

This question was considered by the Attorney General in an opinion reported in the Opinions of the Attorney General for 1926, at page 49, wherein it was held:

"The lunch room fund provided in Section 4762-1, General Code, shall be considered as a part of the general school fund, to be deposited in the usual depositories, and paid out on warrant properly signed by the president or clerk of the board of education, as provided in Section 4768, General Code."

I see no reason to disagree with the former Attorney General in his holding in the opinion above referred to.

In view of the foregoing, and answering your question specifically, I am of the opinion that moneys in the school lunch room fund established under authority of Section 4762-1, General Code, are to be considered as a part of the school funds of the district, and deposited in the depositories provided for such school funds, and paid out upon warrants signed by the clerk and president of the board of education.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2683.

VACANCY—JUDGE OF COURT OF COMMON PLEAS—WHEN SUCCESSOR IS TO BE ELECTED—HOW BALLOT IS PREPARED.

SYLLABUS:

1. *Where a vacancy occurs in the office of Judge of the Court of Common Pleas, a successor to fill his unexpired term should be elected at the first general election occurring in an even numbered year more than thirty days after such vacancy may have occurred.*

2. *Where a Judge of the Court of Common Pleas died subsequent to the August primary and more than thirty days prior to the November election, a party controlling committee is without authority to nominate a candidate for such office for the unexpired term, nor can such a nomination be made by petition, for the reason that Section 5004, General Code, requires a nominating petition for offices to be filled by the electors of a district lying within a county to be filed with the board of deputy state supervisors of such county "not less than sixty days previous to the date of election."*

3. *Where a vacancy in the office of Common Pleas Judge is caused by death less than sixty and more than thirty days previous to the date of the November election in an even numbered year, a successor to such Judge for his unexpired term may be elected by writing in the name of the person desired by the voters, and a blank space for such purpose should be provided on the ballot, indicating the duration of the unexpired term for which the election is to be made.*

COLUMBUS, OHIO, October 8, 1928.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion as follows:

"We desire your opinion as to the method to be followed in electing a successor to fill the vacancy of Common Pleas Judge occasioned by the death of Hon. C. A. Reid at Washington C. H., Ohio, recently, as provided for in Section 10 of the General Code of Ohio.

Shall the title of the office be placed upon the judicial ballot with a blank place in which to write the name of those persons whom the electors desire to fill the position, or has the controlling committee of the county the right to name a candidate for the vacancy in the office, and have that name placed upon the judicial ballot?

Will you kindly give us an immediate reply as it is necessary that the ballots be taken care of at once."

Prior to the receipt of your letter, I received the following communication from Hon. W. S. Paxson, Prosecuting Attorney, Washington C. H., relative to the same vacancy making a similar inquiry, to-wit:

"Our Common Pleas Court Judge, Hon. C. A. Reid, died September 26, 1928. He was elected in November, 1926. Our Board of Elections desires a ruling from you on the following points:

1. How does a candidate for the unexpired term proceed to get his name on the ballot?
2. If by petition, when must the petition be filed?"

Inasmuch as time becomes an important element in the consideration of this question, I am proceeding to answer both inquiries in the present opinion.

The pertinent part of Section 1532, General Code, is as follows:

"There shall be a court of common pleas in each county of the state, held by one or more judges, each of whom shall have been admitted to practice as an attorney and counsellor-at-law in this state for a period of six years immediately preceding his appointment or election, residing in said county and elected by the electors thereof. Each judge shall hold office for six years, and his successor shall be elected at the election in the even numbered year next preceding the expiration of his term. Each judge heretofore elected as judge of a common pleas district or county shall serve as a judge of the common pleas court of the county of which he was a resident at the time of his election. Provided that when a vacancy may have occurred in the office of any judge of the court of common pleas, in office or elected thereto prior to January 1, 1913, his successor shall be elected for the unexpired term at the first annual election that occurs in an even numbered year more than thirty days after such vacancy may have occurred, and such election shall be by the qualified electors of the county in which the judge, whose office became vacant, resided at the time of his election. The times for the next election of common pleas judges in the several counties and for the beginning of their terms, shall be as follows:

* * *

In Fayette County, in 1920, one judge, term to begin February 9, 1921.

* * *"

This department had occasion heretofore to consider Section 1532, General Code, as contained in 104 Ohio Laws 243. In an opinion reported in Opinions of the Attorney General for 1915, Vol. I, page 738, the syllabus reads as follows:

"An appointment to fill a vacancy in the office of judge of the court of common pleas of the first subdivision of the ninth judicial district should be

made to the office of 'judge of the court of common pleas of the first subdivision of the ninth judicial district' for the period beginning with the date of the appointment and ending with the election and qualification of the appointee's successor."

A case involving a vacancy existing in the office of judge of the Common Pleas Court was before the Supreme Court of Ohio in the case of *State ex rel. Hoyt vs. Metcalfe*, 80 O. S. 244. At the conclusion of a very exhaustive and well considered opinion, Judge Spear used the following language:

"We desire to emphasize that the crucial question at issue is not whether or no, as a general proposition, by force of our constitution and laws, a judge holds over until his successor is elected and qualified. But the question is what is the effect of an appointment to fill a vacancy? We think, for the reasons heretofore given, the effect distinctly prescribed by Section 13 of Article IV, viz.: to clothe the appointee with the power to hold until a successor is elected and qualified, affords the answer."

In an opinion of this department found in Opinions of the Attorney General for 1915, Vol. I, page 862, the syllabus reads:

"The successor of a person appointed in May, 1915, to fill a vacancy in the subdivisional common pleas judgeship, the original term of which would expire on December 31, 1916, is to be elected at the regular election for common pleas judges in the year 1916 by the electors of the county in which the judge, whose office became vacant, resided at the time of his election. Such election would be for the short term intervening between the date thereof and December 31, 1916. At the same election there must be chosen a county common pleas judge for the regular term commencing January 1, 1917."

In the opinion, after quoting the first branch of the syllabus in the *Metcalfe* case, *supra*, which reads:

"Article XVII of the constitution, adopted November 7, 1905, does not expressly repeal or abrogate Section 13 of Article IV of the constitution, nor is it in conflict therewith; and applying to the construction of the former section the established rule that repeals by implication are not favored, it follows that the clause of Section 13 which provides that where 'the office of any judge becomes vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor until a successor is elected and qualified,' remains in force."

I said as follows:

"It is significant that the court did not hold that entire Section 13 of Article IV remain in force, but only so much of it as is quoted in the above branch of the syllabus. Having regard to all these considerations, as well as to the argument of the opinion as a whole, which is too lengthy to be quoted here, it seems clear that the court held that that part of Article IV, Section 13, which provides that:

"* * * Such successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened,' is supplanted by that clause of Article XVII, subsequently adopted, which provides as to all state officers that:

“ * * * Every such vacancy shall be filled by election *at the first general election for the office* which is vacant, that occurs more than thirty days after the vacancy shall have occurred. The person elected shall fill the office for the unexpired term.’

Inasmuch as Section 1 of Article XVIII provides that:

‘Election for state and county officers shall be held on the first Tuesday after the first Monday in November in the even numbered years,’ it follows, of course, that: ‘general election for the office of common pleas judge’ can only be held in the even numbered years.

The Legislature acted on this theory when it provided in the act found in 104 O. L. 243 that:

“ * * * When a vacancy may have occurred in the office of any judge of the court of common pleas, in office or elected thereto prior to January 1, 1913, his successor shall be elected for the unexpired term at the first annual election that occurs in *an even numbered year* more than thirty days after such vacancy may have occurred, and such election shall be by the qualified electors of the county in which the judge, whose office became vacant, resided at the time of his election.’ ”

The information contained in the letter of Hon. W. S. Paxon, Prosecuting Attorney, Washington C. H., is to the effect that Hon. C. A. Reid died September 26, 1928. He was elected to the office of judge of the Common Pleas Court in November, 1926, for a six year term. His term of office would therefore expire as judge of the Common Pleas Court of Fayette County, February 8, 1933, according to the provisions of Section 1532, General Code, and in harmony with his commission heretofore issued.

You inquire whether or not a controlling committee of the county, by which you evidently mean one or both of party controlling committees is authorized to name a candidate for the vacancy in the office and have his name placed upon the judicial ballot.

There is no provision for the nomination of a candidate under circumstances of this kind by a party controlling committee.

Obviously Section 5010, General Code, which reads:

“If a person nominated as herein provided die, withdraw, or decline the nomination, or if a certificate of nomination is insufficient or imperfect, the vacancy thus occasioned, may be filled or the defect corrected in the manner required for original nominations. Such nomination to fill a vacancy, or corrected certificate must be certified to the secretary of state at least thirty days or to the board of deputy state supervisors at least twenty-five days previous to the day of election. If, when the original nomination was certified, there was certified a committee authorized to represent the party, as herein provided, it may fill such vacancy.”

has no application for the reason that no person was nominated for the office in question and consequently there is no vacancy in a nomination for the office of common pleas judge. There is no other section empowering a party controlling committee to make nominations.

In the letter of the Prosecuting Attorney of Fayette County, it is asked whether or not the nomination may be made by petition, and if so, when such petition must be filed. Relative to this inquiry, Section 5004, General Code, providing when and where nomination papers shall be filed, among other things, requires:

"For county offices or officers to be filled by the electors of a district lying within a county, with the board of deputy state supervisors of the county, not less than sixty days previous to the date of election."

It is apparent therefore that it is too late for the filing of petitions.

In the case of *State ex rel. Cox vs. Payne, et al.*, and three other cases, 117 O. S. 317, 158 N. E. 546, the second branch of the syllabus reads:

"Where a nominating petition is filed with the board of deputy state supervisors of elections in any county, no amendment can be made thereto unless such amendment be filed within the time limited for the filing of the original nominating petition."

If a nominating petition can not be amended after the time limit for filing the same has expired, no argument should be necessary to demonstrate that a petition may not be filed except within the time prescribed by statute.

Your attention is directed to Section 5071, General Code, which provides:

"If there was no nomination for a particular office by a political party, or if by inadvertence, or otherwise, the name of a candidate regularly nominated by such party is omitted from the ballot, and the elector desires to vote for some one to fill such office, he may do so by writing the name of the person for whom he desires to vote in the space underneath the heading or designation of such office, and make a cross mark in the circle at the head of the ticket, in which case the ballot shall be counted for the entire ticket, as though the name substituted had been originally printed thereon."

Clearly this is a case where the electors of Fayette County may write in the name of and vote for a person to serve as judge of the Common Pleas Court vice Judge Reid, deceased.

Upon a careful consideration of your inquiries, it is my opinion that a successor to Judge Reid should be elected on Tuesday, November 6, 1928, to serve for his unexpired term ending February 8, 1933; that it is too late for regular nominations to be made for the office by petition or otherwise; that a blank space should be provided on the non-partisanship judicial ballot for the office of Common Pleas Judge, in which it should be indicated the duration of the unexpired term for which the person is to be elected; that this blank space so provided should be used by the voters, writing in the name of the person for whom they desire to vote; and that the successor for the full term should be elected at the November election in 1932.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2684.

INSURANCE—FOREIGN CORPORATION—CHARTERED TO DO BUSINESS
FORBIDDEN IN OHIO—MAY BE LICENSED IN OHIO TO TRANSACT
APPROPRIATE BUSINESS OF INSURANCE.

SYLLABUS:

A foreign corporation may be licensed to engage in the business of insurance in the State of Ohio, subject to the terms and conditions imposed by law, even though it has been