

554.

COUNTY RECORDER—VACANCY—APPOINTEE—ELECTION
OF SUCCESSOR.

SYLLABUS:

The successor of an appointee appointed to fill a vacancy in the office of county recorder, must be elected at the next general election for county officers as provided for in Article XVII, Section 1, of the Constitution of Ohio and Section 4785-4 of the General Code.

COLUMBUS, OHIO, May 4, 1937.

HON. ROY L. HENRY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR: I have your letter of recent date in which you request my opinion, as follows:

"I would like very much to have your opinion upon this question:

Very recently the County Recorder died, and the County Commissioners made the appointment to fill the vacancy and the appointee is qualified and has received his commission from the Governor of Ohio, which states that it is for the unexpired term of Elma L. Schmidt, the deceased recorder.

Now, at the last election, all county offices became four year terms.

Does a man who is appointed for this vacancy serve out the time that Miss Schmidt was elected for, which was four years, or would it be otherwise?"

The single question presented for my opinion is whether the successor of an appointee to a vacancy in the office of county recorder will be selected at the general election for county officers to be held in November, 1938, or will the incumbent appointee serve out the unexpired portion of the four year term as provided for in Section 2750, General Code, which section reads as follows:

"Sec. 2750. There shall be elected quadrennially in each county a county recorder, who shall assume office on the first Monday in January next after his election and who shall hold said office for a period of four years."

Although Section 2750, *supra*, became effective in its present form

on July 7, 1936, this statute was originally enacted as part of House Bill No. 331 (115 O. L., 191), effective July 9, 1933. This act also contained Section 2750-1, General Code in its present form and pursuant to which the predecessor of the incumbent recorder was elected for a four year term. Section 2750-1, General Code, provides:

“The present existing terms of office of county recorders are hereby extended to the first Monday in January, 1937. The first regular election for the office of county recorder under this act shall be held in November, 1936; but any vacancy in such office occurring more than thirty days prior to the regular election for state and county officers in the year 1934 shall be filled at such election for the remainder of the term prescribed in this section.”

Construing these two sections of the statutes together, and considering only the language of these sections, it seems that the Legislature clearly intended that the *regular election* for the office of county recorder should be held every four years, beginning with the November, 1936, election, and an election for this office could be held at no other time. In such case your present recorder would serve for the unexpired portion of the full four year term.

However, a further examination into this problem reveals that the Constitution of Ohio provides for an election of county officers every two years. Article XVII, Section 1, of our State Constitution reads as follows:

“Election for state and county officers shall be held on the first Tuesday after the first Monday in November *in the even numbered years*; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.” (Italics, the writer’s.)

The foregoing constitutional mandate has been carried into the General Code as Section 4785-4, General Code, which provides in part, as follows:

“General elections in the State of Ohio and its political subdivisions shall be held as follows:

* * * * *

(c) For the election of representatives in the Congress of the United States, and of elective state and county officers, in the even numbered years; except as otherwise provided for filling vacancies. * * *”

Please note particularly that Section 4785-4, General Code, employs the term "*general election*" and for the election of county officers these general elections shall be held in the even numbered years.

The statutory guide for selecting the successor of the appointee to the office of county recorder is found in Section 10, General Code, which provides:

"When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. *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. This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy." (Italics, the writer's.)

Section 2755, General Code, which provides for the filling of a vacancy in the office of county recorder, simply states that the appointee shall hold office until his successor is elected and qualified. Consequently, in determining when the successor to the present recorder of Lawrence County shall be selected we must be guided by the provisions of Section 10, General Code, to the effect that "such successor shall be elected for the unexpired term at the first general election for the office which is vacant."

Naturally, the question now arises as to whether the term "regular election" as used in Section 2750-1, *supra*, may be interpreted to have the same meaning as "general election" as used in Section 4785-4, and Section 10, *supra*.

In *State vs. Nash, Governor*, 66 O. S., 612, decided June 26, 1902, the court took the view that the "first proper election" (as used in Revised Statutes, Section 11) is the one at which the officer would have been chosen had there been no vacancy. In construing Section 11 of the Revised Statutes now codified as Section 10 of the General Code, the court held in the fifth branch of the syllabus:

"The term of office of such appointee shall be for the unexpired portion of the term and until his successor is elected and qualified as provided in Revised Statutes, Section 11; and 'the first proper election' is the first election at which a lieu-

tenant governor would have been chosen had no such vacancy occurred.”

At page 620 of the above case the court said:

“The phrase ‘the first proper election’ was construed in *State vs. Barbee*, 45 O. S., 347, to mean the first election appropriate to the office, that is, the election at which state officers are regularly and properly elected.”

Although the two cases above quoted hold that the phrase “regular election” and “first proper election” are synonymous, which interpretation would defer the next possible election of a county recorder until November, 1940, still, in construing the phrase “first general election” as used in Section 10, *supra*, I am bound by the decision in *State, ex rel., Harsha vs. Troxel et al.*, 125 O. S., 235. In that case the court was confronted with the question as to whether the appointee to a vacancy in the four year term of county auditor would serve out the unexpired term or whether the successor to the appointee would be selected at the “first general election” as provided for in Section 10, *supra*. In interpreting this section, Judge Stephenson announced at page 237, of this opinion:

“This section states plainly and succinctly that the successor of an appointee ‘shall be elected for the unexpired term at the first general election for the office which is vacant * * *.’

The November, 1932, election is a general election. It is the first general election after the vacancy was created. This case is not affected by the clause ‘unless otherwise provided by law,’ as, in our opinion, there is no other provision of law affecting the time of election.

The mere fact that the term of the county auditor is fixed at four years in no wise alters this statute.”

Section 2558, General Code, pursuant to which the appointment was made in *Harsha, vs. Troxel*, *supra*, provides:

“A county auditor shall be chosen quadrennially in each county, who shall hold his office for four years, commencing on the second Monday in March next after his election.”

The foregoing statute is phrased in almost exactly the same language as that used in Section 2750, *supra*, which provides a four year

term for the office of county recorder. By a parity of reasoning I believe that the case of *State, ex rel. Harsha, vs. Troxel, et al.*, supra, is completely dispositive of the present question and inasmuch as this case represents the latest pronouncement of the Supreme Court of Ohio on the interpretation of the phrase "first general election" it necessarily takes precedence over the earlier decisions cited in this opinion.

Consequently, I am constrained to advise you, and it is my formal opinion that the successor to the incumbent appointee in the office of recorder of Lawrence county must be selected at the next regular election for county officers which, as provided for by the Constitution and the statutes, will occur in November, 1938.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

555.

APPROVAL—BONDS OF CITY OF ROCKY RIVER, CUYA-
HOGA COUNTY, OHIO, \$5,000.00.

COLUMBUS, OHIO, May 4, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.
GENTLEMEN:

RE: Bonds of City of Rocky River, Cuyahoga
County, Ohio, \$5,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above city dated October 1, 1933. The transcript relative to this issue was approved by this office in an opinion rendered to your board under date of January 29, 1935, being Opinion No. 3878.

It is accordingly my opinion that these bonds constitute a valid and legal obligation of said city.

Respectfully,

HERBERT S. DUFFY,
Attorney General.