A suspended school is at all times, so long as a suitable school building exists in the territory of such suspended school, subject to re-establishment, and a board of education is forbidden by the terms of Section 7730-1, General Code, from selling the building or real estate located in the territory of a suspended school until after four years from the date of such suspension.

In Opinions of the Attorney General for 1922, page 739, it was held:

> "Where a school has been suspended under the provision of Section 7730 G. C., the board of education cannot move a school house in which the suspended school was conducted until after a period of four years from the date of such suspension because of the rights of the petitioners, mentioned in Section 7730 G. C., the sole exception being where such building has been condemned for school use by proper state authorities."

Specifically answering your questions in the order asked, it is my opinion:

First, the abandoning of four of the five school buildings, and the conducting of school in the remaining fifth building, as stated in your letter, does not constitute the centralization of the schools, as centralization is provided for in Section 4726 of the General Code. It amounts to consolidation of the schools, and may be effected by virtue of the provisions of Section 7730, General Code.

Second, consolidation of schools by the suspension of certain schools and the transportation of the pupils residing in the territory of the suspended school to other schools may be accomplished by virtue of the provisions of Section 7730, General Code, without submitting the same to a vote of the electors residing in the territory effected by such consolidation.

Third, there is no authority for submitting the question of consolidation or centralization of schools to a vote of the electors residing in the territory effected by such centralization or consolidation, except as contained in Sections 4726 and 4726-1, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2167.

OFFICE—REMOVAL OF COUNTY RECORDER FOR NEGLECT OF DUTY—COMPLAINT FILED IN COMMON PLEAS COURT—VACANCY—APPOINTMENT BY COUNTY COMMISSIONERS—ELECTION FOR UNEXPIRED TERM.

SYLLABUS:

1. *Under the provisions of Section 38, Article II of the Constitution of Ohio, laws may be passed providing for the removal of a county officer only upon complaint and hearing, and a statute providing for the summary removal of a county officer without a complaint and opportunity to be heard, would be unconstitutional.*

2. *Sections 10-1 to 10-4, General Code, enacted pursuant to the mandate contained in Section 38, Article II of the Constitution of Ohio, prescribe the procedure to be followed for the removal of a county officer guilty of misconduct in office.*

3. *Where a county recorder has refused or wilfully neglected to perform the official duties imposed upon him by law, or has been guilty of misfeasance, malfeasance or non-*

feasance, or other misconduct in office, a complaint should be filed against him specifically setting forth the charge, signed by five per cent of the qualified electors as shown by the next preceding general election of the county, in the Common Pleas Court of such county, and after proper notice has been given, in accordance with the provisions of Section 10-2, *General Code, within thirty days after the filing of said complaint, the same should be heard by the Common Pleas Court and a judgment of forfeiture entered if the facts so warrant.*

4. *Where a vacancy occurs in the office of county recorder, by the terms of Section* 2755, *General Code, it is the duty of county commissioners to appoint a suitable person to fill such office, who, upon giving bond and taking the oath of office, as provided by law, holds his office until his successor is elected and qualified.*

5. *If a judgment of forfeiture should now be entered against a county recorder for misconduct in office and a vacancy declared, a suitable person appointed by the county commissioners to such office will hold the same until the November election in* 1928 *and the qualification of the elected successor immediately thereafter. The elected successor at the November,* 1928, *election would hold the office for the unexpired term of the county recorder, whose office was vacated, viz. until the first Monday in January,* 1931.

COLUMBUS, OHIO, May 28, 1928.

HON. FRANK WIEDEMANN, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion as follows:

> "On April 27, 1928, the recorder of Marion County, Ohio, disappeared. To date no word has been heard from him and inquiry has failed to divulge his whereabouts. It is the intention of the Board of County Commissioners to declare the office vacant and appoint a successor.
>
> 1. What steps will be necessary in order to declare the office vacant?
>
> 2. If a vacancy is declared and a successor is appointed by the Board, how long will he hold office?
>
> 3. Will it be necessary to hold an election the coming November and place before the voters the election of a county recorder to fulfill the unexpired term of the county recorder, or will the appointee hold office until the first Monday in January, when the term of the county recorder expires?"

You state it is the intention of the board of county commissioners to declare the office vacant and appoint a successor. The first question presented by the facts stated in your letter for our consideration is, does a vacancy exist in the office. I think it will readily be conceded that if no vacancy exists in the office of county recorder then the commissioners are without authority to take the action as stated in your letter.

If a vacancy exists, then the provisions of Section 2755, General Code, control. Its provisions are as follows:

> "If a vacancy occurs in the office of recorder, the commissioners shall appoint a suitable person to fill it, who shall give bond, take the oath of office, as provided by law for county recorders, and shall hold his office until his successor is elected and qualified."

It will be observed that the above section does not state what constitutes a vacancy in office.

Section 38 of Article II of the Ohio Constitution provides:

"Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the General Assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution."

This section was before the Supreme Court of Ohio in the case of *State, ex rel. Hoel, Prosecuting Attorney,* vs. *Brown,* 105 O. S. 479, in which it was held as follows:

"1. In 1912 the people of Ohio adopted, as a part of the Constitution, Section 38, Article II, in which, among other things, it is written: 'Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers,' etc.

2. By this section they plainly provided that such removal should be made only 'upon complaint and hearing.'

3. What the Constitution grants, no statute may take away."

In the opinion by Judge Wanamaker, concurred in by the entire court, it was said as follows:

"The main question in this case arises out of Section 2713, General Code, which reads:

'On examination of the county treasury, if it appears by the report of the examiner or examiners that an embezzlement has been committed by the county treasurer, the county commissioners shall forthwith remove the treasurer from office, and appoint some person to fill the vacancy thereby created. The person so appointed shall give bond, and take the oath of office prescribed for county treasurers.'

It is plain that this section nowhere provides for notice to the county treasurer, nor for any hearing upon the charge of embezzlement, as contained in the report.

The county commissioners acted summarily and *ex parte* under the plain provisions of the statute, which it is claimed are fully authorized by Section 6, Article X, of the Ohio Constitution adopted in 1851, which reads:

'Justices of the peace, and county and township officers, may be removed, in such manner and for such cause, as shall be prescribed by law.'

It is claimed by the relator that Section 2713, General Code, is plainly pursuant to Section 6, Article X of the Constitution, and that by the force of this statute what the board of county commissioners did was abundantly warranted both under the statute and the Constitution.

In answer thereto, the defendant depends for his defense upon his rights under Section 28, Article II of the Ohio Constitution as adopted in 1912, which reads:

'Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the General Assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the Constitution.'

In plain phrase this section provides for 'complaint and hearing' before removal, and, where Section 38 applies, any statute failing to measure up to the requirements for removal is plainly faulty and must fail as a constitutional enactment.

It is claimed, however, that Section 38, Article II, although adopted sixty years later than Section 6, Article X, does not supersede Section 6 or in any wise modify it, because, at the close of Section 38, this language appears: 'And this method of removal shall be in addition to impeachment or other method of removal authorized by the Constitution.'

It should be here noticed that the words 'in addition to impeachment or other method of removal' do not relate to any 'method of removal' provided by statute, but a method of removal provided or authorized by the Constitution.

* * *

Where the constitution provides a method for the removal of public officers, it is obvious that the constitutional amendment provided in Section 38, Article II, was intended to preserve such constitutional method. It is equally apparent that it was not thereby intended to preserve any other method of removal, such as provided by the statute, which would in any wise conflict with Section 38.

* * *

It should be noted that this section clearly and concretely recognizes Ohio's obligation to the cardinal doctrines included within this phrase, 'due process of law.'

It must have been clearly intended that a 'complaint and hearing' should be allowed 'to all officers.'

This clear, constitutional, protective grant to the public officers squares at all points of the compass with Webster's basic doctrine:

'A law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.'

It may be said that this is not a criminal trial. True. But it is no less a condemnation for a crime, followed by a penalty, the ousting of a man from public office by three men, servants of the people it is true, but hardly qualified to put out of office without a hearing a public official who has been put into office by the majority votes of the sovereign people.

What the constitution grants, no statute can take away."

Pursuant to the mandate of Section 38, Article II, supra, the Legislature, on April 16, 1913 (103 v. 851), passed an act entitled

"An Act—To provide for the removal of certain officers for misconduct in office."

This act was codified as Sections 10–1 to 10–4 inclusive of the General Code, and it will be observed that Section 10–1, which was Section 1 of the act, specifically refers to Section 38, Article II of the Constitution.

Section 10–1, General Code, provides as follows:

"That any person holding office in this state, or in any municipality, county or any subdivision thereof, coming within the official classification in Section 38, Article 2, of the Constitution of the State of Ohio, who willfully and flagrantly exercises authority or power not authorized by law, refuses or willfully neglects to enforce the law, or to perform any official duty now

or hereafter imposed upon him by law, or who is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance or nonfeasance, shall be deemed guilty of misconduct in office; upon complaint and hearing in the manner provided for herein shall have judgment of forfeiture of said office with all its emoluments entered thereon against him, creating thereby in said office a vacancy to be filled as prescribed by law. The proceedings provided for in this act are in addition to impeachment and other methods of removal now authorized by law, and this act shall not in any way be so interpreted as to divest the governor or any other authority of the jurisdiction now given in removal proceedings."

The procedure for removal is governed by the provisions of Section 10-2, General Code, as follows:

"Proceedings for the removal of public officers on any of the grounds enumerated in the preceding section shall be commenced by the filing of a written or printed complaint specifically setting forth the charge and signed by five per cent of the qualified electors as shown by the next preceding general election of the political subdivision or unit of government whose officer is sought to be removed. But in no case shall less than ten nor more than one thousand electors be required. Such complaint shall be filed with the court of common pleas of the county wherein the officer against whom the complaint is filed resides, except that when the officer against whom the complaint is filed is a common pleas judge, such complaint may be filed in the court of appeals of the district where such judge resides, and all complaints against state officers may be filed with the court of appeals in the district wherein the officer against whom the complaint is filed resides. The judge or clerk of the court shall cause a copy of such complaint to be served upon the officer, against whom the complaint has been filed, at least ten days before the hearing. The hearing herein provided for shall be had within thirty days from the date of the filing of the complaint by said electors. The proceedings had by the court upon such removal shall be matters of public record and a full detailed statement of the reasons for such removal shall be filed with the clerk of the court, and shall be made a matter of public record therein."

The next Section, 10-3, General Code, provides for the suspension of the official by order of the court pending the investigation of the case.

This department has heretofore had occasion to consider Section 10-1, General Code, and others pertinent to the subject.

The syllabus of an opinion found in Opinions of the Attorney General for 1915, Vol. I, page 674, is as follows:

"A temporary removal by a public officer for a limited time from a district represented and with no intention to abandon or surrender the office or to cease to perform its duties will not be deemed an abandonment of an office.

A permanent removal by a public officer from the district represented, will at once, ipso facto, vacate the office.

A refusal or neglect to exercise the functions of an office for so long a period as to reasonably warrant the presumption that an officer does not desire or intend to perform the duties of an office at all, will be held to amount to an abandonment, but is ordinarily held that such an abandonment does not, of itself, create a complete vacancy and that a judicial determination of the fact is necessary to render it conclusive.

Sections 10–1 to 10–4, inclusive, of the G. C., furnish an appropriate remedy where a public officer is guilty of gross neglect of duty."

In the opinion it was said as follows:

"The Legislature of 1913, in pursuance of the mandate of Section 38 of Article II of the Constitution of Ohio, adopted September 3, 1912, passed an act to provide for the removal of certain officers for misconduct in office. This act is found in 103 O. L., 851, the section numbers being 10–1 to 10–4, inclusive. It is provided in Section 1 of the Act, being Section 10–1 of the General Code, that any person holding office in this state or in any municipality, county or subdivision thereof, coming within the official classification in Section 38 of Article II of the Constitution, who is guilty of certain acts specified in the section, shall upon complaint and hearing, have judgment of forfeiture of said office entered against him. Among the grounds upon which such judgment of forfeiture may be based, are refusal or wilful neglect to perform any official duty, gross neglect of duty and nonfeasance. Other sections of this act relate to the courts having jurisdiction in this matter and to the procedure necessary to secure the removal of a public officer."

A later opinion of this department pertinent to your inquiry is one reported in Opinions, Attorney General, 1919, Vol. II, page 1176, in which it was held as follows:

"1. The laws relating to removal from office prior to the enactment and exclusive of Section 10–1 et seq., G. C., do not define causes or fix the procedure for removal from office which applies uniformly to all officers. Such causes for and procedure of removal are found in the various acts creating and defining the duties of such office.

2. By the enactment of Section 10–1 et seq., G. C., in addition to the causes and procedure fixed and provided by earlier statutes, causes for the removal from office generally are fixed and procedure therefor is provided. The power of removal of state officers is vested in the governor of the state and in the court of appeals of the district where the state officer resides. The power of removal of the officers other than state officers, excepting upon complaint against a judge of the common pleas court, is vested in the judge of the court of common pleas of the county in which the officer against whom the complaint is filed resides. The power of removal of a common pleas judge from office is vested in the court of appeals of the district in which such judge resides.

3. The Bureau of Inspection and Supervision of Public Offices has no official power or function, as such, to exercise in the matter of removals from office."

In the opinion the then Attorney General said:

"Section 38, Article 2 (1912) of the Constitution of Ohio and Sections 10–1 et seq. and 283 G. C., are of general application.

* * *

Section 283, G. C., provides that all public officers or employes who neglect to keep the accounts of his office in the form prescribed by the Bureau of Inspection and Supervision of Public Offices, or to make the reports required by such bureau, 'shall be removed from office on hearing before the proper authority.'

Until the enactment of Sections 10–1 et seq. (infra) in 1913 (103 O. L., 851), there was no statute which defined the causes or fixed the procedure for removal from office which applied uniformly to all offices. Specific causes, however, and methods of removal from office, are found in the various earlier acts creating and defining the duties of each office and therefore no general rule is established by them.

For example, Sections 2913, 3036, 3049, 2579, 2790 and 2713, G. C., relate to the removal of certain county officers.

In Section 2913 G. C. the power of removal of the prosecuting attorney is lodged with the common pleas court on complaint of a tax payer.

In Section 3036 G. C. provision is made for the removal of the clerk, sheriff or prosecuting attorney who neglects to comply with the four preceding sections 'at the discretion of the court,' meaning the common pleas court. In this section no procedure is outlined.

In Section 3049 G. C. provision is made that certain county officers failing to make certain reports upon conviction, shall be 'adjudged' guilty of misconduct in office, and be 'immediately removed therefrom.'

Without providing the procedure for such removal, nor specifically designating who shall exercise the power of removal, Section 2790 provides:

'Any person may bring civil action in the common pleas court for removal of the surveyor.'

Section 2713 G. C. empowers the county commissioners to remove the county treasurer for embezzlement 'upon examination of the county treasury.'

* * *

However, by the adoption of Section 38 (supra) in 1912, and the enactment of Sections 10–1 et seq., a general rule for the removal of public officers was provided.

Section 10–1 defines misconduct in office and provides for the removal therefrom of 'any person holding an office in this state, or in any municipality, county or any subdivision thereof.'

Section 10–2 relates to the procedure for removal and requires that when the complaint is against an officer other than a state officer, the complaint shall 'be signed in their own hand writing by at least twenty per cent of the qualified electors within the designated limits for which said officer was elected', and when the complaint is against a state officer, 'it shall be signed in their own hand writing by at least six per cent of the qualified electors of the state.'

Under this section complaints against state officers shall be filed with the governor or court of appeals of the district where the state officer resides, which officials have the power of removal. Complaints against officers other than state officers may be filed with the judge of the court of common pleas of the county wherein the officer against whom the complaint is filed resides, except that a complaint against a common pleas judge may be filed in the court of appeals of his district.

For the purpose of this opinion, it is not necessary to cite or quote further provisions of these sections, but it is sufficient to state that the power of removal is vested in the governor and courts, as above indicated, and that the procedure for hearing of the complaints is provided in this act, being Section 10–1 to Section 10–4, inclusive."

Section 3049, referred to in the above opinion relates to the reports required to be filed under the provisions of Section 3046, General Code, and in this section the county recorder is expressly included. These two sections read as follows:

Section 3046. "On the first Monday of September of each year, each county treasurer, recorder, sheriff, prosecuting attorney, probate judge, commissioner, and clerk of the court of common pleas shall make returns, under oath, to the county auditor, of the amount of fees and moneys received by them, or due them during the year next preceding the time of making such return."

Section 3049. "If any such officer neglects to make such returns, or wilfully violates any provision in this behalf, upon conviction, indictment, or information in the court of common pleas of the county, he shall be adjudged guilty of misconduct in office, and be immediately removed therefrom, and fined for the use of the county not less than two hundred nor more than one thousand dollars, and shall forfeit and pay to the treasurer of the county, for the use of the county, two hundred dollars for each such neglect, and for every ten days such neglect continues, after the time herein fixed for the report. For the payment of such forfeiture and fine, as well as any amount otherwise due from him in official capacity, his sureties shall also be liable upon his bond."

It is apparent that Sections 3046 and 3049, supra, are not applicable to the facts in the instant case as detailed in your letter and supplemented in oral conference.

In view of the holding of the Supreme Court in the Brown case above cited, it is manifest that the facts furnished by you do not automatically create a vacancy in the office of the county recorder. It is also clear that neither the county commissioners nor any other county officers are vested with authority summarily to determine that the county recorder has been guilty of misconduct in office and to declare his office vacant. And since there are no provisions of law other than those contained in the statutes above referred to, prescribing the procedure to be taken for the removal of a county recorder, *"upon complaint and hearing"*, as required by the Constitution, the course laid down in Sections 10–1, et seq. of the General Code must be followed. Therefore, when you shall have completed your investigation, if the facts found by you show that the recorder has been guilty of any misconduct in office, I am of the opinion that steps should at once be taken under Sections 10–1, et seq. of the Code, to accomplish his removal.

Specifically answering your questions it is my opinion that under the provisions of Section 10–2, General Code, proceedings for the removal of the county recorder in question can only be had by the filing of a written or printed complaint specifically setting forth the charge, signed by five per cent of the qualified electors as shown by the next preceding general election of Marion County. This complaint should be filed in the Common Pleas Court of Marion County, and after proper notice has been given, in accordance with the provisions of Section 10–2, supra, within thirty days after the filing of said complaint, the same should be heard by the Common Pleas Court and a judgment of forfeiture entered if the facts so warrant.

In your second question you inquire, if a vacancy is declared and a successor appointed, how long will the successor hold office. In answer to this question, it is my opinion that the appointee will hold office until the November election in 1928, and the qualification of the elected successor immediately thereafter. This elected successor at the November election of 1928 would hold the office for the unexpired term of the county recorder so vacating the office, which would be until the first Monday of January, 1931, as provided in Section 2750, General Code. This likewise answers your third inquiry.

Respectfully,
EDWARD C. TURNER,
Attorney General.