

Opinion No. 22-3632

November 28, 1922

BY: HARRY S. BOWMAN, Attorney General

TO: Mr. Leo F. Sanchez, County Clerk, Estancia, New Mexico.

County Officer Holds Over Where Successor Dies Before Qualifying.

OPINION

{*192} In reply to your letter of the 24th instant stating that the county treasurer-elect of Torrance County, after having received his certificate of election to such office from the county canvassing board, died before he could qualify for such office and asking who the successor of the said treasurer-elect would be and who has the appointive power to designate such successor, I beg to advise you:

The law covering the question of the successors in office to those who die before they can qualify for the office to which they are elected has been variously stated in many cases.

The question which arises is whether there is a vacancy in the office to which he was elected and the solution depends upon the wording of the constitutional and statutory provisions of the jurisdiction.

The constitution of this state provides, in section 2 of Article XX that,

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

Under provisions similar to this it is generally held that if an officer elect dies before qualifying, the incumbent is entitled to continue in the office until the election and qualification of a successor and that no vacancy arises so as to authorize the appointment of another. (See the case of *Balentine v. Bower*, 17 Wyo., 356, 17 Amer. & Eng. Ann. cases 82, and note)

Under the holdings in these cases there would be no vacancy in the office of county treasurer and therefore no appointment could be made, but the present incumbent would hold over until a person properly selected could qualify. The only method by which a person could be chosen to fill the office would be by an election at a regular {*193} election, there being no provision for special elections to fill vacancies in county offices.

Complications, however, would arise if the present incumbent had held office for the maximum period prescribed by the constitution. In other words, if the present incumbent

has filled the office for two terms he would not be qualified to hold for another term and some cases hold that in such circumstances a vacancy does exist and the appointing power would then come into play.

I believe that the present incumbent of the office of county treasurer in Torrance County has held the office for only one term and would therefore not be disqualified to hold under the general rule for another term. It is my opinion, therefore, that no vacancy will exist on January first to which an appointment can be made by the appointing power and therefore that the present incumbent would hold over.