

## **Opinion No. 64-146**

December 9, 1964

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Frank Bachicha, Jr., Assistant Attorney General

**TO:** Honorable Louis E. DePauli, District Attorney, Eleventh Judicial District, Gallup, New Mexico

### **QUESTION**

#### QUESTION

1. Does District Judge C. C. McCulloch, Eleventh Judicial District have authority to sign orders in cases which originally arose and proceeded to judgment in the Small Claims Court where said judge was designated, pursuant to Section 16-5-9, N.M.S.A., 1953 Compilation, by the then Judge of the Small Claims Court subsequent to his resignation?
2. Does Mrs. Kittell, designated Small Claims Court Clerk by the same judge of the Small Claims Court, subsequent to his resignation, have authority to perform the duties of the office of Clerk of the Small Claims Court?

#### CONCLUSION

1. Yes, but see analysis.
2. Yes, but see analysis.

### **OPINION**

#### ANALYSIS

Sections 1 through 12, Article 5 of Chapter 16 of the New Mexico Statutes Annotated, 1953 Compilation, contain the statutory law of this state relating to Small Claims Courts. Certain amendments to these sections were effected by the Laws of New Mexico, 1955, Chapter 104, which are not however pertinent to our present inquiry. By Chapter 231 of the Laws of New Mexico, 1963, Sections 16-5-1 and 16-5-3, supra, were amended. It is to be noted though that the Act itself provides that these amendments are not to become effective until January 1, 1965. By far the most important consequence stemming from these amendments will be the elimination of certain of these courts previously established, since the population requirements applicable to the county wherein it is sought to establish such courts has been raised from "over 50,000 persons" to "100,000 or more persons." The only county within New Mexico which will meet these new population requirements is Bernalillo, according to the 1960 Federal

Census. See: **U.S. Census of Population: 1960, U.S. Department of Commerce, Bureau of the Census.** San Juan County, New Mexico, is shown to have a population, as of 1960, of 53,306 persons. Therefore after January 1, 1965 there will no longer be a Small Claims Court in San Juan County, by operation of law. At the present time such court is legally in existence, although inoperative since the resignation of the judge thereof.

It is our understanding that the former Judge of the Small Claims Court resigned that office, effective April 6, 1964. The "Designations" referred to in the questions posed above, appear to have been executed on April 7, 1964. Both of the copies in our possession show thereon a stamp of the District Court, San Juan County, New Mexico, indicating that they were filed therein on April 7, 1964.

Section 16-5-9, N.M.S.A., 1953 Compilation, is strictly pertinent to this inquiry. It reads as follows:

"16-5-9. **Absence or Disability of Small Claims Court Judge.** -- Whenever the small claims court judge in such counties shall be absent from the county wherein he was elected, or shall be incapacitated or unable to perform his duties as such judge for any cause whatsoever, the district judge of said county, or any other district judge holding court in such county for him may, **at the written request and designation of said judge of the small claims court filed in the minutes of the small claims court,** do any and all things and perform all duties that otherwise could have been done by said small claims court judges, without the necessity of having the causes, matters, proceedings or cases transferred from the docket of the small claims court to the docket of the district court." (Emphasis supplied).

Two questions then are presented. First, does the resignation of the judge of the small claims court permit Section 16-5-9, supra, to become operative? Secondly, if it does, are the Designations executed by said judge valid even though he resigned prior to the effective date of such Designations?

Note that the provisions of Section 16-5-9, supra, become operative only "whenever . . . the judge . . . shall be absent . . . or shall be incapacitated or unable to perform his duties as such judge for any cause whatsoever." It is also required that a written request be made and that the designation be filed in the minutes of the small claims court.

There is an indication by our legislature that it contemplated the occurrence of a vacancy in the office of judge of the small claims court, whether such vacancy be caused by resignation, death, removal, etc. of the elected or appointed officer. This is revealed in the following language contained in Section 16-5-3, N.M.S.A., 1953 Compilation:

"16-5-3. **Election of Judge -- Qualifications -- Salary -- Filling of Vacancy.** -- . . . Whenever a vacancy shall occur in the office of a judge of said court, the same shall be filled for the unexpired term by appointment of a person qualified under the terms of this

act by the governor of the state and the person so appointed shall hold office until his successor is duly elected and qualified."

It is clear that the resignation of the judge of the small claims court caused a vacancy in that office. Section 5-3-1, N.M.S.A., 1953 Compilation, reads in pertinent part as follows:

"5-3-1. **Circumstances Causing Vacancy in Local Office.** -- Any office belonging to the class mentioned in section 3954 (5-3-3) becomes vacant under any of the following circumstances:

.....

5. When the officer removes from the county in which he is elected and in case of municipal officers, when he removes from the town or city for which he is elected;

...

7. By resignation of the officer;

8. By an officer accepting and undertaking to discharge the duties of another incompatible office."

Such vacancy could have been filled by appointment of a successor by the governor of the state, in accordance with Section 16-5-3, supra. Absent such appointment and although such vacancy technically and legally existed, the resigning judge could legally continue to exercise the functions and duties of that office. Several authorities substantiate this position. Attorney General Opinion No. 64-139, dated November 12, 1964, dealt with a problem closely allied to that presented here. This Opinion held that where an appointment is made to fill a vacancy in the office of county commissioner, and no one is elected to fill the balance of the unexpired term, the appointee continues to exercise the authority of such office until January 1st next succeeding the general election. Among other authorities reliance was placed upon Article XX, Section 2, New Mexico Constitution, as well as the case of **Haymaker v. State, ex rel. McCain**, 22 N.M. 400, 163 P. 248, both of which we believe are pertinent to our present inquiry. Article XX, Section 2, supra, reads as follows:

"Every officer, unless removed, shall hold his office until his successor has duly qualified."

The **Haymaker** Case concerned a construction of the above Article, and it involved first a question of incompatibility between offices and secondly, upon finding such incompatibility, a question of the power of the court to remove an official from her elective office, where a successor had not yet qualified therefor. The court held as follows:

". . . We, therefore, are constrained to hold that, notwithstanding the resignation of the Plaintiff in error of the office of the city board of education, or the acceptance by her of the incompatible office, the court was without power, in absence of the qualification of a successor to her for such office, in this proceeding, to remove plaintiff in error therefrom. . . ."

A very important part of that decision, as far as we're concerned, appears at page 407 thereof, as follows:

". . . Current authority firmly established the proposition that an officer holds until his successor qualifies, **even though he has tendered his resignation and the same has been accepted.** Thus in the note to People v. Williams, 36 Am. St. Rep. 514, note page 526, it is said:

'In those states having a statute which provides that a person elected to office shall serve therein until his successor is elected or appointed and qualified, an officer, although his resignation is tendered to and accepted by the proper authority, continues in office . . . as such officer until his successor has qualified. During the interval between the acceptance of his resignation and the qualification and induction of his successor into office, the resigning officer may be compelled by mandamus to perform any of the duties which pertain to the office from which he has resigned' (citing authorities).

In People v. Supervisor, 100 Ill. 332, it was said that **in order to make the resignation effective it must be followed by the act of the successor in qualifying for the office.** It was also said in that case that the statute providing that officers should hold office until their successors are elected and qualified was significant as denoting the policy of the state, **and that the 'public convenience shall not suffer from a vacancy in such public offices,** but that the office shall ever be full, so that there will always be some one competent to perform the duty belonging to the office.' Assuming that the resignation of the plaintiff in error of the first office had been accepted, a vacancy as defined in section 3955, Code 1915, did occur in the office of member of the board of education of the city. But in view of the constitutional provision cited supra, the vacancy, so-called, was not a corporeal vacancy; a condition simply arose thereby which gave the right to the appointing or electing power to appoint or elect some person to the said office in the place and stead of the plaintiff in error. In other words, the right to fill the first office, by the proper power, was initiated thereby, but such right had no effect whatever upon the status of the plaintiff in error with respect to that office until the successor qualified for the office. All that is said in this regard equally applies to the provisions that the acceptance, etc., of an incompatible office vacates the first office. . . ." (Emphasis supplied).

The above supports the conclusion that the judge of the small claims court of San Juan County was empowered to act officially notwithstanding his resignation, inasmuch as his successor had not yet duly qualified. This, however, leaves undecided the question as to the legality of employing the provisions of Section 16-5-9, supra, as discussed above. It has been brought to our attention that the former judge of the small claims court of

San Juan County has been residing in Albuquerque since shortly after his resignation. Such removal from the County of San Juan would, for all practical purposes, render the said judge incapacitated or unable to perform his duties as such judge within the intendment of Section 16-5-9, supra. This is so without regard to the ineffectiveness of his resignation to legally impede him from performing the duties developing upon him as judge, or for that matter, to relieve him from any of the responsibilities pertaining to that office.

It is our opinion therefore, based upon the foregoing, that the Designation executed by Thomas M. Thompson, in his capacity as judge of the small claims court, San Juan County, and pertaining to the Honorable C. C. McCulloch, District Judge, was competent to empower the said Judge McCulloch to perform the duties as judge of the small claims court. Judge McCulloch therefore, may continue to act in that capacity until the appointment and qualification of a successor to Judge Thompson, as provided by law, or until the latter's incapacity to perform those duties is cured, whichever sooner occurs.

It is likewise our opinion that Mrs. Kittell may perform the duties of the office of clerk of the small claims court, if the requirements of Section 16-5-4, N.M.S.A., 1953 Compilation, are followed. The power of Judge Thompson to appoint a clerk is evident, in spite of his resignation, based upon our previous analysis herein.