

COUNTY COLLECTOR: A vacancy does not exist by collector-elect's failure to give bond and he may qualify by meeting the legal requirements any time he is able to do so.

February 21, 1935.



Hon. J. C. McKeehan,
Collector of Adair Co.,
Kirksville, Missouri.

Dear Sir:

You recently made an inquiry in person of this office as to whether or not a county collector must qualify by taking the oath and giving bond and as to the results of his failure so to do.

In 1933 the Legislature repealed Section 9885, R.S. Mo. 1929 and enacted in lieu thereof a new section to be known as Sec. 9885, Laws of Mo. 1933, page 464, which provides:

"Every collector of the revenue in the various counties in this state, and the collector of the revenue in the City of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of said amount: Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties.

Provided, that in all counties which now have or which may hereafter have a population of less than 75,000 inhabitants, according to the last preceding federal decennial census, the county court in such counties may require the county collector thereof to deposit daily all collections of money in such depository or depositories, as may have been selected by such county court pursuant to the provisions of Section 2184, Revised Statutes of Missouri for 1929, to the credit of a fund to be known as 'County Collector's Fund'; provided further, that when such deposits are so required to be made, such county courts may also require that the bond of the county collector in such counties shall be in a sum equal to the largest collections made during any calendar week of the year immediately preceding his election or appointment, plus ten per cent of said amount; provided further, that no such county collector shall be required to make daily deposits for such days when his collections do not total at least the sum of One Hundred Dollars (\$100.00); and provided further, the collector shall not check on such 'County Collectors' Fund' except for the purpose of making the monthly distribution of taxes and licenses collected for distribution as provided by law or for balancing accounts among different depositories."

Section 9886, R.S. Mo. 1929, relating to the bond of ex-officio collectors, is as follows:

"In any county where any officer thereof is ex officio collector of the revenue of said county, he shall give bond and security as such ex officio collector to the State of Missouri, to the satisfaction of the county court of such county, in a sum of at least equal to the amount of all the revenue to be by him collected for any one year, conditioned that he will faithfully and punctually collect and pay over all state and county revenue during his term as such ex officio collector, and that

he will in all respects faithfully perform all the duties of collector according to the statute laws of the State governing county collectors of the revenue."

Section 9887, R.S. Mo. 1929 deals with the failure of the county collector to give bond, and is as follows:

"If any collector shall neglect or refuse to give bond, as required by the next preceding section, his office shall, immediately upon such neglect or refusal, be vacant."

Noting that Section 9887, supra, contains the phrase "as required by the next preceding section", said preceding section being Sec. 9886, supra, we are of the opinion that it has no bearing on the question in the instant case for the reason that the Collector of Adair County is not an ex-officio collector of the revenue of said county, but is amenable to the provisions of Sec. 9885, supra. We must therefore consider the question in the instant case as of any other officer failing to qualify.

The effect of a statute requiring officers to qualify within a given period of time is discussed in the case of State v. Churchill, 41 Mo. 42, wherein the Court said:

"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. Lexdule, 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 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. The treasurer elect, having complied with all the provisions of the statute and received his commission, was entitled to hold the office."

The effect of failure to give bond and qualify is discussed in the case of Aiken v. Sidney Steel Scraper Company, 198 S.W. l.c. 1142 in which the Court said:

*****A failure to qualify by filing a bond when required does not vacate the office. State v. Churchill, 41 Mo. 41; State v. County Court, 44 Mo. 230. In Sproul v. Lawrence, 33 Ala. 674, it is said that the election gives the right and invests him with title to the office. And that is the view taken in this state; even the commission being held to be mere evidence of his title. *****

Regarding the failure to give bond and qualify, 46 C.J. pp.962-963 says:

"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."

Likewise, in the case of Cantley v. Village of Mt. Moriah, 49 S.W. (2d), l.c. 277, the Kansas City Court of Appeals, said:

"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, 254 P. 187; People ex rel. v. Benfield, 80 Mich. 265, 45 N.W. 135; People ex rel. Brooks v. Watts, 73 Hun. 404, 26 N.Y.S. 280. In the case last cited the court quoted approvingly (page 282 of 26 N.Y.S. 73 Hun. 404) from Dill. Mun. Corp. (4th 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.'

Section 9883, R.S. Mo. 1929 is as follows:

"The offices of sheriff and collector shall be distinct and separate offices in all the counties of this state, and at the general election in 1906, and every four years thereafter, a collector, to be styled the collector of the revenue, shall be elected in all the counties of this state, who shall hold their office for four years and until their successors are duly elected and qualified: Provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector."

The above quoted section makes the tenure of office of collector four years, and the person holding the office shall retain the same until a successor is duly elected and qualified.

The result of the collector-elect not qualifying by reason of his failure to give bond is discussed in the case of Abington v. Harwell, 201 Mo. App. 1.c. 349 in the following language:

"The first bond submitted to the county court, on December 2, 1914, by the appellant, was rejected by it on the ground that the Governor of the State had no authority to make the appointment but that under the Statute, section 11745, such authority was vested in the county court. It further appears that the first bond was not in sufficient amount, and on December 17, 1914, the appellant presented a new bond to the county court which was finally approved on April 15, 1915; thereupon the tax book or lists were turned over to him. Prior to that time the defendant continued to act as Collector of the Revenue in his township under the authority of his election as such, his successor not having been duly appointed and qualified."

CONCLUSION

According to the statutes and the decisions above quoted, if the collector-elect shall fail to qualify by being unable to give bond, it is the opinion of this department that a vacancy would not exist in the office of county collector of Adair County such as could be filled by appointment by the Governor; hence, the present collector would retain the office until his successor is elected and qualified, which in the instant case, might be four years, or until another legal statutory election for the election of a county collector is held.

This conclusion is further augmented by Section 5 of Article XIV of the Missouri Constitution, which is as follows:

"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."

Having ruled that Section 9887, R.S. Mo. 1929 is not pertinent to the question involved, it is the opinion of this department that the collector-elect may qualify by meeting the requirements of the statute any time that he may be able to do so, and until that time the present collector may remain in office.

Respectfully submitted,

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APPROVED:

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