

1285

VACANCY—ON BOARD OF TOWNSHIP TRUSTEES—TO FILL THE VACANCY OF UNEXPIRED TERM IS LIMITED TO A PERIOD OF THIRTY DAYS AFTER OCCURRENCE OF VACANCY—§503.24, R.C.

SYLLABUS:

Under Section 503.24, Revised Code, where a vacancy occurs on a board of township trustees, the authority of the remaining members of the board to fill the vacancy for the unexpired term is limited to a period of thirty days after the occurrence of the vacancy.

Columbus, Ohio, April 21, 1960

Hon. John S. Moorehead, Prosecuting Attorney
Guernsey County, Cambridge, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Center Township, Guernsey County, Ohio, had a vacancy created on its Board of Trustees by the resignation of a trustee, submitted in writing, to the Clerk of the Board on December 31, 1959, stating that the resignation was effective midnight December 31, 1959.

“Thereafter, at a meeting of the Trustees held on February 1, 1960, the two remaining trustees filled the vacancy by naming a new trustee to the Board.

“These facts satisfy me that more than thirty days had elapsed after the occurrence of the vacancy on the Board, but leave the question as to whether or not the remaining trustees have any jurisdiction to make an appointment under authority of Section 503.24 of the Revised Code after the elapse of thirty days after the occurrence of the vacancy. This county has a municipal judge with county-wide jurisdiction.

“May I have your opinion as to whether or not these remaining trustees have concurrent jurisdiction with the judge of the municipal court after the passage of thirty days after the occurrence of the vacancy, or in the opposite approach, under such circumstances, does the municipal judge have sole authority? Also, I would appreciate your advice upon the elapse of thirty days under the facts as presented and the statutes.”

Assuming there existed an unexpired term to be filled after the trustee's resignation on the midnight of December 31, 1959, I direct your attention to Section 503.24, Revised Code, which reads as follows:

"If, by reason of the nonacceptance, death, or removal of a person chosen to an office in any township at the regular election, or if there is a vacancy from any other cause, the board of township trustees *shall* appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term.

"If a township is without a board or if no appointment is made within thirty days after the occurrence of a vacancy on the board, the county court of such county *shall* appoint suitable persons, having the qualifications of electors in the township, to fill such vacancies for the unexpired term.

"Wherever, in any township, a municipal court replaces the county court and there is no board of township trustees, or if no appointment is made within thirty days after the occurrence of a vacancy on the board, the municipal judge or the presiding municipal judge, if there is more than one, *may* fill vacancies on the board. In those townships wherein there are no judges of a county court or municipal judges and there is no board of township trustees, or if no appointment is made within thirty days after the occurrence of a vacancy on the board, the probate judge may fill vacancies on such board." (Emphasis added)

It has been held that a statute wherein "may" and "shall" is used interchangeably is to be construed mandatory. *Campbell v. McCormick*, 1 C.C. 510. Regarding statutory construction, the literal meaning of the words "may" and "shall" is not always conclusive. *State ex rel. Myers, v. Board of Education*, 95 Ohio St., 367; *State v. Budd*, 65 Ohio St., 1.

Also pertinent is Section 1901.14, Revised Code, which reads in part as follows:

"Municipal judges have further powers and duties as follows:

"(A) * * * perform any other duties which are conferred upon judges of county courts,* **"

When the legislature imposes a duty, "may" means must. *Roettinger v. Cincinnati*, 16 Ohio App., 273. Where the public interests or rights are concerned, or where something is directed to be done for the public good, "may" is imperative, meaning "must" or "shall." *Columbus S. & C. R. Co. v. Mowatt*, 35 Ohio St., 284; *State ex rel. Mitman v. Commissioners*, 94 Ohio St., 296; *Luthringer v. State*, 11 Ohio App., 294; *Buehrle v. Commissioners*, 14 Ohio App., 334; *Board of Education v. Board of Education*, 8 Ohio N.P., 558.

A direct analogy is drawn from the opinion of Hart, J., in *State ex rel. Jones v. Farrar*, 146 Ohio St., 467, which reads in part, at page 472, as follows:

“* * * but, where it (a statute) directs acts or proceedings to be done in a certain way and indicates that a compliance with such provision is essential to the validity of the act or proceeding, or where it requires some *antecedent and prerequisite conditions to the exercise of a power*, the statute may be regarded as mandatory. * * *” (Emphasis added)

It is clear that the “antecedent and prerequisite” condition for appointment to fill a vacancy of an office of a township trustee by the surviving township trustees must be accomplished within thirty (30) days after vacancy as provided by Section 503.24, *supra*. A failure of this antecedent condition is repeated within the statute in conferring this duty by priority to the county court, the municipal court and the probate court, respectively. There are no words restoring this authority to the remaining township trustees after such 30-day period. If the word “may” should be construed otherwise than mandatory, the repeated prerequisite condition is meaningless. Not only would the absurdity result in “legislating” many interpretations to accomplish a non-manifested intention of the General Assembly for an unwritten “concurrent jurisdiction,” but the public might well be infringed in bearing the brunt of constant litigation in the various circumstances determining with whom the final power of appointment lies.

It follows under the facts presented that the 30-day period within which the remaining trustees had the authority of appointment to fill a vacancy in the board of trustees pursuant to Section 503.24, *supra*, beginning with the date of effective resignation, assumed to be midnight December 31, 1959, terminated midnight January 30, 1960. Their exercise of appointment of February 1, 1960 occurred two days after their jurisdiction elapsed, the authority to appoint resting solely with the municipal judge.

Accordingly, in answer to your query, it is my opinion that under Section 503.24, Revised Code, where a vacancy occurs on a board of township trustees, the authority of the remaining members of the board to fill the vacancy for the unexpired term is limited to a period of thirty days after the occurrence of the vacancy.

Respectfully,

MARK McELROY
Attorney General