

1037.

JUSTICE OF THE PEACE—APPOINTED TO FILL VACANCY—LENGTH OF TERM WHEN NO SUCCESSOR ELECTED AT NEXT REGULAR ELECTION FOR SUCH OFFICE.

SYLLABUS:

1. *Where a term of office is fixed by the Constitution, the statutory right to continue therein until a successor is elected and qualified is limited to the period fixed by the Constitution.*

2. *Where a justice of the peace is appointed to fill a vacancy, and no successor is elected or qualified at the subsequent regular election for justice of the peace, the appointee continues in office until the next regular election for that office, if such term of service does not exceed the four year limitation imposed by Section 2, Article XVII of the Constitution.*

COLUMBUS, OHIO, October 16, 1929.

HON. HAROLD A. PREDMORE, *Prosecuting Attorney, Hillsboro, Ohio.*

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

"J. L. S. of Madison Township, Highland County, Ohio, was elected and qualified as justice of the peace for said township for the term beginning January 1, 1928, and expiring December 31, 1931. On July 28, 1928, J. L. S. died. August 6th, 1928, the trustees of Madison Township appointed M. L. M., justice of the peace for J. L. S.'s unexpired term.

The contention has been raised that said M. L. M. is holding said office illegally and that the appointment made by the trustees to fill the vacancy continued only until the next regular election. However, no one filed or ran for said office at the regular election in 1928 and said M. L. M. continued to serve and is serving as justice of the peace at the present time.

The question presented is whether or not under Section 1714, General Code of Ohio the appointment made by the trustees is for the unexpired term of his predecessor which would be December 31, 1931, or whether the appointment expired at the next regular election.

You will note G. C. 1714 reads in part as follows:

' * * * who shall serve until the next regular election for justice of the peace, and until his successor is elected and qualified. * * * '

If the word 'and' can be construed to read 'or' it would seem that the appointee could hold said office legally until a successor qualified for the office, regardless of how long a time it might be."

We also acknowledge receipt of copy of the entry of appointment, which reads as follows:

"J. L. S., a duly elected justice of the peace of this township, having died August 1st, 1928, it was moved by R. L. H., seconded by W. A. A. that M. L. M., a duly qualified resident of this township be appointed to fill such vacancy and serve until his successor is elected and qualified, and it is ordered that the clerk of this township notify the clerk of the Common Pleas of this county of said vacancy and the date when it occurred and the appointment of M. L. M. at his successor."

Section 2, Article XVII of the Constitution of the State of Ohio reads in part:

“ * * * 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. * * * ”
(Parenthesis and words enclosed therein, the writer's.)

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

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 court of such vacancy and the date when it occurred.”

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.”

Section 8 of the General Code, reads:

“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.”

Section 10 of the General Code, reads:

“When an elective office becomes vacant and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy.”

It will be observed that Section 2, Article XVII of the Constitution, *supra*, expressly limits the term of office of a justice of the peace to four years. Therefore, no person may hold the office of justice of the peace longer than four years, under one election or appointment.

Mr. M. was appointed justice of the peace on August 6, 1928, and even were he to serve until the end of Mr. S.'s term—December 31, 1931—his term of office would be less than four years.

A case somewhat in point, is *In re. Matter of Conley*, 25 Ohio Appellate, 340, where Mr. Voorhees was appointed on June 18, 1924, in place of Mr. Assenheimer, whose term began January 1, 1924, but who had moved from the township. On June 24, 1926, Mr. Voorhees, still acting in the capacity of justice of the peace, no successor having been elected at the regular election in November, 1925, imposed a sentence upon one Conley. Conley sought release on a writ of habeas corpus, alleging

that he was unlawfully sentenced because Mr. Voorhees was not a justice of the peace at the time of his sentence. In the syllabus, the Court of Appeals said:

"A person appointed as justice of the peace by the trustees of a township until next regular election, as provided by Section 1714, General Code, and commissioned by the Governor, and who qualifies and continuously fills and performs the duties of the office thereafter, is at least a de facto officer capable of passing sentence on relator convicted of crime, whether or not the next regular election should have been held before such action."

In the consideration of this question, I am not unmindful of the fact that as was said by Judge Swing, in *State ex rel. Burke vs. Comer*, 7 O. C. C., 258:

"One of the cardinal principles of our state government is that no man shall hold an office by which he is called upon to administer the laws enacted by the people, among the people unless chosen by the people through the ballot box. And this principle is expressed in Section 11 of the Revised Statutes."

The words "at the first general election for the office which is vacant" now contained in Section 10, General Code, supra, mean the same as the words "at the first proper election", contained in Section 11 of the Revised Statutes.

The copy of the Entry of Appointment which you enclose reads in part:

" * * * to fill such vacancy and serve until his successor is elected and qualified, * * * "

It was clearly the intent of the trustees of the township, as expressed in the above entry, that Mr. M. fill the office of justice of the peace only until his successor was elected and qualified.

A rule of public policy presumes against, and will not permit a break in the continuity of public service. It leads to the conclusion that although a public officer's right to hold office may have terminated, yet if the elective power has failed to provide him with a successor, he may continue in office until such power is exercised, unless prohibited by the Constitution.

I note in your inquiry that you state "no one filed or ran for said office at the regular election in 1928." It is to be observed that elections for justice of the peace are held in odd-numbered years by provision of Section 4831, General Code.

The first opportunity to fill the office of justice of the peace, now held by Mr. M., will be held at the regular election in November, 1929. If an election for office of justice of the peace is not held at that time, Mr. M. could continue to serve under his present appointment only until August 5, 1932, when the period of four years from the date of his appointment would terminate.

Inasmuch as it is now too late for candidates for justice of the peace to get their names on the ballot for the November, 1929, election, provision should be made for writing the name in on the ballot, under authority of Section 5025, General Code, which reads in part:

"If upon a ticket there is no candidate or candidates for a designated office, a blank space, equal to the space that would be occupied by such names if they were printed thereon with the blank spaces herein provided for, shall be left."

Specifically answering your question, therefore, I am of the opinion that where a

person is appointed justice of the peace to fill a vacancy in a term commencing January 1, 1928, and expiring December 31, 1931, the first election at which a successor can be chosen is the November, 1929, election and such appointee may serve until such successor is elected and qualified provided that where no successor is chosen at the 1929 election, the term shall not in any event extend beyond four years.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1038.

DEPENDENT CHILD—COMMITTED TEMPORARILY OR PERMANENTLY TO PRIVATE INSTITUTION OUTSIDE COUNTY—LEGAL RESIDENCE IN SUCH FOREIGN COUNTY—EXPENSES NOT CHARGEABLE AGAINST ORIGINAL COUNTY PRIOR TO JULY 21, 1929.

SYLLABUS:

1. *When the Juvenile Court of a county finds a child to be dependent and permanently commits that child to a private institution as provided in Section 1653, General Code, said child thereby becomes the ward of said private institution and the trustees thereof become the guardian of the person of said child.*
2. *If the said commitment is temporary, the trustees of the institution are the guardian of the person of the child so long as it is permitted to remain in said institution.*
3. *During the time the child remains in said institution its legal residence is the county in which the institution is located.*
4. *There is no authority under Section 4438, General Code, as it existed previous to its amendment by the 88th General Assembly, to charge the county from which the child was committed for the expenses incurred by the quarantine of said child on account of contagious diseases.*

COLUMBUS, OHIO, October 16, 1929.

HON. R. L. THOMAS, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your request for my opinion as follows:

“The Juvenile Department of this county, through Honorable Frank L. Baldwin, Juvenile Judge, has been sending a number of dependent children to a private institution located in Cleveland, and erected for the purpose of caring for dependent and neglected children, under the provisions of Section 1653 of the General Code. In a number of cases children, who have been sent to the Cleveland Institution, have contracted contagious diseases and have been confined to the Cleveland City Hospital, resulting in the City Hospital of Cleveland forwarding to the county commissioners of this county, several bills for hospital care amounting approximately to the sum of \$800.00, these statements being rendered under the provisions of Section 4438 of the General Code.

We feel, after a careful consideration of the statutes applicable to this matter, and in view of an opinion rendered by your predecessor in the 1922 Ohio Attorney General's Opinions at page 149, that the provision of Section