

ELECTIONS: Death of contestee in election contest abates the action; if vacancy in office exists, the governor must issue writ of election to fill such vacancy.

January 18, 1935.

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Honorable Guy B. Park,
Governor of Missouri,
Jefferson City,
Missouri.

Dear Governor Park:

Honorable Lawrence Pressley, member of the Legislature, informs this department that you desire an opinion based substantially on the following facts:

"At the November election, November 6, 1934, J. J. Easterday was declared elected to the office of Representative from Crawford County, and certificate of election was duly issued to him. His opponent, Dr. John H. Martyn, served notice of a contest; proceedings were regularly instituted and the contest is now pending. On January 7, 1935, Mr. Easterday died. Does the death of Mr. Easterday abate the action? Is it necessary to hold a special election?"

I.

We shall first consider the question of the effect of Mr. Easterday's death in so far as the election contest is concerned.

Statutes relating to contested elections, beginning with Sec. 10339 R. S. Mo. 1929, to Sec. 10382 R. S. Missouri, 1929, inclusive, do not contain any provision for the revival of the contest in the event of the death of the contestor or contestee; nor are we able to find any general section in the statutes relating to abatement and revival which would apply to the death of a contestee in an election contest.

The general sections relating to abatement and revival of actions is Section 891, R. S. Mo. 1929, which is as follows:

"No action shall abate by the death, marriage or other disability of a party, if the cause of action survive or continue. In case of the death, marriage or other disability of a party, the court, on or before the third term after the suggestion of such death, marriage or disability, may, on motion, order the action to be continued by or against the representative or successor of such party in interest. When

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the cause of action does not survive, the action shall abate only as to the deceased parties, and shall continue as to the survivors, if any, without a revival thereof."

The general principle of law relating to the abatement of actions by death is found in 1 C.J., p. 153:

"At common law, every real or personal action abated on the death of either the sole plaintiff or the sole defendant before verdict and judgment, and this is still the law except in so far as the common-law rule has been modified by statute. And the death of a party had the same effect, with certain exceptions, where there were several plaintiffs or defendants."

In 28 C.J. 3384 the following is supported by cases of *Gantt vs. Brown*, which will be quoted by law, and by the decisions of many other states:

"Unless otherwise provided by statute, a contested election case abates on the death of the contestee, and in some jurisdictions it abates upon the death of the contestant. But in others it is not abated by the death of the contestant, and where an election for governor and lieutenant governor is contested and the contestant for the office of governor dies pending the contest, the contest for the office of lieutenant governor may continue the governorship contest for his own benefit, as the lieutenant governor, upon the death of the governor, succeeds to that office."

A leading decision, and very much in point, is the case of *Gantt v. Brown*, 244 Mo., 271, l.c. 301, wherein the court said:

"Does the admitted death of Judge Gantt abate this action? We think so. We have no statute in Missouri providing for the survival of such an action. The very nature of the office contested makes the action purely personal. The duties of such an office are such that they must be performed by the holder thereof and can not be delegated to another. In other words, the duties must be personally performed and are nondelegable. These things impress the suit as being one purely personal in character. No one has any interest in the office except the contending parties. Salary is a mere incident to the office. (State ex rel. Evans v. Gordon, 245 Mo. 12) And salary is not in a legal sense involved in this case. Salary might follow as a result of the

case, and purely as an incident to the office, but not by force of the judgment itself to be rendered in this case. That judgment is fully bounded by the terms of our statute. (Sec. 5925, R. S. 1909.) And it should also be remembered that in the United States the right to hold office is not a property right in the same sense as personal or real property. It is in no sense an incorporeal hereditament, as in some English offices. (Throop on Public Officers, chap. 2, sec. 16 et seq.)

"In this country the right to hold office is purely statutory, and unless forbidden by constitutional edict, can be given and taken by the legislative will. Being purely statutory the modes and manner of acquiring it are likewise purely statutory, and it is to the statutes that we must go to determine a case of this character. However, the common law as to abatement may shed light. The common law rule is thus tersely stated in 1 Cyc., p. 47: 'At common law a suit abated by the death of a party before trial or verdict. If the cause of action was one that did not survive, death put a final end to the suit. If the cause was one that survived or could survive, plaintiff or his personal representative was obliged to bring a new action against defendant or his personal representative.'

"This strict common law rule has been modified by statutes in the States generally, and provisions have been made for the revival of the pending action in the name of the parties having the right, by survivor, to further prosecute the case. These statutes obviate the necessity of bringing a new suit by those to whom the action survived. Then we have statutes which make certain actions survive, which at the common law did not survive the death of the party. But as stated we have no statute in this State providing for the survival of an action like the one at bar. Nor is it an action which at common law survived.

"Let us test this case by the general rule. In 1 Cyc, p. 49, it is said: 'As a general test an executor or administrator cannot come in and prosecute a suit unless he was in a condition to commence a like suit if it had not been begun by his testator or intestate. At common law, as a general rule, the qualities of assignability and survival are tests each of the other and are convertible terms.' Applying these tests to the

case at bar it is clear that it must abate. Had Judge Gantt died ten days after the election in 1910 and without bringing this action, was there any one who could have brought it for him? The answer must be in the negative. If not there is no one who can be substituted for him how for the further prosecution of the case. And if we apply the common law test of assignability we come out at the same point. There are some cases that the very nature of the case makes death the end of the case and this is one of them. For instance in a divorce proceeding death of necessity determines the case. In such case as to the marital relation death accomplishes just what the party sought, i.e. a dissolution of the marriage relation. So in the case at bar. Here the contestant sought the right to exercise the rights and privileges of a judge of this court. Such could not be exercised for him by another, so that death of necessity put an end to his ambitions in this direction. The case might be likened to a dowress, who in life sues for the advancement of her estate. If such dowress die, the further prosecution of such suit would be useless, because with her death was the death or falling in of her estate. So here the grim reaper has destroyed the power of contestant to occupy the office, and to enjoy the privileges, powers, duties and emoluments thereof. This to my mind is the reason of the situation. But going to our statutes we have a further and conclusive reason. As above indicated we have a statute which prescribes the judgment to be rendered in such a case. Section 5925, Revised Statutes 1909, reads:

'In every case of a pending contested election, the person holding the certificate of election may give bond, qualify and take the office at the time specified by law, and exercise the duties thereof until the contest shall be decided; and if the contest is decided against him, the court or other tribunal deciding the same shall make an order for him to give up the office to the successful party in the contest, and deliver to him all books, records, papers, property and effects pertaining to the office, and may enforce such order by attachment or other proper legal process.'

"Such is the only judgment provided for by the law in cases of contest. It is not like a judgment in a quo warranto proceeding. It is a judgment peculiar to contest cases, and for the very good reason that such cases are in an independent class unto themselves.

Death as fully precludes the entering of the judgment provided for in this statute as it precludes the admeasurement of the widow's dower estate after her death. The statutory order we make, is that contestee surrender the office to contestant, and deliver to contestant all the paraphernalia of the office. Death of the contestant forbids such an order or judgment, and as the action is one purely statutory and as there is no statutory provision for a different judgment, the case ex necessitate abates.

"The views we have expressed find full support in the case of Hargett v. Parrish, 114 Ala. 515. In that case Hargett contested the election of Parrish and was unsuccessful below. He appealed and pending the appeal Parrish died and the Governor appointed one Hall to succeed Parrish as sheriff. Motion was made to revive the case as against Hall, the successor of Parrish. In that State there was a statute providing that the death of contestant should not abate the suit, but the statute was silent as to the death of the contestee. Discussing the case, McCLELLAN, J., said:

"The proceeding being purely statutory, no pretense that there could be such revivor or substitution at common law being made, the order sought must find statutory authorization, or it cannot be granted. The statute providing for the contest itself provides that a contest does not abate by the death of the contestant, but contains no provision in respect of the death of the contestee."

In view of the above decisions, that the proceedings of contested elections are purely statutory and that the statutes in no wise provide that the contest does not abate by the death of either of the parties, nor for a revival, we are of the opinion that the contest now is abated due to the death of Mr. Basterday.

II.

We shall consider the effect of the abatement of the action in the death of Mr. Basterday from the standpoint of whether or not it creates a vacancy in the office of Representative of Crawford County.

Section 11233 R. S. No. 1929, relating to vacancies in the General Assembly, reads as follows:

"If any member elected to either house of the general assembly shall resign in the recess thereof, he shall address and transmit his resignation, in writing, to the governor; and when any such member shall resign during

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any session, he shall address his resignation, in writing, to the presiding officer of the house of which he is a member, which shall be entered on the journal, in which case, and in all cases of vacancies happening, or being declared, during any session of the general assembly, by death, expulsion or otherwise, the presiding officer of the house in which such vacancy shall happen shall immediately notify the governor thereof."

We assume that Mr. Easterday received his certificate of election, but never qualified or took his seat in the present session of the Legislature. We believe the phrases "and in all cases of vacancies happening" or "being declared, during any session of the general assembly, by death, expulsion or otherwise" are of sufficient scope to bring the condition in the instant case within the purview of the statute.

Article 4, Section 14, is as follows:

"Writ of election to fill such vacancies as may occur in either house of the general assembly shall be issued by the governor."

Section 11234 R. S. No. 1929, is as follows:

"Whenever the governor shall receive any resignation or notice of vacancy, or when he shall be satisfied of the death of any member of either house, during the recess, he shall, without delay, issue a writ of election to supply such vacancy."

CONCLUSION.

From the foregoing sections we are of the opinion that a vacancy exists in the office of Representative of Crawford County, and that the vacancy can be filled in accordance with the terms of Section 11234, supra.

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APPROVED:

Attorney-General

Respectfully submitted,

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Assistant Attorney-General