

13.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO, THROUGH DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS, AND V. W. SURVER, AKRON, OHIO—TO FURNISH AND INSTALL SEATS AND DESKS, TRAINING SCHOOL BUILDING, KENT STATE NORMAL SCHOOL, TEN THOUSAND DOLLARS.

COLUMBUS, OHIO, January 19, 1927.

HON. GEORGE F. SCHLESINGER, *Director, Department of Highways and Public Works, Columbus, Ohio.*

DEAR SIR.—You have submitted for my approval a contract between the State of Ohio acting by the Department of Highways and Public Works and V. W. Surver of Akron, Ohio. This contract covers the furnishing and installing of seats and desks for training school building, Kent State Normal School, Kent, Ohio, and calls for an expenditure of ten thousand dollars (\$10,000.00). You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated sufficient to cover the amount of this contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given and bids tabulated as required by law. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

In view of the fact that V. W. Surver submitted the bid of ten thousand dollars (\$10,000.00) and that he is the contractor building the training school building, Kent State Normal School, Kent, Ohio, in which building the seats covered by the contract are to be placed, and that the amount of his bid is two thousand dollars (\$2,000.00) less than the architect's and engineer's estimate, and further, that there is only one other bid as low as Mr. Surver's, it is my opinion that you may consider the bid as contemplated in law the lowest and best bid and that the Director of Highways and Public Works may therefore properly enter into a contract with the said V. W. Surver for the furnishing and installing of seats and desks for training school building, Kent State Normal School, Kent, Ohio, at his bid of ten thousand dollars (\$10,000.00).

Finding said contract and bond submitted for my approval in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
EDWARD C. TURNER,
Attorney General.

14.

JUSTICE OF PEACE--TOWNSHIP BOARD OF TRUSTEES--VACANCY--WHO HAS POWER TO APPOINT--SECTION 3262 G. C.--UNDER SECTION 138 G. C. JUSTICE OF PEACE MUST HAVE LEGAL CERTIFICATE--COMMISSION FROM GOVERNOR.

SYLLABUS:

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.

2. By Section 138 of the General Code, a justice of the peace is ineligible to perform any duty pertaining to his office, including the appointment of a suitable person to fill a vacancy on a township board of trustees, until he presents to the proper authority a legal certificate of his election or appointment, and receives from the governor a commission to fill such office, and otherwise qualifies according to law.

COLUMBUS, OHIO, January 20, 1927.

HON. W. S. PAXSON, *Prosecuting Attorney, Fayette County, Washington C. H., Ohio.*

DEAR SIR:—I have your letter of January 11th, 1927, requesting my advice, in which you state that one of the township trustees of Perry township has removed from the township and resigned, that there is no justice of the peace in such township and that, because of the expense involved in securing a commission from the governor, no one will accept an appointment and qualify as justice of the peace in such township. You further state as follows:

“It seems to me that under Section 3261, General Code, the remaining two trustees would have authority to appoint a justice of the peace, which appointment would be sufficient without getting a commission from the governor. This justice of the peace could give bond and qualify, then appoint a new trustee and resign, if he did not care to continue in office.”

Two questions are thus presented for answer:

First: Can a vacancy in a board of township trustees be filled in any way other than that prescribed by General Code, Section 3262 (hereinafter quoted), viz., by appointment by a justice of the peace of the township, and

Second: Can a person who has been appointed a justice of the peace of a township, but who has not received his commission to fill such office from the governor, exercise the power conferred by Section 3262 of the General Code, upon justices of the peace to fill a vacancy in the board of township trustees of their respective townships?

Each of these questions must be answered in the negative.

Section 3262 of the General Code, entitled “Vacancy in office of trustees” is the only section contained therein providing for the filling of vacancies in a board of township trustees. This section 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.”

When there is no justice of the peace in a township, therefore, and when there is no one willing to accept an appointment and qualify as a justice of the peace in such township, a vacancy in the board of township trustees of such township cannot be filled, and this department has heretofore so held.

"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."

Opinions of the Attorney General, 1913, Vol. II, page 1420.

Coming now to the second question it is clear that the board of trustees of Perry township, notwithstanding the fact that one of its members has removed and resigned, has the power to appoint a qualified resident of the township to the office of justice, although in passing it is proper to observe that it is Section 1714 of the General Code, and not Section 3261 that governs the filling of vacancies in this office. Indeed, by the terms of Section 1714 it is the positive duty of the board to appoint a suitable person to the office of justice of the peace, provided one who is willing to serve can be found. But before the person so appointed can exercise any of the powers of his office, he must receive from the governor a commission to fill such office.

So much of General Code Section 138 as is pertinent provides:

"A * * * justice of the peace, shall be ineligible to perform any duty pertaining to his office, until he presents to the proper officer or authority a legal certificate of his election or appointment, and *receives from the governor a commission to fill such office.*" (Italic the writer's.)

And while Section 1720 of the Code reads that:

"When a person *elected* justice of the peace receives a commission from the governor, he shall forthwith take and subscribe the oath of office before the clerk of the court of common pleas or before a justice of the peace of his county," (Italic the writer's.)

this section, as well as Section 1721 (relating to the bond to be given by a justice of the peace) applies *a priori* to a person *appointed* justice of the peace as well as to one elected, and by the language thereof clearly indicates that the first essential step in qualifying for the office of justice of the peace is receiving a commission from the governor. It follows that by the express terms of Section 138, supra, and from the obvious intent of Sections 1720 and 1721, a person appointed a justice of the peace is statutorily ineligible to perform any of the duties pertaining to his office, until he has qualified, by receiving from the governor a commission to fill the office and otherwise qualified according to law, and that an attempted appointment to fill a vacancy in a board of trustees by one who has not received his commission from the governor would be void.

In connection with your problem your attention is invited to Section 3267 of the General Code reading as follows:

"A person elected or appointed to a township office, who neglects or refuses to serve therein, shall forfeit and pay to and for the use of the township wherein he resides at the time of such election, the sum of two dollars, to be recovered by an action before a justice of the peace of such township. The township clerk shall demand, receive, or sue for such forfeiture, in the name of the township, and when collected, pay it to the township treasurer. No person may be compelled to serve in a township office two terms in succession."

From the plain wording of the sections quoted, and for the reasons stated, I am of the opinion that except as prescribed in General Code Section 3262, viz., by appointment by a justice of the peace of the township, there is no way provided by law for the filling of a vacancy in a board of township trustees, and that until a person appointed justice of the peace, has received his commission to fill such office from the governor and otherwise qualified according to law, he is ineligible to perform any of the duties of his office, including the filling of a vacancy in the board of trustees.

Respectfully,

EDWARD C. TURNER,

Attorney General.

15.

MUNICIPAL CORPORATION—MAY ENACT AND ENFORCE ORDINANCE
—SEIZURE AND SALE OF CONVEYANCE USED IN TRANSPORTING
INTOXICATING LIQUOR—MUST COMPLY WITH GENERAL LAWS
OF STATE.

SYLLABUS:

A municipal corporation may enact and enforce an ordinance providing for the seizure and sale of conveyances used in transporting intoxicating liquor, providing the provisions of said ordinance are not in conflict or inconsistent with the general laws of the state.

COLUMBUS, OHIO, January 21, 1927.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of January 14, 1927, requesting my opinion on the following:

“Section 6212-43, G. C., provides for the seizure and sale of conveyances used in transporting intoxicating liquors illegally.

Question: May a municipal corporation provide by ordinance for the confiscating of conveyances used in transporting liquor contrary to the provisions of an ordinance?”

Section 3 of Article XVIII of the Constitution of the State of Ohio provides:

“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”

In the case of *Heppel vs. The City of Columbus*, 106 Ohio St. 107, decided, December 12, 1922, the court held:

“By virtue of authority conferred upon municipalities by Section 3, Article XVIII of the Ohio Constitution, to adopt and enforce within their limits such local police regulations as are not in conflict with general laws, municipalities may enact and enforce ordinances, the provisions of which are not inconsistent with the general laws of the state, prohibiting the manufac-