

of the General Code, which section also provides for legal counsel in connection therewith. This section reads:

"Prosecutions for the violation of the provisions of this act (G. C., Sections 486-1 to 486-31), or the rules and regulations of the state commission established in conformity thereto, shall be instituted by the attorney general or by the state commission acting through special counsel, or by the county prosecutor for the county in which the offense is alleged to have been committed; and prosecutions for violations of this act and the rules and regulations of any municipal commission by any officer or employe of such city, shall be instituted by such municipal commission through the legal department of such city or by such municipal commission acting through special counsel."

In my opinion, the civil service commission not only has authority, but it is its duty, to make an investigation touching upon the enforcement and administration of the provisions of the civil service act, when it has reason to believe that an appointing officer is not complying with the intent and spirit of the act and thereafter report his finding thereon to the governor, or to the mayor or other chief appointing officer of a municipality in case such violation is on the part of a municipal officer.

In conclusion and in answer to the questions stated at the outset of this discussion, it is my opinion that:

1. Persons in the classified civil service, who become candidates for nomination for office, or for members of a party controlling committee, at a primary election, violate the provisions of the civil service act, and for that reason may be discharged from the service in the manner provided by law.

2. The civil service commission may not withhold its approval of that part of the payroll or account for the salary or compensation of a person in the classified civil service, who has become a candidate for nomination for office, or for member of a party controlling committee, at a primary election, except where such person has been removed or suspended by the appointing authority in the manner provided by law.

3. A person in the classified civil service may be removed only as provided in Section 486-17a of the General Code.

4. The civil service commission may make investigations to ascertain whether or not the civil service law has been violated, and thereafter proceed as authorized in Sections 486-22 and 486-28 of the General Code.

Respectfully,

EDWARD C. TURNER,

Attorney General.

2804.

CLERK OF COURT—BOND EXPIRES WITH TERM OF OFFICE—FAILURE TO GIVE NEW BOND ON RE-ELECTION CREATES A VACANCY— FILLED BY APPOINTMENT.

SYLLABUS:

An official bond given by a person who was elected in 1924 to the office of Clerk of the Common Pleas Court of a county in this state, for the term of said office which commenced on the first Monday of August, 1925, is not effective for the purpose of

qualifying such person to said office for a succeeding term to which he was elected in 1926, and which commenced on the first Monday of August, 1927. But the failure of such person to give an official bond for the term for which he was elected in 1926 as provided by Section 2868, General Code, created a vacancy in said office which the board of county commissioners was authorized and required to fill by the appointment of a clerk *pro tempore* in the manner provided by Section 2870, General Code.

COLUMBUS, OHIO, October 29, 1928.

HON. R. D. WILLIAMS, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of a communication from you, in which my opinion is asked on certain questions therein stated. Your communication reads as follows:

“At the November election in 1918, T. L. M. was elected Clerk of Courts of Athens County, Ohio. He was re-elected in 1920, 1922, 1924 and 1926. Following each election save and except the one in 1926, and before entering upon his duties as Clerk, he filed a bond as required by G. C. Section 2868, which bonds were duly approved by the County Commissioners. After his election in 1926 he filed no such bond.

The bond filed by him after his election in 1924, and before he entered upon his duties on August 2, 1925, was dated July 25, 1925, and contained the following conditions:

‘The condition of this obligation is such, that

Whereas, the said T. L. M. was, on the ----- day of November, in the year of our Lord one thousand, nine hundred and twenty-five, duly elected to the office of Clerk of the Court of Common Pleas of Athens County, Ohio, to hold his office for two years, beginning on the 2d day of August next after his said election, and until his successor is chosen and qualified.’

It will be observed that there is an error in the above condition, in that it says Mr. M. was elected in 1925, when it should have been 1924.

The bond further provided that if Mr. M. should account for the moneys coming into his hands as Clerk and perform his other official duties—‘during the term for which he has been elected as aforesaid, then this obligation shall be void * * * .’

On December 28, 1927, M. was adjudged insane by the Probate Court of Athens County, Ohio, and committed to the Athens State Hospital. On and prior to said December 28, 1927, E. M. N. was the duly qualified deputy clerk of said court.

On the 28th day of December, 1927, the county commissioners in special session passed and placed on their journal the following resolution, to-wit:

‘Whereas, a temporary vacancy has occurred in the office of Clerk of Courts of Athens County, Ohio, on account of temporary absence from the office:

Be it Resolved, by the board of county commissioners of Athens County, Ohio, in session, that P. M. be and she is hereby appointed Clerk Pro Tempore upon her giving bond in the sum of \$10,000.00 as provided by G. C. Section 2868.’

P. M. is the wife of said T. L. M. She gave bond in the sum required, dated December 28, 1927; approved by the board of county commissioners on January 16, 1928, and filed with the county treasurer on January 17, 1928. Upon her appointment and filing of her bond, Mrs. M. assumed the duties of the office. She appointed said E. M. N. her deputy. Record of said appointment was made on the journal. She is still acting as such deputy clerk.

On January 9, 1928, T. L. M. was permitted by the hospital authorities to come home on a trial visit. He immediately resumed the performance of the duties as Clerk. Later, on February 29, 1928, M. was discharged from the hospital as cured.

Under the facts stated :

1—Has the bond given by Mr. M. in 1925 terminated, or does its obligation continue until this time?

2—Did the judgment of insanity automatically create a vacancy in the office of Clerk of Courts?

3—If Mrs. M. was lawfully appointed clerk or pro tempore clerk, did the return of Mr. M. after he was discharged from the hospital as cured, terminate Mrs. M's. right to the office?

4—If the judgment of insanity of Mr. M. created a vacancy in the office of clerk, did that terminate the right of Miss N. to act as deputy clerk?"

Section 2868, General Code, referred to in your communication, should be read in connection with Section 2867, General Code, as it read before its amendment (112 O. L. 139), and with Section 2870, General Code, in the consideration of the questions here presented. These sections provide as follows:

Sec. 2867. "There shall be elected biennially in each county a clerk of the court of common pleas, who shall hold his office for the term of two years, beginning on the first Monday of August next after his election."

Sec. 2868. "Before entering upon the discharge of the duties of his office, the clerk of the court of common pleas shall give bond to the state in a sum not less than ten thousand dollars nor more than forty thousand dollars, to be fixed by the county commissioners, with sureties approved by the commissioners and conditioned that he will enter and record all the orders, decrees, judgments and proceedings of the courts of which he is by law the clerk, pay over all moneys by him received in his official capacity, and faithfully and impartially discharge the duties of his office. Such bonds, with the oath of office and the approval of the commissioners indorsed thereon, shall be deposited with the county treasurer and kept in his office."

Sec. 2870. "When a vacancy occurs in the office of clerk of the court of common pleas, the county commissioners shall appoint a clerk pro tempore, who shall give bond and take the oath of office prescribed for the clerk-elect. If the commissioners are not in session when such vacancy occurs, the county auditor shall forthwith give written notice thereof to each of them, and thereupon they shall meet and make the appointment. If the commissioners fail to make an appointment for ten days after they severally have had such notice of vacancy, the appointment shall be made by the county auditor."

With respect to your first inquiry, it is to be noted that the authorities are not in accord on the question of whether an official bond given by an elected public officer

is effective for any purpose after the lapse of the term of office for which such official bond was given and while the officer is holding over in such office and performing the duties of the same. See *State of Ohio vs. Corey*, 2 O. D. Rep. 669; *State of Ohio vs. Crooks*, 7 Ohio, Pt. 2, p. 221; *Perry vs. State Ex Rel Blosser*, 90 O. S. 392; *Akers vs. State*, 8 Ind. 484.

In this connection, it is to be noted that Section 8 of the General Code provides that "a person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws." And in the determination of a question of this kind arising under the official bond of a public officer in this state, the provisions of the bond should be read in the light of the section of the General Code above noted. 29 Cyc. 1457; *Perry vs. State Ex Rel Blosser*, *supra*.

No question is presented with respect to the liability of the officer named in your communication or of his sureties on the official bond given by him pursuant to his election as Clerk of the Common Pleas Court of Athens County in 1924, on account of any default on his part in the performance of official duties, after the expiration of the term for which said bond was given and during the term for which he was elected in 1926. However a question of this kind might be decided in the light of the above noted and other applicable authorities, it is certain that the official bond given by said T. L. M. pursuant to his election in 1924, for the term of office which began on the first Monday of August, 1925, was not effective for the purpose of qualifying him for said office for the term for which he was elected in 1926, and which commenced on the first Monday of August, 1927. Touching this question, Section 7 of the General Code provides as follows:

"A person elected or appointed to an office who is required by law to give a bond or security previous to the performance of the duties imposed on him by his office, who refuses or neglects to give such bond or furnish such security, within the time and in the manner prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed, and such office shall be considered vacant and be filled as provided by law."

The provisions of this section are obviously mandatory, and the failure of said T. L. M. to give an official bond as Clerk of the Common Pleas Court for the term for which he was elected in 1926, and which commenced on the first Monday of August, 1927, created a vacancy in the office, which the county commissioners, under the provisions of Section 2870, General Code, were authorized and required to fill by the appointment of some person as clerk pro tempore. *State Ex Rel Poorman vs. County Commissioners*, 61 O. S. 506. The fact that the county commissioners erroneously considered said vacancy to be one of a temporary nature did not, of course, change the real nature of such vacancy, or affect the authority of the county commissioners to fill the same by the appointment of P. M. as clerk pro tempore. Said P. M. having given the required official bond and, presumably, having also taken the required oath of office, she is still clerk pro tempore of the Common Pleas Court of said county, unless, of course, she has since resigned said office or abandoned the same. No facts touching these questions appear in your communication.

In any event, the fact that said T. L. M. after his release from the hospital assumed to perform some or all of the duties of said office of Clerk of the Court of Common Pleas did not give him any right to such office; and if said P. M. has not resigned or abandoned her office as clerk pro tempore of said court her authority as such office should still be recognized. If, on the other hand, said P. M. has resigned or abandoned the office to which she was appointed, the county commissioners should

fill the vacancy thus created by the appointment of some other person who will give the required official bond and who will otherwise qualify as clerk pro tempore of said Court of Common Pleas.

The failure of said T. L. M. to qualify for the term of office for which he was elected in 1926, and which, as above noted, commenced on the first Monday in August of 1927, renders your second question immaterial, for the reason that a vacancy already existed in the office at the time the adjudication of said T. L. M.'s insanity was made. By way of answer to this question, however, I am inclined to the view that inasmuch as the rights of said T. L. M., as an elected officer, to the emoluments of the office to which he was elected attached to the office itself, and such right was not conditional on the performance of the duties of the office by said T. L. M., who, under the provisions of Section 2871, General Code, was authorized to appoint one or more deputies who could perform all of the duties of such office (Section 9, General Code), the temporary insanity of said T. L. M. mentioned in your communication would not have had the effect of creating a vacancy in said office if such vacancy had not otherwise existed.

Your third question has been sufficiently answered by what has been said above, but answering the same more specifically I am of the opinion that if Mrs. M. was legally appointed to the office of clerk pro tempore of said court and if she qualified as such officer, the return of T. L. M. and the assumption by him of the duties of said office did not terminate the right of Mrs. M. to the office to which she was appointed.

I do not see how any question can arise with respect to the tenure of E. M. N. in her position as deputy clerk of said court. Wholly aside from the question of the effect of her appointment to said position by T. L. M., prior to the term and qualification of P. M. as clerk pro tempore, it appears that said E. M. N. was again appointed deputy clerk by P. M. and her appointment entered of record. Under this state of facts, said E. M. N. obviously has a right to hold her position as deputy clerk until she is dismissed or someone else appointed to said position in her place, or until the term of her superior has expired.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2805.

DEED OF RELINQUISHMENT—CITY OF CINCINNATI—MIAMI &
ERIE CANAL LANDS—APPROVED.

COLUMBUS, OHIO, October 29, 1928.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of October 26, 1928, as follows:

"Herewith I am transmitting the deed which has been tendered by the City of Cincinnati to the State of Ohio, relinquishing to the State certain Miami and Erie Canal lands that were included in three separate leases conveying to the City of Cincinnati certain Miami and Erie Canal lands for boulevard and subway purposes.

The tracts that are intended to be relinquished to the State by the deed herewith enclosed, are for the surplus abandoned Miami and Erie Canal lands