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## JUSTICE OF THE PEACE

1. NO AUTHORITY TO PERFORM DUTIES OF OFFICE UNTIL PROPERLY COMMISSIONED—SECTION 107.05 RC.
2. NO JUSTICE OF THE PEACE HAVING A COMMISSION, THERE IS NO JUSTICE IN THE TOWNSHIP UNDER SECTION 503.24 RC; POWER OF APPOINTMENT DEVOLVES UPON PRESIDING MUNICIPAL JUDGE OR PROBATE JUDGE.
3. CLERK OF COURT OF COMMON PLEAS MAY REFUSE TO FILE COMMISSION OF JUSTICE OF THE PEACE, THERE BEING NO PROVISION FOR SUCH.
4. RECORD OF BOND TO ADJOIN RECORD OF OATH—SECTION 1907.10 RC; UNDER SECTION 1907.08 RC CLERK OF COURT OF COMMON PLEAS MAY REFUSE TO RECORD BOND UNTIL OATH IS TRANSMITTED.

## SYLLABUS:

1. A justice of the peace who has not received his commission is, under the terms of Section 107.05, Revised Code, ineligible to perform any of the duties of his office, and an appointment by him to fill the unexpired term of a township trustee who has died, resigned, or not accepted his office, is invalid.

2. If no justice of the peace in a township has received a commission and thus none is eligible to make an appointment to fill an unexpired term of a township trustee, there is no justice of the peace in that township for the purposes of Section 503.24, Revised Code, and the power to make such an appointment devolves upon the presiding municipal judge or probate judge.

3. There being no statutory provision for the filing of the commission of a justice of the peace in the office of the clerk of the court of common pleas, the clerk of the court of common pleas may properly refuse to file or make a record thereof.

4. Section 1907.10, Revised Code, requires that the record of the bond of a justice of the peace adjoin the record of his oath; and when a justice of the peace fails to transmit his oath to the clerk of the court of common pleas for recording in accordance with Section 1907.08, Revised Code, the clerk of the court of common pleas may refuse to record his bond until the oath is properly transmitted.

Columbus, Ohio, June 6, 1957

Hon. Robert L. Perdue, Prosecuting Attorney  
Ross County, Chillicothe, Ohio

Dear Sir:

Your inquiry raises two questions. For the sake of clarity I will consider them separately.

Your first question is relevant to two conflicting appointments made to fill a vacancy existing on a board of township trustees. Section 503.24, Revised Code, provides in pertinent part as follows:

“If a township is without a board 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 suitable persons, having the qualifications of electors in the township, to fill such vacancies for the unexpired term.

“Wherever, in any township, a municipal court replaces the justices of the peace, the municipal judge or the presiding municipal judge if there is more than one, may fill vacancies on the board. In those townships wherein there are no justices of the peace or municipal judges, the probate judge may fill vacancies on such board.”

In your query you state that the justice of the peace made the first appointment in question on December 17, 1956, but that he had not received his commission at that time and in fact did not receive it until January of 1957. In addition to the language of Section 503.24, Revised Code, quoted above, conferring the power to make this appointment on the justice of the peace having the oldest commission, I also invite your attention to Section 107.05, Revised Code, which reads as follows:

“A judge of a court of record, state officer, county officer, militia officer, or justice of the peace, shall be ineligible to perform any duty pertaining to his office until he presents to the proper officer a legal certificate of his election or appointment, and receives from the governor a commission to fill such office.”

In Opinion No. 14, Opinions of the Attorney General for 1927, page 21, the then attorney general said, reading the second paragraph of the syllabus:

“By Section 138 of the General Code (Section 107.05, Revised 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.”

A number of cases establish the right of such an appointee to hold his office prior to receiving a commission, but they also recognize that he may not perform the duties nor exercise the powers of the office until receiving the commission.

Clearly then on December 17, 1956, this justice of the peace had no power to make a valid appointment.

There is no municipal court having jurisdiction over the township in question, so the power to make the appointment devolves upon the judge of the probate court in accordance with Section 503.24, *supra*. The statute actually speaks of a township in which there is no justice of the peace, but I feel this must be interpreted to mean a township wherein no justice of the peace is qualified to make the appointment, for if that interpretation were not adopted a situation would arise wherein no one would have the power to make this appointment, and I cannot believe that such was the legislative intent. Thus the subsequent appointment made by the judge of the probate court was valid.

Having thus disposed of this question, it is unnecessary to consider the effects of other irregularities in the qualification of this justice of the peace.

Your second question involves the refusal of the clerk of the court of common pleas to record the bond and commission of this same justice of the peace when they were presented to him on February 1, 1957, and the specific question is whether the clerk was proper in such refusal.

Finding no statutory provision for filing the commission of a justice of the peace, I conclude that the clerk acted properly in that regard.

As to the filing of the bond, Section 1907.10, Revised Code, provides:

“The officer with whom the bond is filed under section 1907.09 of the Revised Code, shall forthwith notify the clerk of the court of common pleas in writing of such filing, giving the

date of filing. Such clerk *shall* make an entry of such filing *in the record in which the oath of the justice of the peace is recorded, and such entry shall adjoin the record of such oath.* No officer, other than such clerk, shall certify the signature and qualification of a justice.” (Emphasis added.)

The use of the word “shall” creates a mandatory duty upon the clerk. By the terms of this section it is the duty of the clerk to make the entry *and* to make it in adjunction to the record of the *oath* of the justice of the peace. Section 1907.08, Revised Code, provides that the justice of the peace shall within ten days after being administered his oath transmit the same to the clerk of the court of common pleas. In your supplementary letter of April 29, 1957, you state that it appears that the justice of the peace did not transmit his oath of office in accordance with Section 1907.08, Revised Code. If the justice of the peace has failed to perform that mandatory duty there is obviously no record of his oath in adjunction whereto the clerk can record his bond. I conclude that compliance with the provision of Section 1907.08, Revised Code, requiring the transmittal of the oath for recording is a condition precedent to the duty of the clerk to record the bond. Accordingly, the clerk properly refused to record the bond.

It is my opinion, and you are advised, that:

1. A justice of the peace who has not received his commission is, under the terms of Section 107.05, Revised Code, ineligible to perform any of the duties of his office, and an appointment by him to fill the unexpired term of a township trustee who has died, resigned, or not accepted his office, is invalid.

2. If no justice of the peace in a township has received a commission and thus none is eligible to make an appointment to fill an unexpired term of a township trustee, there is no justice of the peace in that township for the purposes of Section 503.24, Revised Code, and the power to make such an appointment devolves upon the presiding municipal judge or probate judge.

3. There being no statutory provision for the filing of the commission of a justice of the peace in the office of the clerk of the court of common pleas, the clerk of the court of common pleas may properly refuse to file or make a record thereof.

4. Section 1907.10, Revised Code, requires that the record of the bond of a justice of the peace adjoin the record of his oath; and when a justice of the peace fails to transmit his oath to the clerk of the court of common pleas for recording in accordance with Section 1907.08, Revised Code, the clerk of the court of common pleas may refuse to record his bond until the oath is properly transmitted.

Respectfully,  
WILLIAM SAXBE  
Attorney General