

COUNTY SURVEYOR: If surveyor refuses or neglects to give bond within the time prescribed in section 11572, then, by the terms of section 11574, a vacancy may be declared and filled by the Governor under section 10216.

May 7, 1937

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Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
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Dear Sir:

This Department is in receipt of your letter of March 2, wherein you request an opinion based on the following facts:

"The County Surveyor of Marion County, who was elected at the last general election, has failed to qualify for said office under section 11573, R. S. Mo., 1929. He is now employed by the Works Progress Administration and spends five days a week in this work outside of Marion County. He, however, maintains his legal residence in this County.

"

"I have advised the County Court that a vacancy exists and that they should declare said vacancy by an appropriate order of Court, and that the vacancy should be filled by the Governor.

"Several emergencies now exist and it is necessary that I be advised by your office immediately if you concur with me in my opinion to the County Court."

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The pertinent part of Section 11573, Revised Statutes Missouri 1929, is as follows:

"Every county surveyor shall, within sixty days after receiving his commission, and before entering upon the duties of his office, take the oath prescribed by the Constitution, and enter into bond to the state of Missouri, in a sum not less than one thousand nor more than five thousand dollars, to be determined by the county court, conditioned that he will faithfully perform all the duties of the office of county surveyor, and that at the expiration of his term of office he, or in case of his death, his executors or administrators, will immediately deliver to the recorder of deeds of the county all the records, books and papers appertaining to his office; * * * "

Section 11574, Revised Statutes Missouri 1929, refers to the failure to give bond and is as follows:

"If any county surveyor fail to give such bond in the time prescribed in the preceding section, his office shall be vacant."

In determining whether or not there is a vacancy the question arises as to the person now in office. If the surveyor-elect was supposed to succeed

himself, then the question of vacancy must be treated from that standpoint. If he was supposed to succeed another person who has not vacated the office or relinquished it at the end of his term, then the question of vacancy must be considered from that standpoint.

If the latter situation exists, then the decision in the case of Langston v. Howell County, 79 S. W. (2d) 99, would govern. The court, at l. c. 102, said:

"Our Constitution, (section 5, Art. 14) provides that: '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,' and section 11196 R.S. 1929 (section 9168, R.S. 1919), Mo. St. Ann. sec. 11196, p. 6141, reads: 'All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified.' We find no constitutional or statutory provision which either expressly or by implication excludes the county highway engineer, or the office of county highway engineer, from the operation and effect of the foregoing constitutional and statutory rule so that since there is no 'contrary provision' the rule so prescribed must be applied. It is said in 46 C. J. p. 968: 'The general trend of decisions in this country is that, in the absence of an express or implied constitutional or statutory provision to the contrary an officer is entitled to hold his office until his successor is ap-

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pointed or chosen and has qualified.' Langston's official term was fixed at one year, but upon the expiration thereof, no successor having been appointed, his right to hold such office, and his title thereto, continued until the right of a duly appointed and qualified successor attached. His right to hold over and his continuance in the office was of course contingent and defeasible subject to be terminated at any time by the appointment and qualification of his successor. During the time an officer so holds over, under the provisions of the constitutional and statutory provisions, supra, he holds the office as a de jure officer (46 C.J. p. 969) and by the same tenure, after the prescribed term, until the right of his duly chosen and qualified successor attaches. It therefore appears that the trial court was in error as to the applicable rule of law, and in holding that Langston was not entitled to hold over and continue in office after the expiration of the term prescribed by the order of appointment."

But we assume that no one is acting or attempting to act as Surveyor of Marion County unless it be the person concerning whom your letter relates. Bearing in mind the terms of Section 11574, quoted supra, the question arises is said statute directory or mandatory in its terms. The various authorities relating to vacancies in office as a result of the officer-elect failing to give bond, is reviewed at length in the case of Bank of Mt. Moriah v. Mt. Moriah, 226 Mo. App. 1. c. 1231:

"The main question in dispute between the parties is whether this section of the statute, requiring a bond of the treasurer of the village, is directory or

mandatory, it being conceded by the defendant that, if it is mandatory, Downey never became treasurer of the village and was not entitled to possession of its funds.

"If a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory. The rule thus stated is in harmony with that other well-recognized canon that statutes directing the mode of proceedings by public officers are to be held to be directory and are not to be regarded as essential to the validity of a proceeding unless it be so declared by law. (State v. Cook, 14 Barb. 259.) By this we mean that if a fair consideration of the statute shows that unless the Legislature intended compliance with the proviso to be essential to the validity of the proceeding, which nowhere appears, then it is to be regarded as merely directory.' (State ex inf. Frank W. McAllister v. Bird et al. 295 Mo. 344, 351, 352.)

"In State ex rel. v. Churchhill, 41 Mo. 41, the provision of a statute requiring the county treasurer to give bond within ten days after his appointment or election was held to be merely directory, it being said that the matter of time was not essential to the validity of the bond nor a condition precedent to the party's title to the office. In State ex rel. v. Findley,

101 Mo. 368, it was held that the statute forbidding county courts from accepting an official bond with the name of a judge of the court as a surety thereon was directory only.

" 'In the absence of a statute so providing, it is generally held that a failure to qualify, although it affords cause for forfeiture of the office, does not create a vacancy, and even though it is irregular and improper to induct one into office, without giving the required bond, such a one is legally in office, and so remains until removed by judicial process, and if the oath is taken or the bond filed at any time before proceedings are taken to declare a vacancy, it is sufficient.' (46 C. J., pp. 962,963.)

"The case of United States v. Bradley, 10 Peters, 343, involved an act of Congress providing that 'all officers of the pay, commissary and quartermaster's department shall, previous to entering on the duties of their respective offices, give bond and sufficient bonds to the United States, fully to account for all moneys and public property which they may receive, in such sums as the secretary of war shall direct.' It was held that the giving of such a bond was a mere ministerial act, and not a condition precedent to the officer's authority to act as pay master; that the appointment was complete, when made by the president and confirmed by the senate. A similar ruling was made in the cases of U. S. v. Eaton, 169 U. S.

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331, 346; Glavey v. U. S. 182 U.S. 595; State ex rel. v. Carroll, 57 Wash. 202; Board of Commissioners v. Johnson, 124 Ind. 145; Pickering v. Day, 95 Am. Decisions, 291. The following cases involve statutes making the giving of a bond mandatory and a condition precedent to qualifying for the office. (Rounds v. Bangor, 46 Me. 541; 543; Andrews v. Covington, 69 Miss. 740; State ex rel. v. Tucker, 54 Ala. 205; Advisory Opinion to Governor, 65 Fla. 434; G.N.O. & T. R. Co. v. Cundiff, 166 Ky. 594; Patterson v. State of Nebraska, 92 Neb. 729.)

"Section 7155 is not similar to the statutes construed in the cases last cited but more like those in the cases heretofore cited.

"Some statutes provide that the failure to give bond shall work a vacancy or a forfeiture of the office, but it is usually held that, under these statutes, the officer continues to be a de jure officer until a vacancy or forfeiture is declared. (See State ex rel. v. Ely, 43 Ala. 568; State ex rel. v. Callow, 78 Mont. 308; People ex rel. v. Thomas, 80 Mich. 265; People ex rel. v. Watts, 26 N. Y.S. 280.) In the case last cited the court quoted approvingly (page 282) from Dill. Mun. Corp. (4 Ed.) as follows:

" Statutes requiring an oath of office and bond are usually directory in their nature; and unless the failure to take the oath or give the bond by the time prescribed is expressly declared, ipso facto, to

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vacate the office, the oath may be taken or the bond given afterwards, if no vacancy has been declared. ' "

CONCLUSION

We are of the opinion that due to the provisions of Section 11574 prescribing the result of failure of the officer-elect to give bond in the specified time, that the county court now has the power to declare a vacancy or a forfeiture, and, as stated in your letter, the vacancy may be filled by the Governor in accordance with the provisions of Section 10216, Revised Statutes Missouri 1929.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
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