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COUNTY TREASURER: Death of treasurer-elect.

Where a county treasurer-elect dies prior to qualifying for office, no vacancy in the office is created. The incumbent treasurer has the right to hold the office until his successor is elected and qualified.

No. 4390

February 2, 1965.

Hon. James M. Hare
Secretary of State
The Capitol
Lansing, Michigan

Your recent letter states that at the November 3, 1964 general election Mason County elected a new county treasurer, who died on November 9, 1964. The incumbent treasurer did not run to succeed himself. You therefore wish my opinion as to whether the death of the county treasurer-elect created a vacancy to be filled after January 1, 1965.

The exact question you present was before this office in 1912.¹ In summary, this office held at that time that the incumbent was to continue to hold his office until his successor was elected and qualified. The third subdivision of C.L. 1897 § 3596 provided for special elections to be held in cases of vacancies in office created by the death of the officer before the commencement of the term of office for which he was elected. At the present time there is no statute providing for special elections where the officer-elect dies prior to the commencement of his term of office. Furthermore, under the present Michigan law there is no vacancy created by the death of the county treasurer-elect prior to his qualification for the office.

Section 206 of the Michigan election law, being C.L.S. 1961 § 168.206, M.S.A. 1956 Rev. Vol. § 6.1206, provides:

"The office of county clerk, county treasurer, register of deeds, prosecuting attorney, sheriff, drain commissioner, surveyor or coroner in any county in this state shall become vacant upon the happening of any of the following events: Death of the *incumbent*; his resignation; his removal from office for cause; his ceasing to be a resident of the county in which his office is located; his conviction of an infamous crime or an offense involving the violation of his oath of office; the decision of a competent tribunal declaring his election or appointment void; his refusal or neglect to take and subscribe to the constitutional oath of office and deposit the same in the manner and within the time prescribed by law; or his refusal or neglect to give bond in the amount and manner and within the time prescribed by law." [Emphasis supplied]

It is to be noted that the death of the incumbent creates a vacancy. There is no provision creating a vacancy in the case of the death of the officer-elect. There are other provisions of the Michigan election law which provide for alternatives in the event of the death of the candidate after the

¹ O.A.G. 1913, p. 159, December 16, 1912.

primary ballot has been printed, but before the actual primary election.² There is also a provision which provides for an alternative in the event a candidate has been nominated to a county office and dies prior to the general election.³ Thus, at this point it may be stated that the death of the county treasurer-elect does not create a vacancy, nor is there any alternative provided specifically in the event of his death prior to his qualification.

We turn, then, to the next question, which is: Does the incumbent treasurer continue to hold over? The answer to that question is yes. This answer is based upon the "hold-over" provision of the statute setting forth the county treasurer's term of office.

The Michigan Supreme Court has examined the hold-over provisions of statutes providing terms of office. As early as 1891⁴ the Supreme Court held that the death of the auditor-elect of Wayne County, prior to his qualification and before the expiration of the term of office of the incumbent, created no vacancy, and the incumbent continued to hold said office. In *Toy ex rel. Elliott v. Voelker*, 273 Mich. 205, the Supreme Court had before it an analogous case, except for one important difference in the facts. There, also, the officer-elect died prior to the date on which his term was to begin. The major difference is the court held that prior to his death he had qualified for the office. In distinguishing that case from those which had preceded, the court pointed out very clearly that the death of an officer-elect prior to his qualification did not create a vacancy which could be filled by appointment, provided that there was an incumbent whose term of office was for a prescribed period and "until his successor is elected and qualified." The Michigan Supreme Court said of the hold-over clause:

"Giving effect to the hold over clause as it reads results in no absurdity nor departure from constitutional policy. The term consists of a 'fixed tenure and a contingent term.' * * * The hold over provision is purely conditional, on failure of an elected successor or his qualification. Thereby, the right of incumbent to hold over term does not end until his successor has been elected and has accepted the office by qualifying. So, barring contingencies, the office is held by an elected official. * * *" [p. 216]

In an earlier case, *Common Council of Detroit v. Schmid*, 128 Mich. 379, the Supreme Court adopted the reasoning of the lower court which contained the following statement:

"* * * The present city officers were elected by the people, under the law that then existed, and with full knowledge of the law, to hold their offices for the full term for which they were elected. What was that term, under the law? It was just this: That they should hold their offices for the full time specified in the law for each officer, respectively, and until their successors were elected and qualified. Under the law they hold their offices, not by legislative appointment, but by the votes of the people constitutionally recorded, and from no other authority. * * *" [p. 391]

² C.L.S. 1961 § 168.195, M.S.A. 1956 Rev. Vol. § 6.1195.

³ C.L.S. 1961 § 168.199, M.S.A. 1956 Rev. Vol. § 6.1199.

⁴ *Lawrence v. Hanley*, 84 Mich. 399.

The incumbent Mason County Treasurer was elected at the General November Election of 1962 for a two year term beginning on the first day of January next following his election and continuing until a successor shall have been elected and qualified, all as set forth in Section 203 of the Michigan Election Law.⁵ The two year term ended December 31, 1964 but because of the language of the statute and under the rule of the foregoing court decision the incumbent continues in office. He does not begin a new term on January 1, 1965 but holds over until a successor has been elected and qualified.⁶ His status in the law is that of a *locum tenens*. The expression *locum tenens* is derived from the Latin and is defined in *54 Corpus Juris Secundum*, page 666, as meaning: "holding the place; a deputy, substitute, lieutenant, representative; a hold-over in office." In *Burrill's Law Dictionary*, Vol. 2, "*locum tenens*" is defined as: "A lieutenant, deputy or representative. Literally, a place holder; one who holds the place of another." [p. 165] The foregoing definitions would indicate that the expression *locum tenens*, if used accurately, covers two situations:

(1) Where there is a principal or incumbent in office but for some reason he is not qualified or capable of performing his duties, then a deputy, substitute, lieutenant or representative can be appointed who would be *locum tenens* and hold in place of another;⁷

(2) Where an incumbent holds over past the end of his term and until his successor is elected and qualified.

In the case of *Rogers v. Frohmler, State Auditor* (1942), 59 Arizona 513, 130 P.2d 271, one Houston was a duly qualified and acting member of the Industrial Commission of Arizona for a term which expired on January 8, 1942. He was not reappointed and the issue before the Court was his status after the expiration of his term. On this point the Court said:

"The governor did not exercise his undoubted power [of appointment] before January 8, when the vacancy in Houston's old term ended and a new term began. But on that date, under the statute, Houston was still the *locum tenens* of the new term beginning on January 8, under the obligation of discharging the duties of the office, but subject to being relieved of that obligation any time that a successor had qualified."

If the incumbent Mason County Treasurer continues in office there will be no vacancy. He does not hold his office for any definite term but may lawfully continue to serve until his successor is elected and qualified. Under present law such a successor will not be elected until the general November election of 1968. However, a vacancy in the office would be created prior to that date by the occurrence of one of the events designated in Section 206 of the Michigan Election Law.⁸

⁵ C.L.S. 1961 § 168.203; M.S.A. 1956 Rev. Vol. § 6.1203.

⁶ Sec. 203 of the Mich. Election Law, *supra*, was amended by Act 35 P.A. 1963, Second Extra Session, and by Act 185 P.A. 1964, Art. VII, Sec. 4, Constitution of 1963, fixes the term of the county treasurer at four years.

⁷ For example, such a situation could arise where the governor suspends a public officer under Art. V, Sec. 10 of the Mich. Const. of 1963 and makes a provisional appointment under Sec. 11 of that Article.

⁸ C.L.S. 1961 § 168.206; M.S.A. 1956 Rev. Vol. § 6.1206.

The facts of this opinion emphasize the need for appropriate legislation declaring the office to be vacant upon the death of the person elected to the office prior to his qualifying for the office and providing for a special election to fill the vacancy.

650203.1

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MOTOR VEHICLES: Assessment of points.

Abstracts of conviction for driving without a license, driving without a license in possession, driving in violation of restrictions imposed on a license, or, driving while license has been denied, suspended or revoked, as provided for under Sections 301, 311, 312, 904 and 905 of Chapters III and VIII of Act 300, P.A. 1949, as amended, should be forwarded under the provisions of Section 732, as amended, of said act to the division of driver and vehicle services in the office of secretary of state. Said division is required to assess and record points for these convictions under the provisions of Section 320a, as amended, of said act.

No. 4330

February 3, 1965.

Hon. James M. Hare
Secretary of State
The Capitol
Lansing, Michigan

You have requested my opinion on two questions. The first is whether abstracts of conviction for driving without a license, driving without a license in possession, driving in violation of restrictions imposed on a license, or, driving while license has been denied, suspended or revoked, as provided for under Sections 301,¹ 311,² 312,³ 904,⁴ and 905⁵ of Chapters III and VIII of the Michigan Vehicle Code being Act 300, P.A. 1949, as amended, should be forwarded to the department⁶ under the provisions of Section 732, as amended, of said act.

Section 732⁷ requires the forwarding to the department of an abstract of the court record of any conviction of violation of any provision of the act. That duty is placed upon the magistrate of a court not of record, and also on the clerk of a court of record. The only exception is for convictions involving the illegal parking or standing of a vehicle.

It follows that abstracts of conviction for driving without a license, driv-

¹ C.L.S. 1961 § 257.301; M.S.A. 1960 Rev. Vol. § 9.2001.

² C.L.S. 1961 § 257.311; M.S.A. 1960 Rev. Vol. § 9.2011.

³ C.L.S. 1961 § 257.312; M.S.A. 1960 Rev. Vol. § 9.2012.

⁴ C.L.S. 1961 § 257.904; M.S.A. 1960 Rev. Vol. § 9.2604.

⁵ C.L.S. 1961 § 257.905; M.S.A. 1960 Rev. Vol. § 9.2605.

⁶ Section 12 of the Michigan Vehicle Code states:

“‘Department’ means the division of driver and vehicle services created in the office of the secretary of state by the provisions of this act, acting directly or through duly authorized agents and employees.”

⁷ C.L.S. 1961 § 257.732; M.S.A. 1960 Rev. Vol. § 9.2432.