

2639.

PROBATE JUDGE—VACANCY—SUCCESSOR ELECTED—FOR WHAT TERM—TAKES OFFICE WHEN.

SYLLABUS:

1. *A person elected to fill a vacancy in the office of judge of a county Probate Court is elected for the unexpired term only.*

2. *A person elected to fill a vacancy in the office of judge of a county Probate Court takes office when he has received his certificate of election from the county board of elections, obtained his commission from the Governor, given bond to the State of Ohio and taken the oath of office.*

COLUMBUS, OHIO, December 8, 1930.

HON. GEO. E. SCHROTH, JR., *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—Your recent communication reads as follows:

"I have been requested to secure an opinion from you concerning a point in law which has been presented to me and the facts are as follows:

The Hon. Clyde C. Porter was elected Probate Judge of this county in 1928, and because of ill health, sometime during the year 1929, resigned. At that time, Herbert Abbott was appointed to fill the vacancy created by Mr. Porter's resignation. Then, according to the statute, it was necessary to elect a new Probate Judge at the next general election.

On November 4, 1930, Mr. V. A. Bennehoff, of this city, was elected by the voters of this county and so certified by the board of deputy supervisors of elections.

The question now arises as to whether or not Mr. Bennehoff was elected for a full four year term or to fill only the unexpired term created by the vacancy due to the resignation of Mr. Porter.

A still further question arises as to when the new incumbent takes office and we would appreciate very much having an immediate answer to these questions."

From public records, I find that Judge Porter was elected Probate Judge of Seneca County at the November election in 1928 and assumed office by virtue of Section 1580, General Code, on February 9, 1929, and that his term of office would have extended until February 9, 1933, by reason of the same section, had he not resigned. His resignation was effective November 8, 1929, and Judge Abbott was appointed on September 25, 1929, by Governor Cooper to fill the vacancy occurring on November 8, 1929, under authority of Article IV, Section 13 of the Ohio Constitution.

I am informed by the Secretary of State that the abstract of the votes of the recent election in Seneca County which has been submitted to him under the terms of Section 4785-153, General Code, shows that the vote for Mr. Bennehoff for Probate Judge was for the unexpired term. Therefore, I am assuming that the ballots carried the name of Mr. Bennehoff as a candidate for Probate Judge for the unexpired term. Whether or not the ballots indicated for what term Mr. Bennehoff was a candidate, it remains to be seen if the law authorized the election of a Probate Judge, and, if so, for what term.

The facts in the matter presented by you are very similar to those upon which I based my Opinion No. 298, rendered April 12, 1929, and published in Opinions of

the Attorney General for 1929, Volume I, page 462. In that opinion the facts showed that the Probate Judge of Mercer County who had been elected in 1928 and assumed office on February 9, 1929, had died on March 7, 1929, and the vacancy was forthwith filled by the Governor. The question arose as to when a successor should be elected by the people to fill the vacancy temporarily filled by the Governor. It was held in the syllabus as follows:

“Where a vacancy occurred in the office of Probate Judge on March 7, 1929, an election should be held to fill the unexpired term at the November election in 1930.”

You will note that said opinion disclosed in the syllabus that the successor should be elected at the November election in 1930. It may also be noted that the person elected at the November election in 1930 would hold office for the unexpired term of the Probate Judge who was elected in 1928.

I deem it unnecessary to again set forth in detail the process of reasoning by which these conclusions were reached. Suffice it to say that said opinion is decisive of your first question, and I therefore am enclosing a copy of the ruling. I hereby reaffirm my conclusions as previously set forth. Therefore, in specific answer to your first question, I am of the view that Mr. Bennehoff was elected to fill the unexpired term created by the vacancy due to the resignation of Judge Porter.

Coming now to your second question, Section 4785-152, General Code, provides that after each general election the county board of elections shall within five days or sooner canvass the returns and prepare abstracts. Section 4785-153, General Code, provides, in part, as follows:

“When the canvass has been completed the board shall cause to be prepared statements of the results showing:

1. Upon a single sheet an abstract of votes for president and vice president of the United States.

* * *

4. Upon another sheet an abstract of votes for senators to the General Assembly and representatives to the General Assembly, judges of the Court of Appeals, judge of the Probate Court, judges and clerk of the Common Pleas Court, sheriff, county auditor, county commissioner, county treasurer, county recorder, county surveyor, prosecuting attorney, coroner and all other local offices.

* * *

Such statements shall be posted on the bulletin board in the board's office and furnished to the local newspapers. Certified copies of the abstracts of the votes shall be prepared on forms to be prescribed and furnished by the Secretary of State. One copy of each of such abstracts shall be forwarded by registered mail to the Secretary of State at Columbus. Duplicate copies of all such abstracts shall be filed in the office of the board.”

Also, Section 4785-158, General Code, provides in part:

“The abstracts showing the returns of the election for county, township, municipal, and school district offices within the county shall be canvassed by the board, and the persons receiving the highest number of votes for each office so canvassed shall be deemed elected.

* * *

When it has ascertained and declared the result of an election for county, township, school district or municipal officers, the board shall make and deliver to the persons elected certificates of their election on blanks, the form of which shall be determined by the Secretary of State. * * *

From the above statutes it is seen that the county board of elections canvasses the votes for county offices, and when it has determined the result of an election, delivers to the successful candidates a certificate of election.

It is provided by Section 140, General Code, that upon receipt of a certificate of election by the Secretary of State, and upon payment of the fee of \$5.00 to the Secretary of State (see Section 139, General Code), the Governor shall issue and forward the proper commission to the clerk of the Common Pleas Court who shall deliver it to the officer entitled to it.

Section 138, General Code, states that a judge "shall be ineligible to perform any duty pertaining to his office, until he presents to the proper officer or authority a legal certificate of his election * * * and receives from the Governor a commission to fill such office."

In the case of *State vs. Moffit*, 5 Ohio, 362, it was held that a judge has no authority to act until the commission has been issued.

Article XV, Section 7 of the Ohio Constitution reads as follows :

"Every person chosen or appointed to any office under this State, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the Constitution of the United States, and of this state, and also an oath of office."

Section 2, General Code, provides as follows :

"Each person chosen or appointed to an office under the constitution or laws of the state, and each deputy or clerk of such officer, shall take an oath of office before entering upon the discharge of his duties. The failure to take such oath shall not affect his liability or the liability of his sureties."

From the above provisions of the Constitution and statute, it is necessary that a judge elected to an office take an oath before entering upon the discharge of his duties.

It is provided by Section 1581, General Code, that "before entering upon the discharge of his duties, the Probate Judge shall give a bond to the State in a sum not less than \$5,000 with sufficient surety" and that "such bond, with the oath of office endorsed thereon, shall be deposited with the county treasurer and kept in his office."

Summing up all of the preceding steps, it is quite evident that the Probate Judge, Mr. Bennehoff, takes office when he has received a certificate of election, obtained a commission from the Governor, taken the oath of office and given bond to the State of Ohio.

I am informed through the office of the Secretary of State that Mr. Bennehoff was commissioned for the unexpired term of Judge Porter on November 28, 1930. I assume that all steps were complied with up to that time. Therefore, as soon as Mr. Bennehoff takes the oath of office and gives bond to the State of Ohio, thereby qualifying for the office, he will be an incumbent of said office.

Therefore, in specific answer to your second question, I am of the opinion that the Probate Judge, who has been elected to fill the unexpired term of a Probate Judge takes office when he has received a certificate of election from the county board of

elections, obtained a commission from the Governor, given bond to the State of Ohio and taken the oath of office.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2640.

APPROVAL, CONTRACT FOR ROAD IMPROVEMENT IN LUCAS COUNTY.

COLUMBUS, OHIO, December 8, 1930.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

2641.

APPROVAL, BONDS OF GUYAN RURAL SCHOOL DISTRICT, GALLIA COUNTY, OHIO—\$735.00.

COLUMBUS, OHIO, December 8, 1930.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2642.

APPROVAL, BONDS OF VILLAGE OF FRANKLIN, WARREN COUNTY, OHIO—\$17,000.00.

COLUMBUS, OHIO, December 8, 1930.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.