

the same as it would have been had Cooke's deed to the State not been accepted and filed for record. And in this view, I am required to advise you not to spend any money in the erection and construction of an armory building on this property until the title to the same has been quieted in the name of the State of Ohio or until it is shown that the Board of County Commissioners of Lawrence County and their successors in title have a good and indefeasible fee simple title by adverse possession of the property here in question independent of any defects in the record title to the property.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1675.

ANY PERSON ELECTED MEMBER OF THE BOARD OF EDUCATION—FAILURE TO QUALIFY WITHIN 10 DAY PERIOD—VACANCY CREATED, WHEN—HOW FILLED.

SYLLABUS:

If any person is elected as a member of a board of education, and fails to qualify within ten days after the organization of the board of education to which he was elected, at the expiration of such ten day period a vacancy is created for that term of office to which the person who failed to qualify was elected, and thereupon, such vacancy must be filled by the board of education in accordance with the provisions of Section 4748, General Code.

COLUMBUS, OHIO, December 22, 1937.

HON. RALPH FINLEY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication, which reads as follows:

"I should like an opinion on the following matter:

At the recent November election, three new members were elected to the Bolivar Board of Education to fill the offices which would be left vacant by reason of expiration of term of

three members serving on this board of education and whose terms would expire on December 31st.

Two of the newly elected members refuse to qualify by reason of the fact that they had also been elected to the office of village council and these two offices being incompatible and a member of the village council being prohibited from serving in any other capacity, the question is:

Is this a case of a vacancy such as may be filled by appointment according to law, or is this a case of a hold-over; and if so, are two of the present members of the board of education whose terms expire on December 31st, entitled to hold over and if so, what method of determination is to be used to determine which two of the three present members shall hold over inasmuch as there are only two of those elected who have refused to qualify?"

The sections of the General Code to be considered in answering your request are, and provide as follows:

"Sec. 4745. The terms of office of members of each board of education shall begin on the first Monday in January after their election and each such officer shall hold his office for four years except as may be specifically provided in chapter 2 of this title (G. C. § § 4698 to 4707), and until his successor is elected and qualified."

"Sec. 4746. Before entering upon the duties of his office, each person elected or appointed a member of a board of education or elected or appointed to any other office under this title shall take an oath to support the constitution of the United States and the constitution of this state and that he will perform faithfully the duties of his office. Such oath may be administered by the clerk or any member of the board."

"Sec. 4748. A vacancy in any board of education may be caused by death, non-residence, resignation, removal from office, failure of a person elected or appointed to qualify within ten days after the organization of the board or of his appointment, removal from the district or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon there-

after as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy.”

It is to be observed:—that, by virtue of the provisions of Section 4745, supra, the terms of office of the persons elected to the Board of Education, of Bolivar Rural School District begin on the first Monday in January, 1938; that by reason of the provisions of Section 4747, General Code, the date of organization of the board of education is the same date as the beginning of the terms of such members; and that, by the provisions of Section 4746, supra, each member of the board of education must qualify by taking an oath to support the Constitution before entering upon the duties as member of the board of education.

It is further to be observed:—that, by the provisions of Section 4748, supra, one elected as a member of the board of education has ten days after the organization of the board within which to qualify; that, upon failure of any person elected as a member of the board of education to qualify within ten days after the organization of the board, a vacancy is created or caused to exist on the board of education for that term of office to which said person who failed to qualify was elected; and that, the vacancy thereby created must “be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election for the unexpired term.”

It therefore can be said:—that, if any one of the three persons elected as members of the Board of Education of Bolivar Rural School District fails to qualify as a member of such board within ten days after the organization meeting of the board, on the first Monday of January, 1938, at the expiration of such ten day period a vacancy will exist on the Board of Education of Bolivar Rural School District for the term of office to which said person who failed to qualify was elected; and that any such vacancy which comes into being after the expiration of such ten day period must be filled by the Board of Education of the Bolivar Rural School District “at its next regular or special meeting, or as soon thereafter as possible, by election.”

This holding is in accordance with an opinion appearing in Opinions of the Attorney General for the year 1930, Volume 1, page 149. The situation in that case was that a “new person failed to qualify” and the question arose “as to the right of the defeated member to retain his seat for the failure of his successor to qualify.” The then Attorney General held:

“In the event a person who has been elected as a member of a board of education fails to qualify within ten days after the organization of the board, as provided in Section 4747, General

Code, a vacancy exists under the provisions of Section 4748, General Code, which vacancy should be filled as therein provided."

To the same effect are the following opinions:

Opinions of the Attorney General, 1934, Volume II, page 1451;
Opinions of the Attorney General, 1931, Volume I, page 348;
Opinions of the Attorney General, 1931, Volume III, page 1498;
Opinions of the Attorney General, 1918, Volume I, page 356.

It cannot be said that the failure to qualify by the person elected as a member of the Board of Education of Bolivar Rural School District gives the present member of the board of education whom he was elected to succeed, the right to hold over by virtue of the provisions of Section 4745, *supra*. It is to be noted from the language of Section 4745, *supra*, that the provision stating the member who is to be succeeded shall hold his office "until his successor is elected and qualified," is in the nature of a general provision; that, the provisions of Section 4748, *supra*, are specific, in that they set forth that upon the occurrence of certain enumerated specific conditions, among which is the failure of a person elected as a member of the board of education to qualify, a vacancy shall be caused to exist; that it makes it mandatory if such a vacancy is created or comes into existence it must be filled by the board, "by election," as provided therein. The words contained in Section 4748, *supra*, "by election for the unexpired term," negative any argument that a retiring member may hold over by reason of the failure of the newly elected member to qualify.

Therefore, in specific answer to your question it is my opinion that, if any of the three persons elected at the November election, as a Member of the Board of Education of Bolivar Rural School District fails to qualify within ten days after the organization of such board of education, at the expiration of such ten day period, a vacancy is created for that term of office to which the person who failed to qualify was elected, and such vacancy must be filled by the board of education in accordance with the provisions of Section 4748, General Code.

Very truly yours,
HERBERT S. DUFFY,
Attorney General.