

COUNTY TREASURER:

No vacancy exists in the office of county treasurer by virtue of the failure of treasurer-elect to qualify under Laws of Mo. 1937, p. 425.

January 31, 1939



Honorable Wilson Plank  
Treasurer  
Dent County  
Salem, Missouri

Dear Sir:

This Department is in receipt of your letter of January 26th with the following request for an opinion:

"The newly elected treasurer of this county has not, as yet, filed bond, and I would like to have your advice and opinion as to necessary and legal steps in connection therewith. Do I hold over until next election, or is it necessary for the Governor to make an appointment?"

In 1937 the office of treasurer was restored, Laws of Missouri, 1937, page 425. Section 12130a provides as follows:

"On the Tuesday after the first Monday in November, 1938, and every four (4) years thereafter there shall be elected by the qualified voters of the several counties in this state, now or hereafter having a population of less than 40,000 inhabitants and in counties having a population of 75,000 and less than 90,000 inhabitants, according to the last Decennial United States Census, 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 (4) years, and until his successor is elected and qualified, unless sooner removed from office. Provided, that nothing in this section shall apply to counties under township organization."

Since you state that your successor has not yet filed bond, it is necessary to consult Section 12133, Laws of Missouri, 1937, page 426, which relates to the giving of bond, providing as follows:

"The person elected or appointed county treasurer under the provisions of this article shall, within ten days after his election or appointment as such, enter into bond to the county in a sum not less than twenty thousand dollars, to be fixed by the county court, and with such sureties, resident landholders of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office."

We are particularly concerned with the clause, "within ten days after his election or appointment as such." We think the case of Bank of Mt. Moriah v. Mt. Moriah, 226 Mo. App., 1. c. 1231, decides the matter. We quote extensively from the decision for the reason that it recites all of the early decisions and differentiates the same:

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

Conclusion.

For the reason that the statute, to-wit, Section 12133, quoted supra, does not provide that the failure to give the bond within the time mentioned in said statute works a vacancy or a forfeiture, we are of the opinion that no vacancy exists in the office of Treasurer in your county at this time. Under the decision of State ex inf. Hulen v. Brown, 220 Mo. App. 468, and many other similar ones, you, as the present Treasurer, provided you have not surrendered your office, can hold office until your successor qualifies. Your successor may qualify any time during your term; otherwise, you will hold until the next regular election for the election of county treasurer.

Respectfully submitted,

OLLIVER W. NOLEN  
Assistant Attorney-General

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney-General

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