

2001.

CONSTABLE—TEMPORARY REMOVAL FROM TOWNSHIP DOES NOT
VACATE OFFICE.

SYLLABUS:

When a constable moves from a township in which he was elected to another township, with the intention of returning after a short period of time, under circumstances which do not show an abandonment of the office, the office which he holds is not thereby vacated.

COLUMBUS, OHIO, June 20, 1930.

HON. LEE D. ANDREWS, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—Your recent communication reads as follows:

“A constable was elected at the last election, duly qualified, and is now serving in this office. Recently he moved from the township in which he was elected, to another township in this county. However, he has only moved there temporarily, in order to farm his crops and will return to the township in which he was elected, in the autumn.

Does his temporary absence from the township constitute a vacancy in this office of constable?”

Section 4 of Article XV, of the Ohio Constitution, reads in part, as follows:

“No person shall be elected or appointed to any office of this state unless possessed of the qualifications of an elector. * * * ”

The “qualifications of an elector” are set forth in Section 1 of Article V of the Ohio Constitution, as well as Sections 4785-29 et seq. of the General Code.

It is to be noted from the above constitutional and statutory provisions that a non-resident of a township would be ineligible to election to the office of constable. It seems, however, that your question has to do with one who becomes a non-resident of the township after he was elected to the office of constable and after he qualified for that office and entered upon the performance of his duties. In the consideration of your question, I shall assume that the constable whom you mention has not abandoned his office by refusing or neglecting to exercise the functions thereof, and that he is still attentive to his duties so that he would not be removable for misconduct in office under the terms of Sections 10-1 et seq. and Sections 6212-34, General Code.

Section 3261, General Code, appearing in Part I, Title 2, Division 2, Chapter I of the General Code, under the heading “General Provisions,” sub-heading “Officers,” provides:

“If by reason of non-acceptance, death, or *removal* of a person chosen to an office in any township, except trustees, at the regular election, or upon the removal of the assessor from the precinct or township for which he was elected, or there is a vacancy from any other cause, the trustees shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term.” (Italics the writer’s).

Section 3329, General Code, appearing in Chapter 5, of the same part, title and division as Section 3261, *supra*, under the heading “Constables,” provides:

“When, by death, *removal*, resignation, or non-acceptance of the person

elected, a vacancy occurs in the office of constable, or when there is a failure to elect, the township trustees shall appoint a suitable person to fill such vacancy until the next biennial election for constable, and until a successor is elected and qualified. If there is no constable in a township, the constable of an adjoining township in the county shall serve any process that a constable of such township is authorized by law to serve." (Italics the writer's.)

It is obvious that Sections 3261 and 3329, General Code, supra, should be read together, as they are in *pari materia*. In fact, this office has heretofore so held in an opinion reported in Opinions of the Attorney General for 1927, Volume II, page 1435 at 1439, wherein it is stated, after quoting both of the above sections:

"These sections relating to the same subject matter must be construed as statutes in *pari materia*."

The above mentioned opinion, at page 1440, also held:

"In passing, although both sections last above quoted provided for appointment by the trustees in the case of 'removal,' it is my opinion that the removal contemplated is a voluntary moving away from the township and not a removal by operation of law (Sections 10-1, et seq., or Section 6212-34, General Code)."

The above construction of the word "removal" harmonizes with its interpretation by a former Attorney General, which interpretation is to be found in Opinions of the Attorney General for 1921, Volume I, page 159. Said opinion held in the syllabus:

"The permanent removal from the township of the township treasurer creates a vacancy in the office of township treasurer, which vacancy it is duty of the township trustees, pursuant to the provisions of Section 3261, G. C., to fill."

In the body of the opinion it is further stated:

"It is also proper to say that we think the word 'removal,' as found in Section 3261, G. C., means permanent, as distinguished from mere temporary removal. * * *

It may also be added that the view herein expressed as to the meaning of the word 'removal' in Section 3261, G. C., is in agreement with the view taken by a former opinion of this department, found in Opinions of the Attorney-General for 1917, Vol. I, p. 527, although in said opinion the construction herein given was assumed to be the correct one without discussion."

I am inclined to agree with the 1921 opinion, wherein the word "removal" is construed to mean permanent removal. Although I find no prior opinions of this office, or court decisions directly involving the matter of a constable's removal from the district, I do find several opinions discussing analogous provisions in statutes controlling members of boards of education and township trustees. The statute controlling a vacancy in the office of a township trustee (G. C. 3262) provides, in substance, that when for any cause a township is without a board of trustees, or there is a vacancy in such board, the vacancy shall be filled in the manner set forth therein.

In the Opinions of the Attorney General for 1924, page 525, it was held in the syllabus:

"1. Upon a township trustee changing his residence from the township in which he was elected to another, a vacancy in such office is created, to be filled in the manner provided by Section 3262.

2. Whether or not there has been such a change of residence is a question of fact to be determined by ascertaining the intent of such person. If he removes with the purpose of establishing a fixed habitation elsewhere and does not intend to return to his former home, a change of residence is effected; or, in the event that after a temporary removal he should decide to permanently remain away from his original habitation, this would likewise constitute a change of residence. Circumstances surrounding the acts of such a party may be considered for the purpose of determining what his real intentions are."

In the case of members of boards of education, Section 4748, General Code, provides that "removal from the district" of a member of a board of education creates a vacancy in such board. My predecessor in an opinion appearing in Opinions of the Attorney General for 1927, Volume II, page 1057, exhaustively considered the question involved in the removal of a member of the board of education from the district. He held as set forth in the syllabus:

"Permanent removal from the district of a member of a board of education creates a vacancy in such board. Such removal, for temporary purposes only does not create a vacancy. Whether the removal from the district of a member of the board of education is permanent or temporary is in all cases a question of fact to be determined from the intention of the member so moving, considered in the light of all the circumstances connected with such removal."

I had occasion to discuss the above statute i. e. 4748, General Code, in my opinion No. 856, rendered on September 12, 1929, and appearing in Opinions of the Attorney General for 1929, Volume 2, page 1327. From the facts before me in said opinion, it appeared that one Mr. B. moved about May 1, 1929, from his school district to a school district in an adjoining county, but it further appeared that he intended to return in the fall and was willing to make an affidavit to that effect. The question before me, of course, was as to whether these facts could cause a vacancy in the board of which he was a member. I held that such removal did not create a vacancy. Furthermore, I held as set forth in the first paragraph of the syllabus:

"The permanent removal of a member of a board of education from his school district creates a vacancy in the office. Temporary removal, does not. The intention of the member, to be gathered from all the circumstances attendant upon his removal, is the controlling factor in determining whether a removal is temporary or permanent."

In the course of the opinion, after reviewing all of the aforementioned opinions, I stated:

"It will be seen, from the foregoing, that the question of whether or not 'removal from the district' has been effected in any case, is a mixed question of law and fact, and depends to a great extent on the intention of the person himself. To determine this intention is a matter of extreme difficulty in any specific case, and necessitates the taking into consideration of all the circumstances surrounding the situation.

In a comparatively recent case, being that of *State ex rel. vs. Paulson*,

29 O. A. R., p. 121, decided by the Court of Appeals of the First District, it was held:

'Where member of board of education moved into another school district with wife and children, who attended school in that district, such member had removed from district within meaning of Section 4748, General Code, relating to vacancy in board of education, though he still owned residence property in first district and intended to return at some future time; word "removal" meaning change of place, especially of habitation.'

The opinion in the above case is very short, and contains no reference to other decisions or to controlling legal principles, nor does it recite the facts in the case, to any great extent. It was a suit in quo warranto, and the court, of course, passed upon the facts, as well as the law. The court no doubt had before it all the attending circumstances, and observed the witnesses in giving their testimony. The case is not controlling in any respect, and leaves the question just as I have stated it herein; that is, that the intention of the party controls, and that intention is to be gathered from all the circumstances, his intention being the controlling circumstance, and his declaration of that intention being one of the criteria by which to determine the intention."

Without any further extended discussion, it clearly appears that it is a question of fact whether removal from the district causes a vacancy in an office. Moreover, the intention of the party is controlling and is to be gathered from all the circumstances. From the facts before me in this opinion, it appears that the constable has the intention to return to his own township in the fall. It is impossible for me to come to any other conclusion than that his removal will only be temporary.

It may not be amiss here to reiterate that I have assumed that the constable is neither refusing nor neglecting to perform the duties of his office. If my assumption be incorrect then a different conclusion might well be reached.

Therefore, in specific answer to your question, I am of the opinion that when a constable moves from a township in which he was elected, to another township, with the intention of returning after a short period of time, under circumstances which do not show an abandonment of the office, the office which he holds is not thereby vacated.

Respectfully,

GILBERT BETTMAN,
Attorney General.

2002.

DISAPPROVAL, LEASE TO PREMISES OF SOPHIA C. ALTMAIER, CITY OF COLUMBUS, FRANKLIN COUNTY, OHIO, FOR USE OF STATE OF OHIO.

COLUMBUS, OHIO, June 20, 1930.

HON. ALBERT T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication submitting for my examination and approval a lease in quintuplicate from Sophia C. Altmaier of 144 East Main Street, Columbus, Ohio, to yourself as Superintendent of Public Works, for the State of Ohio. This lease grants to your department the use for automobile parking purposes of 435.5 square feet in the rear of the Hartman Hotel Building and 122.7 square feet in the rear of lessor's place of business at 142 East