PUBLIC INSTRUCTION, DEPARTMENT OF: Where newly-elected township trustee dies after taking oath but before filing bond, incumbent holds over.  
January 3, 1939.

Hon. Grover Van Duyn,  
Asst. Supt. of Public Instruction,  
State House,  
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion based upon the following statement of facts, viz.:

A candidate elected to the office of township trustee on November 8, took his oath of office November 17. He died December 8, prior to filing his bond.

You submit the following questions:

"1. Should the present incumbent, who has served only four years, continue in office?

2. Should your answer to the above question be in the affirmative will it be necessary for him to take the oath of office and file a new bond? Will he continue in office for a term of four years?"

Since the present incumbent has served only four years he is not ineligible to continue to hold under the holdover provision of the Indiana Constitution which provides as follows:

"Whenever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer, other than a member of the General Assembly, shall hold his office for any given term, the same shall be construed to mean, that such officer shall hold his office for such term, and until his successor shall have been elected and qualified."

Art. 15, Sec. 3, Indiana Constitution.

Section 1 of Chapter 236 of the Acts of the General Assembly of 1933 provides as follows:

"Township trustees, township assessors, justices of the peace, constables, three (3) members of the township advisory board, and such other township officers as may be provided for by law, shall be elected at the
general election held on the first Tuesday after the first Monday in November, 1934, and every four (4) years thereafter, and such election shall be conducted by the provisions of the law governing general elections. The term of office of all township officers shall be four (4) years and such term shall begin on the first Monday in January succeeding their election."

Burns Indiana Statutes Annotated (1933), Section 29-1901.

The provision of this statute fixing the term of all township officers at four years, to begin on the first Monday in January succeeding their election, is to be construed, as provided in the above quoted provision of the Constitution, so as to mean that such officer "shall hold his office for such term, and until his successor shall have been elected and qualified."

Being duly qualified in the constitutional sense means that the officer shall have performed in all respects every act requisite before entering the duties of his office.

Kimberlin v. The State, ex rel. Tow, 130 Ind. 120, at p. 125.

The filing of a bond in the office of the County Auditor is one of such prerequisites.

Burns Indiana Statutes Annotated (1933), Sections 65-102 and 65-103.

It follows that the person elected on November 8 failed to qualify as the successor of the present incumbent. The present incumbent, therefore, holds over until his successor is duly elected and qualified. I think the answer to your first question clearly is in the affirmative.

See in support of the above:

Kimberlin v. The State, ex rel. Tow, 130 Ind. 120, together with cases therein cited.

I call attention to the language of the court in the case above cited, on page 124, which is as follows:

"The rule is that, where a person is in the possession of an office, under a constitutional or statutory provision like that found in our Constitution, and a successor is duly elected, but dies before he qualifies, no
vacancy occurs, since one of the contingencies upon which the incumbent’s term of office is to expire has not taken place, namely, the qualification of a successor.”

In answering your second question, I call attention to the following language from the same case, quoting from page 125:

“The weight of authority is that where there exists a constitutional provision such as we are now considering, a term of office fixed by statute runs not only for the period fixed, but for an additional period between the date fixed for its termination and the date at which a successor shall be qualified to take the office. The period between the expiration of the term fixed by statute and the time at which a successor shall be qualified to take the office is as much a part of the incumbent’s term as the fixed statutory period.”

Upon the basis of the above language it apparently would not be necessary for the present incumbent to take the oath of office over again, but I recommend that it should be done and a new bond filed. Under present laws the hold over trustee will, in my opinion, continue in office until his successor is elected and qualified.

ACCOUNTS, STATE BOARD OF: Cost bond of non-resident plaintiff in civil action, when clerk may release.

January 5, 1939.

Hon. Edward C. Brennan,
State Examiner,
State Board of Accounts,
Indianapolis, Indiana.

Dear Sir:

I have before me the request of your predecessor for an official opinion in answer to the following question:

“In cases where a non-resident plaintiff in a civil action posts a cost bond with the clerk of the circuit court, and the judgment for the costs is against the defendant, should the clerk hold the cost bond until the costs are paid, or can same be returned to the plaintiff?”