

190.

COUNTY TREASURER—PHYSICALLY ABSENT FROM OFFICE FOR SEVEN MONTHS—NO VACANCY—SPECIFIC CASE.

COLUMBUS, OHIO, March 13, 1929.

**SYLLABUS:**

1. *Where a county treasurer is physically absent from his office for a period of seven months on account of illness, such situation does not create a vacancy which the county commissioners are authorized to fill under the provisions of Section 2636 of the General Code if the duties of the office are being properly performed under his supervision.*

2. *Such a state of facts does not afford grounds for removal under the provisions of Section 10-1 of the General Code.*

COLUMBUS, OHIO, March 13, 1929.

HON. R. L. THOMAS, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—In your recent communication you request my opinion as follows:

“In interpreting the language of Section 2636 of the General Code, is the office of county treasurer considered vacant, and should the commissioners appoint a person to fill such vacancy in the event that the treasurer has for the past seven months been unable by reason of illness to be present at his office, and is at the present time unable to do so, or could he be removed under Section 10-1 of the General Code under the circumstances hereinbefore set forth?”

Section 2636 of the General Code, to which you refer, provides:

“When the office of county treasurer becomes vacant by death, removal, resignation, neglect to give bond or other cause, the commissioners shall forthwith appoint a suitable person to fill such vacancy. The person so appointed shall give bond and take an oath as required by law.”

It is apparent that there is no vacancy in the case to which you refer unless the absence of the present treasurer for the period stated in your communication comes within the phrase “other cause”, as mentioned in said section. While it is somewhat difficult to determine what is meant to be included in the term “other cause”, in pursuance to well known statutory rules of construction where specific enumeration of a class is made and then a general term employed, the general term will be limited to the same character of the things mentioned specifically. Undoubtedly the removal of an officer from the district in which he was elected would vacate the office and be included within the phrase “other cause”. The same condition would obtain in the case of a public officer having been convicted of a felony. Likewise, if an officer would willfully absent himself from the office without any attempt to perform or supervise the performance of the duties of the office, such conduct would work an abandonment of the office, which probably would be included within the phrase “other cause”. It is a well established principle of law in this state that it is not essential that a public officer actually be present and physically transacting the business of the office in order to be in possession of the office.

In an opinion rendered by my predecessor, found in Opinions of the Attorney General for the year 1927, page 2171, it was held :

“A county recorder is entitled to the salary provided for the office to which he has been elected and for which he has qualified, so long as he retains title to the office, even though he devotes his entire time to other lines of endeavor. The proceeds flowing from the other lines of endeavor to which a county recorder devotes his time and attention rightfully belongs to such officer personally, and he is not required to account for the same to the county.”

Also, in an opinion of my predecessor, No. 2168, issued May 28, 1928, to Hon. Frank Wiedemann, Prosecuting Attorney of Marion County, it was held that a vacancy did not exist in the office of the recorder although the recorder had disappeared and no word had been received regarding him for more than a month. Said opinion points out that under such circumstances it is not within the discretion of the county commissioners to declare a vacancy but such vacancy must occur by reason of death, resignation or some other cause which creates a vacancy, and unless such cause is present a vacancy may be created only by the removal process under Sections 10-1 to 10-4 of the General Code, enacted in pursuance of Section 38 of Article II of the Ohio Constitution or other legislation, if any there be, provided for removals.

In an opinion of this department, found in Opinions of the Attorney General for 1922, p. 477, the then Attorney General held :

“Where a county surveyor in the year 1918, filed application with the board of county commissioners for leave of absence without pay while in the military service of the United States, and the county commissioners passed a resolution purporting to grant such leave, and the county surveyor entered such military service and remained therein for the last six months of 1918 following his application for leave of absence, such county surveyor is not now barred from asserting a claim to payment of such salary. Accordingly, the salary for said period of six months constitutes a claim against the county, of which the surveyor is entitled to payment without reference to allowance or disallowance by the board of county commissioners.”

It will be observed in this case that the surveyor for a period of six months was not undertaking to exercise any of the duties or functions of his office. This opinion was based upon a former opinion of the Attorney General, found in Opinions of the Attorney General for 1918, p. 970, which held that the fact that the county surveyor enlisted in the army and left the county to take training at Fort Benjamin Harrison did not, *ipso facto*, vacate the office. Both of said opinions contain a comprehensive discussion of the status of such an officer and are conclusive upon the proposition that an absence from the office for any reasonable time does not create a vacancy. If the neglected duties or absence reaches a point wherein the same may be said to amount to nonfeasance in office, this in itself would not create a vacancy, but steps should be taken under existing law to remove such an officer. Of course, as hereinbefore stated, an office may be voluntarily forfeited by a willful, total and complete abandonment of the same. See Throop on Public Offices, Sec. 422. In the case you mention it is not stated whether or not the treasurer is attempting in any wise to exercise any duties of the office.

Section 2637 of the General Code provides for the deputies to be appointed by the county treasurer, as follows :

"Each county treasurer may appoint one or more deputies, and he shall be liable and accountable for their proceedings and misconduct in office."

The sections following relate to the duties of the office, which need not be specifically set forth herein for the reason that the duties generally of a county treasurer are so well known as to require no further elaboration.

Section 9 of the General Code provides :

"A deputy, when duly qualified, may perform all and singular the duties of his principal. A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him. The principal may take from his deputy or clerk a bond, with sureties, conditioned for the faithful performance of the duties of the appointment. In all cases the principal shall be answerable for the neglect or misconduct in office of his deputy or clerk."

A situation can easily be imagined wherein one who is absent from the office on account of illness, by reason of his experience and familiarity with the duties of the office, may supervise and direct his deputies and other employes in such manner as to effect a successful administration. In fact, a person well qualified, though not physically able to attend, might be able to supervise an office with better results to the public than an incompetent official who spent his entire time actually in the office.

It must be conceded that in view of the authority of a deputy to perform all and singular the duties of his principal, the work of the office may be successfully carried on even though the treasurer is not physically present in the office for a long period of time. In any event, so long as such an officer is *compos mentis* and has qualified by giving the proper bond and has appointed deputies who are carrying on the functions of the office, he is still in possession of the office and there is no vacancy existing which the commissioners are authorized to fill. Furthermore, such commissioners have no power or authority to declare such a vacancy.

You further inquire whether or not the facts stated in your communication are grounds for removal under the provisions of Section 10-1 of the General Code. Said section provides :

"That any person holding office in this state, or in any municipality, county or any subdivision thereof, coming within the official classification in Section 38, Article 2, of the Constitution of the State of Ohio, who willfully and flagrantly exercises authority or power not authorized by law, refuses or willfully neglects to enforce the law, or to perform any official duty now or hereafter imposed upon him by law, or who is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance or nonfeasance, shall be deemed guilty of misconduct in office; upon complaint and hearing in the manner provided for herein shall have judgment of forfeiture of said office with all its emoluments entered thereon against him, creating thereby in said office a vacancy to be filled as prescribed by law. The proceedings provided for in this act are in addition to impeachment and other methods of removal now authorized by law, and this act (G. C. Sections 10-1 to 10-3) shall not in any way be so interpreted as to divest the governor or any other authority of the jurisdiction now given in removal proceedings."

Without undertaking to enter into an extended discussion of the provisions of Section 10-1, above quoted, it is believed to be apparent that the absence of the county treasurer for such a period as you mention will not in itself constitute grounds for

removal under said section so long as such officer provides for proper deputies to carry on the functions of the office in such a manner as to adequately provide for the performance of the duties of the office. It is obvious that the only possible violation of said section would be for "gross neglect of duty". In the event the functions of the office are carried on by deputies duly appointed by such treasurer, it is believed that it cannot be legally said that such an officer has been guilty of gross neglect of duty.

Based upon the foregoing, and in specific answer to your inquiry, you are advised:

1. Where a county treasurer is physically absent from his office for a period of seven months on account of illness, such situation does not create a vacancy which the county commissioners are authorized to fill under the provisions of Section 2636 of the General Code if the duties of the office are being properly performed under his supervision.

2. Such a state of facts does not afford grounds for removal under the provisions of Section 10-1 of the General Code.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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191.

HOUSE BILL NO. 165—EXTENSION OF STATE AID TO SCHOOL DISTRICTS CO-OPERATING WITH UNIVERSITIES IN TEACHER TRAINING—CONSTITUTIONAL.

*SYLLABUS:*

*House Bill No. 165, which provides for the extension of state aid to such school districts as co-operate with approved colleges and universities in teacher training work, will, if enacted, be valid and constitutional.*

COLUMBUS, OHIO, March 14, 1929.

HON. S. K. MARDIS, *Chairman, School Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication in which you request my opinion as to whether or not the provisions incorporated in House Bill No. 165 would, if enacted into law, be constitutional. The title and text of said proposed House Bill No. 165 are as follows:

"A BILL

To provide training school facilities in co-operation with colleges and universities approved as teacher-training institutions.

*Be it enacted by the General Assembly of the State of Ohio:*

SECTION 1. Any board of education of any public school district that establishes and maintains in its schools, or in any classroom thereof, schools co-operating, according to rules and standards prescribed by the state department of education, with any college or university approved by the state department of education for the training of teachers, so long as such college or university is so approved, shall receive funds from the general revenues