PUBLIC ADMINISTRATORS: Public Administrator, upon re-election, must furnish new bond to qualify. Bond of prior term remains in force and effect until new bond is furnished.

PROBATE COURT:

October 9, 1951

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Honorable Robert L. Hoy
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Mr. Hoy:

We quote from the letter which you had attached to your request for an official opinion of this department, as the questions presented are found therein. This letter reads as follows:

> "I was elected Public Administrator of Saline County, Missouri, for the term from January 1, 1945 to January 1, 1949; and again was elected for the term beginning January 1, 1949 to January 1, 1953. I served the first term and am now serving in the third year of the second term. I furnished a surety bond for $10,000.00 when first taking office, and that bond was continued by renewal premiums until the present time and still is in force and effect. I furnished no new bond at the beginning of the second term, both I and the local Agent of the Surety Company, thinking that the mere continuation of this original bond sufficiently met the statutory requirements. However, on or about the middle of the third year of my second term, the State Auditors advised that in their opinion this original bond did not cover such estate as were begun and handled in the second term but covered only the estates begun in the first term; so, at that time (about the middle of the third year of the second term), a second bond was furnished and is and has been in force and effect since then.

"1- Does the first bond cover only the estates handled in the first term?

"2- Does the first bond, continued on into the second term, cover the estates begun and handled in the second term as well as those begun in the first term and continued on into the second term?

"3- Was the second bond necessary?

"4- Was the second bond, written and filed about the middle of the third year of the second term, liable for the estates begun and handled in the second term during the portion of the second term prior to the time the bond was written? (Was there any liability on the second bond for the Public Administrator's handling of second-term estates prior to the issuance of the bond?)

"5- Does the Probate Court have the right to allow credit to the Public Administrator from the several estates being handled a pro-rata reimbursement totalling the cost of the bond premium which has been paid personally by the Officer, or is this premium cost one that must be borne personally by the Officer? (Are the several estates being handled liable for their several pro-rata premium cost of the Officer's bond?)

"6- Does the County Court have the right to pay this bond premium?"

Section 461.780, RSMo 1949, provides for the election of a public administrator and further provides that before entering on the duties of his office, he shall take the oath and enter into bond to the State of Missouri. This section reads in part:

"Every county in this state, and the city of St. Louis, shall elect a public administrator at the general election in the year 1880, and every four years thereafter, who shall be ex officio public guardian and curator in and for his county. Before entering on the duties of his office, he shall take the oath required by the constitution, and enter into bond to the

> state of Missouri in a sum not less than ten thousand dollars, with two or more securities, approved by the probate court and conditioned that he will faithfully discharge all the duties of his office, which said bond shall be given and oath of office taken on or before the first day of January following his election, * * * *."

There is no Missouri constitutional or statutory authority which distinguishes between an official elected for the first time and one who is re-elected. Such being the case, we feel that the general rule stated by the court in State ex rel. v. Stafford, 43 P. (2d) 636, l.c. 639, 99 Mont. 88, is controlling. This rule is stated as follows:

> "Our statutes make no distinction between an official elected or appointed for the first time to office and those re-elected or re-appointed; all must qualify in the manner prescribed, or a vacancy occurs in the office, and this is the general rule. 22 R. C. L. 452. If an officer 'is re-elected he is directed to qualify anew, the same as if another were elected. * * * By not doing this the office becomes vacant.' Wapello County v. Bigham, 10 Iowa, 39, 74 Am. Dec. 370."

Section 461.780, supra, specifically provides that the public administrator shall enter into bond before entering upon the duties of the office. There was no new bond entered into in the instant case until sometime during the third year of the second term. Since there is no distinction between election for a first term and re-election and since a bond must be entered into in order to duly qualify for a second term, it must be concluded that the public administrator under consideration did not duly qualify for his second term until sometime during the third year of said term.

Now we assume that there was no appointment of an individual to the office of public administrator who duly qualified prior to the time that the public administrator elected for a second term did enter into a new bond. We must then inquire as to the status of the public administrator from the beginning of his alleged second term until the time he duly qualified by entering into a new bond.

It is true that Section 461.780, supra, providing for the election of a public administrator for a term of four years, fails to specifically provide that said officer shall continue in office until his successor has been duly elected or appointed and qualified. However, Section 12 of Article VII, Constitution of Missouri, 1945, provides that "except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified." Section 105.010, RSMo 1949, is a statutory provision to the same effect. No constitutional or statutory provision can be found which would exclude public administrators from the operation of this rule. Therefore, in view of the above, we conclude that the instant public administrator continued to hold the office during the alleged second term by virtue of his election to the first term until that time during the second term that he requalified by giving the new bond.

Now for determination comes the question of the surety's liability upon the bond given at the time the public administrator qualified for his first term. The rule in Missouri in such instances is discussed and stated in the case of Town of Canton v. Bank of Lewis County, 92 S.W. (2d) 595, 338 Mo. 817, as follows at l.c. 599:

> "* * *Appellants have cited cases which we deem controlling in this case. State ex rel. v. Kurtzeborn, 78 Mo. 98, was an action on a constable's bond. The default occurred long after the term of two years, for which the constable had been elected, had expired. A successor had not been elected and qualified as prescribed by law. This court in that case said: 'The constable was elected in November, 1874, and his term consequently expired, under statutory provisions, two years thereafter, or in November, 1876. But under another statutory provision, he continued in office, until his successor was elected and qualified. Wag. Stat. 963, § 1. The conversion of the money collected occurred, according to the petition, January 28th, 1877, and this suit was brought January 6th, 1879. Under the section just mentioned, Kurtzeborn's term of office did not expire until his successor was elected and qualified.

> He, therefore, continued to be constable, and his sureties to be bound, up to the time he converted the money collected; for the provisions of the law just cited are to all intents and purposes, as much part and parcel of the bond, as if so nominated therein.' In the case of Long v. Seay, 72 Mo. 648, bondsmen were held liable on the bond of a treasurer of a school board who had been elected for one year but had held office for three years. To the same effect, see State ex rel. v. Smith, 87 Mo. 158, loc. cit. 160. The general rule is thus stated in 46 C.J. 1072, § 408: 'Where the bond is conditioned for the discharge of duties by the officer until a successor has been elected or appointed and has qualified, or where it is provided by law that an officer shall discharge the duties of his office until a successor has been elected or appointed and has qualified, the general rule is that, where an officer so holds over, the liability on his bond continues until such successor has qualified, although in some jurisdictions it is held that the liability extends only for such further time after the expiration of the term as is reasonably sufficient for the election or appointment and qualification of a successor.' * * *."

Applying the above rules to the instant case, it is our opinion that the surety remains liable upon the first bond until that time when the second bond was given by the public administrator during his second term. This view is further supported by the language of the court in the case of State ex rel. v. Stafford, cited earlier in this opinion, where the court continued at l.c. 639 by saying:

> "A situation similar to that here considered was disposed of in Baker City v. Murphy, 30 Or. 405, 42 P. 133, 35 L.R.A. 88, wherein it appears that the defendant Murphy was re-elected city treasurer; he failed to requalify but continued to hold the office. He contended that he was holding under his second term and alleged that 'said plaintiff, Baker City, its mayor and common council, acknowledged said Murphy and held him out to the world * * *

> as his own successor.' The court held, in effect, that Murphy could only become his own successor by requalifying; that he had held under one continuous term--his original term--which, under the statutory authority to hold until his successor was elected and qualified, was prolonged until such time as his successor was appointed and qualified to fill the vacancy he created by failure to qualify, and, as the statute became a part of the contract, the original sureties on his bond were liable for his defaults for the full extended term. See, also, State v. Lansing, 46 Neb. 514, 64 N. W. 1104, 35 L. R. A. 124; Bullock v. State, 65 N.J. Law, 557, 47 A. 62, 86 Am. St. Rep. 668."

Therefore, in answer to your first question regarding whether or not the first bond covered only the estates handled in the first term, we feel that under the facts presented it not only covered those handled during the first term but also those handled until that time that the public administrator qualified for his second term by entering into a new bond. We further feel that this also sufficiently answers your second question.

Your third question regards the necessity of the second bond. As specifically required by Section 461.780, it was necessary that the second bond be given in order for the public administrator to duly qualify for his second term. Until such a time that he did, the office was subject to such consequences as a failure to qualify for office produces.

Regarding the fourth question, we are unaware of any statutory authority or principle of law which would warrant holding that the second bond would cover liability for estates begun and handled prior to the execution of same. We are of the opinion that the second bond has no retroactive effect.

Regarding your fifth question, we can find no statutory authority which expressly or impliedly gives the Probate Court the right to allow a pro-rata reimbursement from the several estates being handled which would total the cost of the premium of the bond furnished by the public administrator.

An official opinion rendered by this department under date of April 10, 1941, and addressed to the Honorable James D. Clemens, provides the answer to your sixth question. It

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was held therein that "the County Court is not authorized to pay the premium on the bond required of a public administrator." Please find enclosed a copy of this opinion.

CONCLUSION

It is therefore the opinion of this department that:

1. A public administrator elected for a second term to succeed himself must furnish a new bond in order to duly qualify for the office for the second term.

2. Upon re-election of a public administrator to succeed himself, the bond given by him at the beginning of his first term remains in full force and effect until such time as he duly qualifies for the second term by furnishing a new bond.

3. The bond furnished at some time during the second term can have no retroactive effect and will not cover any liability occurring during the second term prior to the time the bond is furnished.

4. The Probate Court is without authority to allow to the public administrator a pro-rata reimbursement from the several estates handled which would total the cost of the premium of the bond furnished by said public administrator.

Respectfully submitted,

RICHARD H. VOSS,
Assistant Attorney General

RHV:ba

APPROVED:

J. E. TAYLOR
Attorney General

Encl.