

and fees; such examination to be made by and such fees and penalties assessed by and paid to the auditor of state.

Fees so received by the auditor of state and by him paid into the state treasury to the credit of the general revenue fund are hereby appropriated for the express purpose of paying the cost of such examinations."

Under the provisions of Section 710-153 of the General Code, the superintendent of banks has the right to examine the books and affairs of any trust company and hence, under the terms of Section 710-171, your office has adequate authority to make an examination in this instance.

I would suggest that you verify the list of outstanding policies and check the canceled policies against the list so verified, ascertaining in each instance the authority for the cancellation of the policy, which should include the consent of the policy holder in case a new policy is issued by the purchasing company in lieu of the one canceled.

I am of the opinion that, upon being satisfied that there are no outstanding liabilities, it is your duty to authorize the withdrawal of the deposit in question.

Respectfully,
EDWARD C. TURNER.
Attorney General.

411.

MUNICIPAL COURT OF PIQUA—UNAUTHORIZED TO APPOINT WASHINGTON TOWNSHIP TRUSTEE, MIAMI COUNTY.

SYLLABUS:

The judge of the municipal court of Piqua, Ohio, does not have power or authority to make an appointment to fill a vacancy on the board of trustees of Washington township, Miami county, Ohio.

COLUMBUS, OHIO, April 29, 1927.

HON. L. E. HARVEY, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date which reads as follows:

"Will you please favor me with your opinion on the following question:

Can the Judge of the Municipal Court of Piqua appoint some suitable person to fill a vacancy on the board of trustees of Washington township?

Section 3262 of the General Code, provides that the justice holding the oldest commission shall make the appointment to fill a vacancy in the board of trustees of a township.

Section 1579-598 provides, in part, that no justice of the peace shall be elected in Washington township.

It was evidently the intention of the legislature that the duties of the justice of the peace should be performed by the Municipal Court. The act creating the Municipal Court for the City of Piqua confers on

it the civil and criminal jurisdiction formerly held by the justice of the peace in the territory over which the court has jurisdiction.

It is my opinion that the act is not broad enough to confer on the Judge of the Municipal Court the authority to appoint a trustee to fill a vacancy on the board of trustees of Washington township.

The City Solicitor of the City of Piqua does not agree with me on this construction of the law and holds that the Judge of the Municipal Court has ample authority under the act creating the Municipal Court, to appoint some suitable person to fill this vacancy and the Judge is about to make the appointment.

I would therefore like to have your opinion on this question in order to settle the controversy?"

Section 3262, General Code, entitled "Vacancy in office of trustees" provides for the filling of vacancies in a board of township trustees and reads 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."

This section has been construed in two former opinions of this office, the first being found in the Annual Report of the Attorney General for 1913, Vol. II, page 1420, the syllabus of which reads:

"Under the provisions of the General Code, a vacancy in the board of trustees of a township may be filled by the justice of the peace of said township holding the oldest commission. In a township where there is no justice of the peace and no one is willing to accept an appointment as justice of the peace, the vacancy in the board of trustees cannot be filled."

The other opinion is Opinion No. 14, Opinions of the Attorney General for 1927, dated January 20, 1927, the first syllabus of which reads:

"1. Section 3262 of the General Code, provides that when there is a vacancy in a township board of trustees, the justice of the peace holding the oldest commission, or when the commissions of two or more justices bear even date, the justice oldest in years shall appoint a suitable person, eligible to the office, to fill such vacancy, and since no other provision for the filling of such a vacancy is contained in the Code, in a township where there is no justice of the peace, and no one is willing to accept an appointment and qualify as justice of the peace, a vacancy in the board of trustees cannot be filled."

Section 3262, supra, is the only section of the General Code having to do with filling a vacancy that may exist in a board of township trustees and by virtue of the provisions of this section the power to appoint, in the event of a vacancy thereon occurring, is vested in a justice of the peace of the township in whose board such vacancy occurs.

On April 29, 1921, (109 O. L. 555) the legislature passed an act entitled:

"To establish a municipal court for the city of Piqua, Miami county, Ohio, and fixing the jurisdiction thereof, and providing for a judge thereof, and other necessary officers and defining their powers and duties."

Certain sections of the General Code, a part of said act, are herein set forth: Section 1579-560, provides:

"That there be and hereby is created a court of record in and for the city of Piqua and the townships of Washington, Springcreek and Brown in the county of Miami, and state of Ohio, to be styled 'The Municipal Court of Piqua, Ohio' (the jurisdiction thereof, to be herein and hereafter fixed and determined)."

Section 1579-598, provides:

"Upon the qualification of the municipal judge, as provided for in Section 2 (G. C. Section 1579-561) hereof, the jurisdiction of the criminal court of the city of Piqua, the mayor of the city of Piqua or any person or officer exercising the jurisdiction of a mayor in the city of Piqua, and of all justices of the peace of said Washington, Springcreek and Brown townships, Miami county, Ohio, in all civil and criminal matters shall cease, and no judge of the criminal court, justice of the peace or constable shall thereafter be elected in said Washington, Springcreek and Brown townships."

It will be noted that by the provisions of Section 1579-598, supra, upon the qualification of the municipal judge the jurisdiction of all justices of the peace of Washington township, *in all civil and criminal matters* shall cease, and no justice of the peace shall thereafter be elected in Washington township.

Having abolished the office of justice of the peace in said township, the question arises as to whether or not the act creating the municipal court of Piqua, Ohio, confers power and authority upon the municipal judge thereof to appoint a township trustee as provided in Section 3262, supra.

An examination of the sections of the General Code which are parts of the act creating the municipal court of Piqua, Ohio, convinces me that your question must be answered in the negative.

The municipal court and the judge thereof have only those powers and duties as are conferred upon them by the statutes which created them.

The section relating to the jurisdiction of the court in question is Section 1579-562, which, after making certain provisions with reference to the criminal jurisdiction of such court, provides as follows:

"* * * and in addition thereto said municipal court shall have ordinary civil jurisdiction within the limits of the said city of Piqua and townships of Washington, Springcreek and Brown, in said county of Miami, and state of Ohio, in the following cases:

(1) In all actions and proceedings of which justices of the peace, or such courts as may succeed justice of the peace courts, have or may be given jurisdiction.

(2) In all actions and proceedings at law for the recovery of money and of personal property of which the court of common pleas has or may be given jurisdiction, when the amount claimed by a party, or the appraised value of the personal property sought to be recovered does not exceed

seven hundred and fifty dollars, and in such actions, judgment may be recovered for over seven hundred and fifty dollars, when the amount over seven hundred and fifty dollars shall consist of interest or damages, or costs accrued after the commencement of the action.

(3) All actions on contracts express or implied, when the amount claimed by the plaintiff, exclusive of all costs, does not exceed seven hundred and fifty dollars. When a cause arising out of a contract is pending in the municipal court and when the ends of justice demand that the contract be reformed or rescinded, the municipal court shall have jurisdiction to decree such reformation or rescission (rescission).

(4) All actions or proceedings whether legal or equitable to enforce the collection of its own judgements.

(5) All actions for the sale of personal property under chattel mortgage, lien or other charges of incumbrance upon personal property, and for marshalling of all liens thereon, when the appraised value of such property shall not exceed seven hundred and fifty dollars.

(6) All actions and proceeds (proceedings) for the sale of personal property under lien of judgement of the municipal court or lien for material or fuel furnished or labor performed and for the marshaling of all liens thereon.

(7) All actions and proceedings in the nature of creditor's bills in aid of execution, to subject the interest of a debtor in real or personal property to the payment of a judgement of the municipal court.

(8) All actions and proceedings in the nature of interpleader and involving seven hundred and fifty dollars or less, but parties may interplead as to larger amounts in any action originally instituted, involving seven hundred and fifty dollars or less."

Section 1579-563, General Code, contains certain provisions relating to the jurisdiction of such court within the limits of Miami county, and enumerates matters chiefly ancillary to the powers conferred in the preceding section.

Section 1579-564, General Code, provides:

"The municipal court shall have jurisdiction of all misdemeanors and of all violations of city ordinances of which police courts or the mayor in municipalities or a justice of the peace now have or may hereafter be given jurisdiction. In felonies the municipal court shall have the power which police courts or the mayor in municipalities or a justice of the peace now have or may hereafter be given."

Section 1579-565, General Code, provides:

"The municipal court shall have jurisdiction of all bastardy cases the same as justices and common pleas courts now have and other quasi-criminal actions and proceedings of which a court of a justice of the peace now has or may hereafter be given jurisdiction; and in all such actions the practice and procedure and the powers of the court in relation thereto shall be the same as those which are now or may hereafter be possessed by a court of a justice of the peace."

The jurisdiction of such court is thus defined and the power and authority of the judge thereof is thereby limited. Nowhere is the court specifically given

power to make the appointment under consideration, and the question arises: Is any language used in said act sufficiently broad so as to include the power to appoint a township trustee as contemplated in Section 3262, *supra*.

The word "jurisdiction" is derived from the Latin *ius*, meaning law, and *dicere*, meaning to decide. As defined by Bouvier, jurisdiction is "the authority by which judicial officers take cognizance of and decide causes;" "the power to hear and determine."

By the act creating the municipal court of Piqua, Ohio, the jurisdiction, *viz.*, the power of justices of the peace of Washington township to hear and determine *all civil and criminal matters* was abrogated and such power was vested in the municipal court. But insofar as any administrative or political powers as distinguished from judicial powers theretofore vested in justices of the peace no mention was made and therefore no such power was granted to such municipal court.

Different sections of the General Code place upon justices of the peace various duties which are in nowise judicial but are purely administrative and ministerial in their nature. For example, by Section 10645, General Code, a justice of the peace is authorized to appoint an appraiser to appraise the estate of a deceased person, where one of the appraisers appointed by the probate court fails to attend. By Section 3470, General Code, he is given power to order any householder of the township to inter certain dead at the expense of the trustees. Section 5114 confers certain powers with reference to making an abstract of a vote in municipal elections. Section 11182 authorizes a justice to solemnize marriages. By Section 1738, General Code, upon the written application of the persons therein named, a justice of the peace is authorized to appoint one or more electors of the county as special constables to guard and protect the property of the applicants.

In the case of *People of the State of California, ex rel. vs. Thomas H. Bush, et al.*, 49 Cal. 344, it was held:

"The performance of a ministerial act by a judicial officer, does not constitute the act itself a judicial proceeding.

The appointment of a member of the Board of Supervisors by a County Judge, is a ministerial and not a judicial act, and is not subject to review by *certiorari*."

In the opinion the court said:

"The appointment of the Supervisors is, in its nature, a ministerial and not a judicial act. Its nature is not dependent upon the quality or character of other acts which may be performed by the officer, who makes the appointment. * * * A judicial officer may be required by law to discharge other than judicial duties. He may, by authority of law, perform ministerial acts (*People vs. Provines*, 34 Cal. 520), but when performed, they do not become judicial acts, because they were performed by a judicial officer. This becomes apparent on a moment's consideration. A County Judge is authorized among other things to take the acknowledgment of a deed, and to solemnize marriage. No one will contend, that in performing those acts he exercises judicial functions."

In theory at least it has always been fundamental in our government that there is a well marked division of powers into legislative, judicial and executive, although there has sometimes been evinced a tendency to disregard this classification.

An examination of Section 1579-562, supra, clearly shows that all of the actions and proceedings contemplated in this and the related sections are judicial in their nature. It may well be that the legislature in creating the municipal court of Piqua determined to confer upon this court only functions purely judicial. In any event it is clear that the power to appoint township trustees was not expressly conferred upon such municipal court and an examination of the entire act creating this court discloses no legislative intent in such act to confer upon such court any of the administrative duties formerly given to justices of the peace. Nowhere in the law is there any provision which authorizes the municipal court to discharge all the functions theretofore devolving upon justices of the peace nor is there a blanket provision which names the municipal court as successor to the jurisdiction, powers and duties of justices of the peace. Instead, the law abolishes the office of justice of the peace in the townships in question and creates a municipal court upon which certain jurisdiction formerly exercised by a justice of the peace is conferred.

In arriving at this conclusion I am not unmindful of a former opinion of this office, vis., Opinion No. 3904 of the Opinions of the Attorney General for 1926, dated December 22, 1926, a copy of which is herewith enclosed. Although this opinion has reference to the act creating the municipal court of Springfield, Ohio, the act therein construed is in substance the same as the one now under consideration so far as powers conferred are concerned.

As above stated the only way a vacancy on the board of township trustees may be filled is as provided by Section 3262, supra. No justice of the peace now being in existence in Washington township, such vacancy cannot be filled.

Answering your question specifically it is my opinion that the judge of the municipal court of Piqua, Ohio, does not have power or authority to make an appointment to fill a vacancy on the board of trustees of Washington township.

Respectfully,
EDWARD C. TURNER.
Attorney General.

412.

APPROVAL, NOTE OF LAURELVILLE VILLAGE SCHOOL DISTRICT,
HOCKING COUNTY, OHIO, \$9,120.00.

COLUMBUS, OHIO, April 29, 1927.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.