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## VILLAGE COUNCIL — CO-EXTENSIVE WITH TOWNSHIP:

1. NOT REQUIRED TO ESTABLISH OFFICE OF JUSTICE OF PEACE OR OFFICE OF CONSTABLE OR TO REGULATE DISPOSITION OF FEES, COMPENSATION, CLERKS OR OTHER OFFICERS AND EMPLOYES — SECTION 3512 G. C.
2. JUSTICE OF PEACE AND CONSTABLE — DULY ELECTED AND QUALIFIED IN MUNICIPALITY — CO-EXTENSIVE WITH TOWNSHIP — DULY CONSTITUTED OFFICERS — SUCH STATUS NOT CHANGED BY FAILURE OF COUNCIL OF MUNICIPALITY TO ENACT ORDINANCE PROVIDING OFFICERS, REGULATION OF FEES, COMPENSATION, CLERKS AND OTHER OFFICERS AND EMPLOYES.
3. WHERE DULY ELECTED AND QUALIFIED CONSTABLE IN SUCH TOWNSHIP IN ACTIVE MILITARY SERVICE — WHOLLY ABSENT FROM TOWNSHIP — VILLAGE COUNCIL WITHOUT POWER TO DECLARE OFFICE VACANT.

## SYLLABUS:

1. Section 3512 of the General Code does not require the council of a village which has become co-extensive with the township either to establish the office of justice of the peace and the office of constable or to regulate the disposition of their fees, their compensation, clerks or other officers and employees.

2. A justice of the peace and constable who have been duly elected and qualified in a municipality which is co-extensive with a township, are duly constituted as such officers notwithstanding the failure of the council of such municipality to enact an ordinance providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employees.

3. Where a duly elected and qualified constable in a township which is co-extensive with a village is in active military service and wholly absent from the township, the council of such village is without power to declare his office vacant because of such absence.

Columbus, Ohio, May 29, 1944

Bureau of Inspection and Supervision of Public Offices  
Columbus, Ohio

Gentlemen:

I acknowledge receipt of your communication requesting my opinion and reading as follows:

"We are inclosing herewith a letter from the Solicitor of the Village of Lakemore, in which he has requested advice concerning the application of section 3512 G. C., to the offices of Justice of the Peace and Constable of the township, and disposition of their fees, in a situation wherein the village council has not adopted an ordinance to regulate the disposition of such fees. In this connection the following questions are submitted:

QUESTION 1. Does Section 3512 of the General Code of Ohio require that the Council of the Village establish the office of Justice of the Peace and the office of Constable, and regulate the disposition of their fees, their compensation, clerks, and other officers and employes?

QUESTION 2. Is there a duly elected Justice of the Peace and a duly elected Constable in the Village of Lakemore?

QUESTION 3. If the answer to question 2 is 'no', then what is the status of the present Justice of the Peace and Constable?

QUESTION 4. If there is a duly elected and qualified Constable in and for the Village of Lakemore, may the council now declare this office of Constable vacant, and then proceed to fill the vacancy?

As we find no rulings by which we could answer the above questions, and since they are applicable to a number of municipal corporations with boundaries identical with those of townships, may we request that you examine the inclosure and give us your opinion in answer to the said questions."

The factual situation and the questions raised are best shown by a quotation from the letter which you enclose from the solicitor of the village in question. It reads in part:

"The Village of Lakemore, State of Ohio, was incorporated

about 1921, from territory formerly within the Township of Springfield, Summit County, Ohio.

In 1932, the Township of Lakemore was created, and thereby the boundaries of the Village of Lakemore and the boundaries of the Township of Lakemore became identical.

Neither the proceedings of Council of the Village of Lakemore, nor its record of ordinances, shows any action by the Council of the Village of Lakemore, State of Ohio, providing offices of Justice of the Peace and Constable, regulating the disposition of their fees, their compensation, nor clerks and other officers and employees. However, since 1932, a candidate for the office of Justice of the Peace and a candidate for the office of Constable has appeared on the Municipal Ballots and these persons were, by the board of elections, declared elected, thereafter qualified and acted as such officers. It seems this was done at several elections.

At the General Election in November, 1943, a Constable was elected, thereafter qualified and early in 1944 left the Village, County and State and since then has been serving in the Army or Navy of the United States. He refuses to resign. There is no other Constable in the Village."

Section 3512, General Code provides:

"When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes. Such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of such city or village. All rights, interests or claims in favor of or against the township may be enforced by or against the corporation."

It will be noted that this section does not purport in the least, to authorize a municipality to create the offices of justice of the peace and constable or in any wise to define or limit their powers, but only authorizes the council to enact ordinances providing offices, "regulating" the disposition of their fees, their compensation, etc. As to all other township offices it is provided that they shall be abolished and their duties performed by the corresponding officers of the city or village.

It will be noted that there is nothing in this section which suggests that justices of the peace and constables are to be regarded as municipal officers. They have been from the earliest history of the state a part of the judicial system of the state. Under the Constitution prior to its amendment in 1912, justices of the peace were specifically provided for. However, by the 1912 amendments, Section 9 of Article IV, which had contained this provision, was repealed and Section 1 of Article IV was amended so as to provide expressly for the Supreme Court, Court of Appeals, Court of Common Pleas and Court of Probate, "and such other courts inferior to the Courts of Appeals as may from time to time be established by law." These amendments became effective January 1, 1913.

At the time of the adoption of this amendment there were in existence a number of statutes, including Sections 1712 to 1746, General Code, providing for the election and compensation of justices of the peace as well as sundry statutes defining their jurisdiction, and the Supreme Court in a decision rendered February 25, 1913, in *State ex rel. v. Redding*, 87 O. S., 388, held that notwithstanding the repeal of the provision of the Constitution specifically providing for these minor courts, justices of the peace holding office January 1, 1913, were entitled to serve until the expiration of the term to which they had been elected. Shortly after this decision was rendered, to wit, April 18, 1913, the legislature enacted Section 1711-1, General Code, expressly establishing the office of justice of the peace in each township of the state excepting where a court other than a mayor's court then existed or might thereafter be created having jurisdiction of all cases in which justices of the peace have or may have jurisdiction. This section further adopted and continued in force all statutes theretofore enacted fixing the jurisdiction or pertaining to the offices of justice of the peace.

These minor courts are therefore distinctly a part of the judicial system of the state and are to be regarded as state offices and as such, wholly beyond the power of a municipal council to alter or dispense with either by affirmative action or by failure to act.

This proposition was noted by the Supreme Court in *State, ex rel. v. Brooklyn Heights*, 122 O. S., 311, where the court referring to a justice of the peace in a township which had become co-extensive with a village, said:

“The relator did not become an employee of the village, nor was his state office as justice of the peace extinguished by the enactment of the ordinance or the provisions of Section 3512, General Code.”

In an opinion by a former Attorney General, found in Opinions of the Attorney General for 1927, page 905, the question under consideration was whether the council in a case falling within the provisions of Section 3512, General Code, having first provided that the compensation of the justice should be the fees taxed and collected in state cases tried before him, may thereafter repeal that ordinance and fix his compensation at a stipulated sum per month, all fees being paid into the village treasury. Section 4219, General Code was cited, which provides that council shall fix the compensation of all officers and employees in the village government and that the compensation so fixed should not be increased or diminished during the term of the officer's employment.

The Attorney General said in the course of his opinion:

“The office of justice of the peace being a part of the judicial system of the state *is a state office* created within a township and, when the corporate limits of a city or village become identical with those of a township, the justice of the peace continues as such officer. He does not become a village or city officer. The legislature has provided that the justice of the peace shall exercise the functions of his office under municipal ordinances but this does not constitute him a municipal officer and in my opinion the provisions of Section 4219, *supra*, have no application to the office of justice of the peace or the incumbent thereof.”

In an opinion found in Opinions of the Attorney General for 1934, page 1346, it was held:

“Where at the time of the appointment of a justice of the peace to fill a vacancy in such office in a township having identical boundaries with a village, there is no municipal ordinance in effect regulating the compensation of justice of the peace but such justice's compensation consists of his statutory fees, village council may legally enact an ordinance placing the office of justice of the peace on a salary basis after the term of office of the justice of the peace appointed to fill the vacancy has commenced, and apply the provisions of the ordinance to said justice appointed to fill the vacancy.”

It will be observed that from the language of the syllabus just

quoted, it appears to have been assumed that until the council did enact an ordinance placing the office on a salary basis the compensation of the justice consisted of his statutory fees, but it does not appear that that was the exact question that was before the Attorney General for decision. That, however, was evidently the opinion of the then Attorney General, as evidenced by the language used on page 1349. He there refers to "the *assumption of jurisdiction* by the village council under Section 3512, General Code", and says:

"Thus the situation would be that at the time of Rogers' appointment, the justice of the peace was compensated by the fee provisions of statutes regulating justices of the peace. In this event, council could legally do as they did and enact a salary ordinance for justice of the peace, Rogers, after his term had begun."

This is in accord with my own opinion. It appears to me that the provision of Section 3512, General Code, relative to the enactment of ordinances providing offices, regulating the disposition of the fees of justices and constables and their compensation is not a mandate or a condition precedent but is merely an authorization to the council. If we should assume that it is necessary that council pass an ordinance regulating the disposition of the fees of these officers and fixing their compensation before they can receive any compensation for their services, then the mere failure or refusal of council to act would have the effect of impeding and probably preventing the administration of justice by these tribunals, because while the council could not abolish these offices, they could thereby make it impossible to find anyone who would serve, because wholly deprived of compensation. It appears to me that when the state has established these offices and has fixed the fees to which they are entitled, but has authorized a municipal council to regulate the disposition of these fees and substitute a salary therefor, the failure of the council to do anything in the matter would leave the officers free to execute their functions and receive the fees which the state law provides they should receive. There is nothing in the provisions of Section 3512, General Code, which authorizes the fees of justices and constables to be increased, decreased or dispensed with, but only to "regulate" their disposition. That the Supreme Court regarded the maintenance of these minor courts as quite essential to the preservation of the rights of the people, we note the language of the court in the case of *State, ex rel. v. Redding*, supra, where, after referring to the existence of the

justice's courts since the birth of the state, the court says:

"Its work has been extensive and embraces important matters and transactions. It has exclusive jurisdiction in certain civil cases, including actions for the recovery of sums not exceeding one hundred dollars. \* \* \*

It is not conceivable that the constitutional convention or the people intended that a citizen should be deprived of his rights and remedies in controversies exclusively within the jurisdiction of the office in question, or that a litigant should have no protection in matters concerning which he could look to the justice of the peace only for relief."

Accordingly, in answer to your first question it is my opinion that Section 3512 of the General Code does not require the council of a village which has become coextensive with the township either to establish the office of justice of the peace and the office of constable or to regulate the disposition of their fees, their compensation, clerks or other officers and employees.

What has been said above will apply to, and I believe substantially cover your second question. If the electors of the village in question have elected a justice of the peace and constable in the manner prescribed by law, no action or inaction on the part of the village council could affect the legal status of such officers.

In view of the foregoing, your third question does not call for any answer.

Your fourth inquiry presents a situation of some difficulty, inasmuch as it appears that the duly elected constable has entered the military service and is wholly absent from his duties, but declines to resign. The question is, how if at all, may his office be made vacant so that a successor may be appointed.

I find no provision in the statutes whereby anyone is given authority to declare the office of constable vacant because the officer is absent from his duty. Apparently, the only procedure whereby he might be removed would be by resort to Section 10-1 of the General Code, which reads as follows:

“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 2, of the constitution of the state of Ohio, who willfully and flagrantly exercises authority or power not authorized by law, refuses or willfully 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 nonfeasance, 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 (G. C. Par. 10-1 to 10-3) 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 et seq. of the General Code provide for charges, and hearing in the Court of Common Pleas, and for a judgment of removal by the court. The practical difficulty, however, in this procedure is the requirement that the officer must be served with a copy of the complaint, and if he is overseas or out of the state in the military service that would seem to be impossible, as the statute makes no provision for substituted service by publication or otherwise, and since the procedure is quasi-criminal, the provisions of the statute would have to be strictly construed. *McMillen v. Diehl*, 128 O. S., 212.

Non-performance of the duties of his office would seem to be sufficient ground for removal under the statutes above mentioned, but it would not be ground upon which any authority could declare the office vacant. That was the holding of the supreme Court in the recent case of *State, ex rel. Clinger v. White*, 143 O. S., 175, when it was held:

“Where there is no specific provision of statute on the subject, the incumbent of a county office does not lose title to his office or his right to the salary or compensation connected therewith by reason of mere absence from the county.”

A practical method of meeting the situation, in part at least, in the case under consideration will be found in Section 3331, General Code, which reads:

“A justice of the peace may appoint a constable or con-



stables for a special purpose, either in civil or criminal cases, when such appointment becomes necessary in the following cases:

1. When there is no constable in the township:
2. In case of disability of one of the regular constables in the township:
3. When the constable therein is a party to the suit:
4. When, from the pressure of official business, the constables therein are not able to perform the duties required by the office.

The justice making the appointment, shall make a memorandum thereof on his docket, and require the person appointed to take an oath, as in other cases."

Section 3332, General Code, provides:

"After taking such oath, the person so appointed shall have the same authority, be subject to the same penalties, and entitled to the same fees, as other constables."

So long as the elected constable is absent because of active military service, he could very properly be considered as under a disability which prevents him performing his official duties, and that situation would, in my opinion, justify the appointment of a special constable. However this procedure is only palliative for it is clear that the justice of the peace must make a special appointment in each case that comes before him, and can not endow such special constable with the general police power enjoyed by a regularly elected constable. It was so held in 1927 Opinions, Attorney General, page 32; 1930 Opinions, Attorney General, page 215; 1931 Opinions, Attorney General, 1162.

Accordingly, in specific answer to your fourth question it is my opinion that where a duly elected and qualified constable in a township which is co-extensive with a village is in active military service and wholly absent from the township, the council of such village is without power to declare his office vacant because of such absence.

Respectfully,

THOMAS J. HERBERT  
Attorney General