

"The taxing authority of any school district in addition to other powers conferred by law shall have power to purchase, construct, enlarge, extend, complete, improve, equip and furnish buildings and play grounds for public school purposes, and acquire real estate with or without buildings thereon, and easements, for such purpose."

The authority therein conferred does not, however, in my opinion extend beyond the plain language of the section. I feel that the authority therein conferred to construct buildings for public school purposes cannot possibly be extended to comprehend the construction of a dwelling house for the janitor in conjunction with the construction of the school house itself. While the reasons for such construction may be entirely meritorious, they do not constitute a justification for the expenditure of public funds in this manner.

I am, therefore, of the opinion that there is no authority for a board of education to issue bonds, a part of the proceeds of which will be devoted to the construction of a janitor's dwelling house upon school property.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1560.

TOWNSHIP TRUSTEE'S BOND—APPROVED BY JUSTICE OF THE PEACE—PROCEDURE WHERE THERE IS NO JUSTICE OF THE PEACE TO APPROVE SAME. (SEE OPINION NO. 1565.)

SYLLABUS:

1. *By the terms of Section 3269, General Code, bonds of newly elected township trustees are required to be approved by a justice of the peace of the township in which such bonds are given, and there is no authority for the examination and approval of such bonds by any other officer or officers.*

2. *In case there is no justice of the peace to approve the bond of newly elected township trustees, each of such trustees should enter into a bond with two good and sufficient sureties residents of the same township with the trustee, as required by Section 3269, General Code, (or with a duly authorized guaranty company as surety, as authorized by Section 9571, G. C.) and file the same with the township clerk for record. When such bond is so entered into and filed, said trustees are authorized to enter upon the duties of their office and no vacancy would be created therein.*

COLUMBUS, OHIO, January 10, 1928.

HON. EDGAR G. MARTIN, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of January 4, 1928, in which you request my opinion, your letter reading as follows:

"The following problem has been presented to me:

Section 3269 reads as follows,—'Before entering upon the discharge of his duty, each township trustee shall give bond to the state for the use of the township, with at least two sureties, who shall be residents of the same town-

ship with the trustee, in the sum of five hundred dollars, conditioned for the faithful performance of his duty as trustee. Such bond shall be approved by a justice of the peace of the township in which the bond is given.'

In several townships in this county there is a vacancy in the office of justice of the peace, and the trustees are unable to secure anyone to fill this vacancy. In the absence of the justice of the peace, who should approve the bond of the trustees under above Section 3269? Pending the approval of the bond, who composes the members of the board of trustees, those elected and to be qualified as of January first, 1928, or the previous board?"

Section 3269, General Code, is quoted in full in your letter and it is unnecessary again to set forth this section.

It will be noted that while, by the express terms of this section, a township trustee is required to give bond to the state as prescribed in the section "before entering upon the discharge of his duties," it is not expressly provided that the bond shall be approved before the trustee enters upon the discharge of his duties, although, generally speaking, it is the law that "before an official bond may be regarded as legally filed it must be approved by competent authority." 39 Cyc. 1387.

With reference to the necessity of approval of an official bond, Mechem in section 311, page 209, of his work on Public Offices and Officers, says as follows:

"The statutes requiring bonds to be given usually require that, before they are accepted, they shall be examined and approved by some representative of the government. The purpose of this examination is, obviously, that there shall be some means by which the public may be assured that the bond tendered is sufficient in form and amount and is so executed as to effectuate the objects contemplated in its requirement."

And in the next section the same authority says:

"It is also evident that the duty imposed upon the officer charged with the responsibility of examining and approving or rejecting the bond is one owing to the public, and not to the principal or his sureties.

* * * "

As to the liability of the sureties on an official bond not approved according to law or not approved at all, it has been held that where, by reason of the execution and filing of a bond an officer has been inducted into office, the sureties on such bond cannot avoid liability because of defective approval or lack of approval thereof.

Mechem in section 313, page 209 of the work above cited, states the law as follows:

"Approval being thus for the protection of the public only, it is well settled that where, by virtue of the bond, the officer has been inducted to the office, his sureties cannot escape liability for his defaults because the bond was not approved by the proper officer or was not approved at all."

In section 182, page 193 of Throop on Public Officers, it is said:

" * * * It is well settled that the validity of the bond, that is, the liability of the principal and sureties therein, is not affected by an omission to acknowledge it; or by an acknowledgment before an officer not empowered to take the acknowledgment, or by a failure to approve it; or an approval by an unauthorized officer or court; or by any defects in the justification."

While in the next section the same authority says:

“With respect to the approval of an official bond, it has been held that an officer who is sued, cannot justify as an officer, unless his official bond has been approved as required by law. But as respects the sureties’ liability, the approval is not deemed in law a part of the bond; and, in an action upon the bond, the sureties are not entitled to oyer of the approval. * * * ”

Many decisions of the courts might be cited to the same effect, including *McCracken vs. Todd*, 1 Kan. 148; *People vs. Wardwell*, 17 Ill. 278; *Clark, et al. vs. State*, 7 Blachf. (Ind.) 758; *People vs. Edwards*, 9 Calif. 286. In the case last cited the court said:

“The defect in the approval of a sheriff’s bond cannot be set up as a defense in an action on said bond against the sureties. The object of the law in requiring the approval is to insure greater security to the public, and it does not lie in the obligors to object that the bond was accepted without proper examination into its sufficiency by the officers of the law.”

I find no section of the Code authorizing the approval of the bond of a township trustee by any officer or officers other than a justice of the peace of a township in which the bond is given. The better weight of authority is to the effect that the examination and approval of a bond are acts requiring the exercise of judgment and discretion and are quasi-judicial in their nature. This was the holding in the case of *Davies, Aud. vs. State, ex rel.* 11 O. C. C. (N. S.) 209, 212, in which the court said:

“A deputy auditor, Mr. Otto Sanzenbacher, attempted to approve the bond of Scherer, but we are quite clear in our view that the approval of an official bond is an act requiring such judgment of the officer attempting to exercise such approval that it can not be done by a merely ministerial officer, and we do not think that a deputy auditor is clothed with the power attempted here to be exercised.”

It follows that bonds of township trustees may only be approved by the officer designated by statute namely, a justice of the peace of the same township.

The specific question asked by you has heretofore been passed upon by this department, namely, in an opinion reported in Opinions, Attorney General, 1917, Vol. III, page 2450, the first branch of the syllabus of which reads:

“In case there is no justice of the peace to approve the bond of a township trustee, he should enter into a bond with two good and sufficient sureties and file the same with the township clerk for record. By so doing said trustee would be authorized to enter upon the duties of his office and no vacancy would be created in said office.”

In the opinion it was said as follows:

“Section 3269, G. C., reads in part as follows:

‘Before entering upon the discharge of his duty, each township trustee shall give bond * * *. Such bond shall be approved by a justice of the peace of the township in which the bond is given.’

Section 3270, G. C., provides in part as follows:

‘ * * * Such original bond or new bond shall be deposited with the township clerk and recorded by him.’

Section 3265, G. C., provides as follows:

'If after receiving notice of his election or appointment, a person elected or appointed to a township office fails to take the oath of office and give bond within the time required by law, he shall be deemed to have declined to accept, and the vacancy shall be filled as in other cases.'

The question is as to the course a trustee ought to pursue under the sections above quoted, in a case where there is no justice of the peace in a township and therefore no one to pass upon the sufficiency of the bond of said trustee. So far as I know, there is no provision of law which will take care of a situation such as you suggest; that is, in the event there is no justice of the peace to pass upon the sufficiency of the bond, there seems to be no other officer designated who can perform this duty which devolves upon a justice of the peace. Neither do I know of any decision of the courts in which a question of this kind has been judicially determined.

However, in *State ex rel. Ackerman vs. Dahl*, 65 Wis. 510, there is a decision which to some extent at least would bear upon the matter now under consideration. The fourth branch of the syllabus reads:

'The wilful and unjust refusal of the officer required to approve the official bond of a person elected or appointed to an office, to give it his approval, can not deprive such person of his office or create a vacancy therein.'

In the opinion on p. 521, the court reasoned as follows:

'The person who has been elected or appointed to an office and who does all that is required of him by law to enable him to hold the office, can not be deprived of such office by any wilful or unjust refusal of the person or officer, who is required to approve his bond, to give it his approval. If such a rule is to prevail, then the officer whose approval of an official bond is required may in any case by such wilful and unjust refusal create a vacancy in an office.'

At the time this decision was rendered there was a provision of law in Wisconsin as follows:

'The neglect or refusal of any officer elected or appointed or reelected or reappointed to any office to give or renew his official bond or to deposit the same in the manner and within the time prescribed by law shall create a vacancy.'

The court used the following language in reference to this provision:

'Under this provision, when the officer has done all he can possibly do to comply with the law in this respect, it can hardly be said that he has neglected or refused to give and deposit his bond when he has been prevented from so doing by an unlawful act or wilful refusal on the part of some other officer to perform a duty imposed upon him in regard to such official bond.'

It seems to me the reasoning of the court in this case could be made to apply to the facts in the case under consideration. If the township trustees elected to office at the last election do all in their power to comply with the law, they would be justified in entering upon the duties of their office and no vacancy could be said to exist; that is, if they give a bond and are not able to have the same approved because there is no justice of the peace in the township, they would be warranted in filing the same with the clerk of the township, and by so doing there would be no vacancy in the office and they would be authorized in law to enter upon the discharge of the duties of their office.

There is a case reported in 25 O. S. 567, styled *Kelly et al. vs. State of Ohio*, which tends in the same direction as the holding in the Wisconsin case.

* * *

On p. 577 in the opinion the court say:

'The objection that the bond was not accepted and approved is not founded in fact. It was orally accepted by two of the commissioners, and that in our judgment is sufficient. The better practice undoubtedly is to put the acceptance in writing, or to enter it on the journal, but we know of no law making it indispensable.

The law requiring the certificate of the prosecuting attorney to be indorsed on the bond is merely directory, and the want of such a certificate by no means avoids or invalidates the bond.'

From all the above it is my opinion that if the township trustees elected did all in their power to comply with the law, namely, entered into a bond with two good and sufficient sureties, resident of the township, and file the same with the township clerk, they will be authorized to enter upon the duties of their office and there could be no vacancy declared in the same.

However, I desire to suggest in passing that in the event there should be a justice appointed to fill the vacancy in said township at any time during the terms of office for which the township trustees were elected, they should then have said justice approve the bonds in accordance with the provisions of Section 3269, G. C., above quoted."

While the facts in the Wisconsin case cited in the above opinion are somewhat different and distinguishable from the facts in the cases you describe in your letter, and while I am not unmindful of the fact that the failure to have the bond of a newly elected trustee examined and approved by competent authority deprives the public of the protection that such an examination and approval insures, I am inclined to agree with the reasoning and conclusions of the opinion of my predecessor in office.

I desire, however, especially to direct your attention to the suggestion contained in the opinion above quoted to the effect that "in the event there should be a justice appointed to fill the vacancy in said township at any time during the term of office for which the township trustees are elected, they should then have said justice approve the bonds in accordance with Section 3296, G. C." This will assure to the people of the township the examination and approval of the trustees' bonds contemplated by law and will, in addition, do away with any question whatever as to whether or not township trustees whose bonds are not approved as prescribed by law are *de jure* or *de facto* officers.

Specifically answering your questions, it is my opinion that:

1. By the terms of Section 3269, General Code, bonds of newly elected township trustees are required to be approved by a justice of the peace of the township in which such bonds are given, and there is no authority for the examination and approval of such bonds by any other officer or officers.

2. In case there is no justice of the peace to approve the bond of newly elected township trustees, each of such trustees should enter into a bond with two good and sufficient sureties residents of the same township with the trustees, as required by Section 3269, General Code, (or with a duly authorized guaranty company as surety, as authorized by Section 9571, G. C.) and file the same with the township clerk for record. When such bond is so entered into and filed, said trustees are authorized to enter upon the duties of their office and no vacancy would be created therein.

Respectfully,

EDWARD C. TURNER,
Attorney General.