does not have an absolute right to have such persons paid from county funds. In order to have such persons compensated from the county fund the Treasurer must first convince the board of county commissioners that his judgment in this matter is sound and that the board should approve the appointment of, and recommend the salary for, such personnel.

2. The present necessity for a second deputy and clerk is, in a sense, irrelevant. The only thing that matters is whether the board of county commissioners has, prior to the Thursday following the first Monday in August of 1966, approved the existence of such positions, and whether the county council's appropriation for 1967 includes a salary for such positions. If those conditions exist then the county commissioners do not have a right to deny pay to such deputy and clerk during service in 1967 pursuant to appointment by the treasurer.

3. I am required by statute to advise only state officers and agencies in the conduct of their affairs and therefore am not authorized to plan a course of action for a county treasurer. I may point out, however, that the plaintiffs in both the *Applegate* and *Porter* cases, *supra,* filed actions in mandamus.

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## OFFICIAL OPINION NO. 14

May 15, 1967

**ELECTIONS—TOWNSHIP OFFICERS—Justice of the Peace—Expiration of Term When Successor Does Not Qualify.**

Opinion Requested by Mr. Robert A. O'Neal, Superintendent Indiana State Police.

I am in receipt of your recent letter in which you inquire who is the Justice of the Peace in a given township in view of certain specified facts.

The pertinent facts set out in your letter may be summarized thusly:

1. A Justice of the Peace was both elected and qualified in the year 1962, and he assumed that office on January 1, 1963, for a four-year term ending December 31, 1966.

2. That incumbent Justice and another person were candidates for the office of Justice of the Peace in the general election held November 8, 1966.

3. The other candidate moved out of, and changed his residence from, both the township and the county in which it is situate on November 7, 1966, the day preceding the election.

4. The other candidate received the greater number of votes for the office of Justice of Peace in the general election held November 8, 1966.

5. The other candidate did not, at any time following the election, post a bond or take an oath of office or assume the office of Justice of the Peace. He did, however, file a resignation of office with the County Board of Commissioners on December 27, 1966.

6. Subsequent to receipt of the resignation of the other candidate the County Board of Commissioners appointed a third person to fill the purported vacancy in the office of Justice of the Peace created by the resignation of the other candidate.

7. The incumbent has continued to act as, and intends to continue to act as, Justice of the Peace in that township.

Your question is whether it is the incumbent Justice of the Peace or the person appointed by the Board of Commissioners who is the lawful Justice of the Peace in that township.

There is no doubt that a County Board of Commissioners has the authority to fill any vacancy in an office of Justice of the Peace in any township within that county.

The Indiana Constitution, Art. 6, § 9, provides:

> "Vacancies in county, township, and town offices, shall be filled in such manner as may be prescribed by law."

Acts 1875, ch. 59, § 1, the same being Burns § 49-406 provides:

> "Whenever a vacancy occurs in the office of justice of the peace, it shall be the duty of the board of commissioners of the county in which such vacancy may occur to fill the same by an appointment; which appointment shall be certified to the governor by the auditor of said county, and, upon said certificate of appointment being filed with the governor, he shall commission the person so appointed as justice of the peace to serve until his successor is elected and qualified."

The question, however, is whether under the circumstances there existed a vacancy. "An appointment to fill a vacancy is void when there is no vacancy." *McGuirk v. State ex rel. Gottschalk,* 201 Ind. 650, 659, 169 N.E. 521 (1930).

The Indiana Constitution, Art. 15, § 3, provides:

> "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."

In construing the above constitutional provision the Indiana Supreme Court, in *Swank v. Tyndall,* 226 Ind. 204, 212, 78 N.E. 2d 535 (1948), said:

> "When the elective term ends and no qualified person has been elected and qualified to take over the duties of the office, the person holding the office at the end of the elective term has a right and duty, commanded by Art. 15, § 3, *supra,* to hold the office and discharge its duties 'until his successor shall have been elected

> and qualified.' This service is not a part of his elective term, but is a constitutional term granted to avoid a vacancy—and to assure an ever-continuing government in any and every emergency."

And further, on page 213 of 226 Ind., the Court said:

> "So far as we have found in each such case there was an attack upon the right of the official to hold the office for the contingent, defeasible term provided for by the Constitution. We think in each such case it was the intention of the court to say that the right and duty of the official to hold and to serve the contingent term provided for by the Constitution, is quite as imperative, well founded and impregnable, as his right and duty to serve the definite and certain term for which he was elected."

The above language suggests that the term of office of an incumbent Justice of the Peace or any other elected officer, does not expire until his successor is both elected and qualified. Several earlier cases support that conclusion.

In *Baker v. Wambaugh,* 99 Ind. 312 (1884), a successor (Bell) to the incumbent Justice of the Peace (Clark) was elected but Bell did not give bond or otherwise qualify himself; the county commissioners appointed a third person (Wood) to the office of Justice of the Peace; Clark turned over to Wood his official docket and papers, and Wood qualified himself and thereafter acted as Justice of the Peace. The *Baker* case arose when a defendant against whom Wood rendered a judgment instituted an action in the Circuit Court to enjoin the enforcement of that judgment for the reason that Wood (appointee) was not a Justice since Clark (incumbent) had not resigned and thus there was no vacancy to which Wood could have been appointed. The Circuit Court awarded a perpetual injunction. The Supreme Court reversed the Circuit Court and dissolved the injunction on the basis that a vacancy could occur from voluntary abandonment of the office as well as from formal resignation. In reaching its conclusion the Court said, on page 315:

> "But the complaint in the present case shows that Bell was elected Clark's successor in April, 1882, and was never qualified; then as to Clark the allegation is merely that he never resigned. This allegation does not show that Clark was still holding the office. If Bell failed to be qualified in proper time, Clark might have continued to serve, and might, also, have abandoned the office if he chose so to do."

The Court obviously accepted the principle that a Justice of the Peace whose successor has been elected but not qualified has the right to continue in office.

The case of *Kimberlin v. State ex rel. Tow,* 130 Ind. 120, 29 N.E. 773 (1891), is perhaps more squarely in point even though it concerns a different township office. In that case Tow, the incumbent township trustee, was not a candidate for re-election in the election for that office held in April, 1890. (Acts 1889, ch. 226, § 3, specified that township trustees were to be elected on the first Monday in April in the year 1890 and every fourth year thereafter.) The successful candidate in that election died suddenly and instantly between the closing of the polls and the completion of the counting of the ballots. A purported election was held the following November (presumably in conjunction with the regular general election, although the opinion does not so specify) and both Tow and Kimberlin were candidates. Kimberlin was declared elected by the proper election officials, received a certificate of election, qualified and filed his bond. In the month of December, 1890, the County Commissioners entered an order reciting that there was a dispute as to who was elected township trustee and appointed Kimberlin to that position. Tow, the incumbent, initiated proceedings in the Circuit Court and Kimberlin was enjoined from acting as trustee. From that injunction Kimberlin appealed.

The Supreme Court ruled that the election held in November, 1890 was not authorized by law and was therefore void. The Court considered the right to continue in office of a township trustee whose successor had been elected but died before qualifying in an election in which the incumbent did not participate, who had been defeated in a subsequent popular election

that was declared void, and whose office had been both declared vacant and filled by appointment by the County Commissioners.

To the argument that the constitutional provision that the term continues until a "successor shall have been elected and qualified" should not be strictly construed as meaning "election by the people" but rather as meaning "chosen" or "designated" and therefore should include appointment by the County Commissioners the Court said, on page 123:

> "No authority is cited by the appellant which supports his first position, and we have no knowledge of any such authority; while, on the contrary, the adjudicated cases seem to be harmonious in holding that where one is lawfully in the possession of an office, under a constitutional or statutory provision to the effect that he shall hold until his successor is elected and qualified, his right to hold over continues until a qualified successor has been elected by the same electoral body as that to which such incumbent owes his election, or which by law is entitled to elect a successor. *Gosman v. State, ex rel.,* 106 Ind. 203; *State v. Lusk,* 18 Mo. 333; *People, ex rel., v. Tilton,* 37 Cal. 614; *Lawhorn, Ex Parte,* 18 Gratt. 85; *Johnson v. Mann,* 77 Va. 265; *State, ex rel., v. Jenkins,* 43 Mo. 261; *State, ex rel. v. Harrison,* 113 Ind. 434."

To the question of whether the election of a successor who thereafter fails to qualify terminates the term of the incumbent and creates a vacancy the Court said, on page 124:

> "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. McCrary Elections, section 314; *Commonwealth, ex rel., v. Hanley,* 9 Barr (Pa St.), 513."

The *Hanley* case cited in the quotation above also concerned the effect of the death of a successful candidate (to the office of clerk of the orphans' court) before qualification. The Indiana Supreme Court, on page 125, quoted with approval this passage from the opinion of the Pennsylvania Court:

> "In discussing the questions arising under these facts, the Supreme Court of Pennsylvania said: 'Being duly qualified in the constitutional sense, and in the ordinary acceptation of the words, unquestionably means that he, the successor, shall possess every qualification; that he shall, in all respects, comply with every requisite before entering on the duties of the office; that, in addition to being elected by the qualified electors, he shall be commissioned by the Governor, give bond as required by law, and that he shall be bound by oath or affirmation to support the constitution of the commonwealth, and to perform the duties of the office with fidelity. Until *all* these requisites are complied with by his successor . . . the respondent is *de jure* as well as *de facto* the clerk of the orphans' court.' "

Numerous other cases could be cited in support of the proposition that the term of an incumbent office holder who is otherwise eligible continues until an elected successor qualifies himself, but the cases discussed above should suffice.

Since the successful candidate described in your statement of facts did not qualify himself for office there is no need to consider the question of whether, having moved out of the township prior to the election and therefore being ineligible, the successful candidate was, in fact, elected.

It is my opinion that the incumbent Justice of the Peace described in your statement of facts is the legal Justice of the Peace in his township and will continue to be so until a successor is both elected and qualified, or until he resigns or abandons his office, or until he becomes ineligible to hold the office.