

that the trustee was elected to succeed himself.

Section 997, Revised Codes of Montana, 1935, provides:

"Trustees elected shall take office immediately after qualifying, and shall hold office for the term of three years except as elsewhere expressly provided herein, and until their successors are elected or appointed and qualified.

"The clerk of the district shall, at the time of issuing certificate of election to a person elected as trustee, deliver to such person a blank oath of office. Every trustee shall file his oath of office with the county superintendent of schools within fifteen days of the receipt of the certificate of election and blank oath of office from the clerk. Any trustee failing to qualify as herein provided shall forfeit all rights to his office and the county superintendent of schools shall appoint to fill the vacancy caused thereby."

From the above quoted code section it appears that the failure to file the oath of office within fifteen days from the date of the receipt of the certificate of election and blank oath of office may result in a vacancy in the office.

In State ex rel Wallace v. Callow, 78 Montana 308, 254 Pac. 187, our court considered Section 511, Revised Codes of 1921, which provides in part that an office becomes vacant upon the refusal or neglect to file the official oath or bond within the time prescribed. Under the facts in the case a proper bond was not filed and an appointment made, with the result that the appointee received the office. The court in considering Section 511, which is similar to Section 997, said:

"As courts are required to construe statutory provisions in accordance with the legislative intent, it is held that the word 'vacancy', as used in such statutes, is not to be considered in its literal sense, it is ordinarily given a more liberal figurative meaning conforming to the intention of the law-maker and the purpose to be accomplished; . . . that 'within the meaning' of a statute identical with

Opinion No. 23

Trustees, School—Oaths, School Trustees—Vacancy—Office of School Trustee.

Held: That the failure of a school trustee to qualify within the time fixed does not of itself create a vacancy in the office and that his qualification prior to an appointment to the office precludes there being any vacancy in the office.

April 8, 1947

Mr. Robert F. Swanberg
County Attorney
Missoula County
Missoula, Montana

Dear Mr. Swanberg:

You have requested my opinion as to whether there is a vacancy in the office of school trustee resulting from the failure of the trustee elected to file his oath of office within fifteen days from the time he received notice of election and the blank oath of office from the clerk. You advised me

ours, such officer-elect is to be considered an 'incumbent' of the office to which he has been elected; . . . and, while the statute is not self-executing, the declaration of the proper authority, after the expiration of the statutory period and before qualification by the officer-elect, creates a 'vacancy' in the office on the commencement of the term to which such officer is elected."

It is to be noted that the court held the statute not to be self-executing and that a vacancy is created by the "declaration of the proper authority, after the expiration of the statutory period and before qualification by the officer-elect." In other words, if the officer files his oath before an appointment is made, even though after the prescribed time, there is no vacancy. Also in the Callow case, the court quoted with approval from a leading text the following:

"These provisions as to time, though often couched in most explicit language, are usually construed to be directory only and not mandatory; . . . a failure to give bond within the time prescribed does not, therefore, ipso facto work a forfeiture, . . . even though the statute expressly provides that upon a failure to give the bond within the time prescribed, the office shall be deemed vacant and may be filled by appointment."

In *State ex rel Nagle v. Stafford*, 99 Montana 88, 43 Pac. (2nd) 636, our court again considered Section 511 and held that the failure to file a bond would preclude the incumbent from holding an office claimed by an appointee whose appointment had been confirmed by the Senate. The Court recognized the rule that the vacancy occurs upon the appointment and its confirmation as the court said:

"Such a vacancy may be filled by the official authorized to do so as soon as it occurs, as the appointing power is plenary, but where, as here, confirmation is necessary, the appointment is not effective to oust the incumbent until the new appointee is confirmed."

The text in 42 Am. Jur. 973 states in regard to a statute providing for

forfeiture of an office for failure to qualify within the time fixed as follows:

"The object of such provisions is accomplished, it is said, by holding that a failure to qualify does not in itself work a forfeiture of the party's right to office, but simply authorizes the proper authority to declare such forfeiture and fill the office by appointment."

From the facts you gave no appointment has ever been made and in particular none was made during the time the trustee was in default for failure to file his oath of office.

It is therefore my opinion that the failure of a school trustee to qualify within the time fixed does not of itself create a vacancy in the office and that his qualification prior to an appointment to the office precludes there being any vacancy in the office.

Sincerely yours,

R. V. BOTTOMLY,
Attorney General