

Opinion No. 11.**County Treasurer—Vacancy—Oath and Bond—County Commissioners—Appointing Power—Offices and Officers—Constitutional Law.**

Held: Where county treasurer elect—who has taken and subscribed the constitutional oath of office and filed the proper approved bond—dies before the commencement of his term of office on the first Monday of March, a vacancy will occur in the office of county treasurer on said first Monday in March. Incumbent's term will terminate on first Monday in March. Under constitution, board of county commissioners shall appoint person to fill vacancy, and the appointee shall hold such office until the next general election.

January 26, 1943.

Mr. Dan S. Sullivan, Chairman
Board of County Commissioners
Silver Bow County
Butte, Montana

Dear Mr. Sullivan:

You have informed me Mr. William McPhail was duly and regularly elected county treasurer of Silver Bow County for a four-year term, beginning on the first Monday of March, 1943; that Mr. McPhail thereafter took and subscribed and filed the constitutional oath of such office and also furnished and filed the required, approved bond of said office; that Mr. McPhail thereafter died on the 22nd day of January, 1943.

Your question is:

“Under the circumstances prevailing in this case, are the county com-

missioners authorized to make an appointment to fill the office of county treasurer until the next general election?"

Section 5 of Article XVI of the Constitution of the State of Montana, as pertaining to your question, provides:

"There shall be elected in each county the following county officers who shall possess the qualifications for suffrage prescribed by Section 2 of Article IX of this Constitution and such other qualifications as may be prescribed by law:

". . . one treasurer, who shall be collector of the taxes, provided that the county treasurer shall not be eligible to his office for the succeeding term . . . Persons elected to the different offices named in this section shall hold their respective offices for the term of four (4) years, and until their successors are elected and qualified. Vacancies in all county, township and precinct offices, except that of county commissioners, shall be filled by appointment by the board of county commissioners, and the appointee shall hold his office until the next general election . . ."

It appears there is no question Mr. McPhail was duly and regularly elected county treasurer. Did he qualify as required by law?

Black's Law Dictionary defines "qualify" or "qualified," as used above, as "adapted, entitled, as an elector to vote; applied to one who has taken steps to prepare himself for an office or appointment, as by taking an oath, giving bond."

"Qualify," as used in the Constitution means to take such steps as the statute requires before the person elected or appointed to an office is allowed to enter on the discharge of its duties, such as file a sufficient bond, to be approved by the proper officer, and to take and subscribe the official oath.

State v. Albert, 55 Kan. 154, 40 Pac. 286, 287;

State v. Irey, 116 Kan. 21, 225 Pac. 1050, 1051.

Section 511, Revised Codes of Montana, 1935, provides an office becomes vacant upon the happening of either of enumerated events. Subdivision 1 provides, "the death of incumbent."

The only question is: Does the incumbent treasurer hold over after the expiration of his term on the first Monday in March, 1943, or is there a vacancy as defined in the Constitution and statute quoted above?

The Constitution has spoken in plain language and clear intent. The incumbent treasurer's term expires on the first Monday of March, 1943. He has no hold over in any event because of the fact Mr. McPhail was duly and regularly elected county treasurer and had qualified by filing his constitutional oath of office. (Section 1 of Article XIX of our State Constitution.)

Thereby, Mr. McPhail was entitled to take the office on the first Monday in March, 1943, and at that time, had he lived, the right of the incumbent to occupy the office would have terminated. The rights of the parties became fixed when Mr. McPhail qualified. Of course, the incumbent has the right to fill out his term to the first Monday in March, 1943, but he has a right to nothing more.

The general rule has been stated as follows:

". . . When a successor has been legally elected and qualified, the prior incumbent's right to hold over thereupon ceases, and it does not revive because his successor dies after his qualification, but before the commencement of his term." (Mechem on Public Officers, Section 401, P. 259.)

It is also stated as follows:

"Where a successor has so qualified, the right of the incumbent to hold over ceases, and does not revive upon the death of his successor before the commencement of the latter's term." (46 C. J. 970, and cases cited.)

To the same effect, see Bradley v. Clark, 133 Cal. 196, 65 Pac. 395.

In direct point are:

State ex rel. Elliott v. Bemenderfer, 96 Ind. 374;

State ex rel. Johnson v. Albert, 55 Kan. 164, 40 Pac. 286;

State ex rel. Attorney General v. Seay, 64 Mo. 89, 27 Am. Rep. 206;

People ex rel. Sweet v. Ward, 107 Cal. 236, 40 Pac. 538;

People v. Boughton, 5 Colo. 487.

"In the Indiana case the court said: 'The contention of the relator's counsel is that McVitty died before his term of office commenced, he was never qualified, and, therefore, no successor to the relator was ever elected and qualified. This position is not tenable. The right of McVitty to the office was vested at the time he took the oath in the manner and form required by law, and his subsequent death did not entitle the relator to hold over. A vacancy resulted for the reason that a successor to the relator had been duly elected and qualified, and this having taken place his right to hold over terminated. . . .'"

"'Until his successor is elected and qualified' is not esoteric language. The phrase is common in this State and elsewhere. The words are plain and have an accepted meaning in the law. Are there any considerations of the purpose of this provision which require a different construction than the natural one of taking the oath and filing the bond, where a bond is required, and performing such other acts, if any, as the law may require as a condition precedent to the right to take the office when the term begins? . . ."

"Giving effect to the hold over clause as it reads results in no absurdity nor departure from constitutional policy. The term consists of a 'fixed tenure and a contingent term.' *People v. Ward*, 107 Cal. 236, 239, 40 Pac. 538, 539. The hold over provision is purely conditional, on failure of an elected successor or his qualification. Thereby, the right of incumbent to hold over term does not end until his successor has been elected and has accepted the office by qualifying. So, barring contingencies, the office is held by an elected official. . . ."

"Moreover, no other qualification was then required by statute and, from time immemorial elected officers had been permitted, and sometimes required, by statute to qualify before their terms began. The provision therefore permits both election and qualification of a successor before the end of the incumbent's term and requires no further act to be done or condition to exist to nullify the hold over provision. It establishes one test for all conditions and works differently because the conditions,

not the test, are different." (*Toy ex rel. Elliott v. Voelker*, 273 Mich. 205, 262 N. W. 881.)

The people by the Constitution, the courts by their decisions, and the legislature by our statutes, have determined this matter.

It is therefore my opinion Mr. McPhail qualified for the office of county treasurer before his death by taking and subscribing the constitutional oath, and by further filing the proper approved bond. Therefore, the term of the incumbent will expire on the first Monday in March, 1943. By the death of Mr. McPhail, a vacancy will occur in said office on said date which the Constitution demands shall be filled by the board of county commissioners, and the appointee shall hold such office until the next general election.

Sincerely yours,
R. V. BOTTOMLY
Attorney General