions are contained in Secs. 2883 and 426 of the

Revised Codes. Sec. 2883 provides that in case of vacancy the district judge "must fill the vacancy by appointing for the unexpired term, etc.," and Sec. 426 provides any person elected or appointed to fill a vacancy after filing his official oath and bond possesses all the rights and powers and is subject to all the liabilities, duties and obligations as if he had been elected to the office for the full term.

The supreme court of Montana, in *State ex rel. McGowan, et al, v. Sedgwick*, 127 Pac., 94, in considering this and other provisions of the state constitution and statute, HELD, that the exception stated in Section 5 of Art. XVI, had reference to the power of appointment and not to the term of the appointee, and that Sec. 2883 of the Revised Codes, in so far as it attempted to fix the tenure of the appointee "for the unexpired term" is void, and that a vacancy in the office of county commissioner should be filled by election at the "next general election" after the vacancy occurs, conformably to the provisions of Sec. 34, Art. VII, State Constitution.

The court in considering the question then presented; that is, whether an election could legally be had to fill a vacancy under a somewhat similar state of facts as those above stated, and in considering the provisions of the constitution, said, in part:

"In every instance of appointment to fill a vacancy in an elective office, unless an exception be made in the office of county commissioners, the Constitution specifically limits the tenure of the appointee to the next general election or until his successor is elected and qualified; and the phrase 'until his successor is elected and qualified' is literally construed by the Constitution itself, in the concluding sentence of Section 34 of Article 8. 'A person elected to fill a vacancy shall hold office until the expiration of the term for which the person he succeeds was elected;' for, if an appointee holds for the residue of the term, then there could never be 'a person elected to fill a vacancy' if an appointment has been made. That sentence is intelligible only upon the theory that the appointee holds only until the next general election or until the person elected for the residue of the term qualifies."

Further on in the opinion the court says:

"It will be seen that there was not any exception whatever to the rule that one appointed to fill a vacancy in an elective office should hold the office only until the next general election; and, in the absence of express exception and of any reason which can be suggested for an exception in favor of one appointed to fill a vacancy in the office of county commissioner, we think it quite apparent that the framers of the Constitution intended to reserve to the people the right, which they theretofore possessed, of electing the person who should fill that office, which of all offices most directly concerns the average voter, particularly the tax paying voter; for the board of county commissioners is the business agent of the people in the management of county affairs. Apparently the people of the state were unwilling to permit an appointee to hold beyond

the next general election; that is, beyond the time when opportunity would be first presented to fill the vacancy by an election. But, if respondent's position is tenable, they made an exception, and that, too, by mere implication and without any apparent reason, in favor of one appointed to fill a vacancy in the office of county commissioner, and by implication consented that, as to that particular office, an appointee might hold over one or even two general elections, as in the instances now before us."

If the provisions of Sec. 34, Art. VIII of the Constitution are controlling, and the supreme court has so decided, all doubt is removed. The phrase "until the next general election and until his successor is elected and qualified" is susceptible of but one construction. To hold that the person elected in such cases does not take office until sometime in January following would be, in effect, to amend this provision of the constitution to read "until his successor is elected and qualified and two months thereafter." The general rule of law is that "the term of office, when not provided by statute, begins, in the case of elective offices, on the date of election."

29 CYC. 1398.

But our constitution adds the phrase "and qualified."

"To qualify" means in this case to give the bond and take the oath of office and to file the same as required by law. The provisions of Sec. 426 of the Revised Codes are emphatic.

"After filing his official oath and bond possesses all the rights and powers and is subject to all the liabilities, duties and obligations as if he had been elected to the office for the full term."

How could he possess all the rights and powers and be subject to all the liabilities, duties and obligations from the time of filing his official oath and still not take office for some two months thereafter.

The general rule of law applicable to the tenure of appointments in case of elective offices is aptly stated in CYC:

"In many of the states, however, as a result either of the statute or of judicial decision, the term expires in the case of elective offices on the qualification of the successor of the person filling the vacancy who is chosen at the first general election after the vacancy occur."

29 CYC, 1402-1403.

This rule is stated with reference to the tenure of appointments to fill vacancies in elective offices, and the provisions of Sec. 34, Art. VIII of the State Constitution, expressly limit the terms of such appointees and provides that they shall cease when the persons elected have qualified. It is true that Sec. 4 of Art. XVI of the State Constitution specifies "the first Monday in January, but this has reference to the beginning of the full term. It certainly does not refer to a vacancy, for the law cannot specify when a vacancy shall occur, although it does nominate the term of office of both appointive and elective officers.

The Supreme Court of Kentucky in considering a similar question said:

"We are of opinion that the provisions of the constitution and statute supra all refer to offices which are to be filled for the full constitutional or statutory terms. There seems to be nothing in either the constitution or statutes of this state fixing the time at which one elected, or appointed to fill a vacancy in office, shall assume the duties of such office. It would, however, have been impossible for the appellee to have entered upon the duties of the office, the vacancy in which he was elected to fill, at the beginning of a term, for the term began on the the first Monday in January, 1902, nearly two years before his election. Except as the beginning or ending of a full term of office, the first Monday in January has no more significance than the first Monday of any other month. The term of the office of sheriff is four years, no more and no less. The present term throughout the state began with the first Monday in January, 1902. The term had but one beginning, and will have but one ending, though there may be a dozen incumbents during the one term. The appellant was not appointed to serve during the remainder of the unexpired term of his predecessor, but only to fill the vacancy caused by the latter's death until an election could be held as provided by law to fill such vacancy for the remainder of the unexpired term, which election, as thus provided, could not take place until November of the year 1903. Therefore, upon the election and qualification of appellee the vacancy ceased, and it became the duty of appellant to retire at once from the office in favor of appellee, who was entitled to begin the immediate performance of the duties thereof, without waiting until the first Monday in January following, as would have been the case if he had been elected for a full term of four years."

Jones v. Sizemore, 25 Ky. Law Reporter, 1957.

29 CYC. 403.

State v. Johns, 3 Ore. 533.

If, therefore, a certificate of election has been issued to you and you have filed your bond and oath of office, and your bond has been approved, you are now in office, and this without regard to any mere forms which may have been used relative to your nomination or election, for the fact remains that you were elected to fill that vacancy under the authority of Sec. 34, Art. VIII, and of Sec. 5 of Art. XVI of the State Constitution, which specify when you shall take office, and no one has power to amend or change the Constitution, or to hold in abeyance the mandates of Sec. 426 of the Revised Codes.

Yours very truly,

ALBERT J. GALEN,

Attorney General.