

4. Your fourth question is answered by that portion of Section 2140, supra, which provides:

“ * * * The Ohio board of administration may so transfer an apparently incorrigible prisoner whose presence in the reformatory appears to be seriously detrimental to the well-being of the institution.”

By the terms of this section the Ohio Board of Clemency, with the written consent of the governor, may transfer to the penitentiary an apparently incorrigible prisoner whose presence in the reformatory appears to be seriously detrimental to the well-being of the institution and upon such fact being determined by the Ohio Board of Clemency, with the written consent of the Governor, such transfer may be made irrespective of the age of such prisoner.

Respectfully,
EDWARD C. TURNER,
Attorney General.

820.

CONSTABLE—WHEN CONVICTED OF A FELONY—CONCERNING REMOVAL FROM OFFICE.

SYLLABUS:

1. *The office of constable is not ipso facto vacant because the incumbent thereof is convicted of a felony against the laws of the United States.*

2. *If such incumbent refuses to resign he may be removed from office “upon complaint and hearing” as provided by Sections 10-1, et seq., General Code, or by the Governor in accordance with the terms of Section 6212-34, General Code.*

3. *If, by the methods prescribed by Sections 10-1, et seq., General Code, or Section 6212-34, General Code, such officer is removed from office, the township trustees, by the terms of Section 3261, General Code, shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term.*

COLUMBUS, OHIO, August 3, 1927.

HON. RALPH E. HOSKOT, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date which reads as follows:

“The following situation has arisen in this county and our opinion has been sought regarding it. We should like very much to have your opinion thereon under the circumstances.

Two elected constables of the same township in this county were convicted in the United States District Court here for conspiracy to violate the Volstead Act. One was sentenced to the Federal Prison at Atlanta, Georgia, for a period of twenty months. The other was sentenced to be confined in the county jail of one of the counties of this state for a period of four months.

FIRST—Are these men disqualified from holding office as constables to which they were elected and which office they held until the time of their conviction?

SECOND—Are either or both of their offices vacant by reason of the conviction itself or must further proceedings be had to vacate same.

THIRD—If further proceedings are necessary to vacate these offices or either of them what proceedings should be taken?

FOURTH—If these offices are now vacant or if further proceedings are necessary to vacate them, after said offices have been vacated by such proceedings as may be necessary, how are the vacancies to be filled?"

I infer from your letter that the constables in question were convicted for a violation of Section 37 of the Federal Criminal Code (35 Stat. 1096) which provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to affect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The offense denounced by this section is a felony inasmuch as Section 335 of the Federal Criminal Code (35 Stat. 1152) provides:

"All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies."

In considering the question that you present your attention is directed to the following sections of the Constitution of Ohio and of the General Code which provide:

Article V, Section 4. "The general assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime."

In furtherance thereof the legislature enacted Section 12390, G. C., which reads:

"A person convicted of felony, unless his sentence is reversed or annulled, shall be incompetent to be an elector or juror, or to hold an office of honor, trust or profit. * * * "

Section 12391, General Code, provides:

o "A person who has been imprisoned in the penitentiary of any other state of the United States under sentence for the commission of a crime punishable by the laws of this state by imprisonment in the penitentiary is incompetent to be an elector or juror, or to hold an office of honor, trust or profit within this state, unless he has received a general pardon from the governor of the state in which he was imprisoned."

As stated in Vol. 36, Cyc. page 1183:

"It is a fundamental rule in the construction of statutes that penal statutes must be construed strictly. Such statutes are to be interpreted by the aid of all the ordinary rules for the construction of statutes, and with the cardinal object of ascertaining the intention of the legislature. In order to enforce a penalty against a person, he must be brought clearly within both the spirit and the letter of the statute."

The legislative history of Section 12390, supra, the plain import of its terms, and the fact that by Section 12391, supra, the legislature has made provisions for the disfranchisement of persons convicted of felonies in sister states where such felony is punishable by imprisonment in the penitentiary by the laws of this state, clearly shows that Section 12390, supra, applies only to persons convicted in the courts of Ohio for a felony denounced by the laws of Ohio. By its terms Section 12391, supra, applies to persons who have been imprisoned in penitentiaries of sister states and no provision whatever is made with reference to persons convicted in the federal courts of felonies denounced by the laws of the United States.

Section 6, Article X, of the Constitution of Ohio, provides:

“Justices of the peace, and county and township officers, may be removed, in such manner and for such cause, as shall be prescribed by law.”

Section 38, Article II, of the Constitution of Ohio, provides:

“Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for any other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution.”

Pursuant to the provisions of Section 38, Article II, supra, the legislature on April 16, 1913, (103 O. L. 851) passed an act entitled:

“An act to provide for the removal of certain officers for misconduct in office.”

which now appears as Sections 10-1, 10-2, 10-3 and 10-4, of the General Code.

Section 10-1, General Code, provides:

“That any person holding office in this state, or in any municipality, county or any subdivision thereof, coming within the official classification in Section 38, Article II, of the Constitution of the State of Ohio, who wilfully and flagrantly exercises authority or power not authorized by law, refuses or wilfully neglects to enforce the law, or to perform any official duty now or hereafter imposed upon him by law, or who is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance or non-feasance, shall be deemed guilty of misconduct in office; upon complaint and hearing in the manner provided for herein shall have judgment of forfeiture of said office, with all its emoluments entered thereon against him, creating thereby in said office a vacancy to be filled as prescribed by law. The proceedings provided for in this act are in addition to impeachment and other methods of removal now authorized by law, and this act shall not in any way be so interpreted as to divest the governor or any other authority of the jurisdiction now given in removal proceedings.”

Section 10-2, General Code, provides:

“Proceedings for the removal of public officers on any of the grounds enumerated in the preceding section shall be commenced by the filing of a

written or printed complaint specifically setting forth the charge and signed by five per cent of the qualified electors as shown by the next preceding general election of the political subdivision or unit of government whose officer is sought to be removed. But in no case shall less than ten or more than one thousand electors be required. Such complaint shall be filed with the court of common pleas of the county wherein the officer against whom the complaint is filed resides, except that when the officer against whom the complaint is filed is a common pleas judge, such complaint may be filed in the court of appeals of the district where such judge resides, and all complaints against state officers, may be filed with the court of appeals in the district wherein the officer against whom the complaint is filed resides. The judge or clerk of the court shall cause a copy of such complaint to be served upon the officer, against whom the complaint has been filed, at least ten days before the hearing. The hearing herein provided for shall be had within thirty days from the date of the filing of the complaint by said electors. The proceedings had by the court upon such removal shall be matters of public record and a full detailed statement of the reasons for such removal shall be filed with the clerk of the court, and shall be made a matter of public record therein."

Section 10-3, General Code, authorizes the court to suspend the officer in question pending such investigation and to subpoena witnesses and compel their attendance and provides how such witness and other fees shall be paid.

Section 10-4, General Code, permits a review of the decision of the Court of Common Pleas by the Court of Appeals and outlines the procedure incident thereto and concludes:

"If any officer is removed and the law provides no means for filling the vacancy, the county board of deputy supervisors of elections in such county where such officer so removed resides shall order a special election to fill such vacancy in the unit of government in which such officer removed was elected."

The case of *State ex rel. Hoel, Prosecuting Attorney, vs. Brown*, 105 O. S. 479, is indicative of the procedure that must be followed generally in the removal of public officers. The first three paragraphs of the syllabus thereof read:

"1. In 1912 the people of Ohio adopted, as a part of the Constitution, Section 38, Article II, in which, among other things, it is written: 'Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers,' etc.

2. By this section they plainly provided that such removal should be made only 'upon complaint and hearing.'

3. What the constitution grants, no statute may take away."

In addition to the method of removal by "complaint and hearing" provided by Sections 10-1, et seq., supra, the legislature, by the provisions of Section 6212-34, General Code, has vested in the governor authority to remove any official for misfeasance, nonfeasance or malfeasance or wilful neglect, or failure to enforce the laws relating to intoxicating liquors. This section reads:

"The governor shall have authority to remove any official for misfeasance, nonfeasance or malfeasance or wilful neglect, or failure to enforce the laws relating to intoxicating liquors. The governor shall cause to be filed a com-

plaint before him against such officer and fix the time for the hearing. Process to compel the attendance of witnesses shall be issued and served by the sheriff of the county in which such witness resides. The judgment of the governor upon the hearing provided herein shall be final. He shall file in the office of the secretary of state a statement of all the charges made against such officer and the result of his finding thereon."

A recent case construing this section of the General Code is *The State, ex rel., Watkins vs. Donahey, Governor, et al.*, 110 O. S. 494, (decided June 3, 1924), the syllabus of which reads:

"Section 6212-34, General Code (109 O. L., 9), is a valid exercise of legislative power, and provides a remedy for removal of all officers, including officers in the classified service, who are charged with the duty of enforcement of laws relating to intoxicating liquors, in addition to the power of removal lodged in civil service commissions by Section 486-17a, General Code."

1. In view of the foregoing and answering your first question specifically I am of the opinion that the officers in question are not disqualified *ipso facto* because of their conviction.

2. As indicated above, neither office is vacant by reason of the convictions themselves and further proceedings must be had to vacate the same.

3. Answering your third inquiry three ways are suggested whereby the offices in question may be vacated. First, the township trustees may request the resignation of these officers and if they resign the vacancy may be filled as provided in Section 3329, *infra*. Second, proceedings may be instituted as provided by Sections 10-1, *et seq.*, *supra*. Third, by the terms of Section 6212-34, *supra*, the governor has authority to remove the incumbents from office. In both the latter methods the vacancy may be filled as provided in Section 3329, *infra*.

4. The answer to your fourth inquiry is found in Sections 3261 and 3329, General Code, which provide:

Sec. 3261. "If by reason of non-acceptance, death, or removal of a person chosen to an office in any township, except trustees, at the regular election, or upon the removal of the assessor from the precinct or township for which he was elected, *or there is a vacancy from any other cause*, the trustees shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term."

Sec. 3329. "When by death, removal, resignation, or non-acceptance of the person elected, a vacancy occurs in the office of the constable, or when there is a failure to elect, the township trustees shall appoint a suitable person to fill such vacancy until the next biennial election for constable, and until a successor is elected and qualified. If there is no constable in a township, the constable of an adjoining township in the county shall serve any process that a constable of such township is authorized by law to serve."

These sections relating to the same subject matter must be construed as statutes *in pari materia*. It is therefore my opinion that regardless of whether the constables resign, are removed upon "complaint and hearing" or by the governor, the township trustees by the terms of Sections 3261 and 3329, *supra*, have authority to fill the vacancies.

In passing, although both sections last above quoted provided for appointment by the trustees in the case of "removal," it is my opinion that the removal contemplated is a voluntary moving away from the township and not a removal by operation or law (Sections 10-1, et seq., or Section 6212-34, General Code).

Respectfully,
EDWARD C. TURNER,
Attorney General.

821.

APPROVAL, LEASE ON PROPERTY LOCATED AT 961 SOUTH HIGH STREET, COLUMBUS, OHIO.

COLUMBUS, OHIO, August 3, 1927.

HON. JOHN E. HARPER, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and opinion a lease between Anna E. Swingle, as lessor, and the State of Ohio by George F. Schlesinger, Director of Highways and Public Works, acting for the Division of Charities, Department of Public Welfare, as lessee, covering property located at 961 South High Street, Columbus, Ohio. The proposed lease is for a period of eighteen months beginning the 1st day of July, 1927, and ending on the 31st day of December, 1928, and calls for an expenditure of \$4500.00, payable quarterly in advance.

You have also submitted an encumbrance certificate bearing No. 1490, and certified by the Director of Finance to the effect that there are unencumbered balances legally appropriated sufficient to pay the rent for the first six months period of said lease.

Finding said lease and encumbrance estimate in proper legal form, I hereby approve the same.

The above lease and encumbrance certificate are returned herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

822.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND FOUR RAILWAY COMPANIES FOR ELIMINATION OF GRADE CROSSING NEAR MARTINS FERRY, OHIO.

COLUMBUS, OHIO, August 3, 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, as first party, The Pennsylvania Railroad Company, lessee of the Cleveland and Pittsburgh Railroad Company, as second party, The Wheeling and Lake Erie Railway Company, as third party, and The Wheeling Traction Company, as fourth party.