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JUSTICES OF PEACE — WHERE PROBATE JUDGE OF COUNTY BY ORDER DULY INCREASED NUMBER OF JUSTICES OF PEACE IN ANY TOWNSHIP OR COUNTY, TOWNSHIP TRUSTEES HAVE NO AUTHORITY TO APPOINT PERSON TO FILL OFFICE THUS CREATED—ADDED JUSTICE IS TO BE ELECTED AT NEXT REGULAR ELECTION FOR SUCH OFFICE—SECTION 1713 G. C.

SYLLABUS:

When the probate judge of a county has by order duly increased the number of justices of the peace in any township in such county, pursuant to the provisions of Section 1713, General Code, the trustees of the township have no authority to appoint a person to fill the office thus created, but such added justice is to be elected at the next regular election for such office.

Columbus, Ohio, February 7, 1945

Hon. D. H. Peoples, Prosecuting Attorney
Pomeroy, Ohio

Dear Sir:

I acknowledge receipt of your letter requesting my opinion, and reading in full as follows:

“Please give me an opinion on the following:

Have the Township Trustees of a Township, the right and authority to appoint a person to fill the office of Justice of the Peace, and to act until his successor is elected and qualified, under the facts as hereinafter set forth. And has such a vacancy occurred, such as will permit the appointment of such Justice of the Peace?

On December 20th, 1944, the Probate Court of this (Meigs) County increased the number of Justices of the Peace for Salisbury Township, Meigs County, Ohio from three to four (4). All papers and entries were duly filed in said Probate Court of this County and all proceedings seemed to be regular in every way.

A demand is now made upon the Township Trustees to make an appointment under Section 1714 of the General Code."

Section 1713, General Code, provides :

"When it is made to appear to the satisfaction of the probate judge of a county that there is not a sufficient number of justices of the peace in a township thereof and that public notice has been given therein that application will be made for an additional number of justices, the court in its discretion may add one or more justices to such township. *The trustees shall give notice to the electors of the township to elect the justice or justices so added at the regular election for such office.* If it is made to appear to such court that the number of justices in a township should be decreased, it may restrict the number as it deems proper. All justices of the peace shall be elected for a term of four years. No justice may be deprived of his commission until the expiration of the term for which he was elected."

(Emphasis added.)

Section 1714, General Code, reads :

"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."

The answer to your inquiry turns on the question whether the action of the probate court in increasing the number of justices of the peace in a township creates a vacancy. If there is a vacancy which the law intends shall be filled, plainly it is to be filled by the township trustees.

It will be noted that Section 1714, General Code, above quoted, mentions vacancies caused by death, removal, absence, resignation, refusal to serve "or otherwise." It might appear that "otherwise" would cover the situation which you present where a new office has been created. The law does contemplate that that situation may under certain circumstances create a vacancy. In 42 Am. Juris., page 978, it is said :

"A vacancy may arise in an office newly created. The general rule governing the matter seems to be that when a law establishing an office takes effect a vacancy in the office at once

exists, *unless the language of the law imports futurity of selection, or unless other restrictions are imposed.* Hence, the term 'vacancy' applies to an existing office without an incumbent, although it has never been filled; for example, when a new county is created, the county offices, before they are filled, are considered as being technically vacant." (Emphasis added.)

Note the exception indicated by the words italicized. A vacancy does not exist in the eyes of the law if the language of the statute imports futurity of selection or imposes other restrictions. Here we find in Section 1713, General Code, express provision that when the probate judge has created the new office, the township trustees shall give notice to the electors to elect the justice so added at the next regular election for such office.

We may contrast this procedure with that provided when the office of chief justice of the supreme court was created. The legislature enacted Section 1467, General Code, to this effect:

"A chief justice shall be elected every six years, beginning in 1914, to hold his office for a term of six years commencing on the first day of January next after his election. *Until a chief justice is so elected and qualified, the governor shall appoint a chief justice.* Vacancies occurring in the office of chief justice of the supreme court, shall be filled in the manner prescribed for the filling of vacancies in the office of judge of the supreme court." (Emphasis added.)

Thus it will be noted that the legislature provided expressly for an interim appointment. In my opinion the provisions of Section 1713, General Code, clearly negative any intention to provide for an interim appointment in the situation here presented. That conclusion is strengthened by the provisions of Section 1717, General Code, relative to the certificate of the clerk as to the *appointment* of a justice of the peace to fill a vacancy, or the *election* of an additional justice when one has been authorized. That section reads as follows:

"In certifying to the secretary of state the appointment of a justice of the peace to fill a vacancy, the clerk of the court shall state in his certificate the *name of the justice whose place is supplied* by the person whose appointment is so certified, and the date when the vacancy occurred. *When the election of an addi-*

tional justice in a township is properly authorized, the clerk in certifying his election to the secretary of state shall state in his certificate that he is such additional justice of the peace, so authorized and elected.” (Emphasis added.)

This statute plainly contemplates that a “vacancy” presupposes that there was a former incumbent in the office whose place is being filled by appointment.

The question presented by you was before one of my predecessors who held, as disclosed by the syllabus of his opinion in 1924 Opinions of the Attorney General, page 107:

“In the case of a newly created office of an additional justice of the peace in a given township by the probate court, neither such court, nor the trustees of the township, are authorized to fill this position of justice of the peace by appointment, but the trustees shall give notice to the electors of the township to elect the additional justice so added at the regular election for such office following the date of the creation of the office by the probate court.”

I am wholly in accord with that opinion.

Respectfully,

HUGH S. JENKINS
Attorney General