

No. 51

**OFFICE & OFFICER—VACANCY—JUSTICE OF THE
PEACE—OATH AND UNDERTAKING**

- Held: 1. A public officer who failed to file a properly attested oath of office as provided by Section 432, Revised Codes of Montana, 1935, did not ipso facto his office.
2. Filing of oath of office prior to assuming the duties of the office is mandatory.
3. Provisions of Section 432, Revised Codes of Montana, 1935, are directory only.

March 19, 1941.

Mr. John D. French
County Attorney
Lake County
Polson, Montana

Dear Mr. French:

You have requested my opinion as to whether a Justice of the Peace who was elected at the last general election, by having his name written in, may qualify by filing his oath and bond on the 20th day of January following his said election. You further advise this party was, at the time of said election, the duly appointed and qualified incumbent of said office. You further advise he never paid a filing fee, no certificate of election has been issued to him yet, nor has the office been declared vacant and an appointment made to fill said office. The party has not yet filed his bond and oath, but "insists on his right to do so."

Section 8839, Revised Codes of Montana, 1935, provides:

"8839. **Oath and Bond of Justice of the Peace.** Every Justice of the Peace elected or appointed, after he has received his certificate of election or appointment, shall, before entering upon the duties of his office, be required to execute an undertaking to the State of Montana in the penal sum of two thousand dollars, with at least two sufficient sureties, who shall justify according to law, and which said undertaking shall be approved by the County Clerk, and, in addition, such Justice shall take the constitutional oath of office, which oath or affirmation shall be endorsed upon his official undertaking, which shall be filed with the County Clerk."

Section 432, Revised Codes of Montana, 1935, provides:

"432. **Time of Filing Oath.** 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 ap-

pointment, or before the expiration of fifteen days from the commencement of his term of office, when no such notice has been given."

It will be noted Section 8839 does not prescribe the time when a Justice of the Peace, elected or appointed, must file his oath and bond. It merely provides he "shall . . . be required to execute an undertaking . . .", "after he has received his certificate of election . . .", and "before entering upon the duties of his office . . ." The statute further provides that, in addition to executing the bond, "such justice shall take the constitutional oath of office, which oath shall be endorsed upon his official undertaking which shall be filed with the County Clerk." It is plain, from a reading of the whole statute, the oath and undertaking must be executed and filed "before entering upon the duties of his office."

No time being prescribed in Section 8839, supra, or in any other statute, for the filing of the oath and bond of a Justice of the Peace, except as noted, Section 432, supra, applies; and the Justice elect must file his oath and bond within thirty days after he receives notice of his election, or before the expiration of fifteen days before the commencement of his term of office.

However, the provisions of Section 432, supra, have been held to be directory rather than mandatory. See *State ex rel Wallace vs. Callow*, 78 Mont. 308, 322, 254 Pac. 187. This same case, however, hold that, while the provisions requiring the filing within a specified time are directory, the requirement that the oath and bond be filed before assuming the duties of the office is mandatory. The court in the *Callow* case points out an exception to this rule, as follows:

"The only exception to this rule is that where the officer-elect has done all that he can toward qualifying and is prevented from fully complying with the law by the wrongful act of the approving officer, or the person with whom the bond must be filed, he cannot be deprived of his office."

The election was held on November 5, 1940, and the first Monday in January following was January 6, 1941. Therefore, under Section 432, supra, the Justice elect was required to file his bond (assuming he received no notice of his election) before the expiration of fifteen days from the 6th day of January, 1941, the date of commencement of his term, which would be January 21st. Hence, the oath and undertaking in this case filed on January 20th would be within the time prescribed by statute.

It appears from the facts that the Justice elect attempted to file his bond on January 20th, and still claims the right to file the same. If the County Clerk refuses to accept the bond and oath, the filing thereof would come within the exception noted in the *Callow* case.

Is there a vacancy in the office of Justice of the Peace?

Section 8837, Revised Codes of Montana, 1935, provides that "The term of office of Justices of the Peace is two years from the first Monday in January next succeeding their election." Section 8838 provides that "If a vacancy occurs in the office of Justice of the Peace, the County Commissioners of the county must appoint an eligible person to hold the office for the remainder of the unexpired term."

The Justice here was appointed to fill a vacancy. He could hold under such appointment only for the unexpired term (see *State ex rel Morgan vs. Knight*, 76 Mont. 71, 245 Pac. 267.) This term ended on the first Monday in January, 1941. If any vacancy existed, it must therefore have existed at that time. There was no vacancy then, for a Justice was elected for the ensuing term.

Section 511, Revised Codes of Montana, 1935, enumerates the events upon the happening of which an office becomes vacant. The only one pertinent here is subdivision (9), "His refusal or neglect to file his official oath or bond within the time prescribed." We have pointed out that under the facts and the decision in the *Callow* case, such failure was excused and there was no vacancy.

The case of State ex rel. Jones vs. District Court, 39 Mont. 583, 104 Pac. 860, to which you refer, holds that where the statute fixes a definite term, without the qualifying words, "or until his successor is elected and qualified," the term ends at the expiration of the term fixed and, upon failure to elect, a vacancy occurs. This holding is not applicable here for the simple reason that there was no failure to elect.

Therefore, it is my opinion:

- (1) The requirement that the official oath and undertaking be filed within a stated period is directory only, but such oath and undertaking must be filed before the officer assumes his duties.
- (2) No vacancy occurs where the officer-elect attempts in good faith to file his official oath and undertaking, but is prevented from doing so by the wrongful act of the officer with whom said oath and undertaking are required to be filed.
- (3) On officer-elect who is prevented from filing his oath and undertaking, by the wrongful act of the officer with whom it is required to be filed, cannot be deprived of his office.

Sincerely yours,

JOHN W. BONNER
Attorney General