

2860.

ELECTIONS—CANDIDATE DYING BEFORE ELECTION DAY AND RECEIVING MAJORITY OF VOTES CAST—NO ELECTION—COUNTY SURVEYOR INCUMBENT HOLDS OVER—EXCEPTION.

SYLLABUS:

1. Where a candidate for county surveyor dies before election day on a day too late for a substitution to be made by the central committee and a majority of the electors cast their ballot for the deceased candidate, the opponent under such circumstances cannot be declared elected.

2. Under such circumstances the present incumbent will hold over under the provisions of Section 8 of the General Code until his successor is elected or appointed and qualified, providing the total tenure under his election shall not exceed four years.

COLUMBUS, OHIO, November 10, 1928.

HON. J. E. PATRICK, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—Acknowledgement is made of your recent telegram which reads:

“THE DEMOCRATIC CANDIDATE FOR SURVEYOR OF THIS COUNTY WHO WAS NOMINATED AT THE AUGUST PRIMARIES DIED TOO LATE TO PERMIT A SUBSTITUTION TO BE MADE BY THE CENTRAL COMMITTEE (STOP) IN THE EVENT THAT HE SHOULD RECEIVE MORE VOTES THAN THE REPUBLICAN CANDIDATE WHO WOULD BE ELECTED (STOP) THE PRESENT INCUMBENT IS NOT A CANDIDATE (STOP) WOULD HE UNDER THOSE CIRCUMSTANCES HOLD OVER.”

From the statements in your communication it would appear that it was impossible to fill the vacancy caused by the death of the Democratic candidate for county surveyor, under the provisions of Section 5012 of the General Code, which in substance provides that a vacancy caused by death which occurs after the printing of the ballots may be filled by filing the proper certificates with the Secretary of State at least ten days and with the deputy state supervisors at least five days before the day of election. There seems to be no other statutory provision applying to the situation your communication presents.

In considering your first inquiry, some difficulty is encountered by reason of the fact that the law upon this subject is somewhat unsettled. In some jurisdictions it has been held that where the elector is informed as to the disqualification or death of the candidate and marks his ticket for such candidate, this action is to be regarded as an intention on the part of the voter to throw away his vote and such vote is null and void and should not be counted. (See 9 Ruling Case Law, page 1126).

The same authority states:

“In at least one case the American rule has been broadly stated as making no distinction between votes cast in ignorance of the recipient's ineligibility and those given with full knowledge thereof, the minority candidate being held to be defeated in either case by the majority cast in favor of the ineligible candidate. And there are other decisions to the same effect.”

The following is quoted from 20 Corpus Juris, page 207:

"It is a fundamental idea in all republican forms of government that no one can be declared elected and no measure can be declared carried, unless he or it receives a majority or a plurality of the legal votes cast in the election. The fact that a plurality or a majority of the votes are cast for an ineligible candidate at a popular election does not entitle the candidate receiving the next highest number of votes to be declared elected; in such case the electors have failed to make a choice and the election is a nullity. Some but not other courts recognize an exception to the rule when, and only when, the voters have knowledge at the time of casting their ballots of the ineligibility of the candidate receiving a majority or a plurality of the votes, and in such case allow the candidate receiving the next highest number of votes to be declared elected on the theory that the voters voting for the ineligible candidate wilfully threw their votes away. Upon a like principle if the candidate who receives a majority or plurality of the votes cast for an office dies on election day, or so shortly prior thereto that it is practically impossible to fill the vacancy, and the fact of his decease is not known on the part of the voters generally, the candidate receiving the next highest vote for the same office is not entitled to the office. * * *"

The reason for the above rule is based upon the principle that an election is a deliberate choice of a majority and that one receiving a smaller number of votes than those that were cast for someone else cannot be declared to be elected. In other words it is stated that votes are not illegal because they were voted for a person in whose behalf they cannot be counted.

Attention is further directed to McCrary on Elections, which authority at page 247, discusses the question as to who is elected when the person receiving the highest number of votes is ineligible when his ineligibility was known to those who voted for him before casting their votes. It is pointed out in this text that the English rule is to the effect that, where the majority candidate is ineligible and sufficient notice of his ineligibility has been given, the person receiving the next highest number of votes will be declared elected. However, the English rule does not appear to be the American rule. The following is quoted from page 249 of said authority:

"* * * It is a fundamental idea with us that the majority shall rule, and that a majority, or at least a plurality, shall be required to elect a person to office by popular vote. An election with us is the deliberate choice of a majority or plurality of the electors. Any doctrine which opens the way for minority rule in any case is anti-republican and anti-American. * * *"

Again on page 250 the following is stated in the discussion of a Kentucky case:

"* * * The appellant and one Bayes were candidates for the same office. Bayes died on the afternoon of the election before the polls had closed. The count showed that Bayes had received a majority of the votes cast, but it was impossible to determine how many votes had been cast for him at the time of his death. The Court in passing upon appellant's claim to the office held that he was not the choice of a majority of the qualified voters who had cast their votes in good faith at the election and that he was not entitled to a certificate of election. * * *"

In an opinion of the Attorney General, found in the Opinions of the Attorney General for 1918, page 74, it was held:

"A person who receives a smaller number of votes than his opponent is not considered elected because of the ineligibility of the successful candidate."

Your attention is further directed to the case of *State ex rel. vs. Speidel, et al.*, 62 O. S. 156, in which it was held, as disclosed by the first branch of the syllabus:

“When the candidate for an office for whom a majority or plurality of votes was cast at the election, dies on the election day and before the polls are closed, the candidate for the same office receiving the next highest number of votes is not thereby elected; nor has he thereby acquired any right to be inducted into the said office.”

It is believed the foregoing conclusion of the court would dispose of your first inquiry were it not for the discussion in the body of the opinion wherein the court indicates that it was not made manifest that a single vote was cast after the death of the candidate. In that case the candidate died one hour and forty-five minutes before the polls were closed. However, the court further indicates, notwithstanding its declaration to the effect that no proof was shown that any votes were cast after the death of the candidate, that the time of the death is not important in determining the question. In that case the candidate who died received 4369 votes and one of his opponents received 3802 votes. The following is quoted from the body of the opinion:

“No process of valid reasoning can make 3802 votes to be more than 4369 votes. Not merely a plurality, but a majority, of all the votes cast for sheriff on that election day, were cast against Cover; and it does not avail him that the majority of votes were cast, in good faith, for a man who had died during the election. The majority was not for Cover, and that is all he can make of it. The election may fail altogether by reason of the death of the person receiving the largest number of votes cast, or by reason of ineligibility of the successful candidate, or by reason of irregularities, but that could not elect a man who in fact has received a smaller number of votes than his opponent.”

It is therefore believed that as a proposition of law, there is little difference between a candidate dying upon election day and such a death occurring before the election after the time has expired for filling the vacancy. There is no way of determining how many of the electors who voted for the deceased candidate knew of his death. It is possible, of course, that many were informed upon the subject. On the other hand, it is possible that many of such electors did not know of such death. In tabulating the votes it would be impossible to separate the votes of those who knew and those who did not know. However, where the deceased candidate receives more votes than his opponent, the intent of the majority of the electors is certain as to not desiring said opponent for the office.

It is the duty of the election officials to count the ballots and indicate the votes cast for the candidates whose names appear thereon irrespective of whether or not such candidate is eligible to fill the office. Such a duty is a ministerial duty and there is no discretion to be exercised by said election officials. Opinions, Attorney General, 1927, Vol. III, page 2026, Opinions, Attorney General, 1920, Vol. I, page 13, *Dalton vs. State*, 43 O. S. 652 and *State ex rel. vs. Graves*, 91 O. S. 113.

It would therefore appear in the case you present that the tabulation of the election officials should clearly indicate the number of votes cast for the deceased candidate and the number of votes cast for his opponent and it will be easy to determine whether or not the Republican candidate receives a majority of the votes cast.

The foregoing would seem to be dispositive of your first inquiry.

In considering the question as to whether the present incumbent holds over, your attention is directed to the opinion reported in the Opinions of the Attorney General for the year 1927, Vol. II, page 1137, wherein the status of a coroner was discussed in view of the fact that there was not a candidate for such office at the general election. The following is quoted from the syllabus of said opinion:

“Where there was no candidate for the office of coroner at the general election in November, 1926, the then incumbent may hold over under Section 8 of the General Code at least until his successor is elected or appointed and qualified, providing the total tenure under his election shall not exceed four (4) years. * * *”

In the body of the opinion it was pointed out that Section 22 of Article XVII of the Constitution of Ohio, provides in part that:

“* * * and the term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four (4) as may be so prescribed.”

Inasmuch as the Constitution limits the term of elective county officials to four years, Section 8 of the General Code cannot have the effect of extending said term beyond the period of four years for the reason that the holdover period is to be regarded as a part of the regular term. This proposition was thoroughly discussed in Opinion No. 1579, rendered under date of January 14, 1928, to Hon. John K. Sawyer, Prosecuting Attorney, Woodsfield, Ohio, with relation to the question as to whether a justice of the peace held over at the expiration of his term of four years when no successor had been elected. In said opinion it was pointed out that Section 8 in effect continues in office one who has been elected until a successor is elected, appointed and qualified unless it is “otherwise provided in the constitution or laws.” Said opinion further points out that it is otherwise provided in the Constitution by virtue of the provisions of Section 2 of Article XVII. This opinion is supported by the case of *State ex rel Attorney General vs. Breuster*, 44 O. S. 589, and *State ex rel. vs. Harvey*, 8 O. C. C. 599, and is in accord with an opinion of the Attorney General found in the Annual Report of the Attorney General for 1912, Vol. II, page 1058.

It is believed pertinent herein to discuss the case of *State ex rel. vs. Baldwin*, 101 O. S. 65, the syllabus in this case reading:

“At the November, 1918, election W. was elected county treasurer for a term of two years beginning on the first Monday in September, 1919. On the 19th day of December, 1918, W. died, having meanwhile given no official bond. Thereupon the county commissioners appointed S. as county treasurer for the term to which W. was elected. In a contest between B., a holdover incumbent, and S., the appointee of the commissioners, Held: The appointment of S. was valid; that, under the provisions of Section 2634, General Code, a vacancy occurred in said office which the commissioners were empowered to fill.”

However, the conclusion reached by the court in the case last mentioned was based upon Section 2634, General Code, which specifically provides that the office of treasurer shall become vacant if the person elected fails to give bond, etc. I find no similar provision in the statutes relating to the county surveyor, although Section 7 of the General Code is a statute of general application of the same general import as said Section 2634, supra.

In the Speidel Case, supra, the second branch of the syllabus, which deals with the question of holding over, reads:

"2. 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."

At the time said case was decided there was a statute declaring a vacancy in the event that the candidate elected for the office of sheriff failed to qualify. However, no mention was made of this statute by the court in its opinion deciding the case. It is noted, however, that the court in its opinion in the Baldwin Case, *supra*, distinguished the facts therein considered from the facts in the Speidel Case, *supra*, in the following language:

" * * * In the Speidel case, *supra*, while a similar statute existed relating to the office of sheriff (Section 2827, General Code), it is not mentioned in the opinion, probably for the reason that Buvinger had died before the close of the polls and therefore the statute was inapplicable. * * *"

The two cases last mentioned construed together are authority for the conclusion that the statutes declaring a vacancy where the elected candidate fails to qualify do not contemplate a case where the candidate dies before election.

From the foregoing it is believed to be clear that Section 8, General Code, does apply to the present incumbent of the office of county surveyor in your county, excepting as said section is modified by the constitutional limitation as to the length of term. As pointed out in the former opinion, found in the Opinions of the Attorney General for 1928, page 1137, hereinbefore referred to, when and if the holdover period of the present incumbent added to his present term for which he was elected exceeds four years there will of necessity be a vacancy. Such a vacancy may be filled by the county commissioners under the provisions of Section 2875, General Code. It may be further pointed out that it will be necessary to provide for the election of a county surveyor at the next regular election held for the election of county officers.

Based upon the foregoing, you are specifically advised that:

1. Where a candidate for county surveyor dies before election day on a day too late for a substitution to be made by the central committee and a majority of the electors cast their ballot for the deceased candidate, the opponent under such circumstances cannot be declared elected.

2. Under such circumstances the present incumbent will hold over under the provisions of Section 8 of the General Code until his successor is elected or appointed and qualified, providing the total tenure under his election shall not exceed four years.

Respectfully,

EDWARD C. TURNER,
Attorney General.