

COUNTY TREASURER: In counties having township organization when the treasurer-elect dies before qualifying for the office in April the person holding the office will continue to hold same until the next general election for electing a treasurer in said counties.

March 1, 1937



Mr. Charles F. Lamkin, Jr.
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Keytesville, Missouri

Dear Sir:

This Department is in receipt of your request for an opinion dated February 25, 1937. Your request reads as follows:

"The following situation has arisen in this county. Chariton County is under township organization and the office of treasurer and collector is combined. Under the law, the term of the treasurer ends ordinarily April 1 of this year. The person elected to that office at the general election last November had died since his election and before the expiration of the term of the present treasurer. I will appreciate an opinion from you as to whether or not the present treasurer holds over and if so, how long, and if there is a vacancy on April 1 because of the death of the person elected, and how the vacancy is to be filled."

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In 1933 the Legislature repealed Section 12130, Revised Statutes Missouri 1929, and re-enacted the section so that it now reads, Laws of Missouri 1933, page 338,

"On the Tuesday after the first Monday in November, 1936, and every four years thereafter, there shall be elected by the qualified voters in all counties of this state now or hereafter having a population of 40,000 or more inhabitants according to the last decennial United States census, and in all counties of less than 40,000 inhabitants if under township organization, a county treasurer, who shall be commissioned by the County Court of his County, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four years, and until his successor is elected and qualified, unless sooner removed from office; Provided, that in counties having adopted or that shall hereafter adopt township organization, the term of office of said treasurer shall be extended to the first day of April next after the election of his successor."

Chariton County, having been for a number of years under township organization, is not affected by the Act of 1933 which provided for the abolishment or

the consolidation of county treasurers in counties of less than 40,000 inhabitants. It appears from the facts as contained in your letter that at the last general election a person was elected to the office, but as the statute provides that the incumbent shall hold his office until April and since the person elected has died we assume that said person made no effort or did not qualify before his death.

Section 5 of Article XIV of the Constitution of Missouri relates to the tenure of office of officers, and is as follows:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

But the grave question is whether or not there is a vacancy. If there is a vacancy the same could be filled by the Governor, under Section 10216. If no vacancy exists does the present incumbent hold over, if so, how long.

Vacancies usually exist and occur upon the death, resignation, failure to qualify or from an ouster of the incumbent. The statutes relating to vacancies in the individual offices usually govern.

In the instant case we are unable to locate any statute which is a guide or determines a vacancy exists in the office of treasurer when a successor, due to death, fails to qualify, or the procedure to be followed in the event such a condition creates a vacancy.

In 22 Ruling Case Law, 437,438, the word 'vacancy' is treated as follows:

"The word 'vacancy' as applied

to a public office has no technical meaning. Its ordinary and popular meaning is that the office is unoccupied and without an incumbent who has a lawful right to continue therein until the happening of some future event. An office is not vacant so long as it is supplied in the manner provided by the Constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it."

It is a well recognized principle of law that the law abhors vacancies. The various political subdivisions of the state, in order that our system of government may function to the best interests, will not declare a vacancy as long as an incumbent is in office. The general rule with reference to the state of facts which you present is stated in 74 A. L. R. 486, as follows:

"In a majority of jurisdictions, the rule obtains that the death or disability of an officer-elect before qualifying does not create a vacancy in the office which may be filled by the appointing power, since he never occupied the office, and that under the provision that an incumbent shall hold his office until his successor is elected and qualified the prior incumbent is entitled to continue in the office until the election and qualification of his successor."

In view of the absence of any statutory or constitutional provision which creates any vacancy under the conditions mentioned in your letter, we are of the opinion that under the decisions herein quoted that no

vacancy now exists, assuming that the present incumbent is remaining in office and discharging his official duties; that by virtue of the Constitution the present incumbent will remain in office until his successor is elected and qualified.

Under the facts which you present there is no successor elected and qualified and there can be no successor elected and qualified, then how long will the present treasurer continue to hold over?

If a vacancy had existed by reason of the death of the treasurer-elect, then the appointive power, under Section 10216, Revised Statutes Missouri 1929, would have appointed some person to fill the vacancy. The statute provides that the appointive power should appoint a person until the next general election or until his successor is elected and qualified. The next general election in your county would be in 1938, but, having ruled that there is no vacancy and no statutory procedure to care for a situation such as you present.

An election to any office can only be held when provided for by law. As was said in the case of State ex rel. McHenry v. Jenkins 43 Mo. l.c. 265:

"Or if not, who is the present clerk? By the terms of the act creating the Kansas City Common Pleas, as well as by the constitutional provision, the clerk shall hold his term until the election and qualification of his successor. Thus there is no vacancy, and Mr. Vincent holds over.

"In relation to relator's second claim, that the omission to hold an election in 1866 can be supplied by one in 1868, we can only say that it is a valid one if the law provides for any such election. But he has failed to show us any such provision, and it would be

difficult to give legal validity to a volunteer election. No election can be had unless provided for by law. As the law makes no provision for the election of clerks in 1868, such election is wholly void and of no effect. This position has never been questioned. In the State v. Robinson, 1 Kansas, 17, a question was raised as to the validity of an election for governor, and it was held that the election under consideration was not provided for by law, that the person elected could not take the chair, and that the previous governor should hold over until the next general election. No case has been known where a volunteer election has been held valid, even though the term of the incumbent had expired."

Also, in the decision of State ex inf. v. Dabbs
182 Mo. 1. c. 367:

"The act of March 25, 1901 (Laws 1901, p. 120), providing for an additional judge of the circuit court of Jasper county, under which defendant was appointed and commissioned, provides, that 'he shall continue in office until the first Monday of January, 1903, and until his successor is elected and qualified.' His successor was elected at the general election held in November, 1902, but died before qualifying and it must follow that defendant is 'entitled to hold over until the next regular term for holding an election for that office.' "

The Legislature having provided for the election of treasurer, in the event that there is no vacancy had in mind uniformity as to time. As was said in the case of State ex inf. v. Smith 152 Mo. l. c. 521:

"In the case at bar Haughton was appointed under section 7 of the Act of 1891, to fill the unexpired term of Sheehan, which ended at the regular election in 1898, and until his successor was duly elected and qualified. The attempted election of his successor in 1898 failed by reason of a tie vote. No successor was then elected and hence none qualified. Therefore no vacancy existed or occurred in the office. The effect was the same as if no election for a successor had been held in 1898. There being no vacancy there was no power in the judges named to appoint defendant to the office, either by virtue of the Act of 1891 or of any other statute, and hence their action was a nullity and defendant had no title to the office. Inasmuch as the Act of 1891 provided that there should be an election for justice of the peace, in St. Louis, at the regular election in 1894 'and every four years thereafter,' and inasmuch as there was in legal intendment no election held in the fourth district in St. Louis for justice of the peace in 1898, there has been no successor yet elected for Haughton, and as the purpose of the law-makers is that there shall be uniformity in the time of electing

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all justices of the peace, and as there is no special statute covering cases like this, it follows that there can be no legal election held to elect a successor for Haughton until the regular election in the year 1902, and that he has a right to continue to hold the office of justice of the peace for the fourth district, in the city of St. Louis, until a successor is elected at that time, and thereafter duly qualifies, by virtue of his appointment until his successor is duly elected and qualified."

We are, therefore, of the opinion that the present incumbent will continue to hold the office of treasurer until the next regular election for electing a treasurer of Chariton County, which, according to the provisions of Section 12130, quoted supra, will be in November 1940.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
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