

ated within the municipality or county, as offer, at competitive bidding the highest rate of interest and give a good and sufficient bond issued by a surety company authorized to do business in the state, or furnish good and sufficient surety, or secure said monies by a deposit of bonds or other interest bearing obligations of the United States or those for the payment of principal and interest of which the faith of the United States is pledged, including bonds of the District of Columbia; and farm loan bonds issued under the provisions of the act of congress known as the federal farm loan act, approved July 17, 1916, and amendments thereto; bonds of the State of Ohio or of any other state of the United States; legally issued bonds of any city, village, county, township or other political subdivision of this or any other state or territory of the United States and as to which there has been no default of principal, interest or coupons, and which in the opinion of the treasurer are good and collectible providing the issuing body politic has not defaulted at any time since the year 1900, in the payment of the principal and interest of any of its bonds; notes issued under authority of law by any county, township school district, road district, or municipal corporation of this state; said security to be subject to the approval of the proper municipal officers, in a sum not less than ten per cent in excess of the maximum amount at any time to be deposited. And whenever any of the funds of any of the political subdivisions of the state shall be deposited under any of the depositary laws of the state, the securities herein mentioned, in addition to such other securities as are prescribed by law, may be accepted to secure such deposits."

While this section is, in the main, pertinent only to the investment of municipal funds, yet by the last sentence thereof its provisions are made applicable to the funds of any of the political subdivisions of the state. It necessarily follows that the securities therein mentioned may be accepted by the township trustees as security for the deposit of township funds subject to the limitations contained in that section.

You will observe that the securities mentioned in Section 4295 of the Code are, in the main, the same as those in Section 2732, to which you have referred. There are, however, certain differences which a careful reading of the section will disclose and which it is unnecessary for me to mention specifically.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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1579.

JUSTICE OF THE PEACE—VACANCY—TOWNSHIP TRUSTEES MUST TAKE OATH AND GIVE BOND BEFORE ENTERING UPON DUTIES—PROCEDURE WHEN THERE IS NO JUSTICE OF THE PEACE TO APPROVE BOND.

*SYLLABUS:*

1. *Where a newly elected justice of the peace fails or refuses to qualify, the justice of the peace whom he was elected to succeed and who has completed his four-year term, does not, by virtue of the provisions of Section 8, General Code, or otherwise, continue in office, the term of office of a justice of the peace being limited by Section 2, Article XVII of the Constitution of Ohio to four years.*

2. *A township trustee is not required to take the oath of office and give bond before the first day of January next after his election when his term of office begins, but must take such oath and give bond before entering on the discharge of his duties.*

3. *There is no authority for the examination and approval of the bonds of newly elected township trustees by any officer or officers other than a justice of the peace. Where, however, there is no justice of the peace to approve the bond of newly elected township trustees, each of such trustees should enter into a bond with two good and sufficient sureties residents of the same township with the trustee, as required by Section 3269, General Code, (or with a duly authorized guaranty company as surety, as authorized by Section 9571, G. C.) and file the same with the township clerk for record. When such bond is so entered into and filed, said trustees are authorized to enter upon the duties of their office and no vacancy would be created therein.*

COLUMBUS, OHIO, January 14, 1928.

HON. JOHN K. SAWYERS, JR., *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Your letter of January 9, 1928, requesting my opinion, and reading as follows, duly received:

“A peculiar situation has arisen in Malaga township, Monroe County, on which I desire your advice.

In said Malaga Township, one new trustee was elected at the November election and two old trustees were re-elected. The newly elected trustee appeared before the only justice of peace in the township on Saturday, December 31, and qualified, giving the requisite bond which was approved by the justice as required in Section 3269. Likewise, the newly elected clerk so appeared and took his oath. The newly elected justice of peace has refused to qualify. On January 2, the two re-elected trustees appeared before the old justice and he approved their bond and administered to them their oath of office on the theory that, his successor not having been qualified, he held over until that time. He acted under Section 8 of the General Code on his own initiative. The trustees then met and organized. Since that time, the old justice has sought legal advice and been advised that his term of office expired on the night of December 31, 1927, and that he had no power to approve the bonds of the newly re-elected trustees and so he has asked to withdraw his approval of same.

I have advised the old justice that under the authority of *State ex rel vs. Brewster*, 44 O. S. 591, that his term of office expired on December 31, 1927, his term of office being fixed and limited by the constitution and he had served out his time. Therefore, if I am right, Malaga Township has no justice of the peace and no one approved the bonds of the two re-elected trustees so they cannot qualify under Section 3269 of the General Code.

However, I have advised the two trustees that they may hold over until they can qualify and have advised them to appoint a justice of peace under authority of Section 7 and Section 1714 of the General Code and, that upon his qualification, their bonds may be approved by him and they can then qualify and organize as a new board of trustees. Am I right in my deductions of the law thus far or was the action of the old justice legal in approving the bonds of the re-elected trustees, that is, did he hold over under Section 8 of the Code? Furthermore, have the two re-elected trustees by their inability to give bond and qualify come under Section 7 of the Code and is their office now vacant and will it become necessary for them to be appointed as trustees when a justice of peace is qualified and can appoint as provided for in Section

3262? I have advised the re-elected trustees that they can qualify as soon as a justice is secured to approve their bonds and that they will not have to be appointed under Section 3262."

In your letter you ask two questions which may be stated as follows:

1. Where a newly elected justice of the peace fails or refuses to qualify, does the justice of the peace, whom he was elected to succeed, and who has completed his four-year term, continue in office by virtue of the provisions of Section 8 of the General Code, or is the term of office of a justice of the peace limited to four years; and

2. Where two newly elected township trustees fail to take the oath of office and give bond until on the second day of January next after the election, on which date such oath was administered and bond approved by a justice of the peace whose term of office (unless he held over under Section 8, General Code) expired on December 31st, two days prior thereto, are such township trustees duly qualified according to law, and if not, have such trustees forfeited their right legally to qualify at a later date.

1. With reference to your first question, your attention is directed to that part of Section 2, Article XVII of the constitution of Ohio which reads:

" \* \* \* The term of office of justices of the peace shall be such even number of years, not exceeding four (4) years, as may be prescribed by the General Assembly \* \* \*  
\* \* \*

\* \* \* All vacancies in other (than state) elective offices shall be filled for the unexpired term in such manner as may be prescribed by law." (Words in parenthesis the writer's.)

In conformity with these constitutional provisions the legislature has enacted Sections 1715 and 1714 of the General Code, which provide as follows:

Sec. 1715. "At the next regular election for such office, a justice of the peace shall be elected in the manner provided by law, for the term of four years commencing on the first day of January next following his election."

Sec. 1714. "If a vacancy occurs in the office of justice of the peace by death, removal, absence for six months, resignation, refusal to serve, or otherwise, the trustees within ten days from receiving notice thereof, by a majority vote, shall appoint a qualified resident of the township to fill such vacancy, who shall serve until the next regular election for justice of the peace, and until his successor is elected and qualified. The trustees shall notify the clerk of the courts of such vacancy and the date when it occurred."

Section 8 of the General Code, to which you refer in your letter, reads as follows:

"A person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

By the express terms of this section it is obvious that a justice of the peace will continue in office until his successor is elected or appointed and qualified, unless it be "otherwise provided in the constitution or laws," and the question is narrowed to a determination of whether or not the language of Section 2, Article XVII of the Con-

stitution, above quoted, precludes a justice of the peace from holding over upon the expiration of his four-year term of office.

The case of *The State ex rel. Attorney General vs. Brewster*, 44 O. S. 589, referred to in your letter, is dispositive of this question. In that case, in an opinion by Chief Justice Owen, it was said:

"The assumption of counsel, that there is no power in the general assembly to extend the term of an office which is limited by the constitution, is abundantly warranted by the case of *State vs. Howe*, 25 Ohio St. 588, where it is said by McIlvaine, C. J.: 'After a careful examination of the question, in the light of both principle and authority, we are led to the conclusion that the general assembly may provide against the occurrence of vacancies by authorizing incumbents to hold over their terms in cases where the duration of their tenures is not fixed and limited by the constitution.' Also, 'in cases where the duration of the tenure of office is limited by the constitution, of course its duration can not be extended by statute.'

If the provision of Section 8, that any person holding an office shall continue therein until his successor is elected or appointed and qualified, is to be given the effect contended for, it is not easy to see why this is not an extension of the duration of the office by statute beyond the limitation prescribed by the constitution.

Section 8 is as much a general law as that providing for the election of auditors for three years, and if the two, construed together, are to be held to authorize a holding over after the expiration of the term of three years, what stands in the way of enacting them in one section instead of two? And what would be said of an enactment which, in the face of this plain constitutional limitation of three years, should provide that 'county auditors shall hold their offices for three years, and until their successors shall be elected and qualified? Would anybody seriously contend that such legislation would be constitutionally valid?

It is certainly by a confused process of reasoning that it is contended that the same provision (Section 8), which authorizes a holding over beyond the term and thus extends the duration of the office, is also a provision for filling a vacancy. If we give it the effect contended for, there is no 'vacancy' to fill. The incumbent is rightfully in office and destined to remain there of right until the beginning of the term of his successor by election.

\* \* \*

Then it should be borne in mind that the provision of Section 8 that an officer shall continue in his office until his successor is elected or appointed and qualified is subject to the qualification 'unless it is otherwise provided in the constitution or laws.' We find it 'otherwise provided' in the constitutional limitation of the term of this office to three years; and 'otherwise provided' by the law which authorizes the county commissioners to fill the vacancy in the auditor's office by appointment. Section 1017."

I find no later decisions of the Supreme Court bearing upon this question, although your attention is directed to the case of *The State ex rel. vs. Harvey*, 8 O. C. C. 599, decided in 1894 in which like conclusions are reached.

Your attention is further directed to an opinion of this department, reported in Annual Report of the Attorney General for 1912, Vol. II, page 1058, in which, after quoting the syllabus from the Brewster case, *supra*, it was said as follows:

"This decision has never been overruled and remains the law of this state. The following propositions may be deduced from it:

1. Where a term of office is fixed by the constitution a statutory right to continue therein until a successor is elected and qualified is limited to the period fixed by the constitution.
2. Such statutes while enacted in pursuance of a well understood rule of public policy yield the plain language of constitutional provisions.

Applying these principles to the case of a justice of the peace whose tenure of office is limited by Article 17, of the Constitution above quoted, it appears that no person may hold the office of justice of the peace more than four years under one election or appointment; therefore if the predecessor of the person inquired about in your correspondence was elected in November, 1907, and began his office in January, 1908, he could not hold office beyond December 31, 1912, even though no successor to him was elected and qualified in November, 1911."

For the reasons stated, it is my opinion that the justice of the peace referred to in your letter did not hold over, and that he was without power to administer the oath of office to and approve the official bonds of the newly elected township trustees on January 2, 1928.

2. You state that you have advised the two trustees who were re-elected "that they may hold over until they can qualify" for the two-year term expiring December 31, 1929.

I very much doubt if it can be said that, in the case submitted by you, the two old trustees who were again elected can hold over. It must be remembered that the language of Section 8 above quoted is that a "person holding an office of public trust shall continue therein until *his* successor is elected or appointed and qualified." How can it be said that either of the two township trustees, who was again elected to serve as township trustee, is the successor of himself and not the successor of the third trustee who was not again elected? It is true that three trustees were elected to succeed the three trustees whose terms expired on December 31, 1927, and that the identity of two of the newly elected trustees is the same as that of two members of the old board. However, it does not follow that either was elected to succeed himself any more than to succeed the old member who was not re-elected, and the one who was not re-elected would have just as much right to hold over as either of the other two.

In this connection, your attention is directed to the language of Judge Matthias in the case of *State ex rel. vs. Larsen*, 110 O. S. 413, 414, as follows:

"It is disclosed that the council of the village of Rocky River consisted of six members elected at large. At the election of the new council in November, 1923, there were thirteen candidates for the six places on the council, some of whom were candidates for re-election. None of those elected could be designated as the successor of a particular former member, consequently had Hutchinson lived he could not have been regarded as his own successor in the new term, and therefore, Christiansen, by reason of his selection for the unexpired term of Hutchinson, could not hold over and become Hutchinson's successor in the new term."

I am not unmindful of the case of *Case vs. Burrell, et al. Township Trustees*, 4 Ohio App. 261; 22 O. C. C. (N. S.) 254, in which it was held that certain action taken by an old board of trustees on January 1st, and prior to the qualification of the newly elected trustees on January 5th and 8th was the action of the *de jure* officers. But it

is manifest that the facts in that case were different from the facts here involved. In view of the conclusions herein reached, however, I deem it unnecessary further to discuss or finally to determine this question.

You refer to Section 7, General Code, which reads :

“A person elected or appointed to an office who is required by law to give a bond or security previous to the performance of the duties imposed on him by his office, who refuses or neglects to give such bond or furnish such security, within the time and in the manner prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed, and such office shall be considered vacant and be filled as provided by law.”

Sections 3268 and 3269, General Code, provide as follows :

Sec. 3268. “Three trustees shall be elected, biennially, in each township, who shall hold their office for a term of two years, commencing on the first day of January next after their election.”

Sec. 3269. “Before entering upon the discharge of his duty, each township trustee shall give bond to the state for the use of the township, with at least two sureties, who shall be residents of the same township with the trustee, in the sum of five hundred dollars, conditioned for the faithful performance of his duty as trustee. Such bond shall be approved by a justice of the peace of the township in which the bond is given.”

Under the holding of the Supreme Court of Ohio in the case of *State ex rel. Witham vs. Nash, Governor, et al.*, 65 O. S. 549, distinguishing the case of *State ex rel. Poorman vs. Commissioners*, 61 O. S. 506, it is my opinion that the two newly elected trustees have not forfeited their right at this time to qualify for the office to which they were elected. The opinion in that case is a short Per Curiam, and reads as follows :

“An infirmity director must give bond ‘before entering on the discharge of his duties.’ Revised Statutes, Section 960. In this respect the law differs from that governing the bond of a sheriff, which prescribes that a sheriff shall give bond ‘within ten days after receiving his commission and before the first Monday of January.’ *State ex rel. Poorman vs. Commissioners*, 61 Ohio St. 506. The term of office of an infirmity director begins on the first Monday in January; but the actual discharge of the duties of such officer does not necessarily begin with his term. The petition does not show that Hill performed any official duty prior to the giving of the bond on January 7, 1902, which was the day after the first Monday in January; but it does show that the board of county commissioners refused to approve Hill’s bond solely because it appeared from the bond that it was not executed nor filed in the office of the board until the 7th day of January, 1902, and that the prosecuting attorney had not certified the sufficiency of the bond for the same reason. This was not enough to authorize the commissioners to consider the office vacant, under Revised Statutes, Section 19, and to proceed to fill the vacancy, under Revised Statutes, Section 959.”

This brings me to a consideration of your statement to the effect that you have advised the re-elected trustees that “they can qualify as soon as a justice is secured

to approve the bonds." On the question here presented, I am enclosing a copy of Opinion No. 1560, rendered under date of January 10, 1928, to the prosecuting attorney of Huron County, the syllabus of which reads as follows:

"1. By the terms of Section 3269, General Code, bonds of newly elected township trustees are required to be approved by a justice of the peace of the township in which such bonds are given, and there is no authority for the examination and approval of such bonds by any other officer or officers.

2. In case there is no justice of the peace to approve the bond of newly elected township trustees, each of such trustees should enter into a bond with two good and sufficient sureties residents of the same township with the trustee, as required by Section 3269, General Code, (or with a duly authorized guaranty company as surety, as authorized by Section 9571, G. C.) and file the same with the township clerk for record. When such bond is so entered into and filed, said trustees are authorized to enter upon the duties of their office and no vacancy would be created therein."

As stated in Opinion No. 1560, *supra*, it is my opinion that the two newly elected trustees can forthwith qualify for office by taking the oath of office before an officer empowered to administer such oath, and by executing and filing with the clerk a bond meeting the requirements of law.

From the context of your letter, I assume that the township trustees have not attempted to discharge any of their duties and it is unnecessary, therefore, to pass upon the question of the validity of any acts attempted to be done by them, or determine whether or not they be officers *de jure* or *de facto*.

In conclusion, and specifically answering your questions, it is my opinion that:

1. Where a newly elected justice of the peace fails or refuses to qualify, the justice of the peace whom he was elected to succeed and who has completed his four-year term, does not, by virtue of the provisions of Section 8, General Code, or otherwise, continue in office, the term of office of a justice of the peace being limited by Section 2, Article XVII of the Constitution of Ohio to four years.

2. A township trustee is not required to take the oath of office and give bond before the first day of January next after his election when his term of office begins, but must take such oath and give bond before entering on the discharge of his duties.

3. There is no authority for the examination and approval of the bonds of newly elected township trustees by any officer or officers other than a justice of the peace. Where, however, there is no justice of the peace to approve the bond of newly elected township trustees, each of such trustees should enter into a bond with two good and sufficient sureties residents of the same township with the trustee, as required by Section 3269, General Code, (or with a duly authorized guaranty company as surety, as authorized by Section 9571, G. C.) and file the same with the township clerk for record. When such bond is so entered into and filed, said trustees are authorized to enter upon the duties of their office and no vacancy would be created therein.

Respectfully.

EDWARD C. TURNER.

*Attorney General.*