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VACANCIES—VILLAGE COUNCIL—CAUSED BY FAILURE OF FOUR OLD COUNCILMEN TO HOLD OVER—FILLED BY MAYOR'S APPOINTMENTS AFTER THIRTY DAYS, IF NEWLY ELECTED MAYOR FAILS TO QUALIFY.

SYLLABUS:

1. *Two newly elected members of a village council, not constituting a majority, have no power to fill four vacancies in such council, caused by the failure of four old members to hold over.*

2. *Such vacancies should be filled by appointments of the village mayor after the expiration of the thirty day period, as provided in Section 4236, General Code.*

3. *When a newly elected mayor has not qualified, the old mayor holds over by the express terms of Section 4255, General Code, and is the proper person to fill said vacancies in the village council.*

COLUMBUS, OHIO, January 29, 1930.

HON. C. LUTHER SWAIM, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—I am in receipt of your recent communication which reads as follows:

“A question has arisen in the village of Midland of this county which involves the following state of facts.

During the latter part of the year 1929 the village council was composed of four members only. The vacancies not being filled. Only two persons were elected for council at the November 1929 election and the four former members refused to take appointments or to hold over as members of council. The person elected as mayor has refused to qualify. If I am not mistaken, you ruled on a similar state of facts for a small village some time during the last two weeks of December and the ruling was that the new members of council could fill these vacancies after thirty days from their taking office.

I would, therefore, appreciate a copy of this opinion which will satisfactorily answer the questions raised in this matter, I believe.”

Your attention is directed to the provisions of Sections 4215, 4236, 4237 and 4255, General Code. Section 4215 provides for a village council of six members. Section 4236 states that “when the office of councilman becomes vacant the vacancy shall be filled by election by council for the unexpired term” and “If council fail within thirty days to fill such vacancy the mayor shall fill it by appointment.” Section 4237 provides, *inter alia*, that a majority of council shall be a quorum to transact business. Inasmuch as there would have to be four members to constitute a quorum to do business, it is obvious that the two regularly elected members could not legally fill the four vacancies, and can do no more than adjourn until the thirty day period elapses when the mayor should designate appointees.

However, you state in your communication that the newly elected mayor has not qualified. Such being the case, the old mayor rightfully holds the office under an express provision of Section 4255, General Code, heretofore mentioned and which reads, so far as pertinent, as follows:

“The mayor shall be elected for a term of two years, commencing

on the first day of January, next after his election, and *shall serve until his successor is elected and qualified.* * * * * " (Italics the writer's)

Of course, it is possible that the old mayor has abandoned the office, but I am assuming for the purposes of this opinion that such is not the case; hence it is believed that the old mayor is the proper person to fill the four vacancies after the expiration of the thirty day period.

The opinion referred to in your communication is undoubtedly my Opinion No. 1337, rendered on December 27, 1929, to the prosecuting attorney of Hardin County. Said opinion held as disclosed by the syllabus as follows:

"1. Where an entire new village council of six members is elected and four of such councilmen-elect are unable to qualify because of having served as election judges in violation of Section 5092, General Code, none of the outgoing members of council hold over because of such situation.

2. The two duly elected members of council not constituting a majority have no power to fill the four vacancies, but after expiration of the thirty day period provided in Section 4236, General Code, the vacancies will be filled by appointment of the mayor."

While the facts in that opinion were somewhat different from those in the situation now before me, nevertheless the law, as contained in the second paragraph of the syllabus, *supra*, is clearly applicable to your inquiry. I am enclosing a copy of said opinion.

In view of the foregoing, I am of the opinion that:

1. Two newly elected members of a village council, not constituting a majority, have no power to fill four vacancies in such council, caused by the failure of four old members to hold over.

2. Such vacancies should be filled by appointments of the village mayor after the expiration of the thirty day period, as provided in Section 4236, General Code.

3. Since the newly elected mayor has not qualified, the old mayor holds over by the express terms of Section 4255, General Code, and is the proper person to fill said vacancies in the village council.

Respectfully,
GILBERT BETTMAN,
Attorney General.

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APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN
JEFFERSON COUNTY.

COLUMBUS, OHIO, January 29, 1930.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*