

3105.

VACANCIES, MEMBERSHIP, VILLAGE COUNCIL:

1. QUORUM, MAJORITY ALL MEMBERS ELECTED WHO REMAIN QUALIFIED. SECTION 4237 G. C.
2. WHERE VACANCY EXISTS, COUNCIL, AT ANY TIME DURING EXISTENCE, MAY ELECT MEMBER TO FILL OFFICE, EVEN THOUGH ELECTION HELD THIRTY DAYS AFTER VACANCY OCCURRED.
3. WHERE VACANCY EXISTED MORE THAN THIRTY DAYS, MAYOR MAY APPOINT PERSON HAVING LEGAL QUALIFICATIONS TO FILL VACANCY.
4. WHERE VILLAGE COUNCIL ELECTS MEMBER NOT QUALIFIED FOR SUCH OFFICE, SUCH ELECTION VOID.
5. WHERE TWO 'COUNCILMEN WERE ELECTED TO FILL VACANCIES, AT A DULY CALLED MEETING, MORE THAN THIRTY DAYS AFTER VACANCIES OCCURRED, IF POSSESSED OF QUALIFICATIONS PRESCRIBED BY STATUTE, THEY BECOME LEGAL MEMBERS OF COUNCIL UPON TAKING OATH OF OFFICE—ANY APPOINTMENT THEREAFTER MADE BY VILLAGE MAYOR TO FILL SUCH VACANCIES IS OF NO EFFECT.

SYLLABUS:

1. *Where a vacancy exists in the membership of council of a village, a quorum will consist of a majority of all the members elected and remaining qualified. (Section 4237, General Code; State, ex rel., v. Orr, 61 O. S., 384.)*

2. *Where such vacancy is discovered to exist, the members of council may elect a member to fill such office at any time during its existence, even though the election is held more than thirty days after the vacancy occurred.*

3. *Where a vacancy exists in the membership of council of a village, which vacancy has existed for more than thirty days, the mayor may appoint a person having the legal qualifications, to fill such vacancy.*

4. *An election by members of a village council of a person to fill a*

vacancy in such office is void and of no effect if the person so elected does not possess the qualifications for such office.

5. *Where vacancies exist in the council of a village, and three members at a duly called meeting by unanimous vote elect two councilmen to fill such vacancies, the persons so elected, if possessed of the qualifications prescribed by statute, become legal members of such council upon taking the required oath of office, even though such election was held more than thirty days after the occurrence of such vacancies, and any appointment thereafter made by the mayor of the village to fill such vacancies is of no effect.*

Columbus, Ohio, December 10, 1940.

Hon. Ward C. Cross, Prosecuting Attorney,
Jefferson, Ohio.

Dear Sir:

The facts set forth in your request for my opinion may be summarized as follows:

The Council of the Village of Geneva on the Lake is, by reason of the provisions of Section 4215, General Code, composed of six members. At a regular meeting of the Council, held on July 1, 1940, Councilman A announced that he had accepted a position in another state, and that he would present his resignation if M would be selected in his stead. When his proposition was not accepted, he stated that he would deliver his undated resignation to the Mayor "to be used when the time comes." Councilman A was present at no subsequent meetings. At the August 24th meeting, the Council requested the opinion of the Solicitor as to the status of Councilman A and was advised that he "had to miss four meetings" before his seat could be declared vacant. Regular meetings of the Council are held bi-monthly.

On August 20, 1940, Councilman B was adjudged to be insane and was committed to a state hospital.

At a regular meeting of Council, held on September 16, 1940, only three members of Council were present. A resolution was presented to declare the seat of A vacant. The Solicitor advised that since but three members were present a quorum did not exist and no action could be taken by the members other than to adjourn. The meeting was then adjourned to September 23, 1940.

At the adjourned meeting three members were again present. The Mayor announced that he had the resignation of Councilman C, which was presented and read. The Solicitor advised that a quorum was not present and that no business could be transacted, and that no vacancies could be filled at the meeting.

On October 17, 1940, a special meeting of the Council was duly called. Three members of Council being present, resolutions were adopted declaring the seats of Councilmen A and C vacant, all three Councilmen voting in favor thereof. W and H were then elected by such three Council members to the vacancies thus created, and were sworn in by the Village Solicitor.

On October 25, 1940, a special meeting of Council was called by the Mayor, the three regular members and the two selected as above set forth being present. The Mayor presented a writing recognizing the resignation of A and C and the confinement of B in the insane hospital and the appointment of X, Y and Z to fill the vacancies thus created. X, Y and Z stated that they had already been sworn in and took seats. The Solicitor was requested for a ruling as to the status of the various new Councilmen. He ruled that X and Y were legally appointed, that H was improperly appointed since he was a laborer employed by the State Highway Department, and that W was at least a de facto Councilman.

At the November 4th meeting, the Solicitor ruled that neither W nor H had been legally selected as Councilman and that the Council consisted of the three old members and X, Y and Z.

You inquire as to the status of H, W, X, Y and Z.

The dispute in question undoubtedly arises by reason of the provisions of Section 4236, General Code, which reads:

“When the office of councilman becomes vacant, the vacancy shall be filled by election by council for the unexpired term. If council fail within thirty days to fill such vacancy, the mayor shall fill it by appointment.”

Let us examine the facts stated in your inquiry with a view to determining when the vacancies first occurred. You state that on July 1, A announced that he would be willing to resign, providing M would be selected to his office, but did not at that time resign since he could not procure such promise. In the absence of a statutory provision, a resignation of a public official must be presented to that officer or board which has the right to fill the

vacancy. 2 McQuillin-Municipal Corporations, 2d Ed., 518. I do not find in your statement of facts any statement that his resignation was ever presented to Council or that any action was taken to declare his office vacant until the special meeting held on October 17, 1940, when a resolution was adopted accepting his resignation, which had not yet been delivered to Council, and his seat declared vacant by the vote of the three Councilmen then present. Such Councilmen then voted unanimously to select W to fill the vacant office thus sought to be created.

The provision of law with reference to the declaration of a vacancy in the office of a member of a village council is contained in Section 4238, General Code, which reads in part:

“ * * * It may punish or expel any member for disorderly conduct or violation of its rules, and declare his seat vacant for absence without valid excuse, where such absence has continued for two months. No expulsion shall take place without the concurrence of two-thirds of all the members elected, and until the delinquent member has been notified of the charge or charges against him, and has had an opportunity to be heard.”

You will note that this section provides for two things: expulsion of a member for violation of rules; also for the declaration of a vacancy of the seat of a councilman for absence without valid excuse for a period of two months. If the vacancy was declared by reason of the failure of A to attend meetings for a period of two months, then the question arises as to whether the three members who were present at the meeting of October 17, 1940, constituted a quorum in order to make the election of the new Councilman. Section 4237, General Code, provides in part as follows:

“Council shall be the judge of the election and qualification of its members. A majority of all the members elected shall be a quorum to do business, but a less number may adjourn from day to day and compel attendance of absent members in such manner and under such penalties as are prescribed by ordinance. * * * ”

From your inquiry, it is to be assumed that the six original members of the Village Council were duly elected and qualified. In considering the question of whether a quorum was present at the meeting on October 17, 1940, it must be remembered that B had on August 20, 1940, been adjudged to be insane, and therefore adjudged to no longer have the qualifications of a councilman. Section 4218, General Code, provides that “each member of council shall have resided in the village one year next preceding his elec-

tion, and shall be an elector thereof. * * * Any member who ceases to possess any of the qualifications herein required or removes from the village shall forfeit his office." Section 6 of Article V of the Ohio Constitution provides that:

"No idiot, or insane person, shall be entitled to the privileges of an elector."

It would thus seem that when it was adjudged that B was insane it was also, in effect, adjudged that he no longer possessed the qualifications of his office and that he forfeited his office.

However, even assuming that the members of the Village Council, after such adjudication, were but five, the question presents itself as to whether the three members present at the meeting, who purported to declare the seats of A and C in the Council vacant and to elect W and H to their seats, constituted "a majority of all the members elected," which is necessary to constitute a quorum for the transaction of business within the meaning of Section 4237, General Code. In the case of *State, ex rel. Attorney General, v. Orr*, 61 O. S., 384, the Supreme Court had almost the precise question before it. In that case, the council was composed of ten members, each of whom had been regularly elected. The city ordinance provided that if a member of council should move from the ward from which he was elected, such removal should be deemed to be a resignation of such member from council. One of the members who had been elected from the second ward moved his residence to the fifth ward. Thereafter, at an organization meeting but five of the remaining nine members were present. The statute at that time (Section 1675, Revised Statutes) provided that "a majority of all the members *elected* shall constitute a quorum for the transaction of business." At such meeting, the five members, acting as though the council, elected a president and other officers of council by the unanimous vote of all five members present. An action in quo warranto was filed to oust the president so elected from his office. The court held, as stated in the syllabus, that:

"2. The fact of removal being conceded, the office may be regarded and treated as vacant, and the number of members of council thereby reduced accordingly.

3. Where there is such a vacancy, a quorum will consist of a majority of all the members elected and remaining qualified."

A similar view was taken by the Court of Appeals of the Seventh Dis-

trict of which Ashtabula County is a part, in the case of *State, ex rel. Meyer, v. Vest*, 13 O. L. Abs., 302.

In view of the holdings of the courts in such cases, I do not believe that it can be held that the three members of Council present at the meeting of October 17, 1940, did not constitute a quorum, within the meaning of the language used in Section 4237, General Code. The material language of such section is not intrinsically different from that contained in former Section 1675, Revised Statutes, construed in *State, ex rel. Attorney General, v. Orr*, *supra*. I am, therefore, of the opinion that unless some reason, other than the want of a quorum, exists for holding invalid the action of the Council at the meeting of October 17, 1940, it must be sustained.

A question may arise as to whether the Council or the Mayor on such date had the right to fill the vacancies. On July 10, 1934, a similar question was answered by one of my predecessors in office. The syllabus of such opinion, found in *Opinions of the Attorney General for 1934, Vol. II*, page 1005, reads:

“1. When a vacancy in a village council is discovered to have been in existence for a period of more than thirty days, such vacancy may be filled by council or by the mayor, whichever authority acts first.

2. Under such circumstances, when a motion is made and seconded by council to appoint a person to fill such vacancy and a vote thereon deferred by the mayor, in refusing to entertain the motion, until after the mayor has made an appointment, the appointment made by the mayor is of no legal effect and the person thereafter appointed by council is the legally appointed incumbent to fill such vacancy.”

In the case of *State, ex rel. Shank, v. Gard*, 8 O. C. C. (N. S.), 599 (affirmed, no opinion, 75 O. S., 606), the court held that, under authority of former Section 1536-613, Revised Statutes, now Section 4207, General Code, the council could fill a vacancy in their membership *at any time* after it occurs. The conclusion of the former Attorney General and such Circuit Court was reached by the application of the well established rule of statutory construction, *viz.*, that where a statute provides for the doing of an act and prescribes the time for the doing thereof, that part of the statute which requires the doing of the act is directory, but the designation of the time is merely permissive and the act can legally be performed at any time thereafter. (See *State, ex rel., v. Mittendorf*, 102 O. S., 229.) I am impelled not only by the reasoning contained in the opinion of my

predecessor, above referred to, but also by the ordinary rules of statutory interpretation to agree with the conclusion of my predecessor that when a vacancy exists in the membership of a village council its members have, under Section 4236, General Code, the authority to fill such vacancy by election at any time during its existence, which authority is exclusively in such council members for a period of thirty days after the occurrence of the vacancy, but after such period the vacancy may be filled either by appointment of the mayor or by election of council; that if the one then acts the other no longer has the right of selection.

It is unnecessary to determine when the vacancy of A's seat in Council occurred, for the reason that no appointment to fill such vacancy had been made by the Mayor prior to October 17, 1940, when W was elected to fill such vacancy, after which time there was no vacancy in the position to which the Mayor could make an appointment. It is therefore my opinion that W was legally elected as Councilman to the office of A.

As I have hereinbefore pointed out, the office of B became vacant at the time when he was adjudicated to be insane and committed to the hospital for treatment. Since council has not yet taken any steps to fill such vacancy and more than thirty days had elapsed after his commitment before the appointments by the Mayor on October 23, 1940, it would appear that at that date he had the authority, by virtue of Section 4236, General Code, to fill the vacant office of B. It would thus seem that the Councilman appointed by the Mayor to the vacant office of B is a legally selected Councilman.

In order to decide which Councilman was properly selected to the office of C, it is necessary to determine when such vacancy occurred. From the enclosures accompanying your request, it would appear that C attended the meeting of Council on September 3, 1940, but that he did not attend the meetings held thereafter. I am not informed when he moved from the village or when notice of such removal was brought to the attention of the members of Council. At the meeting of September 23, his resignation was handed to the Clerk of the Council. However, I find no provision of statute specifically requiring the acceptance of a resignation of a village councilman. If no such statute exists, then it would appear that the rule enunciated in the first syllabus of *Reiter v. State, ex rel.*, 51 O. S., 74, would apply, viz.:

“By the rules of the common law, a resignation of an office does not take effect, so as to create a vacancy, until such resignation

is accepted by the proper authority; but the common law in this regard is not in force in this state, to its full extent, and here a resignation without acceptance creates a vacancy, to the extent at least, of giving jurisdiction to appoint or elect a successor, unless otherwise provided by statute."

If then the resignation of C became effective when received by the Council on September 23, 1940, it would appear that Section 4236, General Code, gave to the members of Council the exclusive right to fill such vacancy until October 23, 1940. It therefore follows that unless the election of H, on October 17, 1940, was invalid for some other reason, he was legally selected by Council and is a Councilman.

I am therefore of the opinion, assuming that the two members of the Council elected by Council on October 17, 1940, had the legal qualifications for the office of councilmen at the time of their election, that they were legally elected to office and that the Mayor had no legal authority to make appointments to fill the offices of A and C after such date. His pretended appointments after such date were therefore a nullity. However, his appointment to fill the vacancy in the office of B must be considered as valid for the reasons above stated.

From the abstract of minutes of Council held during the period in question, I note that there is some doubt in the mind of the Village Solicitor as to whether the election of H filled the vacancy created by the resignation of C, giving as his reason that H was employed by the State Highway Department as a laborer and that, in view of such fact, he could not be elected to such office. The Solicitor's ruling is apparently based on Section 4218, General Code, which reads in part:

" * * * No member of the council shall hold any other public office or employment, except that of notary public or member of the state militia, or be interested in any contract with the village.
* * * "

One of my predecessors in office, in an opinion appearing in the Opinions of the Attorney General for 1927, Vol. 4, page 2555, ruled as stated in the syllabus:

"1. Under the provisions of Section 4218, General Code, a person holding the position of assistant in the county surveyor's office is ineligible to membership in a village council.

2. Under the provisions of Section 4218, General Code, a person holding the position of janitor of a public school is ineligible to membership in a village council.

3. Under the provisions of Section 4218, General Code, a person holding the position of school teacher is ineligible to membership in a village council."

In the Annual Report of the Attorney General, 1912, Vol. II, page 1638, another predecessor has ruled:

"A councilman by express provisions of statute may hold no other public office or employment, except that of notary public or member of the state militia, and therefore neither a principal of a high school nor a janitor in a public school building may hold the office of councilman."

and in the same volume at page 1908, ruled:

"Section 4218, General Code, provides 'No member of council shall hold any other public office or employment', and its terms extend to all public offices and employments."

In an opinion found in the Opinions of the Attorney General for 1918, Vol. I, page 636, the first and second branches of the syllabus read:

"1. The inhibition found in Section 4207, G. C., against holding another public office is not limited to office in or appointment by the municipality, but extends to all public offices and employments.

2. Whenever a member of council accepts and holds any other public office or employment, he ipso facto forfeits his office of councilman."

In the case of *State, ex rel., v. Gard*, 8 O. C. C. (N. S.), 599, which decision was affirmed without opinion in 75 O. S., 606, the court held, as stated in the first paragraph of the headnotes, that:

"The inhibition against the holding of other public office or employment relating to the qualifications of councilmen, is not limited to other office or employment by the municipality but extends to all public office and employment."

It would thus appear that if at the time the oath of office was administered to H, he held any public office or employment, other than that of notary public or member of the State Militia, whatever be its nature, and whether such employment be by the state, county or board of education, he did not as a result of such election become a member of Council. See also:

State, ex rel. Attorney General, v. Craig, 69 O. S., 236

State, ex rel. Monnett, v. McMillan, 15 O. C. C., 163
State, ex rel. Keeler, v. Wagar, 19 O. C. C., 149
State, ex rel. Reinhart, v. Robinson, 59 O. App., 45
State, ex rel. Vian, v. Bryan, 30 O. L. Abs., 61.

In the case of State, ex rel. Vian, v. Bryan, *supra*, the Court of Appeals for the Ninth District held that when a person was elected to the office of village councilman and at the time of acceptance of the oath did not have the statutory qualifications for the office, his election was a nullity.

You do not present the facts concerning H's qualifications at the time of his election. I therefore do not herein express any opinion as to whether he was or was not elected as Councilman. I have attempted to give you the established rules which you may apply to the facts as you may find them to have existed at that time. If you find that he was actually under contract of employment with the Highway Department at the time the oath was administered to him, then it would be my opinion that his election was a nullity. If, however, you determine that at the time of his election he was not actually so employed, but became so employed at a later date, then such employment would be grounds for declaring a vacancy to be filled by the Council by appointment within the period of thirty days after it occurred.

Specifically answering your inquiries, it is my opinion that:

1. Where a vacancy exists in the membership of council of a village, a quorum will consist of a majority of all the members elected and remaining qualified. (Section 4237, General Code; State, ex rel., v. Orr, 61 O.S. 384.)
2. Where such vacancy is discovered to exist, the members of council may elect a member to fill such office at any time during its existence, even though the election is held more than thirty days after the vacancy occurred.
3. Where a vacancy exists in the membership of council of a village, which vacancy has existed for more than thirty days, the mayor may appoint a person having the legal qualifications, to fill such vacancy.
4. An election by members of a village council of a person to fill a vacancy in such office is void and of no effect if the person so elected does not possess the qualifications for such office.
5. Where vacancies exist in the council of a village and three members at a duly called meeting by unanimous vote elect two councilmen to fill such vacancies, the persons so elected, if possessed of the qualifications prescribed by statute, become legal members of such council upon taking the required oath of office, even though such election was held more than

thirty days after the occurrence of such vacancies, and any appointment thereafter made by the mayor of the village to fill such vacancies is of no effect.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

3113.

PETITION, TO AMEND CONSTITUTION OF OHIO, ARTICLE XII, BY ADDING SECTION 13 IN RE: EXCISE TAX ON MOTOR DRIVEN VEHICLE AND MOTOR FUEL—SEE OPINION 3080, DECEMBER 4, 1940.

Columbus, Ohio, December 13, 1940.

Mr. Hugh M. Foster,
35 Arcadia Avenue, Columbus, Ohio.

Dear Sir:

You have submitted for my examination a written petition bearing over one hundred names containing a proposed constitutional amendment and a summary of the same under Section 4785-175, General Code. It is proposed to amend the Constitution of the state of Ohio by the adoption of the new section, to be known as Section 13, Article XII. Copies of said proposed amendment and summary thereof, are hereto attached. (See file, office Attorney General.)

I am of the opinion that the attached summary is a fair and truthful statement of the proposed constitutional amendment and accordingly submit for uses provided by law the following certification:

I, Thomas J. Herbert, Attorney General of Ohio, pursuant to the duties imposed upon me under the provisions of Section 4785-175, of the General Code of Ohio, hereby certify that, in my opinion, the attached summary is a fair and truthful statement of the proposed amendment to amend the Constitution of the state of Ohio by the adoption of the new section, known as Section 13 of Article XII.

Respectfully,

THOMAS J. HERBERT,
Attorney General.