

Opinion No. 19-2186

February 5, 1919

BY: O. O. ASKREN, Attorney General

TO: Mr. Adolfo Gallegos, Torreon, New Mexico.

Justice of the Peace Holds Over if No Election Held.

OPINION

Your letter of January 30th has been duly received by this office, but owing to a rush of business largely on account of the legislature being in session, we have been unable to answer the same before this. You ask the opinion of this office as to what should be done in a case where no election for justice of the peace was had, and where the board of county commissioners have refused to appoint a justice of the peace to act, because the old justice of the peace has not resigned. I take it that the board of county commissioners assume that no vacancy exists, and hence have refused to make any appointment, which view we believe is correct for the reasons hereinafter set forth.

As to the election of precinct officers in this state and their term of office, Sec. 3156 Codification of 1915 states:

"All justices of the peace and constables shall be elected on the second Monday in January of every odd numbered year and shall enter upon the duties of their office on the first Monday of February following their election and hold the same for two years thereafter, unless sooner removed for cause."

There is a provision contained in Sec. 2 of Art. 20 of our constitution which reads as follows:

"Every officer unless removed shall hold his office until his successor has duly qualified."

Sec. 3965 of the Codification of 1915 provides that any office belonging to the class mentioned in Sec. 3954 (which includes precinct officers) becomes vacant under any of the following circumstances: No. 4 -- Expiration of the term of office when no successor has been chosen as provided by law.

With this statement of the law on the subject we proceed to treat the proposition.

It is our opinion that in the specific situation that you present to us no vacancy exists in the office of the justice of the peace. It appears that it is clearly the intent of the constitution that no office shall remain vacant no matter how or when the vacancy occurs. It is true that the term for which the old justice of the peace was elected expires

on the first Monday of February but the constitution by the section hereinabove quoted extends his term until such time as his successor qualifies. It does not create any new term of office, but the old officer by virtue of said provision in the constitution continues in office lawfully discharging its duties, and it cannot be said that there is any vacancy in the office to call forth the exercise of the appointive power of the Board of County Commissioners to appoint a justice of the peace.

The views above given are supported by ample authorities in this and other States where cases have arisen under similar constitutional or statutory provisions as to officers holding until successors should qualify, and as to the authority of the appointive power to fill vacancies.

In the case of *People vs. Whitman*, 10 Cal. 46, Whitman was elected to state comptroller, and at the next general election a man by the name of Mandville was elected as his successor, but having been appointed surveyor general of California, he declined to qualify for the office of comptroller. The governor assumed that there was a vacancy in the office and appointed a man by the name of Malony to fill the office, and an action was brought to determine whether Malony or Whitman was entitled to the office.

The constitution of California had a similar provision as our constitution contains relative to officers holding over until their successors have qualified. In this case the court held that the old officer, Whitman, held over and that there was no vacancy, and that the governor had no power to appoint Malony. The court in its opinion said:

"But the construction we have given the constitution is not only supported by the language of the instrument but by its general scope and spirit. The executive officers are elected by the people and under the elective system, it is more proper that these officers should hold over than that the duties should devolve upon those in whose selection the people have had no voice."

In the case of *People v. Tilton*, 37 Cal. 621, which is a case involving the same proposition presented in the question which we are considering, the learned Chief Justice Sawyer in his opinion said:

"When there is a party expressly authorized by law to discharge these duties temporarily until the power upon whom the duty of election or appointment is devolved can regularly act, there is no occasion for calling into exercise this extraordinary power vested in the governor to make a temporary appointment. There is no good reason for appointing a party to temporarily discharge the duties of an office when there is already a party expressly authorized by the constitution or laws to temporarily discharge those duties."

There are many other cases along the same line, but I will not attempt to state the facts of particular cases, suffice it to cite the following:

People v. Bissell, 49 Cal. 407.

People v. Tyrell, 87 Cal. 475.

People v. Edwards, 93 Cal. 153.

State v. Morrison, 113 Ind. 434, et seq.

Koerner v. State, 148 Ind. 158.

Commonwealth v. Hanley, 9 Penn. 513, et seq.

State v. Lusk, 18 Mo. 333.

Boyett v. Cowling, 78 Ark, 494.

State v. Smith, 94 Ia. 616.

State v. Rowe, 25 O. St. 586.

State v. Compson, 34 Oreg. 25.

Soucy v. People, 21 Ill. App. 370.

State v. Meilike, 81 Wis. 574.

Our supreme court in passing upon Sec. 2 of Art. 20 of our constitution says:

"It is our opinion that the framers of our constitution intended to provide against any suspension of executive authority arising from change of administration or by reason of other circumstances which might bring about such result."

"In other words, the sole purpose of Sec. 2 of Art. 20 is to provide for the expiration of the term of office of public officials, and extending same if necessary until such time as a successor is qualified to take over the office."

It might be argued that Sec. 3956, Codification of 1915, expressly says that an office becomes vacant when the term of an officer expires and a successor has not been chosen as provided by law, but the constitution provides different and of course it prevails. It virtually extends the expired term until a regular successor is chosen as provided by law, and in this case it is by election, so no vacancy can exist.

Admitting for the sake of argument that there is a vacancy in any proper sense after the expiration of the term and before the election and qualification of a successor, the constitution itself fills the vacancy for the time being, by providing that the old incumbent

shall hold till a successor duly qualifies. In other words, he holds over till the elective power has an opportunity and does elect a successor.

Therefore, in conclusion, as I have heretofore stated it is my opinion that the old incumbent in the office of the justice of the peace in your precinct continues to hold over, and is a de facto and de jure officer and that no occasion for appointing a justice of the peace in his place obtains nor can obtain, unless he resigns or for some of the other reasons specified in Section 3956 of the Code of 1915, which renders an office vacant, exist or come into existence.

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