

CORONERS: Vacancy created in office on failure of coroner-elect to give bond. Incumbent coroner entitled to hold over in office until vacancy filled.

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Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Attention: J. Paul Markway
Chief Clerk

Dear Sir:

This is in reply to your letter of recent date requesting the opinion of this department on the following set of facts:

A coroner was elected for the County of Ozark, Missouri, at the recent general election, November 2, 1948, but on December 31, 1948, said coroner-elect stated that he would not give bond as required by law. The specific question is whether or not the coroner who has held office during the past term should hold over in said office.

Prior to the 1945 Constitution of Missouri the coroner was a constitutional officer. The 1945 Constitution made no provision for this office and for that reason the Sixty-Third General Assembly created the office of coroner in each county in the state, as will appear from the Laws of Missouri 1945, page 1404, Section 2:

"At the general election in the year 1948, and every four years thereafter, the qualified electors of the county at large in each county in this state shall elect a coroner who shall be commissioned by the Governor, and who shall hold his office for a term of four years and until his successor is duly elected or appointed and qualified. Each coroner shall enter upon the duties of his office on the first day of January next after his election; Provided, that the term of office of persons holding the office of coroner at the time this act shall take effect shall not be vacated or affected thereby."

According to its own terms it is clear that the above section was not made applicable until the general election in the year 1948, and was not intended to control previous terms of office. Further, Section 3 of the Schedule of the 1945

Constitution provides that the terms of all persons holding public offices to which they were elected or appointed at the time the 1945 Constitution shall take effect shall not be vacated or otherwise affected thereby. Therefore, in reaching a conclusion in this matter we must consider the applicable provisions of the 1875 Constitution of Missouri. Section 10, Article 9, creating the office of coroner in each county provided in part as follows:

"There shall be elected by the qualified voters in each county on the first Tuesday next following the first Monday in November, A. D. 1908, and thereafter every four years, a sheriff and coroner. They shall serve for four years and until their successors be duly elected and qualified, unless sooner removed for malfeasance in office."

Section 5, Article 14, further provided:

"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."

It is clear from the above provisions of the 1875 Constitution that the term of office of coroner was for four years and until a successor be duly elected and qualified.

The general rule of law in such cases is found in 46 Corpus Juris, "Officers", Section 111, Page 969, as follows:

"In many states it is provided by the Constitution or by statute that officers shall hold over after the expiration of their terms until their successors are elected or appointed and have qualified. Under a provision that officers shall hold over until their successors are "elected" and qualified, the officer holding over is in all respects a de jure officer, and the expiration of the term does not produce a vacancy."

See also 43 American Jurisprudence "Public Officers", Section 161, Pages 19 and 20.

The above rule is adopted by the Courts of this state. In State ex inf. Hulen vs. Brown, 274 S. W. 965, 220 Mo. A. 468, the Kansas City Court of Appeals said at Page 967 (S.W.):

"The law is well settled that where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. State ex rel Lusk, 18 Mo. 333; State ex rel Stevenson v. Smith, 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. State ex rel Robinson v. Thompson, 38 Mo. 192; State ex rel v. Ransom, 73 Mo. 78.

"The law under which appellants were appointed fixed their terms of office at one year, and contemplated that at the end of that time new appointments would be made. But, since the appointing power might not be promptly exercised, to prevent a vacancy the law provided for the incumbents to hold over until their successors were appointed and qualified. This is a wise rule as applied to public officers, for thereby the public is protected from possible evils naturally attendant upon a situation wherein neglect and waste might result. This contingency, as contemplated by the law, enters into every such appointment, and it must be concluded that the time an incumbent holds over the designated period is as much a part of his term of office as that which precedes the date when the new appointment should be made. The authorities are uniform on this rule, and we think there can be no question about it."

In the case of Langston et al vs. Howell County, 79 S. W. (2nd) 99, the appointment of a county highway engineer for a period of one year was considered. In that case a new highway engineer was not appointed after the expiration of the one year term. The Supreme Court of Missouri held, even in the absence of language in the appointment to the effect that said appointment extended until a successor was appointed and qualified, that said county highway engineer was entitled to hold his office until his successor was appointed and qualified.

Section 13228, Revised Statutes of Missouri, 1939, provides that all coroners before they enter upon the duties of their office shall take an oath and shall give bond to the State

of Missouri in the penalty of at least \$1000.00, conditioned for the faithful performance of the duties of that office. The foregoing is the expression of the law in Missouri on this general subject.

However, it is further provided in Section 13230, Revised Statutes of Missouri, 1939, that if a coroner-elect does not give bond and qualify within twenty days after his election his office shall be deemed vacant. In the present case the coroner-elect has not given bond as provided by law and, therefore, has not qualified for said office.

We must now determine the effect of Section 13230, supra, in such case. The prevailing view in Missouri seems to be that the time requirement on giving bond is directory rather than mandatory, and further that such failure to give bond within the time required by statute does not create a vacancy or amount to a forfeiture of office. The rule is found in 46 Corpus Juris, "Officers", Section 95, Page 963, as follows:

"* * * On the other hand it has been held that a provision that an office shall become vacant upon a neglect or refusal to qualify within the time prescribed is merely directory and will not create a vacancy. And the same rule has been applied where the statute provides that an officer who fails to file his bond shall be deemed to refuse such office."

The above ruling is recognized by the Missouri Courts. The leading case in Missouri on this matter is State ex rel Attorney General vs. Churchill, 41 Mo. 41, which is cited and relied on in many later cases. The Court there said at Pages 42 and 43:

"It is stated that Jasper N. Norman was duly elected treasurer of the County of Laclede at the election in November, 1866, received his certificate of election, gave his bond, which was approved by the County Court and ordered to be filed, and took the oaths required by law, which were enclosed in his certificate or commission; but that a few days afterwards, on motion of the county attorney, the County Court made an order rescinding the approval of the bond, and declaring it annulled, for the reason that it had not been offered and filed within ten days after the election, as required by the statute - G.S. 1865, Ch. 38, Sec. 5. The court also declared the office vacant and proceeded to appoint the defendant county treasurer, who gave the required bond, was duly qualified, and entered upon the duties of his office.

"We think the court erred in this proceeding. The bond was not void, nor voidable, merely because not presented and filed within the ten days. This provision of the statute is directory only. 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. The time not being of the essence of the thing required to be done here, it was not material. *Rex v. Lexdole*, 1 Burr. 497; *Sedgw. Stat. & Const. Law*, 368-74. When a sheriff was required to give bond within twenty days after his election, it has been held that the statute as to the time of giving the bond was directory merely, and that the failure to give the bond within that time did not forfeit his title to the office. *People v. Holly*, 12 Wend. 481. We are of the opinion that the orders of the court vacating the bond, declaring the office vacant, and appointing the defendant treasurer, should be regarded as having been done without authority of law and as mere nullities."

We believe, however, that the Churchill case can not be considered as authority on the particular facts with which we are concerned here.

The Churchill case was decided in 1867 and involved the construction of G. S. 1865, Chap. 38, Sec. 5 - which was substantially the same as Section 13795, Revised Statutes of Missouri, 1939 now appears. Section 13795 provides that a person elected or appointed county treasurer shall give bond within ten days after his election or appointment. No penalty is attached by that section for the failure to give bond. Section 13795, Revised Statutes of Missouri, 1939, was originally enacted in 1879, a later date than that upon which the Churchill case was decided. Said Section provides that the county court shall at any semi-annual settlement with the treasurer or at any other time may, if the treasurer's bond be deemed insufficient, order him to give a new bond or additional security. It is further provided that if such new bond or additional security be not given within twenty days after the court's order that the office of treasurer shall thereby become vacant. It is evident then that the factual situation presented in the Churchill case is not analogous with the present set of facts in that the statute considered there did not provide a penalty if the provisions regarding time of filing bond were not carried out. In the present case it is provided that the coroner shall give a bond within twenty days after his election and that if he fails to give bond within the required time as provided by law his office shall be deemed vacant.

We must give effect to Section 13230, supra. Where a statute prescribes a time within which a person, in order to be inducted into office, must file a bond and provides that non-compliance with this provision shall result in the office be-

coming vacated and forfeited. Compliance with the statute is mandatory and failure to comply will absolutely forfeit the right to the office.

In *State vs. Heath*, 132 S. W. (2nd) 1001, the Supreme Court of Missouri stated at Page 1003 as follows:

"It is further agreed that the respondent signed the oath of office when taken in the school meeting and also signed a written oath when sworn by the justice of the peace. This court has said: "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". *State ex inf. McAllister ex rel. Lincoln v. Bird*, 295 Mo. 344, 244 S. W. 938, 939. Likewise, it is said: "Statutes fixing the time within which school officers must qualify are, as a general rule, regarded as directory to the extent that mere delay in qualifying within the time prescribed does not, of itself, cause a vacancy in the office, unless there is contained in the statute an express provision to that effect." 56 C. J. 309, Sec. 182; see also 46 C. J. 962, Sec. 95; 22 R. C. L. 451, Sec. 108."

The same conclusion is reached in *Dawson vs. Hetzler*, 74 S. W. (2nd) 488, where it was said at Page 489:

"Statutory provisions in regard to the time of doing an act are generally to be taken as mandatory where a consequence is attached to a failure to comply therewith. *Shaw v. Randall* 15 Cal. 385."

Similar conclusions are also reached in *State vs. Schade*, 167 S. W. (2nd) 135, 1. c. 141, and *Ousley vs. Powell*, 12 S. W. (2nd) 102, 1. c. 103.

The conclusion that Section 13230, supra, is mandatory in requiring the coroner to give bond within twenty days after the election is supported in 18 C. J. S. "Coroners", Section 7, Page 289-290:

"A vacancy in the office of coroner may occur where the incumbent notoriously absconds, or where a coroner-elect fails to file oath and furnish bond within the statutory period; but the death of a coroner-elect before his qualification does not create a vacancy, and the incumbent continues in office until the next election."

Therefore, a vacancy was created in the office of Coroner of Ozark County when the coroner-elect failed to give bond as provided by law.

A further question now arises concerning the authority of the incumbent coroner to hold over in said office. In this connection we cite 46 C. J. "Officers", Section 111, Page 969, as follows:

"It has been held that a provision that an officer shall hold until a successor is "appointed" and qualified, while recognizing the fact that there might be some delay in the appointment, equally and fully recognizes the right to appoint at any time after the term, although there is authority to the contrary. So a provision that officers shall continue in office until their successors are duly qualified is not a limitation upon the power to fill vacancies."

And further in Section 13, Page 970:

"The word "successor", in a provision of the character under consideration, means a successor legally chosen, and duly qualified; and where a successor elected or appointed to office dies before the time for qualifying for the office, there is no vacancy in the office, but the then incumbent holds over. Furthermore, the rule is applicable where a successor refuses to qualify, notwithstanding a statute providing that every office shall become vacant on the incumbent's refusal so to do."

The further rule that there is a presumption against a legislative intent to create a condition which may result in an office becoming vacant is also set out in 46 C. J. "Officers", Section 117, Pages 971 and 972:

"The law abhors vacancies in public offices, and courts generally indulge in a strong presumption against a legislative intent to create, by statute, a condition which may result in an executive or administrative office becoming, for any period of time, wholly vacant and unoccupied by one lawfully authorized to exercise its functions."

It is, therefore, indicated by the general law on this subject that in this particular factual situation the incumbent coroner should hold over in said office until the vacancy has been filled according to law. That this result is consistent with the existence of a vacancy in the office of coroner is shown by the authorities previously cited herein and by the court in the case of State ex inf. vs. Williamson, 222 Mo. 268, which holds that an office becomes vacant when the regular term expires and that an appointment may be made at any time thereafter notwithstanding the ruling that the officer may hold over and that such right to hold over is by sufferance rather than by any intrinsic title to the office. In the Williams case we find the following discussion at Page 282:

"In the case at bar the Act of 1901, as has been repeatedly stated, did not designate the date of the beginning or ending of the term, but the Governor, who was fully vested with appointing power to fill such office, did fix the date of the ending of the term of the relator. By the designation as made by the Governor of the ending of the term, it follows that relator's term expired on May 13, 1909, unless there are provisions in the statute which would longer continue such term.

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"This brings us to the consideration of the statute which would authorize the relator to hold and enjoy the office of factory inspector beyond the end of his term, May 13, 1909. The only provision of law authorizing the relator to hold beyond the designated end of his term, May 13, 1909, are the terms employed in the statute providing that he shall hold "until his successor is appointed and qualified". While this language recognized the fact that there might be some delay in the appointment and qualification of a successor, it equally and fully recognizes the right of the Governor to appoint at any time after the term.

" * * * * For the purposes of appointment there was a vacancy in this office May 13, 1909. The law does not contemplate that there is a new beginning and ending of the term by each appointment, but the term becomes fixed by the first appointment under the act."

On this point we also cite State ex rel Attorney General vs. Thomas, 102 Mo. 85, and State ex rel Withers vs. Stonestreet, 90 Mo. 361.

In view of the foregoing authorities we believe it is in keeping with the general public policy to hold that the incumbent coroner of Ozark County is entitled to hold over in said office until the vacancy created by the coroner-elect in failing to give bond within the required time is filled as provided by law.

CONCLUSION

Therefore, it is the opinion of this Department that the failure of the coroner-elect of Ozark County, Missouri, to give bond as provided by law created a vacancy in the office of coroner of said county. It is further the opinion of this Department that the incumbent coroner is entitled to hold over in said office until said vacancy is filled according to law.

Respectfully submitted,

DAVID DONNELLY
ASSISTANT ATTORNEY GENERAL

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

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