

I do not know, of course, why the injunction suit you mention has not been heard and disposed of. Strictly speaking I should not at this time render an opinion in this matter, as it has been the consistent policy of former attorneys general, as well as myself, to refrain from expressing opinions on matters pending in court. However, inasmuch as you ask for a way properly to dispose of the matter and suggest that the suit will be dismissed, I have prepared this opinion as though the suit had already been dismissed and the matter not now pending in court.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1336.

ELECTION—INELIGIBILITY OF CANDIDATE SERVING AS ELECTION OFFICIAL FOR OFFICE—CANVASSING POWER'S DUTY TO CERTIFY FROM FACE OF RETURNS—HOW TOWNSHIP TRUSTEE VACANCY CAUSED BY FAILURE TO QUALIFY FILLED—JUSTICE OF PEACE SERVES UNTIL SUCCESSOR QUALIFIES.

SYLLABUS:

1. A candidate elected to the office of township trustee who served as an election official in the same precinct at such election, is barred from taking such office by the provisions of Section 5992, General Code.
2. Where three members of a board of township trustees are elected on the face of the returns, it is the duty of the canvassing power, under Section 5112, General Code, to issue certificates of election to all three.
3. A vacancy on the board of township trustees caused by the inability of one of the trustees-elect to qualify, will be filled by appointment, as provided in Section 3262, General Code.
4. Where a justice of the peace is appointed to fill a vacancy and no successor is elected and 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.

COLUMBUS, OHIO, December 27, 1929.

HON. R. D. WILLIAMS, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads as follows:

“At the recent election held on the 5th day of November, this year, a man by the name of Mr. P. was elected township trustee of Lodi Township, Athens County, Ohio. Mr. P.'s candidacy was regular and his name appeared regularly printed upon the township ballot. This Mr. P. was the presiding judge in, and of one of the election precincts of said Lodi Township at said election. Mr. P. is not now, and has not been a trustee of said township, but was elected at such election—at least his was one of the three highest votes cast for trustee. Mr. P. was advised in advance of this election that in the event he served as such presiding judge and was at the same time elected as such trustee, that then and in that event complications might arise. He said then as now that if elected he would make no effort to qualify and would not in fact serve as such trustee. This is his attitude today.

There is, and has been for several months last past but one Justice of the Peace of and within said Lodi Township. This Justice of the Peace is a man by the name of Mr. R. who was not elected, but heretofore received an appointment as such Justice of the Peace. This appointment, I believe, to be regular in every respect. Mr. R. was not a candidate at the last election but there was a fellow by the name of Mr. H. regularly nominated and elected at such election but he will not qualify or serve as such Justice of the Peace.

Queries: 1. After the first of the year will there be a vacancy in the office of township trustee in this township?

2. Is there no process by which one of the old trustees could continue on, on the theory that his successor has not been properly elected or qualified?

3. Should you answer query No. 2 in the affirmative, which one of the three trustees would continue?

4. Will there be a vacancy in the office of Justice of the Peace in this township after the first of the year, or will the present Justice hold over on the theory that his successor has not properly qualified?

5. Should you hold that there will be a vacancy of Justice of the Peace after the first of the year, could the then two township trustees appoint a Justice of the Peace, who in turn, could legally appoint a third member of such trustees?

6. In other words, how can a full board of trustees be legally had for this township after the end of this year?"

Township trustees are provided for by the terms of Section 3268, General Code, which reads as follows:

"Three trustees shall be elected, biennially, in each township, who shall hold their office for a term of two years, commencing on the first day of January next after their election."

Section 3262, General Code, as amended in 113 O. L., is the only section of the statutes providing for the filling of a vacancy in a board of township trustees. Said section reads as follows:

"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, having the qualifications of electors in the township to fill such vacancy or vacancies for the unexpired term. Wherever in any township a municipal court shall replace and supersede the justices of the peace, the municipal judge or the presiding municipal judge, if there be more than one, shall have the same powers to fill vacancies on the board of trustees."

It appears from your inquiry, that two township trustees have been regularly elected. The third person who appears elected on the face of the returns will be barred from taking office because of the provisions of Section 5092, General Code, which reads:

"No person, being a candidate for an office to be filled at an election, other than for committeeman (committeeman) or delegate or alternate to any convention, shall serve as deputy state supervisor or clerk thereof, or as a judge or clerk of elections, in any precinct at such election. A person serving as deputy state supervisor or clerk thereof, judge or clerk of elections con-

trary to this section shall be ineligible to any office to which he may be elected at such election."

Section 5112, General Code, provides that the township clerk shall canvass the vote for township officers, declare the result and issue and deliver certificates to the officers so elected.

As was stated in my opinion No. 1291, issued to Hon. Clarence J. Brown, Secretary of State, the powers of a canvassing board are limited and do not comprehend the determination of election irregularities. It must be guided by the returns and the returns in the present case show the three persons receiving the highest number of votes elected. Certificates of election, therefore, should be issued to these three persons.

The vacancy on the board of trustees existing by reason of the ineligibility of the trustee-elect who served as an election official will be filled by appointment, as provided in Section 3262, supra.

In the 1919 November election of the Buckland Village School District of Auglaize County, one of two persons elected to the board of education was unable to qualify, not being a resident of the school district. The then attorney general ruled (see Opinions of the Attorney General, 1920, Vol. I, p. 14), one of the old board members would not hold over but that the vacancy would be filled by the appointing power which, in that instance, was the incoming board of education.

Coming now to a consideration of the election for justices of the peace, the question arises how long Mr. R. the present incumbent, has served under his present appointment. Section 2, Article XVII of the Ohio Constitution, reads in part:

"* * * 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. * * *

All vacancies in other (than state) elective offices shall be filled for the unexpired term in such manner as may be prescribed by law. * * *"
(Parenthesis and words enclosed therein, the writer's.)

Section 8 of the General Code, reads:

"A person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

It will be observed that Section 2 of Article XVII, supra, expressly limits the term of office of a justice of the peace to four years. This has been construed to mean four years under one election or appointment. See Opinions of the Attorney General, 1928, Vol. I, page 109.

Mr. R., therefore, may serve not to exceed four years under his present appointment, and if such four years terminates before the 1931 regular election for such office, it will be the duty of the township trustees to appoint a successor to serve until his successor is elected and qualified, as provided by Section 1714, General Code, which reads:

"If a vacancy occurs in the office of justice of the peace by death, removal, absence of 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."

In conclusion, I am of the opinion that:

1. A candidate elected to the office of township trustee who served as an election official in the same precinct at such election, is barred from taking such office by the provisions of Section 5092, General Code.

2. Where three members of a board of township trustees are elected on the face of the returns, it is the duty of the canvassing power, under Section 5112, General Code, to issue certificates of election to all three.

3. A vacancy on the board of township trustees caused by the inability of one of the trustees-elect to qualify, will be filled by appointment, as provided in Section 3262, General Code.

4. Where a justice of the peace is appointed to fill a vacancy, and no successor is elected and 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.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1337.

ELECTION—SIX VILLAGE COUNCILMEN ELECTED BUT FOUR DISQUALIFIED FOR SERVING AS ELECTION OFFICIALS—HOW VACANCIES FILLED.

SYLLABUS:

1. *Where an entire new village council of six members is elected and four of such councilmen-elect are unable to qualify because of having served as election judges in violation of Section 5092, General Code, none of the outgoing members of council hold over because of such situation.*

2. *The two duly elected members of council not constituting a majority, have no power to fill the four vacancies, but after expiration of the thirty day period provided in Section 4236, General Code, the vacancies will be filled by appointment of the mayor.*

COLUMBUS, OHIO, December 27, 1929.

HON. MICHAEL B. UNDERWOOD, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, which reads:

“We submit the following for your opinion:

We note that under Section 5092, G. C., there are mentioned several opinions of the Attorney General, and perhaps a copy of one of those would be sufficient.

There were eight candidates for council, six to be elected, but out of the six that received the highest vote, four had served on the board of elections.

Section 5092 provides that no person serving on the election board is eligible to qualify for the office. There were several that received a few votes.

What we wish to know is, who is eligible to qualify under the circumstances?

Of those who did not serve on the board of elections and could therefore qualify, there seems to be only three, and they would not constitute a quorum.”