

contemplation of death to the survivor, then to the extent to which a transfer in interest from one to the other has taken place a taxable succession has occurred and the value of such interest so transferred should be ascertained. In this latter event, however, it must be pointed out, as in connection with the other two questions, that contracts or declarations of trust made prior to June 5, 1919, are, at least with respect to deposits made before that date, not governed by the present law.

The form in which the deposit is made is, of course, immaterial when the underlying circumstances are discovered; nor is it believed that any different presumptions arise in the one case described by you as compared with those which arise in the other; in either event, the interests of A and B are prima facie equal.

It is to be understood that your third question is answered on the basis of the Ohio law. Whenever county auditors are called upon to appraise certificates of deposit or joint accounts in New York banks, for example, they should be governed by the law of New York with respect to which the cases of

Matter of McKelway, supra; and
Dolbeer's Estate, 226 N. Y. 68; 123 N. E. 381;

may be referred to, and no further discussion of the New York law and the application of the reasoning of these cases to the Ohio inheritance tax law in its relation to a New York deposit will be attempted in this opinion.

For the sake of clearness it is to be stated in conclusion that both your second and your third questions have been considered on the theory that the decedent from whom the succession, or supposed succession, if any, has come was a resident of this state, and that the conclusions given are also based on this theory, though in the course of the discussion reference has been made to other possibilities.

Respectfully,

JOHN G. PRICE,
Attorney-General.

1170.

MUNICIPAL CORPORATIONS—SECTION 4251 G. C. APPLICABLE TO BOTH CITIES AND VILLAGES—STREET COMMISSIONER—COMPENSATION OF OFFICER CHANGED AFTER EXPIRATION OF TERM—INHIBITION OF SECTION 4219 G. C. NOT APPLICABLE.

1. *Section 4251 G. C. applies to both cities and villages.*
2. *The inhibition of section 4219 does not apply to changed compensation of an officer after the expiration of the term for which he was elected or appointed and for the period which he holds over until his successor is appointed and qualified.*

COLUMBUS, OHIO, April 20, 1920.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

"We are respectfully calling your attention to the provisions of sections 4363 and 4251 G. C., and an old court decision which was shown us by your Mr. Martin a few days since, which may be found in the Weekly Law Bulletin 1880-1881, Vol. VI, No. 282, and we beg to advise you that in January, 1919, a street commissioner was appointed in a village of this

state for a term of one year and at present is still holding over for reasons as follows: The mayor of the village about the second Monday of January, 1920, appointed another man but this appointment failed to receive confirmation of council; then on the second Monday of February, the mayor appointed still another man but this was not acted upon for the reason that the village solicitor ruled that the time of the appointment had expired.

1. Does not section 4251 G. C. apply to villages?

2. On December 31, 1919, council passed an ordinance increasing the salary of the street commissioner from \$75.00 to \$90.00 per month. Can this increase legally be paid the incumbent who is holding over without re-appointment?"

Section 4251, to which your first question relates, is as follows:

"The director of public service, director of public safety, directors of the university, street commissioner, or any board or officer whose appointment is required herein shall be appointed not earlier than the second Monday in January and not later than the first Monday in February, and shall hold their respective offices until their successors are appointed as herein required."

The sub-title of the series of sections of which this section is a part is "cities." The sections preceding it and those that immediately follow until the next sub-title, which is "villages," refer to "any department of the city," "the affairs of the city" and "welfare of the city." Such inference as may be drawn from its juxtaposition and its sub-title would perhaps limit this section to cities alone. A further study of its legislative history, however, produces a different result. It was section 1536-979 R. S. as found in 97 O. L., 39. It was then a part of chapter I, division 9, pertaining to the election and appointment of municipal officers. It named and applied to the same officers as those in the present section except that it then read

"or any board or officer whose appointment is required by this act."

This language was also used in the earlier section in 96 O. L., 93, where it appeared as section 223 of the municipal code then adopted. The act referred to was the act adopting the municipal code. Section 222 of that code (96 O. L. 93) provided for "the first election under this act," and it is clear that the section as it then stood applied to all officers whose appointment was required by the municipal code. In the same act the office of street commissioner as a city office was not re-created as it was in villages and after the adoption of the code it ceased to be a city office.

Section 1536-979 was intended and did apply to all appointive municipal officers and logically it retained the office of street commissioner for villages as well as those offices which were peculiar to cities alone; it was in the nature of a schedule.

The codifying commission did not make any material changes in this regard, but placed the section under the head of "cities." They did not, however, provide in a separate statute for a schedule of village appointive offices and the term now used in section 4251 "whose appointment is required herein" is construed to retain its original meaning, viz., the officers required to be appointed by the statutes composing the municipal code.

Without the application of section 4251 to villages, there would be no schedule

fixing the beginning of appointive terms of office. These considerations taken with the generality of the terms used, convince me that section 4251 applies to both cities and villages.

Your second question involves the legality of a salary increase of the street commissioner of a village, effective at the end of his one year term, while he is holding over until the appointment and qualification of his successor.

Section 4219 G. C. relates to change of salary of village officers or employes, and its pertinent parts are:

"The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed."

Section 4363 provides for the appointment of a street commissioner in this language:

"The street commissioner shall be appointed by the mayor and confirmed by council for a term of one year, and shall serve until his successor is appointed and qualified."

In the case under consideration, from your letter it is noted that the present incumbent of the office of street commissioner is holding over after the expiration of his one year term; that the mayor after the expiration of such term appointed another street commissioner, which appointment council failed to confirm, and that later the mayor appointed "still another man," but this was not acted upon for the reason that the village solicitor ruled that the "time of the appointment had expired." No opinion is herein expressed as to the correctness of this ruling, except so far as it may be affected by the answer to your first question.

It is believed that the case of *Woehler vs. Toledo*, decided by the Lucas county common pleas court and found in 8 Weekly Law Bulletin, 282, is in point. The syllabus in that case in part is:

"Section 20, Article II, constitution of Ohio, providing that the legislature shall fix the term of office and the compensation of all officers, but no change therein shall affect the salary of any officer during his existing term, unless the office 'be abolished' contemplates a fixed term for all officers; therefore, under a statute that an officer shall hold for one year and until his successor is appointed and qualified, his holding over after the end of the year, no successor being appointed, is not a holding under the term of office, and during such holding over the salary may be changed at will, and the change cannot be made inoperative by the refusal to appoint a successor."

This appears to be a very well considered opinion and in many respects is similar to the case arising on the facts stated in your letter. This department is aware of no later decision of the courts of this state modifying or overruling the holding in the Toledo case and until this decision is distinguished or reversed by a higher court, the reasoning and conclusion of that case must be accepted as the law, consistent with which an affirmative answer must be given to your second question.

It may be mentioned that sections 8 and 10 G. C. (*State ex rel. vs. Speidel*, 62 O. S. 150) have been considered and are believed to be inapplicable, as section 4363

itself specifically provides for the appointee serving until his successor is appointed and qualified.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

1171.

MUNICIPAL CORPORATION—HOW CONFIRMATION OF APPOINTMENTS MADE BY MAYOR ARE CONSIDERED BY COUNCIL—RESOLUTION MUST BE TAKEN BY “YEAS” AND “NAYS” AND AFFIRMATIVE VOTE OF MAJORITY OF MEMBERS CONSTITUTING QUORUM NECESSARY TO CONFIRM—SEE SECTIONS 4224, 4237 AND 4384 G. C.

1. *The confirmation of appointments made by the mayor under section 4384 G. C. may be made by resolution of council, and the votes of the councilmen on the resolution must, by virtue of section 4224 G. C., be taken by “yeas” and “nays” and entered upon the journal.*

2. *A resolution of council confirming appointments made by the mayor under section 4384 G. C., must be adopted by the affirmative votes of a majority of the members constituting a quorum. See section 4237 G. C.*

COLUMBUS, OHIO, April 20, 1920.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date inquiring, first, whether the action of a municipal council in confirming the mayor's appointment of deputy marshals, etc., as provided for in section 4384 G. C., may be evidenced by resolution, or by a “yea” and “nay” vote only, and, second, as to the number of votes necessary to effect confirmation, was duly received.

(1) Section 4384 G. C. provides that:

“When provided for by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special policemen,” etc.

It is clearly apparent that confirmation necessarily requires, and is, action of council, and that being true the confirmation may be made by resolution, and the votes of the councilmen taken by “yeas” and “nays” and entered upon the journal. See section 4224 G. C., which provides that:

“The action of council shall be by ordinance or resolution, and on the passage of each ordinance or resolution the vote shall be taken by ‘yeas’ and ‘nays’ and entered upon the journal,” etc.

(2) There appears to be no statutory provision requiring that resolutions shall be passed by the votes of any particular number of members,—the nearest approach being section 4237 G. C., which provides that “a majority of all the members elected shall be a quorum to do business,” etc.

See, also, *State vs. Massillon*, 13 O. D. 292, (involving certain statutes since amended), which holds, in effect, that a majority of a quorum at a regular or