OFFICERS: Failure to qualify authorizes
JUSTICE OF THE PEACE: predecessor to continue in office.

- -

January 22, 1943

1-25

FILED
99

Honorable Thomas G. Woolsey
Prosecuting Attorney
Cooper County
Boonville, Missouri

Dear Mr. Woolsey:

Under date of January 13, 1943, you wrote this office requesting an opinion as follows:

"The above mentioned Section provides that each township shall be entitled to two Justices of the Peace and an additional Justice if the township shall contain an incorporated town with a population of 2000.00, etc. The same Section provides that Justices of the Peace shall be elected for a term of four years and until their successors are elected and qualified. We are confronted with this situation here in Boonville Township, Cooper County.

"Four years ago P. M. Floyd and B. L. Moore were elected and qualified, Charles Kendall was elected at the same time, but resigned to accept another position. John Stegner was afterward appointed to succeed Kendall. Stegner was subsequently inducted into the Army and Frank Smith was appointed to succeed him. At the last November election B. L. Moore, L. I. Shuck and L. L. Williamson were elected. Moore and Shuck have qualified, but Williamson did not, and, of course, cannot at this late hour. Frank Smith delivered all of his papers and docket to Shuck who is carrying on in place of Smith.

"Query: Is Floyd still authorized to function? He has no qualified successor. I take the position that his commission granted four years

ago authorizes him to function until the next election * * * * "

Later, in response to our inquiry you informed us that all of the persons mentioned in your letter were residents of Boonville, which is a city over two thousand inhabitants and less than one hundred thousand inhabitants. This information eliminates one question which might have been injected into the problem.

In answering your question, attention is first directed to Section 5, Article XIV of the Constitution of Missouri:

"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."

Mention is made in your letter of Section 2522 R. S. Mo., 1939, and the following excerpt is taken from this Section:

" * * * * * but in case there shall be in any such township an incorporated town or city having a population of over two thousand inhabitants, and less than one hundred thousand inhabitants, said town or city shall be entitled to one additional justice of the peace, who shall be a resident of such town or city; * * * * * * * "

Section 2525 provides for the election and term of office of justices of the peace and is as follows:

> "Justices of the peace, as herein provided for, shall be elected at the general election to be held in eighteen hundred and eighty-two, and shall hold their offices for four years, or until their successors are elected, commissioned and qualified; but every justice of the peace now in office shall continue to act as such until the expiration of his commission, and until his successor is elected and qualified."

Section 2533 requires the person elected to the office of justice of the peace to take an oath of office, and Section 2534 provides that a person elected to such office who fails to record the certificate of election and oath of office within thirty days shall be deemed to have refused to accept such office.

The rule seems to be well established in Missouri that the failure to select a successor to an office does not terminate the tenure of office of the person originally selected except where the law indicates the intention to terminate the term at a definite and fixed time. The first expression of this nature is found in State vs. Lusk, 18 Mo. 333. Other cases in which the rule is announced and followed are State ex inf. Hulen vs. Brown, 274 S. W. 985 and Langston vs. Howell County, 79 S. W. (2d) 99.

The case of Knight Brothers vs. Mersman, 36 Mo. 219, was a case involving the office of justice of the peace of St. Louis, and the following quotation is taken from this case at l.c. 221:

> "Appellant insists that his motion to dismiss the suit should have been sustained. In support of this contention it is claimed that the act of April 23, 1891, relating to the election of justices of the peace, repealed by substitution sec-

> tion 8094, Revised Statutes, 1889, on the same subject. If this be conceded, still the conclusion contended for by defendant, that the offices and functions of prior justices ceased upon election under the latter act, does not follow. It is expressly said in the constitution: '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.' This is an affirmative grant of tenure of office, failing resignation, to the time of qualification of the successor of the officeholder. The only limitation to the term thus provided for by the constitution is that a contrary provision shall not have been made by statute. The act of April 23,1891, does not in terms, nor by necessary implication, cut off the tenure of the predecessors of the justices elected under the latter act prior to the qualification of the newly elected justices. * * * * * * * "

In the earlier case of State of Missouri to the use of Jacob Liechter et al., v. Miller et al., 48 Mo. 251, where a question was raised as to the validity of an act of the justice of the peace after the expiration of his commission, the Court spoke in the following manner at l.c. 253:

> "It would seem from the indications of the record that Wells' official term as a justice of the peace had expired prior to the issue of the execution. On that ground it seems to be regarded by the defendants as wholly invalid. It appeared, however, that Wells continued to act officially notwithstanding the expiration of his commission, and that he was acting as a justice at the time the exe-

cution was issued. Having been in office, his continued acts colore officii within the jurisdiction of a justice de jure were valid as to third parties, and cannot be collaterally drawn in question. * * * * * * "

Another case dealing with the justice of the peace is State ex rel. Walker vs. Powles, 136 Mo. 376, which was a quo warranto proceeding in which a judgment of ouster was issued against respondent. The Court in discussing the tenure of office of a justice of the peace used the following language at l.c. 381:

"The term of the office to which he was appointed extended only to the general election in 1890, and by the terms of his commission, and under the law, could extend no longer than to the qualification of his successor elected at such election and duly commissioned in pursuance thereof. As has been seen, the term of office of justices of the peace in this state is four years. They are elected quadrennially at the general election for county officers and have been so elected ever since 1882. The first general election for county officers and justices of the peace occurring after the appointment of the respondent, by the county court, was in November, 1890, at which a successor to the respondent might have been elected, upon whose qualification the term of the respondent would have ceased. But it seems that no successor was chosen at that election, and as the respondent, under his appointment by the county court, was authorized to hold and exercise the functions of said office not only until the next general election of county officers, but until his 'successor was elected, commissioned and qualified,' he thereafter continued lawfully the incumbent of said office and authorized to exercise the functions thereof until a successor for him should be chosen at the

next general election for county officers, and justices of the peace in November, 1894. State ex rel. v. Ranson, 73 Mo. 78."

Taking the facts from your letter , P. N. Floyd was elected justice of the peace four years ago and, under the statutes, would hold his office for the term of four years and until his successor was lawfully chosen and qualified. At the same time Floyd was elected two other persons were elected: B. L. Moore and Charles Kendall. Moore served his four year term and was re-elected and would, therefore, succeed himself. Kendall did not serve his term but was succeeded by Stegner who was succeeded by Smith. At the last election L. I. Shuck and L. L. Williamson were elected justices of the peace along with Moore. Shuck had qualified and Smith delivered to him his docket and all papers pertaining to the office and Shuck is now filling the office held by Smith. This leaves Williamson to be the successor of Floyd. Williamson failed to qualify.

The constitutional provision and the statutes before referred to contain nothing that would directly or by implication terminate the tenure of office of a justice of the peace until his successor is lawfully chosen and qualified. The quotations included support this view.

CONCLUSION

It is, therefore, the conclusion that, under your statement of facts, Floyd, the justice of the peace

for whom no successor has qualified, retains the office and is entitled to perform the duties of the office.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

WOJ:FS