

After examination it is my opinion that said contract is in proper legal form and I have accordingly endorsed my approval thereon and return the same herewith.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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5171.

BOARD OF TRUSTEES—WHICH JUSTICE OF PEACE TO MAKE APPOINTMENT TO FILL VACANCY IN OFFICE OF TOWNSHIP TRUSTEE—REFUND OF COSTS IN ELECTION RECOUNT CASE.

**SYLLABUS:**

1. *Where two justices of the peace were elected at the same time for terms to commence on the first day of January of the next year but the commissions from the Governor of Ohio bear different dates, the justice of the peace holding the commission bearing the earlier date is authorized to appoint a suitable person to fill a vacancy on the board of trustees of such township in accordance with the terms of Section 3262, General Code.*

2. *Where there has been a recount in accordance with Sections 4785-162, et seq., General Code, the petitioner for such recount is not entitled to a refund of the cost thereof deposited by him where, as a result of such recount, he has not established error sufficient to change the result of the election or to change the result in any precinct by at least two per cent of the total vote cast for the office involved, even though a later action to contest said election did change the result thereof.*

COLUMBUS, OHIO, February 18, 1936.

HON. GEORGE S. MYERS, *Secretary of State, Columbus, Ohio.*

DEAR SIR: I acknowledge receipt of your communication which reads as follows:

“Following the election of November 5, 1935, a contest was filed in connection with the office of township trustee. In deciding the matter, the court set aside the election in so far as the two contesting candidates were concerned. This caused a vacancy in the board of trustees which, as the law provides, should be filled by appointment by a Justice of the Peace.

There are two Justices of the Peace in the township concerned, one of whom, (Mr. C.,) has served regularly for about

twenty-five years, and the other (Mr. R.) has served for a period of possibly ten years. At the election of November, 1935, they were both elected to succeed themselves. Mr. R. received his commission from the Governor on December 18, 1935, and Mr. C. received his commission on January 3, 1936. Both commissions are for a term of office beginning January 1, 1936, and both have since given bond and are serving in their respective offices.

Under the above statement of facts, and taking into consideration the provisions of Section 3262 of the General Code, which of the two Justices of the Peace would have the authority to make the appointment to fill the vacancy in the board of township trustees concerned?"

The Prosecuting Attorney of Wyandot County has submitted to me the same question. It appears from his letter that one of the above candidates for township trustee demanded a recount which resulted in no change in the election and that thereafter he filed an action to contest said election which resulted in the court finding that neither of said candidates was legally elected. The said prosecutor also raises the question as to whether under said circumstances, said candidate for said office of township trustee is entitled to a refund of his deposit which he made to cover the costs of said recount. I shall consider both questions in this opinion.

Section 3262, General Code, reads in part as follows:

"When for any cause a township is without a board of trustees or there is a vacancy in such board, the justice of the peace of such township holding the oldest commission, or in case the commission of two or more of such justices bear even date, the justice oldest in years, shall appoint a suitable person or persons, having the qualifications of electors in the township to fill such vacancy or vacancies for the unexpired term. \* \* \*"

If the term "oldest commission" as used in the above section stood alone, it might be possible to construe it to be the commission for the oldest existing term. However, this statute further provides that in case the commissions of two or more justices "bear even date", the justice oldest in years shall appoint. In other words, a justice can appoint by reason of his being oldest in years only when his commission bears even date with one or both of the other justices. Consequently, the term "oldest commission" can only mean the commission bearing the earliest date. As stated in *King, et al., v. Cemetery Association*, 67 O. S., 240:

"The intent of the legislature is determined from what it says, and if its language is clear and unambiguous, the courts have no authority to change it."

It has been held several times by this office that the term "oldest commission" means the unexpired commission of earliest date. Opinions of Attorney General for 1915, Vol. I, page 411; 1918, Vol. I, page 357; and 1934, Vol. II, page 1497. The following is held in Opinions of the Attorney General for 1933, Vol. I, page 750:

"Where two justices of the peace were appointed by the township trustees of a township under authority of section 1714, General Code, on the same day, but received their commissions from the Governor of Ohio, under sections 138 and 139, General Code, at different times, and consequently qualified on different dates, the justice of the peace holding the commission bearing the earlier date is authorized to appoint a suitable person to fill a vacancy on the board of trustees of such township, in accordance with the terms of section 3262, General Code."

The same facts as are presented here seem to have been presented in Attorney General's Reports for 1906, page 62, as in said opinion both justices were elected at the same time. This opinion reads as follows:

"I am in receipt of your request for an opinion of the proper construction of Section 1452 of the Revised Statutes. It appears from your inquiry that a vacancy exists in the office of township trustee; that both justices of the peace were elected at different times prior to 1904, and both elected for the terms now being served in the fall of 1904. The section mentioned authorizes a vacancy in the office of township trustee to be filled by appointment by that justice 'holding the oldest commission.' In my opinion this does not refer to a commission earlier than the one under which the justice is now holding and it is entirely immaterial as to what the terms were served or commissions held by either justice prior to the current term. Both of them seem to have been last elected in 1904. They may have been commissioned at different times, however. If so the township clerk should ascertain which commission bears the earlier date and notify the holder thereof to make the appointment. If both commissions bear the same date the justice 'oldest in years' should make the appointment."

Coming now to the other question raised by the prosecuting attorney of Wyandot County, Section 4785-162, General Code, providing for a recount, reads in part as follows:

“\* \* \* If the petitioner or petitioners succeed in establishing error sufficient to change the results in any precinct by at least two per cent (2%) of the total vote cast for such office in such precinct, or by two per cent (2%) of the total vote cast for and against such issue in such precinct, then the deposit for such precinct shall be refunded, otherwise, the actual cost of such recount shall be paid into the general fund of the county in which such recount is had, provided however, that the minimum charge of such recount shall not be less than five dollars (\$5.00) and the maximum more than ten dollars (\$10.00) per precinct. If sufficient error is established to change the result of the election, regardless of the error found in any precinct, then the deposit made for all precincts shall be refunded.”

Section 4785-166, General Code, provides in part :

“The nomination or election of any person to any public office or party position, or the approval or rejection of any issue or question, submitted to the voters, may be contested by qualified electors of the state, county or political subdivision, as the case may be, upon the terms and conditions hereinafter provided.. \* \* \*”

Section 4785-167, General Code, reads :

“Such a contest shall be commenced by the filing of a petition therefor with the clerk of the appropriate court signed by at least twenty-five voters who voted at the last election for or against a candidate for the office or for or against the issue being contested, or by the defeated candidate for said nomination or election, within fifteen days after the results of any such nomination or election have been ascertained and announced by the proper authority ; or if there be a recount, within ten days after the results of the recount of such nomination or election have been ascertained and announced by the proper authority. Such petition shall be verified by the oath of at least two such petitioners, or by the oath of the defeated candidate filing the same, as the case may be, and shall set forth the grounds for such contest. Said petition shall be accompanied by a bond with surety to be approved by the clerk of the appropriate court in a sum sufficient, as determined by him, to pay all the costs of the contest. The contestor and the person whose right to the nomination or election to such office is being contested, to be known as the contestee, shall be liable to the officers and witnesses for

the costs made by them respectively; but if the results of the nomination or election be confirmed or the petition be dismissed, or the prosecution fail, judgment shall be rendered against the contestor for the costs; and if the judgment be against the contestee or if the results of the nomination or election be set aside then the county shall pay the costs as other election expenses are paid."

The costs referred to in this last section clearly involve costs incurred in the contest action and not those which may have been formerly incurred in a recount. The only provision for a return of the deposit made for a recount is that contained in Section 4785-162 and this provision applies only where sufficient error has been established by such recount rather than by a later action to contest the election.

I am of the opinion therefore, that:

1. Where two justices of the peace were elected at the same time for terms to commence on the first day of January of the next year but the commissions from the Governor of Ohio bear different dates, the justice of the peace holding the commission bearing the earlier date is authorized to appoint a suitable person to fill a vacancy on the board of trustees of such township in accordance with the terms of Section 3262, General Code.

2. Where there has been a recount in accordance with Sections 4785-162, et seq., General Code, the petitioner for such recount is not entitled to a refund of the cost thereof deposited by him where, as a result of such recount, he has not established error sufficient to change the result of the election or to change the result in any precinct by at least two per cent of the total vote cast for the office involved, even though a later action to contest said election did change the result thereof.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*