

clusive. There still remains the legal question, as to what is the proper construction of the words "school years" as used in said statute, Section 7705, General Code.

The same expression is used in Section 7702, General Code, which authorizes the employment of a superintendent in city school districts for a period not longer than "five school years".

This statute came to the attention of the Court of Appeals for Fairfield County, in the case of *Layton v. Clements, et al.*, 27 O. C. A., page 369. It appeared therein that a superintendent of schools had been employed in the city of Lancaster for a period of three years, commencing July 1, 1915. At that time the school year began September 1 of each calendar year, and it was contended that the superintendent had been improperly employed because his term did not conform to the school year and was not made to end on the thirty-first day of August as provided by Section 7702, General Code.

The contract was upheld by the court and it was held, "the provision of Section 7702, General Code, that the term of a superintendent of schools must end on August 31, is directory and not mandatory, time not being of the essence of the contract." In the course of the opinion the court said:

"This provision, as we view it, is directory and not mandatory. A board of education may employ a superintendent for a term not to exceed five years, but it may employ one for less than that period, which was done in the present case. The essence of the contract under consideration is not time, and therefore we do not think the claim of the defendants in this regard is well taken."

Inasmuch as the court in the above case upheld the contract of the superintendent even though the term of the contract did not correspond with school years, and the wording of the statute, Section 7702, General Code, is precisely the same in this respect, as is Section 7705, General Code, I am of the opinion, that the holding of the court in the case above cited is controlling in the construction of the language used in Section 7705, General Code, wherein it authorizes the employment of teachers for not longer than three school years.

I am therefore of the opinion in specific answer to your question that, so far as the term for which the teacher in question was employed is concerned, the employment is legal.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3492.

SALARIES—COUNTY TREASURER AND PROBATE JUDGE APPOINTED TO FILL VACANCIES PRIOR TO AUGUST 22, 1930, AND AFTER SAID DATE ELECTED FOR UNEXPIRED TERMS—BASED ON 1930 CENSUS FROM TIME OF QUALIFICATION AFTER ELECTION.

SYLLABUS:

Where a county treasurer and probate judge were appointed to fill vacancies in such offices sometime previous to August 22nd, 1930, and were elected to fill the remainder of the unexpired terms at the general election in November,

1930, their salaries from the time of their qualification after said election should be based on the 1930 census figures.

COLUMBUS, OHIO, August 8, 1931.

HON. JOHN R. PIERCE, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

“Request is hereby made for an opinion as to the salary of the County Treasurer and the Probate Judge of Mercer County, Ohio.

At the election held in November, 1928, C. L. Vining was re-elected County Treasurer and C. S. Johnson was re-elected Probate Judge. Judge Johnson started on his second term, February 9, 1929, and died on March 8, 1929. Thereafter Raymond A. Younger was appointed Probate Judge by Governor Cooper on March 11, 1929, and was elected for the remainder of the unexpired term at the November election 1930.

Mr. Vining resigned as County Treasurer at the expiration of his first term, September, 1929, and O. V. Runyon was appointed by the Commissioners to that office. At the election held in November, 1930, he was elected for the remainder of the unexpired term.

The salary for each of these offices was \$2250.00 per annum, based upon the census of 1920. The census of 1930 for Mercer County will reduce this salary and these officers are now receiving the reduced salary. Each of them claim that since they are serving the remainder of an unexpired term and since they were both in office before the 1930 census became effective, they are entitled to a salary based upon the 1920 census which was in effect when they took office.”

Article II, Section 20, of the Ohio Constitution is pertinent to consider in connection with your question. Said Section reads as follows:

“The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.”

From the above section of the constitution, you will note that a change in salary shall not affect the salary of any officer *during his existing term*. As disclosed by the Ohio courts and opinions of the Attorney General, the inhibition is personal and, therefore, when an appointee fills a vacancy in an office, his salary is governed by the law in force at the time of his appointment and qualification, rather than by the law in force at the time the person whose term he is helping to complete, took office. See *State ex rel. v. Tanner*, 27 O. C. A. 385; *Zangerle v. State ex rel.*, 105 O. S. 650; *Opinions of Attorney General, 1928, Vol. I, page 256*; and *Opinions of Attorney General, 1930, Vol. II, page 1075*.

Now Section 2636, General Code, provides for the filling of a vacancy in the office of county treasurer and the giving of bond and taking of an oath by the appointee, but such section does not state the length of term of the appointee. Section 10, General Code, being a general section, is, therefore, pertinent and states that an appointee to fill a vacancy “shall hold the office until his successor is elected and qualified”, and that “unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have

occurred". Thus the term of office of an appointee to fill a vacancy in the office of county treasurer is not for the unexpired term, but only until a successor is elected and qualified.

Likewise, Article IV, Section 13, Ohio Constitution, provides that if "the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, *until a successor is elected and qualified*".

It was held in Opinions of the Attorney General, 1929, Vol. I, page 464, that under Article IV, Section 13, Ohio Constitution, and Section 10, General Code, the election of a successor to an appointee who is filling a vacancy in the office of probate judge, shall be held at the first general election for state and county officers, and that the term of office of the successor is for the remainder of the unexpired term. Hence the term of office of an appointee, filling a vacancy in the office of probate judge, is only until his successor is elected and qualified and not for the unexpired term.

From the above discussion it would appear that the probate judge and county treasurer involved in your communication, started a new *term* within the meaning of Article II, Section 20, Ohio Constitution, when they were elected and qualified.

Hence it now remains to be determined at what date the 1930 census was completed so as to change salaries based on county population; for if the census was published before the date of the qualification of the county treasurer and probate judge after their election, it is obvious that their salaries will be based on the 1930 census.

In my Opinion No. 3020, rendered March 5, 1931, it was held in the first paragraph of the syllabus as follows:

"1. The 1930 federal census was officially certified and announced for the purpose of determining salaries payable from county treasuries on August 22, 1930."

Therefore, since the probate judge and county treasurer were elected on November 4th, 1930, qualifying shortly thereafter, sometime after August 22nd, 1930, I am of the opinion that their salaries will be based on the 1930 population, from the time of their qualification till the end of their terms.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3493.

CIGARETTE LAW—WHOLESALE AND RETAIL DEALERS—REFUND OF UNEARNED PORTION OF MONEYS PAID FOR LICENSES, AFTER JULY 9, 1931—HOW TAX ASSESSED BEFORE BUT COLLECTED AFTER EFFECTIVE DATE OF S. B. 324, 89TH G. A. AP-PORTIONED—VENDING MACHINE OWNER'S DUTY TO OBTAIN LICENSE—SPECIFIC FACTS.

SYLLABUS:

1. *Persons who voluntarily discontinue the wholesale or retail business of dealing in cigarettes after July 9, 1931, are not entitled to any refund for the unearned portion of their license fees.*
2. *Persons who took out wholesale and retail licenses to sell cigarettes at the*