

December 5, 1942.

Hon. Frank Christenson
Member Legislature, Coconino County,
Box 635,
Flagstaff, Arizona.

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Dear Sir:

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Recently you requested our opinion in reference to your status as a member of the House of Representatives. You advised that at the general election of November, 1940 you were elected a member of the House from your county and that you qualified and ever since have discharged your duties of office. That at the general election held in November, 1942, Honorable Clyde Stauffer was elected to succeed you but that Mr. Stauffer died before he qualified for office.

Upon this state of facts you ask for our legal opinion on the question as to whether a vacancy in the office will exist in January, 1943, or will you hold over, or will it be necessary under the law to elect or appoint a successor.

Under the facts as outlined above it is our opinion that under the Constitution there will not be a vacancy in the office on the expiration of your term and that you will continue to hold over until your successor is elected and qualifies. We are also of the opinion that under these facts the law will not authorize the calling of a special election, to elect a successor, or require the county board to appoint one.

We have arrived at these conclusions from a consideration of the hereinafter mentioned provisions of the Constitution, statutes and decisions of our Supreme Court.

Section 21, part 2, Article IV of the Constitution is as follows:

"The members of the first Legislature shall hold office until the first Monday in January, 1913. The terms of office of the members of succeeding Legislatures shall be two years."

Under this section the terms of the first elected members ended on the first Monday in January, 1913, and to give each succeeding elected member a two-year term necessarily all terms of members must begin and end on the first Monday of each odd numbered year thereafter, and consequently your term began on the first Monday in January, 1941 and will end on the first Monday in January, 1943. If Mr. Stauffer had lived and qualified for office, his term would have begun on the last mentioned date. But Mr. Stauffer's unfortunate death prevented him from qualifying, so we must look to other provisions of the Constitution to determine what shall be done in such a case. Section 13, Article 22 of the Constitution is the answer. Said section reads as follows:

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"The term of office of every officer to be elected or appointed under this Constitution, or the laws of Arizona, shall extend until his successor is elected and qualify."

Under the section of the Constitution first referred to herein your present term will expire on the first Monday in January 1943, but the second section of the Constitution above quoted makes it your duty to hold over and perform the duties of office until your successor is elected and qualifies.

The following cases from our Supreme Court sustain this conclusion: Sweeney vs. State, 23 Ariz. 435, 204 Pac. 1025; Rogers vs. Frohmler, 130 Pac. (2d) 271; McCall vs. Cull, 51 Ariz. 237, 75 Pac. (2d) 696.

The case of Sweeney vs. Sweeney vs. State presented a state of facts very similar to the facts we are now considering. In the Sweeney case it appeared the regular incumbent of the office of justice of the Peace of Winslow precinct, J.P. Mahoney, was re-elected to succeed himself, but before he had qualified he died and Sweeney was appointed by the board of supervisors to fill the vacancy. In quo warranto proceedings by the county attorney of Navajo County to oust Sweeney and seat one Robert B. Walton, appointee of a board of supervisors whose personnel had changed, the court held that Sweeney was the lawful incumbent of Mahoney's regular term by virtue of his appointment and that his term extended until his successor was elected and qualified.

In that case the court held that Sweeney was entitled to the office as a hold-over under the Constitution. In deciding the case the court said:

"Under the constitutional and statutory provisions we have referred to, it is therefore evident that, had Mahoney lived and had another been elected to succeed him, he would have been entitled to hold the office of justice of the peace of Winslow precinct until a successor had qualified in the manner provided by law. If the successor so elected had failed to qualify as required by paragraph 179, Civil Code, supra, Mahoney would have held over according to the mandatory terms of the constitutional provision until a successor had been elected and had qualified."

We next consider whether the law authorizes or requires the election or appointment of a successor under Section 55-102 and Sections 55-1101 to 55-1107, A.C.A. 1939. You will note that under these sections a vacancy must exist, to authorize the election or appointment of a successor. Therefore, it becomes necessary to determine whether a vacancy will exist on the first Monday in January, 1943; if there is no vacancy then a successor can not be elected or appointed. While Section 12-404 of the Code provides that a vacancy exists upon the failure of a person elected to file his official oath or bond within the time prescribed by law, the Supreme Court in the Sweeney case held that the statutory provision was repugnant to said section 13 of the Constitution and is therefore void. Using this language:

"It therefore incontestably follows that, as the effect and purpose of subdivision 9, paragraph 221, is to create a vacancy under circumstances where the Constitution expressly declares no vacancy shall exist, the statute is to that extent repugnant to the terms of the Constitution and is void,"

and held that a vacancy did not exist because the person elected in the November election failed to file his official oath within the time prescribed by law.

In the case of McCall vs. Cull, supra, the court quoted with approval from the case of Gosman vs. State, 6 N.E. 349, as follows:

"Upon the assumption that no disqualification existed or has intervened, the right of an incumbent who has been duly admitted into an office continues during the prescribed term, and until his successor is elected and qualified. This results necessarily from the constitutional provision last above quoted....As a consequence, it must result that if no contingency has intervened to disqualify an incumbent from holding the office, or cut off his defeasible title, no vacancy has occurred merely because his prescribed term has expired, if in the meantime the right of his successor has not attached. In such a case the body with whom the power to fill vacancies is lodged, has no function to perform. The office is lawfully occupied by a qualified incumbent, whose title has not been defeated. It is not vacant."

In the case of State vs. Osborn, 14 Ariz. 185, 125 Pac. 884, the court said:

"Where in a statute or the Constitution the tenure of an office is fixed, the courts have many times held that no vacancy occurs if the laws or Constitution provide for their holding over until their successors are elected and qualify."

Under these authorities there will be no vacancy in the office so long as you continue therein as a hold-over, and it follows that a successor cannot be elected or appointed under Sections 55-102 and 55-1107 of the 1939 Code, because these sections only call for an election or appointment when there is a vacancy.

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We might add that regardless of what our opinion may be on this question or even what a court might decide in the matter, it would not settle your question because each house of the legislature, by section 8, part 2, Article 4 of the Constitution, are the judges of the election and qualification of their own members, their judgments are final and may not be set aside by the courts.

Yours truly,

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