

2347.

TOWNSHIP OFFICERS—WHEN VACANCY EXISTS A QUESTION OF FACT—TRANSFER OF TERRITORY FROM ONE TOWNSHIP TO ANOTHER—RESIDENCE OF SUCH OFFICERS—RETENTION OF OFFICE REQUIRES PERSONS TO MOVE WITHIN BOUNDARIES OF TOWNSHIP IN WHICH ELECTED.

SYLLABUS:

1. *Where a portion of a township has been transferred to another township and taken within the limits of a municipal corporation, and two members of the board of trustees and a justice of the peace reside in the transferred territory, the offices of the said trustees and justice will be vacant unless said officials remove into the old part of the township within a reasonable time.*

2. *What constitutes such a reasonable time under such conditions is a question of fact to be determined from all of the circumstances.*

3. *In the event that the remaining justice should decide that the vacancy exists, and appoints two members of the board of trustees in pursuance of said decision, his act cannot be questioned except by an action in quo warranto to try the title to the officers so appointed.*

COLUMBUS, OHIO, September 16, 1930.

HON. PAUL J. WORTMAN, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent communication which reads:

“An opinion on the matters hereinafter contained has been requested of us and we would appreciate very much having your opinion on them. The situation is as follows:

The city of Dayton in this county annexed certain territory which formerly was a part of Van Buren Township in this county. Two members of the township board of trustees of said township reside in the annexed territory as well as the senior justice of the peace. The order of transfer went on August 8, 1930.

We would like to have your opinion on the following:

When and under what conditions do the two offices of trustees and the office of justice of peace become vacant? If it is a reasonable time after the date of the order of transfer how long is such reasonable time? Does it depend upon the particular individual holding the office or upon a general rule? Who declares these offices vacant? Do the offices of trustees and the office of justice of the peace become vacant at the same time? Under these conditions, who will fill the office of justice of the peace and who will fill the offices of trustees? When may these offices be filled?

We would appreciate having your opinion on this matter at the earliest possible date as this matter must be settled here within a very short time.”

It will be assumed for the purposes of this opinion that the portion of the township which was annexed to the municipality was also transferred to another township, otherwise, of course, the status of the officers which you mention would not be affected.

Section 1714, General Code, which is essential to consider in so far as the status of the justice of the peace involved in your inquiry is concerned, 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."

Sections 3261 and 3262, General Code, which relate to vacancies in township offices, and which sections are important to consider in connection with your inquiry, read:

§ 3261. "If by reason of non-acceptance, death, or removal of a person chosen to an office in any township, except trustees, at the regular election, or upon the removal of the assessor from the precinct or township for which he was elected, or there is a vacancy from any other cause, the trustees shall appoint a person having the qualifications of an elector to fill such a vacancy for the unexpired term."

§ 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, have the qualifications of electors in the township to fill such vacancy or vacancies for the unexpired term."

In an opinion of my predecessor, found in Opinions of the Attorney General for 1928, at page 984, it was held as disclosed by the syllabus:

"Where the county commissioners of a county, acting under the provisions of Section 3249, General Code, create a new township out of that part of the territory of an existing township included within the limits of a municipal corporation therein, duly elected and qualified justices of the peace of such existing township, residing in such municipal corporation do not become justices of the peace of the prior existing township in and for which they were elected, and they may perform the duties and exercise the jurisdiction of their respective offices therein, provided they establish their residences within such township within a reasonable time after the creation of the new township. If they do not establish their residences in said prior existing township within a reasonable time, vacancies will be created in said offices which the trustees of such township will be authorized to fill."

In an opinion found in Opinions of the Attorney General for the year 1924, page 525, it was held as disclosed by the syllabus:

"Upon a township trustee changing his residence from the township in which he was elected to another, a vacancy in such office is created, to be filled in the manner provided by Section 3261.

Whether or not there has been such a change of residence is a question of fact to be determined by ascertaining the intent of such person. If he removes with the purpose of establishing a fixed habitation elsewhere and does not intend to return to his former home, a change of residence is effected; or, in the event that after a temporary removal, he should decide to permanently

remain away from his original habitation, this would likewise constitute a change of residence. Circumstances surrounding the acts of such a party may be considered for the purpose of determining what his real intentions are."

From the foregoing, it is clear that in the event the territory under consideration in which the officers to whom you refer reside has been transferred to another township, said officers may not function in their official capacity unless they see fit to return and become residents of the old township within a reasonable time. What constitutes a reasonable time is a question of fact which must be determined from all of the circumstances. While, of course, the decisions hereinbefore mentioned refer to the voluntary removal or change of residence by the individual and the case under consideration is a change that comes about by operation of law, it is believed that the principle involved is the same. From the facts stated in your communication, there would not seem to be much doubt but that the justice now residing in Van Buren Township would hold the oldest commission or be the senior justice in contemplation of Section 3262, General Code, if and when a vacancy occurs in the office referred to in your communication. A vacancy occurs, as hereinbefore pointed out, when the justice fails to remove to the old portion of Van Buren township within a reasonable time.

In the 1928 opinions of the Attorney General, hereinbefore referred to, the case of *State ex rel vs. Choate*, 11 Ohio 511, was discussed, wherein it was held that when the Legislature changes the boundaries of a county and such change places an associate judge within the limits of another county, such judge forfeits his office unless within a reasonable time he removes within the limits of the county for which he was elected. Likewise, it was held in *State ex rel vs. Walker*, 17 Ohio, 135, that the commissioners of any county from which the new county is formed, who reside within its limits, cease to be commissioners of the old county unless they move into it. What would constitute a reasonable time is a question, as hereinbefore indicated, that has not been decided. All of the facts and circumstances, of course, must be considered in order to arrive at a proper answer. Inasmuch as the justice who is now residing in Van Buren Township is the appointing power for said trustees when a vacancy exists, it follows as a matter of course that he must first determine when a vacancy does so exist. In the event that the officers residing in that portion of the old township which was transferred have not indicated any intention of returning, and the justice of the peace, who is now residing therein, should decide that, in view of the time that has transpired, a vacancy now exists and appoints the members of the board of trustees, his finding in this respect could not be disturbed except in an action in quo warranto to try the title to the office for which he has made an appointment. From what has been said, it will be seen that the principal question which you present is one of fact and not of law. The same principle with reference to showing the intent of such an officer to return to the old township would apply as applies with reference to the change of residence.

It is stated in 46 C. J. 938, that "the question of what is residence is one of law to be determined by the consideration of the intention and overt acts of the persons whose acts are being considered." It is further a well recognized rule that a temporary change of residence may not be construed as a removal from the district. Therefore, it would appear that no general rule can be laid down but all of the facts and circumstances pertaining to the intention of the parties in a particular case must be determined. It is clear that if the justice who now resides in Van Buren township decides that there is a vacancy in both the office of trustee and the office of justice, and his decision is reasonably supported by the facts, he may proceed to fill the vacancies for members of the board of trustees. Such board then could proceed to fill

the vacancy in the office of justice of the peace. The justice who is now remaining would not, of course, be called upon to determine whether or not there is a vacancy in the office of the justice who has been taken from the district by operation of law, were it not for the fact that his power to make the appointment of members of the board of trustees depends upon whether or not the vacancy has occurred in the office of the justice.

In view of the foregoing, it is believed that a more specific answer may not be made to the inquiries you have propounded. However, it is believed the rules of law hereinbefore mentioned will enable you to determine the proper solution to the problems before you when you applied the facts.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2348.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND ELECTRIC CONSTRUCTION AND MAINTENANCE COMPANY, COLUMBUS, OHIO, FOR ELECTRICAL WORK ON PHYSICAL EDUCATION BUILDING, OHIO STATE UNIVERSITY, AT AN EXPENDITURE OF \$7,952.00—SURETY BOND EXECUTED BY THE SEABOARD SURETY COMPANY OF NEW YORK.

COLUMBUS, OHIO, September 16, 1930.

HON. A. T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works, for the Board of Trustees of Ohio State University, and Electric Construction and Maintenance Company, of Columbus, Ohio. This contract covers the construction and completion of electrical contract, together with Alternates A and B, as covered by the form of proposal dated September 2, 1930, and calls for an expenditure of seven thousand nine hundred and fifty-two dollars (\$7,952.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also furnished evidence to the effect that the consent of the Controlling Board to the expenditure has been obtained in accordance with Section 11 of House Bill 510 of the 88th General Assembly. In addition you have submitted a contract bond upon which the Seaboard Surety Company of New York appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
GILBERT BETTMAN,
Attorney General.