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1. VACANCY — OFFICE, JUSTICE OF PEACE — OCCURS WHEN INCUMBENT OF OFFICE HAS BEEN ABSENT SIX MONTHS, ALTHOUGH DURING THAT PERIOD HE WAS ON ACTIVE DUTY AS MEMBER OF UNITED STATES NAVY—SECTION 1714 G. C.
2. AFTER INCUMBENT ABSENT SIX MONTHS, ANY LEGAL AUTHORITY HE MAY HAVE HAD TO FILL VACANCY IN BOARD OF TOWNSHIP TRUSTEES, SECTION 3262 G. C. CEASES—REMAINING JUSTICE OF PEACE HOLDING OLDEST COMMISSION MAY FILL VACANCY EXISTING IN TOWNSHIP BOARD.

## SYLLABUS:

1. A vacancy occurs in the office of justice of the peace under Section 1714, General Code, when the incumbent of the office has been absent for six months, although during that period he was on active duty as a member of the United States navy.

2. After a vacancy occurs in the office of justice of the peace by absence of the incumbent for six months, any legal authority that such incumbent may have had to fill a vacancy in the board of township trustees under Section 3262, General Code, ceases, and the remaining justice of the peace holding the oldest commission may fill the vacancy existing in the township board.

Columbus, Ohio, March 7, 1945

Hon. Ralph J. Bartlett, Prosecuting Attorney  
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of your letter of recent date relating to the authority of a justice of the peace who has been absent for more than six months, to fill a vacancy in the board of township trustees. Your letter reads as follows:

“A vacancy has occurred by death in a Board of Township Trustees in this county. General Code Section 3262 provides that such a vacancy shall be filled by the Justice of the Peace of such township holding the oldest commission.

The Justice of the Peace holding the oldest commission in the township has been on active duty as a member of the United States Navy for more than a year. General Code Section 1714 provides that a vacancy occurs in the office of Justice of the Peace by absence for six months.

Does this Justice of the Peace have the authority to fill the vacancy in the Board of Township Trustees or should such vacancy be filled by the Justice of the Peace holding the next oldest commission?"

Sections 1714 and 3262, General Code, referred to in your letter, read as follows:

Section 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."

Section 3262. "When for any cause a township is without a board of trustees or there is a vacancy in such board, the justice of the peace of such township holding the oldest commission, or in case the commission of two or more of such justices bear even date, the justice oldest in years shall appoint a suitable person or persons, having the qualifications of electors in the township to fill such vacancy or vacancies for the unexpired term. Wherever in any township a municipal court shall replace and supersede the justices of the peace, the municipal judge or the presiding municipal judge if there be more than one, shall have power to fill vacancies on the board of trustees. In those townships wherein there are no justices of the peace or municipal judges the probate judge shall have the power to fill vacancies on the board of trustees."

It is stated in 46 C. J., pages 973 and 974, Sections 119 and 120, that the reasons for which an office may become vacant may, in the absence of constitutional inhibition, be fixed by the legislature, that a vacancy in office for any of the causes enumerated in a statute is usually regarded as occurring at the time of the happening of the event which is the cause of the vacancy, and that in such cases no judicial determination that the vacancy has occurred is necessary.

It will be noted that Section 1714, General Code, in effect, if not in terms, provides that a vacancy in the office of justice of the peace occurs not only by death, removal, resignation, and refusal to serve, but also by "absence for six months." The same observation is made in Baldwin's Ohio Township Officers Manual, page xliii. Swan's Treatise, Section 10, also says that "The office is deemed vacant: If the justice is absent from the township at any one time for the period of six months."

In 24 O. Jur., Page 290, Section 34, it is said with respect to vacancies in the office of a justice of the peace:

"Vacancies in an office may occur in a number of ways. The statute in providing for the filling of vacancies uses the following language: '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.' It seems that any one of the acts enumerated would create a vacancy."

I am unable to find any constitutional inhibition that would prevent the legislature from declaring that absence for six months shall create a vacancy in the office of justice of the peace, and since the office is a creature of statute (*State v. Curry*, 135 O. S., 253), it seems to me that the legislature may very properly prescribe that the mere happening of a certain event, or the existence of a certain state of facts, such as absence for six months, shall create a vacancy in the office.

Section 1714, General Code, contains no exception in favor of an incumbent who may be absent serving in the United States navy or elsewhere, and it is my opinion, based on the statute and authorities aforesaid, that no justice of the peace who has been absent for six months, has any legal authority to fill a vacancy in the board of township trustees under Section 3262, General Code.

The case you have presented for my opinion is materially different from *State, ex rel. Clinger, Pros. Atty., v. White, et al.*, 143 O. S., 175. That case involved the Act codified as Sections 2397-1 and 2397-2, General Code, relating to vacancies in county offices, and to county officers who are absent for ninety consecutive days. One of the sections expressly provides that "Nothing contained in this Act shall apply to a county officer while in the active military service of the United States."

While, as already indicated, a judicial determination that a vacancy exists may not be necessary, I would suggest that the township trustees, if they have not already done so, and as a matter of orderly procedure, take official cognizance of the vacancy by notifying the clerk of courts of its existence, and also by making an appointment to fill the vacancy, as provided for by Section 1714, General Code. By adopting this procedure any question as to the authority of a de facto justice of the peace thereafter to make an appointment under Section 3262, General Code, probably would be eliminated, and since the absent justice has not attempted so far to make an appointment, I have not discussed the de facto doctrine in this opinion.

You are therefore advised as follows :

1. A vacancy occurs in the office of justice of the peace under Section 1714, General Code, when the incumbent of the office has been absent for six months, although during that period he was on active duty as a member of the United States navy.

2. After a vacancy occurs in the office of justice of the peace by absence of the incumbent for six months, any legal authority that such incumbent may have had to fill a vacancy in the board of township trustees under Section 3262, General Code, ceases, and the remaining justice of the peace holding the oldest commission may fill the vacancy existing in the township board.

Respectfully,

HUGH S. JENKINS

Attorney General