

moved, or is under some disqualifying disability. But when the incumbent is qualified to hold the office and he still is in the office it does not become vacant because of a failure to elect a successor; his term still goes on; until the successor comes in and takes the place there is no vacancy; the old officer goes out, and the successor takes his place. The office is filled also when an officer holds over; in that case the man is his own successor. Under the section quoted the County Court, when a vacancy occurs, has the power to fill it by appointment until the next general election. It is clear there that the County Court fills the vacancy until the next general election, and then the people fill it, and the term terminates as it would have had there been no vacancy.

The vacancy that precedes the election and qualification last referred to is filled by the County Court before, and the remaining portion of the term is filled by the voters at the election.

Other provisions of the statute of the Territory refer to vacancies. Section 270 relates to Territorial or county officers. It provides, in case of the death, resignation or other disability of any Territorial officer, authority is given to fill. There the vacancy is described as by death, resignation or other disability.

In the section that follows the one referred to the words are used: "In case of vacancy by the death, resignation, or other disability of any probate judge," and again, "Or in case of a vacancy by the death, resignation, or other disability of any county or precinct officer, except probate judge or justice of the peace, made elective," and so on. In section 276 of the same book, Congress, in providing for the election of a delegate to Congress, used this language.

Paine, in his work on elections, refers to numerous decisions. In section 227 he says, "The Constitution of California contained the following sections: 'When any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have power to fill such vacancy by granting a commission, which shall expire at the end of the next session of the Legislature, or at the next election by the people, nor shall the duration of any office not fixed by the constitution ever exceed four years.' A statute was in these words: Each of said commissioners shall hold his office for the term of four years, and until his successor is elected, commissioned, and qualified, as in this act provided. The Supreme Court held that under the constitution of the State it was proper that executive officers, elected by the people, should hold over, rather than that the duties should devolve upon those in whose election the people had no choice; that temporary executive appointments were admissible only when there were no incumbents of particular offices to hold over and perform their duties. That if there was a vacancy in any just sense, after the expiration of the term and before the election and qualification of a successor, the statute itself filled the vacancy for the time being, by providing that the former incumbent should hold un-

til the election and qualification of a successor, and that a failure to elect a successor to an office at the expiration of his term did not create a vacancy to be filled by executive appointment. A township trustee, who was elected at the April election in 1868, but did not then give a new bond, did not vacate the office, but was entitled to hold it until his successor was elected and qualified. An officer elected for a term of years, and until his successor is chosen and qualified, may hold over for an indefinite period, if no successor be elected and qualified.

Reference has also been made to a decision of the Supreme Court of Indiana, made in 1888, found in the *Northeastern Reporter*, Volume 16, Page 384, *State vs. Harrison*. It is upon the point as to what constitutes a vacancy for which an appointment may be made. The case involves a controversy between the relator, Joseph L. Carson, and the respondent, Thomas H. Harrison, concerning the right to exercise the office of President of the several Boards of Trustees of the benevolent institutions of the State. The court says, "Pursuant to the provisions of the act, the respondent was elected president of the Boards on the 27th day of February, 1883. The Legislature failed to elect a successor in 1887, as the law required, and the respondent continued and still continues in the office, asserting the right to hold over until a successor shall have been duly elected by a succeeding Legislature. Being of opinion that the failure of the general assembly to elect a successor produced a vacancy in the office, the governor appointed and commissioned the relator as president of the several boards on the 27th day of May, 1887." The law provided that a person should hold until his successor was elected and qualified, and the court, referring to the law, says: "So much of the above mentioned section as applies to the office in dispute reads as follows: 'When, during a recess of the general assembly, a vacancy shall happen in any office, the appointment of which is vested in the general assembly, the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified.' * * * "It must nevertheless be borne in mind that the power of the governor to make a valid appointment does not arise until there is a vacancy in fact. The court says: 'The word "vacancy," as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied in the manner provided by the constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it, and, conversely, it is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event.'"

After citing a number of cases the court says: "When an office has been conferred upon one legally eligible, and has been accepted, no vacancy can be said to exist therein until the term of service, and right to hold, as fixed by the law, expires, or until the death, resignation, or removal of the person elected or appointed. * * *

"The policy of provisions of that nature is to prevent the happening of vacancies in office, except by death, resignation, removal, and the like. They rest upon the assumption that the wiser and more prudent course is, in case the electoral body fails to discharge its functions, to authorize the incumbent to hold over until the succeeding election, rather than that a vacancy should occur to be filled by the appointing power. In recognition of the wisdom of this policy the organic law of the State declares 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 time, 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.' * * * "The term of the office is fixed at two years certain, with a contingent extension. When the contingency happens, this extension is as much a part of the entire term as any portion of the two years. It is certain therefore that all offices to which the above constitutional provision applies are held by the same title, or by as high and lawful tenure, after the prescribed term, until the title of a duly elected and qualified successor attaches as before, and during such term. This right to hold over continues until a qualified successor has been elected by the same electoral body as that to which the incumbent owes his election, or which, by law, is entitled to elect a successor." That case lays down the rule explicitly, that where an officer holds for a term and until his successor is elected and qualified, that the time that he holds after the term fixed, say two years in this case, is as much a portion of his term as the time preceding. That in either case he holds by virtue of the law. The law makes it a part of his term.

The case of *Parcel vs. the State*, ex rel. Lowrey, in the 110th Indiana, page 112. This was a proceeding commenced on the 10th day of January, 1886, by an information in the name of the State, on the relation of Robert A. Lowrey, against Clark R. Parcel, to test the right of the latter to hold the office of county commissioner for the third district of Pulaski county. In that case the incumbent died, and Clark R. Parcel was thereupon appointed to fill the vacancy. It seems there was no question about the vacancy; there was an actual vacancy caused by death—not a case where the person held over. The court says: "But according to the agreed statement of facts, it does not appear that any one was elected at the November election in 1884." (That was the regular election). "Hence, at the expiration of Lowrey's second term, no successor having been elected and qualified, he continued rightfully to hold over until his successor was elected and qualified. No election having taken place in 1884, to fill the term which was to commence in 1885, that term remained vacant, except as the relator occupied it under his right to hold over until the election and qualification of his successor. The term being thus vacant, it came under the provision of section 4678, R. S. 1881, which required that at the general election in 1886 all existing vacancies