

Opinion No. 13**Office and Officers—Vacancy—Oath—
Bond.**

Held: An officer may file his oath and bond at any time after he receives notice of his election, before the office has been declared vacant, but not thereafter.

January 29, 1945.

Mr. James Hunter, Chairman
Board of County Commissioners
Musselshell County
Roundup, Montana

Dear Mr. Hunter:

You request an opinion on the following facts as set out in your letter:

Mr. R. V. Colgrove, who was elected two years ago to the office (of county attorney), went into the military service, and we appointed an acting county attorney, who qualified.

These men both filed for the office in the 1944 election, and Mr. Colgrove was again elected. However, he failed to qualify by filing the required bond. He did file an affidavit that he would accept the office when possible, but did not do anything about a bond.

In addition to the above facts, I assume the board has taken no action to date in declaring the office of county attorney vacant.

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

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

The affidavit referred to in your letter, a copy of which you have furnished me, states Mr. Colgrove "received from the county clerk and recorder, a certificate of election, and that he does hereby accept said office for the term set forth in said certificate . . ." The affidavit is not dated, except that it appears it was subscribed and sworn to on November 28, 1944. We must assume, therefore, that he received his notice of election on or prior to November 28, 1944. Hence, under the provisions of Section 432, supra, he was required to file his oath not later than December 28, 1944. He has not done this.

Section 511, Revised Codes of Montana, 1935, provides when an office becomes vacant, and enumerates certain events, the happening of which will cause a vacancy. Among these events is the following, which is pertinent to the question here at issue.

"His refusal or neglect to file his official oath or bond within the time prescribed."

A majority of courts, and the great weight of authority, is to the effect that statutes similar to our Section 432, supra, requiring an oath of office to be filed within a certain fixed time, are usually directory in their nature, and unless the failure to file the oath or bond within the time prescribed is expressly declared by statute, ipso facto, to vacate the office, the oath may be taken and filed and the bond given afterwards if no vacancy has been declared. See the following authorities: Dillon on Mun. Corp. 4th Ed.; Wallace v. Callow, 78 Mont. 308, 254 Pac. 187; In re Bank of Mt. Moriah' Liquidation-Cantley, Com'r. v. Village of Mt. Moriah, 226 Mo. A. 1230, 49 S. W. (2d) 275; State ex rel. Lease v. Turner, 111 Oh. St. 38, 144 N. E. 599, 601; Opinion No. 5, Vol. 15, Opinion No. 277, Vol. 18, Report and Official Opinions of the Attorney General.

In the case of Wallace v. Callow, supra, the officer filed his bond after the expiration of the thirty days, but before he had filed the bond, the office

had been declared vacant. The court said:

"What then, is the position in which we find relator? Under all of the decisions above, holding that sections similar to our Section 432 are directory only, 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 (State ex rel. Lease v. Turner, above), nonaction by the proper authority amounting to a waiver of the right to declare a forfeiture (Mechem on Public Officers, above). But in the case at bar there was no waiver, there was action. On December 21, 1926, Judge Pomeroy made and entered an order declaring a vacancy in the office." (Emphasis mine.)

In the case here considered, I am not informed whether the commissioners have made an order declaring the office vacant. Under the authority of Wallace v. Callow, supra, the officer elect would have until the order declaring the office vacant has been made in which to file his oath, regardless of the time prescribed in Section 432, supra, but not after such order has been made.

It is therefore my opinion an officer may file his oath at any time after he receives notice of his election and thus qualify for the office, but may not do so after the office has been declared vacant by the proper authority.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General