

2419.

TOWNSHIP TRUSTEE — RESIGNATION FILED WITH JUSTICE OF THE PEACE OF HIS TOWNSHIP HOLDING OLDEST COMMISSION — VACANCY CREATED — FILLED BY SUCH JUSTICE.

SYLLABUS:

*A resignation of a township trustee when filed with the justice of peace of his township holding the oldest commission becomes effective when so filed and creates a vacancy which may be filled by such justice of the peace.*

Columbus, Ohio, June 18, 1940.

Honorable James W. Lang, Jr., Prosecuting Attorney,  
West Union, Ohio.

Dear Sir:

This will acknowledge receipt of your letter of recent date in which you request an opinion upon the following:

“On April 13, 1940, a Township Trustee filed with the Justice of Peace of his Township holding the oldest commission, a resignation from the office of such Township Trustee. No resignation was filed by such resigning trustee with the Board of Trustees or any other person. Thereafter the said Justice of Peace accepted the resignation and appointed an elector to fill the vacancy.

“The Trustee that purported to resign now claims that he is still a member of the Board of Trustees and entitled to act as such as his resignation with the Justice of Peace was in effective as he was not the proper person to resign with.

“I will appreciate your advice as to who is the proper person or persons with whom to file the resignation as Township Trustee, and whether or not the resignation of the Trustee mentioned herein has become effective.”

“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. Wherever in any township

a municipal court shall replace and supersede the justices of the peace, the municipal judge or the presiding municipal judge if there be more than one, shall have power to fill vacancies on the board of trustees. In those townships wherein there are no justices of the peace or municipal judges the probate judge shall have the power to fill vacancies on the board of trustees."

As there can be no question but that Section 3262, General Code, *supra*, grants to the justice of the peace holding the oldest commission, the power to fill a vacancy on the board of township trustees, the sole question involved herein is as to whether or not the trustee who purported to resign as such officer tendered his resignation to the proper person.

As the statute does not prescribe as to what person or persons a township trustee is to resign with, it is necessary to seek some other means of determination. It is stated in Vol. 7, O. Jur. at page 798:

" \* \* \* while the common law of England has not been adopted by express legislative enactment, its introduction by our forefathers as their birthright was almost a matter of course and its implied recognition by the government and by the people may fairly be presumed. To it we constantly resort, when the positive law is silent or insufficient. If no precedent is found for a remedy to enforce an acknowledged right, one of its most cherished principles requires us to adapt one to the exigency and make good the maxim, that there is no right without a legal remedy. \* \* \*"

In the case of *Bloom v. Richards*, 2 O. S., 387, the Court states:

"The English common law, so far as it is reasonable in itself, suitable to the condition and business of our people, and consistent with the letter and spirit of our federal and state constitutions and statutes, has been and is followed by our courts, and may be said to constitute a part of the common law of Ohio. But wherever it has been found wanting in either of these requisites, our courts have not hesitated to modify it to suit our circumstances, or, if necessary, wholly to depart from it."

We may, therefore, conclude that the common law of Ohio may properly be applied to this question.

Upon consideration of the question of resignation of a public officer, the Supreme Court of Ohio in the case of *Reiter v. State, ex rel*, 51 O. S. 74, in paragraph 1 of the syllabus states:

"By the rules of the common law, a resignation of an office does not take effect, so as to create a vacancy, until such resignation is accepted by the proper authority; but the common law in this

regard is not in force in this state, to its full extent, and here a resignation without acceptance creates a vacancy, to the extent at least, of giving jurisdiction to appoint or elect a successor, unless otherwise provided by statute."

At page 82 of the opinion it is stated:

"\* \* \* A proper regard for the rights of the people requires that it shall not be in the power of any officer, or body of men, to refuse to accept a resignation, and thereby prevent an election at the proper time to fill the vacancy. \* \* \*

The responsibility of a hiatus in office, should rest upon the person or body holding the appointing power, rather than upon the resigning officer. \* \* \*"

From the above quotation it would seem clear that the courts of this state have adopted a rather liberal policy concerning the resignation of public officers having in mind the havoc that might be wrought through a strict interpretation of the common law rules.

As neither the legislature nor the courts of Ohio have made any commitment directly upon the exact question herein involved, it is necessary to look elsewhere for authority. In the case of *Edwards v. U. S.*, 103 U. S. 470, at page 478, the court says concerning the power of the township board to receive a resignation from a resigning township supervisor:

"\* \* \* The supervisor is not their officer, representative, or appointee. They only represent the township in exercising the power, vested in them, of filling a vacancy when it occurs. This makes them the proper body to receive the resignation, because they are the functionaries whose duty it is to act upon it."

In Vol. 22, R. C. L., at page 558, it is stated:

"The official with whom a resignation of a public office must be filed may be designated by statute. For example an act of the legislature may confer on a county judge jurisdiction to receive and accept the resignation of a justice of the peace of the county. And again the justices of the town may be intrusted with authority to accept the resignation of any town officer. In the absence of a statutory direction a public officer should tender his resignation to the tribunal having authority to appoint his successor, or to call an election to fill the office. For example where a board of county commissioners has power to appoint successors to viewers for a drainage system the right of such board to accept the resignations of the viewers for the county has been recognized. By statute the common law rule may be re-enacted, and where this has been done

it has been held that the resignation of an elective or appointive officer must be tendered to the person who has the power to appoint his successor, and that a resignation tendered to any other person or body is a nullity."

In Vol. 22, R. C. L., at page 559, on the subject of withdrawal of resignation it is stated:

"Where an unconditional resignation, to take immediate effect, has been transmitted to the power authorized to accept it, it is held by some courts that it cannot be withdrawn, even with the consent of the officer with whom it is filed. The reason for this view is that public policy requires that there be no uncertainty as to who are and who are not public officers. \* \* \*"

It appears that the Supreme Court of Ohio in the case of *Reiter v. State, ex rel.*, supra, modified and liberalized the English common law rule concerning the necessity of acceptance of the resignation of a public officer, that the common law rules in their most strict interpretation would permit and sanction tender of a resignation by a public officer to the authority having power to appoint a successor in such office.

It is, therefore, my opinion that a resignation of a township trustee when filed with the justice of peace of his township holding the oldest commission becomes effective when so filed and creates a vacancy which may be filled by such justice of the peace.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.