

Officer of County, Removal From. County Officer, Removal From County, Effect of. Vacancy in County Office, When Created. Coroner, Removal From County Creates a Vacancy When. Public Officer, Where Must Reside During Term.

Law relating to vacancy caused by permanent removal of county officers from the county considered and construed.

November 15, 1915.

Hon. T. F. Shea,
County Attorney,
Deer Lodge, Montana.

Dear Sir:

I am in receipt of your letter of the 4th instant, submitting the questions:

“Does the permanent removal from the county of the person elected to the office of county coroner create a vacancy in such office?”

“May the Board of County Commissioners become liable in any action by reason of its failure to declare the office vacant, when facts are presented to such board, establishing

the fact of the permanent removal from the county of the officer?

"Does the coroner, notwithstanding his absence from the county, continue to remain the duly qualified coroner until a vacancy has been declared by the Board of Commissioners?"

Section 11 of Article IX of the State Constitution, read in connection with Section 2955, Revised Codes, prescribes the qualifications to hold office, one of these qualifications being that the party must be a qualified elector of the county. Section 420 Revised Codes, declares that an office becomes vacant upon the incumbent "ceasing to be a resident of the state, or, if the office be local, of the district, city, town or township for which he was chosen or appointed, or within which the duties of his office are required to be discharged." This statute was taken directly from the California statute, and has been many times construed by the California Court.

In *People ex rel Fleming, v. Shorb et al*, the statement of facts is to the effect that Shorb was elected county treasurer, appointed his deputies and then left the state. Sixty days expired, and the Board of Supervisors declared the office vacant, and appointed a successor. Shorb's deputies refused to vacate, and quo warranto proceedings were instituted. The absence of Shorb from the state was admitted. The court in the decision, among other things, said:

"The absence of Shorb from the state, as alleged and admitted ipso facto effected a vacancy of the office of treasurer, and consequently a vacancy of the office of each of his deputies."

People v. Shorb, 35 Pac. 163, 164;

In *People ex rel Treacy v. Brite*, the California Court quoted at length the statute of the state, which is the same as the Montana statute, and reached the same conclusion, to-wit, that ceasing to be a resident of a district operated as a vacancy in the office.

See also *Matter of Buhler*, 80 N. Y. Supp. 195;

Relender v. State (Ind.) 49 N. E. 30;

Ladeen case, 104 Minn. 252, 116 N. W. 485, 16 L. R. A. (N. S.) 1058;

S. V. Huff, 172 Indiana 1, 87 N. E. 141; 29 Cyc. 1404.

Of course, the coroner may combat the order of the board, declaring the vacancy, either by refusing to surrender the office to the new appointee, or by bringing subsequent action to have the order of the Board, declaring the vacancy and making the new appointment, set aside.

2. It is the general policy of law that county officers should reside within the county, and when the County Board, who are charged with general supervision of the affairs of the county, are affirmatively informed that some county officer is violating this provision of law, and has permanently removed from the county, it is undoubtedly the duty of the Board to declare the vacancy; for the public have a right to insist that the public officials reside within the county. What if any liability would attach to the Board in case it failed to declare this vacancy, would have to be determined from

the facts of any particular case, which might be urged against the Board in a claim for damages, or otherwise, for a failure to discharge their duty as public officials.

3. Conceding that the coroner has permanently removed from the county, that fact is well known to him. Under the holdings, the vacancy occurred ipso facto, with his removal. He is no longer a public official, for his permanent removal from the county, under the doctrine cited above, had the force and effect of a resignation. What the ultimate result would be in case he assumed to act as coroner, like the foregoing question, would be determined from the particular facts of the case as then presented, for the doctrine of de facto officer might attach, if the facts warranted.

From these conclusions, I am of the opinion that the Board has the right, if they believe from the facts that the coroner or any other county officer has permanently removed from the county, to declare a vacancy, and to appoint a successor, or proceedings may be instituted in the district court, under the provisions of Section 9006.

Yours very truly,

J. B. POINDEXTER,

Attorney General.