

2676.

JUSTICE OF PEACE — TOWNSHIP — WHERE AT GENERAL ELECTION, NOVEMBER, 1939, "S" WAS ONLY PERSON ELECTED — "M" WAS ELECTED, NOVEMBER ELECTION, 1935 AND "H" WAS APPOINTED BY TOWNSHIP TRUSTEES TO FILL UNEXPIRED TERM OF "C" WHO HAD BEEN REGULARLY ELECTED, NOVEMBER, 1935, AND SUBSEQUENTLY RESIGNED— "S" SUCCEEDS TO OFFICE OF "M".

SYLLABUS:

At the general election held in November, 1939, "S" was the only person elected to the office of justice of the peace of ——— Township. At the time of such election "M" and "H" were each serving as justice of the peace of such township, "M" having been elected to such office at the November election, 1935, and "H" having been appointed thereto to fill the unexpired term of "C", who was elected to such office at the general election of November, 1935, and who subsequently resigned. HELD: "S" succeeds to the office of "M".

Columbus, Ohio, August 22, 1940.

Hon. John W. Howell,
Prosecuting Attorney,
Gallipolis, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion on the following:

"Guyan Township in this county has three Justices of the Peace.

At the general election in 1935 M and C were duly elected as two of the Justices of the Peace of said Township and each of them subsequently qualified and filed his commission with the Clerk of Courts of this county and started to serve a four year term as such officer.

At the general election in November, 1937, N was duly elected as one of the Justices of the Peace of said township for a four year term and subsequently qualified, filed his commission with our local Clerk of Courts and entered on the duties of his office.

Subsequently C resigned as such officer and H was appointed by the Township Trustees to serve until his successor was elected and qualified, H filing his commission with the Clerk and qualifying in January of 1938.

At the general election held in 1939 the Election Board obviously made a mistake in preparing the ticket for the election of the Justices of the Peace, it being printed upon said ticket 'vote for not more than one,' and the name of S was written in and he was elected for a four year term as one of the Justices of the Peace of said township. He subsequently qualified and filed his commission with the Clerk of Courts.

Under this set of facts will you kindly advise me as to which of the Justices of the Peace in said township should turn over his docket and books to S, the newly elected Justice of the Peace."

In substance you inquire whether, under the circumstances outlined in your communication, M or H should deposit his dockets, etc. with S the newly elected justice of the peace. Clearly, N need not be considered by reason of the fact his term will not expire until December 31, 1941.

Article XVII, Section 2 of the Constitution of Ohio provides in part as follows:

" * * * The term of office of Justices of the Peace shall be such even number of years not exceeding four (4) years, as may be prescribed by the General Assembly."

Section 1713, General Code, reads in part as follows:

" * * * All justices of the peace shall be elected for a term of four years."

M was elected justice of the peace in November, 1935 and by virtue of the provisions above quoted his term expired December 31, 1939. There being a constitutional limitation of four years for such office, M therefore may not legally hold over beyond the expiration of the term for which he was elected.

The question as to the length of a term of office fixed by the Constitution was considered by this office on two former occasions. In an opinion rendered by the then Attorney General in 1929 (Opinions of the Attorney General, 1929, Vol. II, page 1577), it was held:

"Where a term of office is fixed by the Constiution, the statutory right to continue therein until a successor is elected and qualified is limited to the period fixed by the Constitution."

In the course of that opinion it was said at page 1578 as follows:

“It will be observed that Section 2, Article XVII of the Constitution, *supra*, expressly limits the term of office of a justice of the peace to four years. Therefore, no person may hold the office of justice of the peace longer than four years, under one election or appointment.”

Similarly, in answer to the same question it was stated in an opinion rendered in 1925 (Opinions of the Attorney General, 1925, Vol. I, page 52):

“A justice of the peace elected to serve a term of four years, and to whom no successor has been chosen who has qualified for such office, may not legally continue to serve as such justice of the peace.”

I come now to a consideration of H's tenure of office as of December 31, 1939. It appears that he was appointed justice of the peace in January, 1938, to fill the vacancy created by the resignation of C. Such appointment was made in pursuance of Section 1714, General Code, which provides as follows:

“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.”

Section 1715, General Code, provides:

“At the next regular election for such office, a justice of the peace shall be elected in the manner provided by law, for the term of four years commencing on the first day of January next following his election.”

Having in mind Section 4785-4d, General Code, which provides that general elections for justices of the peace shall be held in the odd numbered years, it would appear that “the next regular election for such office” after the resignation of C would be held in November, 1939. In connection therewith, I direct your attention to the Opinions of the Attorney General, 1923, Vol. I, page 486, wherein the then Attorney General held:

“The term of a person appointed to fill a vacancy in the office of justice of the peace would be terminated as soon as a successor was elected and qualified, which could be on the first day of

January following the November election in the odd year following his appointment.”

In the case of *In Re Conley*, 25 O. App. 339, wherein the court held a sentence valid which was pronounced upon a person by a justice of a peace who had been appointed and who had served beyond the next regular election, it was stated:

“A person appointed as justice of the peace by the trustees of a township until regular election, as provided by Section 1714, General Code, and commissioned by the governor, and who qualifies and continuously fills and performs the duties of the office thereafter, is at least a de facto officer capable of passing sentence on relator convicted of crime, whether or not the next regular election should have been held before such action.”

In the 1929 opinion, hereinbefore referred to, it was stated with regard to the tenure of office of a justice of the peace who had been appointed to said office:

“Where a justice of the peace is appointed to fill a vacancy, and no successor is elected or qualified at the subsequent regular election for justice of the peace, the appointee continues in office until the next regular election for that office, if such term of service does not exceed the four year limitation imposed by Section 2, Article XVII of the Constitution.”

From the foregoing, it would appear that had no person been elected in November, 1939, to succeed H, he might legally remain in office until a successor would be elected in November 1941, who would qualify and assume office January 1, 1942.

Summing up what I have already said, it is to be noted that the law would not permit M to serve beyond December 31, 1939, under authority of his election in November, 1935, but would countenance the holding over of H after said date.

An examination of the statutes pertaining to your question reveals a deficiency in connection therewith. The Legislature apparently did not contemplate a situation where one person elected to the office of justice of the peace might succeed one of two justices of the peace then in office, and consequently, made no specific provision therefor.

For a definite answer to your inquiry we must therefore, turn to general propositions of law for assistance and direction. At page 485 of the

opinion in the case of State, ex rel. Henry vs. Triplett, 134 O. S. 480, Williams J. observed as follows:

“ * * * The law abhors a vacancy as nature abhors a vacuum. Faithful to this principle the courts do not favor a construction of doubtful statute that will leave an office without an incumbent. Rather the courts assume that in creating an office the Legislature intends that it should not remain unoccupied.”

Guided by this well recognized rule of law, it is my opinion that S succeeded M whose term of office expired December 31, 1939. To hold otherwise, i. e., that S succeeded H would bring about a vacancy in the office of the justice of the peace formerly occupied by M by reason of M's disability to serve beyond December 31, 1939. In holding that S succeeds M no vacancy arises in that H may hold over as explained earlier in this opinion.

In line with the foregoing, and in specific answer to your inquiry, it is my opinion that M's term of office having expired automatically, S must be considered as having succeeded thereto and M would therefore be required under the terms of Sections 1727 and 1741, General Code, to deposit with S his official dockets and those of his predecessors which are in his custody, together with all files and papers, laws and statutes, pertaining to his office.

Respectfully,

THOMAS J. HERBERT,
Attorney General.