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VACANCY — PERSON HELD OFFICE OF SHERIFF, WAS REELECTED, DIED ON FIRST DAY OF TERM — VACANCY CREATED IN SUCH TERM — PERSON DULY APPOINTED AND QUALIFIED TO FILL SUCH VACANCY WILL HOLD OFFICE OF SHERIFF FOR FULL UNEXPIRED TERM OF PREDECESSOR AND UNTIL SUCCESSOR IS ELECTED AND QUALIFIED.

SYLLABUS:

When a person who held the office of sheriff and who is reelected to succeed himself, dies on the first day of the term to which he was reelected, a vacancy is thereby created in such term, whether such person qualifies for such term or not, and the person who is duly appointed and qualified to fill such vacancy thus created, will hold the office of sheriff for the full unexpired term of his predecessor and until his successor is elected and qualified.

Columbus, Ohio, January 31, 1945

Hon. Forrest E. Sidener, Jr., Presecuting Attorney
London, Ohio

Dear Sir:

This will acknowledge receipt of your recent communication, which reads as follows:

"I am in receipt of a letter from the Madison County Commissioners which reads as follows:

'Mr. Forrest E. Sidener, Jr.,
Madison County Prosecutor,
London, Ohio.

Dear Sir:

We would appreciate an early opinion relative to a question which has arisen in connection with our recent appointment of a county sheriff to succeed the sheriff elect who died on Monday, January 1, 1945 at about 9:45 P.M. in Grant Hospital following a lengthy illness.

Gorman F. Clark, former sheriff and now deceased, was elected in November 1944 to a term of four years commencing on the first Monday of January, 1945 which was, this time, on January 1, 1945.

His surety bond in the sum of Ten Thousand (\$10,000.00) dollars, furnished by the United States Fidelity and Guaranty Company, Baltimore, Maryland, was signed by Gorman F. Clark, as Principal, while he was in the Franklin County Hospital, and was approved by this Board of Commissioners on January 2, 1945.

The oath of office attached to said bond was signed by Gorman F. Clark while he was in a Franklin County Hospital at the same time he signed as Principal, and the oath shows the date of December 29, 1944.

The signing as Principal and the oath was done in the presence of Deputy Sheriff Earl Lamb and Earl Lamb then returned to Madison County and delivered both bond and oath to Bonding Agent and Notary Public E. R. Schurr of London, Ohio.

The oath of office, showing the signature of Gorman F. Clark well known by E. R. Schurr, was notarized by E. R. Schurr, Notary Public in and for Madison County, Ohio, whose commission expires February 19, 1945.

Assuming that the new bond and oath were legally drawn and that the Sheriff Elect Gorman F. Clark did actually serve on the new term from 12:00 o'clock midnight December 31, 1944 to approximately 9:45 P. M. January 1, 1945, this board proceeded to appoint a sheriff.

On Friday January 5, 1945 the Board of County Commissioners of Madison County did appoint Harold R. Bidwell as County Sheriff and the resolution, on record, reads as follows:

"Resolved, that Harold R. Bidwell be, and hereby is, appointed as Madison County Sheriff for the unexpired term of former Sheriff Gorman F. Clark, namely, for the period commencing Monday, January 8, 1945 to and including the day preceding the first Monday of January, 1949, and be it,

Further Resolved, that the amount of bond for Harold R. Bidwell be and is hereby fixed at the sum of Ten Thousand (\$10,000.00) dollars."

Our questions are:

(1) When the bond was signed by Gorman F. Clark as Principal, and the oath signed by Gorman F. Clark as Sheriff elect, while he was in Franklin County Hospital, where he had been for several weeks, and the oath later notarized by a notary public at his office in Madison County, had the Sheriff Elect legally and actually started the term to which he was elected in November, 1944, and did a vacancy exist in the "new" term at time of his death on January 1, 1945?

(2) If the "new" term had started we presume the resolution of the new appointment is legal and in order, but in the event the Sheriff Elect failed to legally qualify for the "new" term and the "old" term merely came to an end at his death, death being almost at the end of the first day of the "new" term period, then could this Board of Commissioners appoint a new sheriff for the "full new term" of the deceased, or for what period of time?

Thanking you for an early reply, we are,

Yours very truly,

Gola Mink
Rodney Plymell
R. W. Armstrong
Madison County
Commissioners'

As to the first question in the aforesaid letter I might add a note or two of explanation. The notary public in the case did not have a state wide commission and was only authorized to act in his official capacity in Madison County, Ohio. Therefore, did the deceased sheriff qualify? Was he ever legally sworn into office?

As to the second question: It is my understanding of the law that if the deceased sheriff had qualified and was legally in office that the new appointment would be for the unexpired term; otherwise the appointment would be until the next general election. Now, going on the assumption that the old sheriff didn't qualify and therefore the commissioners did not have the power to appoint for the unexpired term does the new sheriff automatically hold office for a two year period or must the commissioners make a new appointment?

I realize you are very busy but we would greatly appreciate it if you could give us an opinion at your earliest possible convenience due to the fact that so many complications could arise if we do not have a sheriff whose acts can be considered as official. Arrests, service, etc. may not be valid with embarrassing consequences to all concerned."

An examination of the statutes pertinent to your first question discloses that it is unnecessary to determine whether or not a vacancy existed in the term of Gorman F. Clark commencing January 1, 1945, by reason of the alleged irregularities connected with his taking the oath of office. In other words, if a vacancy existed, to which appointment could lawfully have been made, how such vacancy occurred is of no concern. The only question to be considered is whether or not a vacancy occurred during the term commencing January 1, 1945.

Obviously, if Mr. Clark was properly qualified by giving his bond and taking the oath of office, his death occurred during his "new" term of office and consequently a vacancy was then created in such term and appointment thereto could then lawfully have been made, in accordance with the provisions of Section 2828, General Code, which reads in part:

"When the office of sheriff becomes vacant, the county commissioners shall appoint a suitable person to fill the vacancy. The person so appointed shall give bond, take the oath of office prescribed for the sheriff, and hold the office during the unexpired term."

While your letter does not specifically so state, the records in the office of the Secretary of State disclose that Gorman F. Clark was the sheriff of Madison County for the term commencing the first Monday in January, 1941 and ending on the day preceding the first Monday of January, 1945.

For the purposes hereof, let us then assume that the irregularities set out in your letter were fatal, and that no oath of office within contemplation of law was taken by Mr. Clark. In such case, since Mr. Clark was the duly elected and qualified sheriff serving during the term ending December 31, 1944, it is apparent that Section 8 of the General Code would be controlling. Said section reads:

“A person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws.”

Inasmuch as there are no other provisions in the Constitution or laws covering the office of sheriff, Mr. Clark, had he failed to qualify for the term commencing January 1, 1945, would have held over on his preceding term and still have been sheriff on January 1, 1945 when he died. Consequently, a vacancy would then have occurred during the term commencing January 1, 1945, to which the appointment of Mr. Bidwell could lawfully have been made.

Furthermore, even if Mr. Clark had not been sheriff of Madison County for the term ending December 31, 1944, a vacancy would have resulted if he had failed to qualify for such office for the present term. In regard thereto, your attention is directed to Section 10 of the General Code, which reads:

“When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. *When an elected candidate has failed to qualify for the office to which he has been elected, the office shall be filled as in the case of a vacancy.* Until so filled, the incumbent officer shall continue to hold

the office. This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy."

(Emphasis' added.)

From the above, it is obvious that the office of sheriff of Madison County became vacant during the term commencing January 1, 1945 and that the county commissioners were then, under the express authority of Section 2828, General Code, empowered to fill such vacancy. Therefore, if Harold R. Bidwell was otherwise properly appointed in accordance with law, his appointment to such office was legal, and he is now the duly appointed and properly qualified sheriff of Madison County.

I come now to your second question.

With respect thereto, your attention is invited to the provisions of Section 2828, supra. It will be observed that said section provides :

"The person so appointed shall * * * hold the office during the unexpired term."

To be considered in connection therewith, however, is Section 10, supra, the material language of which reads :

"When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified."

In the case of State, ex rel. Sheets, Attorney General, v. Speidel, 62 O. S. 156, decided March 6, 1900, wherein the question before the court was whether or not a person appointed to fill a vacancy in the office of sheriff held over for the unexpired term and until his successor was elected and qualified, the provisions of Section 11, Revised Statutes, were read into and grafted upon Section 1208, Revised Statutes. Section 11, Revised Statutes, is the predecessor of Section 10, General Code, and Section 1208, Revised Statutes, is the predecessor of Section 2828, General Code. In said case it was held, as disclosed by the second branch of the syllabus :

“When one who is holding the office of sheriff, and is a candidate for election to succeed himself, dies before entering upon the new term, a vacancy is thereby created in the term in which he was serving, but not in the term for which he was a candidate and upon which he had not entered; and one who is duly appointed and qualified to fill the vacancy thus created will hold the office for and during the unexpired term of his predecessor, and until his successor is elected and qualified; and such election must be had at the first proper election that is held more than thirty days after the occurrence of the vacancy.”

It is worthy of note that the court in the above case held that the election at which a successor is elected must be had at the first proper election that is held more than thirty days after the occurrence of the vacancy. Such holding, if applied to the instant case, might seem to impel the conclusion that a successor to Mr. Bidwell would have to be elected at the general election to be held in November, 1946, since such election will be the “first proper election that is held more than thirty days after the occurrence of the vacancy.”

In this connection, however, it will be observed that Section 11 of the Revised Statutes, under which the Speidel case was decided, contained different language than that now set out in Section 10 of the General Code, with respect to the time for the election of a successor to an appointed officer. Said Section 11, Revised Statutes, read in part:

“When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office till his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy.”

In Section 10, General Code, as it now exists, the sentence which provides that such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred, commences with the words “unless otherwise provided by law”. Herein lies the distinction between the language under consideration by the Supreme Court in the Speidel case and that which is applicable in the instant case. Section 2828, *supra*, is the statute wherein it is “otherwise provided by law”. As above pointed out, said section provides that the person shall hold the office during the unexpired term. While it is true that Section 1208, Revised

Statutes; contained substantially the same provisions as those which are present in Section 2828, General Code, with respect to the person appointed serving for the unexpired term, yet it seems to me that the words "unless otherwise provided by law" in Section 10, General Code, require the conclusion that a person appointed to fill a vacancy in the office of sheriff continues to hold such office for the full unexpired term of his predecessor and until his successor is elected and qualified.

In stating the above conclusion, I am not unmindful of the case of State, ex rel. v. Troxel, 125 O. S. 235, wherein it was held:

"The successor of an appointee appointed to fill a vacancy in the office of county auditor, which vacancy occurred more than thirty days before the next general election at which county officers can be voted for, must be elected at the next general election for county officers."

Said case dealt with a vacancy in the office of county auditor which occurred on July 25, 1931, and more than thirty days before the November election, 1932. It was contended that because the term of county auditor is for four years, and the predecessor was elected in 1930, his successor could not be elected until the general election in 1934.

In answer thereto, the court, in commenting on the provisions of Section 10 of the General Code, stated (p. 287):

"This section states plainly and succinctly that the successor of an appointee 'shall be elected for the unexpired term *at the first general election* for the office which is vacant * * *'

The November, 1932, election is a general election. It is the first general election after the vacancy was created. This case is not affected by the clause 'unless otherwise provided by law,' as, in our opinion, there is no other provision of law affecting the time of election."

The provisions of law dealing with the filling of vacancies in the office of county auditor are contained in Section 2562, General Code, which reads:

"If a vacancy occurs in the office of county auditor, from any cause, the commissioners of the county shall appoint a suitable person, resident of the county, to fill the vacancy."

It will be seen that the above section, unlike Section 2828, General Code, has no provisions relative to the period of time that a person appointed to a vacancy thereunder, shall serve. This fact clearly distinguishes the Troxel case from the one here under consideration.

While I have pointed out that the pertinent provisions of Section 10, General Code, are substantially different from those of Section 11, Revised Statutes, and that such difference, in my opinion, justifies the above conclusion, it is significant to note that in the Speidel case the court, notwithstanding the fact that it was held that a successor must be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy, also held that the appointee in such case was entitled to hold the office of sheriff for and during the unexpired term of his predecessor. Of course, it must be borne in mind, in this regard, that at the time said case was decided the term of the sheriff was only for two years. However, from the decision in such case, it seems clear that the successor to the appointee did not assume office until the first Monday of January after his election. In other words, such successor did not enter office immediately upon his having been declared elected and having qualified. Thus, it appears from such decision that the court gave full effect to the language of Section 1208, Revised Statutes, which provided that the appointee shall "hold his office for and during the unexpired term of the sheriff whose place he fills", even though Section 11, Revised Statutes, contains no provision comparable to the words "unless otherwise provided by law" set out in Section 10 of the General Code.

In light of the above, it would appear, and it is consequently my opinion that Harold R. Bidwell is entitled to hold the office of sheriff of Madison County during the full unexpired term commencing the first Monday of January, 1945 and ending on the day preceding the first Monday in January, 1949, and until his successor is elected and qualified.

Respectfully,

HUGH S. JENKINS
Attorney General