

tem, out of the gasoline tax excise fund, which is allotted to county treasurers by the Auditor of State.

Your question may be answered in the affirmative in the light of the case of *State ex rel Crabbe vs. The City of Columbus*, decided by the Court of Appeals of Franklin County, Ohio, on May 28, 1926, and reported in Volume 153, North Eastern Reporter, page 174, in which the court held:

“City held empowered to expend funds allotted under gasoline excise tax law to buy sand dryer to be used in city asphalt plant, operated exclusively to prepare materials for maintaining and repairing streets, since city officials have latitude of discretion in use of such funds so long as money is spent to maintain and repair highways, in view of General Code, Section 5537.”

There is no distinction between the right to purchase sand dryers and road drags, since both are purchased for and used in the maintenance and repair of roads.

The gasoline excise tax is collected for the purpose of maintaining and repairing certain roads, and the money derived therefrom may be used in the purchase of necessary road equipment, to be used exclusively towards the maintenance and repair thereof.

I am therefore of the opinion that the county can expend a part of the gasoline tax excise fund apportioned to it, to purchase road drags which are to be used exclusively in maintaining and repairing gravel roads which are a part of the county road system.

Respectfully,
EDWARD C. TURNER,
Attorney General.

105.

COUNTY AUDITOR—IF AUDITOR-ELECT FAILS TO QUALIFY ON OR BEFORE THE SECOND MONDAY IN MARCH NEXT AFTER HIS ELECTION, THERE WILL BE A VACANCY IN SUCH OFFICE—APPOINTEE TO SUCH VACANCY HOLDS OFFICE UNTIL SUCCESSOR IS ELECTED AND QUALIFIED—SUCCESSOR SHALL BE ELECTED FOR UNEXPIRED TERM AT FIRST NOVEMBER ELECTION AT WHICH STATE AND COUNTY OFFICERS ARE ELECTED.

SYLLABUS:

Under Section 2561 of the General Code, if a county auditor-elect fails to qualify on or before the second Monday in March next after his election, there will be a vacancy in such office. The person appointed to fill such vacancy shall hold the office until his successor is elected and qualified. His successor shall be elected for the unexpired term at the first November election at which state and county officers are elected.

COLUMBUS, OHIO, February 26, 1927.

HON. E. P. MCGINNIS, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR MR. MCGINNIS:—This will acknowledge the receipt of your recent communication requesting my opinion as follows:

"Our county auditor, Mr. T., was re-elected last November, and his term begins the second Monday in March. He has accepted another position, and the county commissioners have appointed Mr. W. M. to fill out his present term since his resignation, and he will also get the appointment to start the 14th of March. As the law has undergone some changes since any important decisions which we can find, we would like to have an opinion from your office regarding the length of the term for which Mr. M. will be appointed; whether a man will be elected at the next general election in 1928 or whether Mr. M. will hold the term for the full four years for which Mr. T. was elected."

Section 2558, General Code, provides as follows:

"TERM OF OFFICE: 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 above enactment, making the office of county auditor a four-year office, is found in 108 O. L., Pt. 2, p. 1294.

Section 3 of said act, providing for the extension of existing terms at the time of the enactment, provided as follows:

"The present existing terms of office of county auditors are hereby extended to the second Monday in March, nineteen hundred and twenty-three. The first regular election for the office of county auditor under this act shall be held in November, nineteen hundred and twenty-two; but any vacancy in such office occurring more than thirty days prior to the regular election for state and county officers in the year nineteen hundred and twenty shall be filled at such election for the remainder of the term prescribed in this section."

Section 2562, General Code, is as follows:

"VACANCY: HOW FILLED: If a vacancy occurs in the office of county auditor, from any cause, the commissioners of the county shall appoint a suitable person, resident of the county, to fill the vacancy."

Article XVII, Section 2, of the Ohio Constitution, provides that:

"the term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four (4) years
* * * "

as may be prescribed by the General Assembly.

The concluding sentence of the above mentioned section of the Ohio Constitution is:

"All vacancies in other elective offices (other than state officers or members of the General Assembly) shall be filled for the unexpired term in such manner as may be prescribed by law."

Section 10 of the General Code is as follows:

"TERM OF APPOINTEE TO ELECTIVE OFFICE: 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."

Section 10 of the General Code was formerly Section 11 of the Revised Statutes and read as follows :

"When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy; but 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 of the same, of anyone elected to such office before the occurrence of such vacancy."

The only change in the language of the statute, all of which was made by the Codifying Commission, is shown by the italics in the following words :

"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."

In respect of changes in language made by codifiers, there are two general rules of interpretation laid down in the cases by our Supreme Court (which you will find cited on page 1 of Page's Annotated Ohio General Code) :

1. A change in the wording of a statute, made in a general revision, will not be presumed to change its meaning.

2. If the language of the revised section is plain, unambiguous and different in meaning from the prior statute, it is the duty of the Court to give the effect required by law to the plain and ordinary signification of the words without regard to the language of the prior statute.

In the case of *State ex rel. Trauger vs. Nash, Governor*, 66 O. S. 612, it is 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 lieutenant governor would have been chosen had no such vacancy occurred."

The foregoing interpretation of "the first proper election" must be read in the light of the particular case. In the first place, the Court did not overrule the construction placed upon the phrase "the first proper election" in *State vs. Barbee*, 45 O. S. 347. In the body of the opinion in the Trauger case, it is said :

"It seems, from a study of the Constitution, Article III, Section 18, that the office of lieutenant governor was omitted therefrom because, for obvious

reasons, it was desired to have the term of office of the lieutenant governor begin and end at the same time with the term of office of the governor, and that the last clause of that section of the Constitution would defeat that purpose, if the office of lieutenant governor was named therein."

Taking up the case of *State vs. Barbee*, 45 O. S. 347, which involved the election of an "additional judge" in the third subdivision of the Fifth Judicial District, the act creating which provided for a choice at the April elections, the Court held that the proper election for the office was the April election and not the fall election at which state officers generally were required to be elected.

The case of *State ex rel. Springer vs. Hadley*, 59 O. S. 167 was decided upon the authority of *State vs. Barbee* and *State ex rel. vs. Dahl*, 55 O. S. 195. Were it not for two facts:

(a) That in the codification of Section 10, that section was substantially changed so as to provide for an election for the *unexpired term*;

(b) When the term of auditor was fixed at four years in 108 O. L., Part 2, page 1294, the Legislature enacted Section 3, *supra*, which clearly indicates that from thence the office of county auditor was to be one not only of four years duration but of distinct periods beginning on the second Monday in March, 1923;

the case of *State ex rel. Springer vs. Hadley*, 59 O. S. 167 would be decisive of all of your questions.

In this last mentioned case, it was held:

"A county auditor elected to succeed one appointed by the county commissioners to fill a vacancy is elected for the full term of three years, commencing on the third Monday in October next after the election."

At the general election in November, 1895, one M. was duly elected auditor of Fayette county for the full term of three years, to commence on the third Monday of October, 1896. He died prior to the commencement of said term. On the third Monday of October, 1896, the commissioners appointed one L., who qualified and entered upon the discharge of the duties. At the general election in November, 1897 (not 1898), one C. was elected and received a certificate of election and a commission entitling him to enter upon the discharge of the duties of said office until the third Monday of October, 1899, but no longer. At the November election, 1898, a candidate for the office attempted to qualify but the election officials refused to print his name upon the ballot because they were of the opinion that C's official term would continue until the third Monday of October, 1901, and that no election to said office was to be held in November, 1898.

In the *per curiam* opinion, the Court held that under Section 11 of the Revised Statutes the first "proper election" was that of November, 1897, the Court further stating "it is admitted that the election of Craig to the office at that time was proper," and the only question left to be determined by the Court was "for what term was he elected."

It is my opinion that the words "at the first general election for the office which is vacant," now contained in Section 10 of the General Code, mean the same as the words "at the first proper election," contained in Section 11 of the Revised Statutes. In other words, it is my opinion that these terms refer to the classes of elections. Under the Revised Statutes it was necessary to differentiate between the spring and fall elections. Today, under the General Code, it is necessary to differentiate between

the general election occurring in the even numbered years, at which state and county officers are selected, and the general elections occurring in the odd numbered years, at which municipal and township officers are selected.

As was said by Judge Swing of the First Circuit Court in the case of *State ex rel. Burke vs. Comer*, 7 O. C. C. 258:

"One of the cardinal principles of our state government is that no man shall hold an office by which he is called upon to administer the laws enacted by the people, among the people unless chosen by the people through the ballot box. And this principle is expressed in Section 11 of the Revised Statutes * * * ."

It is my opinion, however, that the addition in Section 10 G. C. to the original language contained in Section 11, Revised Statutes, to-wit, "unless otherwise provided by law, such successor shall be elected for the unexpired term," is a substantial change in the law as it existed at the time of the decision of the 59 O. S. case, and the interpretation of this change is to be governed by the second rule of interpretation first above set out.

It is therefore my opinion that the rule laid down in said last mentioned case has been changed only to the extent that the successor to the incumbent appointed by your county commissioners for the term beginning on the second Monday in March, 1927, will be elected at the November, 1928, election for the *unexpired term* which ends at the beginning of the second Monday in March, 1931.

Section 2561 G. C. provides:

"If a county auditor elect fails to give bond and take the oath of office as required by law on or before the day on which he is so required to take possession of his office, it shall become vacant."

Therefore, under the authority of *State ex rel. Spaulding vs. Baldwin*, 101 O. S. 65, there will be a vacancy in the office of auditor if the candidate elected at the November election fails to qualify on or before the second Monday in March, and it will be necessary for the commissioners to fill such vacancy, if it occurs, on the second Monday in March.

The conclusion at which I have arrived is contrary to the conclusion arrived at by my predecessor in Opinion No. 1566, dated June 4, 1924, and found in Volume I, page 345 of the Attorney General's Opinions for 1924. The only case discussed in that opinion is the case of *State vs. Speidel*, 62 O. S. 156, which case was not followed in the case of *State ex rel. vs. Baldwin*, *supra*.

This Opinion No. 1566 disregards entirely *State ex rel. Springer vs. Hadley* and other cases which I have cited above. Furthermore, it interprets Section 10 of the General Code as requiring a departure from a hitherto settled policy that the successor to an elective officer is to be elected at the next appropriate election.

If we were to hold that the election of the successor for the *unexpired term* could only be held at the same time as the election of the successor for the *full four year term*, it would require the passing by of an appropriate election in 1928 at which state and county officers generally are elected and wherein there would be no added expense to the public and whereby the people would be given the first opportunity to elect the successor at an appropriate election and where the elected successor would have two years and four months to serve instead of four months.

Besides, as I have already pointed out, it is my opinion that the term "first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred," both distinguishes between and refers to the election

occurring, respectively, in the even numbered years and in the odd numbered years. (See also the use of the term "general election" in G. C. 4967.)

Respectfully,
EDWARD C. TURNER,
Attorney General.

106.

TUITION FEES—UNDER SECTION 7681, GENERAL CODE, TERM "WARD" SHOULD BE LIBERALLY CONSTRUED—WHETHER OR NOT PUPIL SHOULD PAY IS QUESTION OF FACT TO BE DETERMINED IN EACH CASE—LOCO PARENTIS.

SYLLABUS:

1. *The term ward, as used in Section 7681, General Code, should not be limited to its technical meaning, but should be construed liberally in the interests of the education of the youth of school age in this state.*
2. *A determination of the question of whether or not a child has been in good faith committed by its parents to the care and custody of another for the purpose of having a home provided for it, or whether such living with another is merely for the purpose of evading the law requiring the payment of tuition for school attendance, is in all cases a question of fact to be determined from a consideration of all the facts and circumstances surrounding the case.*
3. *A child who resides permanently in the home of an actual resident of a school district and to which child such actual resident stands in loco parentis may attend the public schools of such district without paying tuition, even though the parents of such child reside outside the district.*

COLUMBUS, OHIO, February 26, 1927.

HON. C. LUTHER SWAIM, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—I have your inquiry with reference to the right of the board of education of Blanchester, Clinton county, Ohio, to require the payment of tuition from certain pupils attending the Blanchester high school, which reads as follows:

"Blanchester High School is located in the southwest corner of Clinton county, and is very close to the county line. It is in constant trouble over the question of tuition of students from outside of its territory. There are many students there from three other counties, Warren, Brown and Clermont. However, most of these students are paying tuition at the present time.

A case has arisen in which a student from Perry township, Brown county, is attending Blanchester high school and refuses to pay tuition on the ground that he is exempt from the payment of tuition. The board claims that he is not exempt, and I have also rendered the same opinion, and now it asks an opinion of your office upon this question.

Perry township maintains a high school several miles, over bad roads, from the residence of this pupil, or the residence of his father. The mother of this student died when he was young, and he lived with his grandmother for a time. Later his father remarried, and his father took the child and sent him to school up to the time that he started to high school. The grand-