

Opinion No. 277.

Public Officers—Official Oaths and Bonds—Failure to File Within Prescribed Time.

HELD: That a public officer who failed to file a properly attested oath of office as provided by Section 432, R. C. M., 1935, did not ipso facto forfeit his office.

2. Filing of oath of office prior to assuming the duties of the office is mandatory.

3. Provisions of Section 432, R. C. M., 1935, are directory only.

January 2, 1941.

Mr. Edison W. Kent
County Attorney
Philipsburg, Montana

Dear Mr. Kent:

The person who was regularly elected clerk of the district court for Granite county at the general election held November 5, 1940, filed his bond and oath of office in the office of the county clerk and recorder within the time prescribed by Section 432, R. C. M., 1935. On December 12, 1940, after the expiration of the time limit prescribed by Section 432 the clerk of court's attention was called to the fact that his oath of office was not sworn to before a person competent to administer oaths in this state. Thereafter, on December 13th, the clerk of court took and subscribed the constitutional oath of office before a notary public and filed it in the office of the clerk and recorder.

Section 511, R. C. M., 1935, provides that "an office becomes vacant on the officer's refusal or neglect to file his official oath or bond within the time prescribed."

You have suggested that the failure to file a proper oath within the prescribed time does not automatically vacate the office but have asked an opinion from this department.

Article XIX, Section 1 of the Montana Constitution declares in part, " * * * all officers, * * * shall, before

they enter upon the duties of their respective offices, take and subscribe the following oath: * * *." Then, all that is required by the Constitution is that the oath be taken at any time before the officer enters upon the duties of his office. The clerk of court has complied with this constitutional provision. Perhaps failure to comply with the Constitution would be fatal to the officer for the provisions of the Constitution are mandatory. (Article III, Section 29.)

Such is not the fact with provisions of statute. They may be either mandatory or directory. In *State ex rel. Wallace v. Callow*, 78 Mont. 308, 322, the Supreme Court of this state declared that the provisions of Section 432 were directory only. This is in accord with the vast weight of authority and the expressions of authors of textbooks on Public Officers.

It must be held that the failure to file a properly attested oath of office within the time prescribed by statute did not ipso facto vacate the office. No action was taken to declare the office vacant before December 13th, when a properly attested oath was filed.

In *State ex rel. Lease v. Turner* (Ohio), 144 N. E. 599, 601, the court said:

"The law does not look with favor upon declaring a forfeiture in an office to which one has been elected in a legal manner, and where the office has not been declared vacant, and no other rights or title have intervened, such irregularities as failure to give bond, or take the oath of office within the prescribed time are not sufficient grounds for declaring a forfeiture of the office."

State ex rel. Wallace v. Callow (supra) p. 323, cites this decision and concludes:

"It is held that compliance with the requirements before action is taken by the authority in whom is vested the right to declare a forfeiture, and before other rights or title vest is sufficient."

It is my opinion that the clerk of court is entitled to take office on the first Monday in January, 1941, as the duly elected and regularly qualified officer of Granite county.