Therefore it is belived that a city board of education could legally compensate a person holding the office of city solicitor for his services in preparing an abstract of title.

Respectfully,
C. C. CRABBE,
Attorney General.

635.

UNDER SECTION 1532-6 G. C. GOVERNOR IS AUTHORIZED TO APPOINT ADDITIONAL JUDGE FOR LUCAS COUNTY—110 O. L. 157.

COLUMBUS, OHIO, August 11, 1923.

SYLLABUS:

Under section 1532-6 *G. C.* (*H. B.* 410, *Eighty-fifth General Assembly*), *the Governor is authorized, on and after the effective date of said statute, to appoint the additional judge provided for in said statute.*

HON. A. V. DONAHEY, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have requested my opinion as to whether, under the provisions of House Bill 410, Eighty-fifth General Assembly, in effect July 26, 1923, you have authority to appoint an additional judge of the Court of Common Pleas in and for Lucas County. You state that your reason for requesting an opinion is that the act provides that the first election for the additional judge shall take place in 1924 and, unlike certain earlier acts of similar purport, does not in so many words direct the Governor to make an interim appointment. The act in question has been designated as section 1532-6, which reads as follows:

"From and after the passage and taking effect of this act, there shall be one additional judge of the court of common pleas in and for Lucas county, who shall reside therein.

Such additional judge shall be elected in 1924 and every six years thereafter, for a term of six years, commencing on the first day of January, next after his election. Vacancies occurring in the office of such additional judge in Lucas county shall be filled in the manner prescribed for the filling of vacancies in the office of judge of the court of common pleas.

"He shall have the same qualifications and shall receive the same compensation as is provided by law for the judges of the court of common pleas in Lucas county. He shall exercise the same powers and have the same jurisdiction as is provided by law for judges of the court of common pleas. He and his successors shall, however, be elected and designated as a judge of the court of common pleas, division of domestic relations, and all the powers provided for in title four, chapter eight, of the General Code, relating to juvenile courts, shall be exercised in Lucas county by such judge of said court of common pleas, and on and after the appointment of such judge, there shall be assigned to said judge and his successors,

elected or appointed in pursuance of this act, all cases under the juvenile court act, all bastardy cases and all divorce and alimony cases in said county. And whenever said judge of the court of common pleas, division of domestic relations, shall be sick, absent, or unable to perform his duties, the duties of said office shall be performed by another judge of the court of common pleas of said county, assigned for said purpose, according to law."

It is clear beyond question, from the opening sentence of the section, that an additional judgeship came into existence on the date that the act became effective. This raises the question whether a vacancy thereupon arose which you are authorized to supply, either by virtue of the terms of the act itself or by virtue of general provisions as to appointing power vested in the Governor.

The point is well settled that a vacancy exists upon the coming into effect of a law establishing an office. This rule is quite clearly stated in the case of People ex rel Snyder v. Hylan, 212 N. Y., 236. The syllabus in that case is as follows:

"1. When a law establishing an office takes effect a vacancy in the office at once exists, unless the language of the law imports futurity of selection.

2. A constitutional amendment, adopted in November, 1913, to take effect January 1, 1914, increased the number of county judges in Kings county from two to four and provided that the additional judges should be chosen at the general election held in the first odd numbered year after the adoption of the amendment. HELD, that vacancies existed in such newly created constitutional offices from the time the amendment took effect; that the governor was authorized to fill such vacancies by appointment in the same manner as like vacancies occurring in the Supreme Court (Const. art. 6, sec. 15); that the appointment of two judges to fill such vacancies on March 27, 1914, was valid, and that the judges so appointed are *de jure* county judges of Kings county."

It may be added that the constitutional provision of the state of New York respecting vacancies in the Supreme Court is in substance that vacancies occurring otherwise than by expiration of term, are to be filled at the next general election, with the proviso that until the vacancy is so filled by election, the Governor may, with the advice and consent of the Senate, if the Senate is in session, make an interim appointment, and if the Senate is not in session, the Goveror alone may supply the vacancy by interim appointment.

You will thus see that the case dealt with a situation very much like that now before you. The opinion contains a full citation of authorities and, among others, makes this reference to an Indiana case:

"A leading case which has perhaps been most frequently cited to the same effect is Stocking v. State(7 Ind. 326). The Constitution of Indiana authorized the governor to fill by appointment a vacancy in the office of the judge of any court. The legislature in the exercise of its constitutional power so to do created a new judicial circuit but made no provision for the appointment of the new circuit judge by the governor. The Supreme Court of Indiana held that a vacancy in that office which the governor could fill 'flowed as a natural consequence' from the action of the legislature in doing what it had the right to do—namely establish a new circuit.

'There is no technical nor peculiar meaning to the word 'vacant' as used in the constitution. It means empty, unoccupied; as applied to an office without an incumbent. There is no basis for the distinction urged, that it applies only to offices vacated by death, resignation, or otherwise. An existing office, without an incumbent, is vacant, whether it be a new or an old one. A new house is as vacant as one tenanted for years, which was abandoned yesterday. The emergency which created the office, would imply that the vacancy in the office of judge * * * should be filled immediately.'"

Another case of interest is that of State ex rel Attorney General v. Breckinridge, 34 Okla., 649. In the course of the opinion the court say at page 658:

"Under the above decisions, there was no superior court in Tulsa county that could be supplied with a judge by the eletorate in the November election of 1910. When the census of 1910 was made known, July 20, 1910, the office came into being by operation of the general law (Superior Court Act). When the office came into being, there was, *ipso facto,* a vacancy in the office. Knight v. Trigg, 16 Idaho, 256, 100 Pac. 1060; State v. City of Butte 41 Mont. 377, 109 Pac. 710.

There being a vacancy in the office *eo instanti,* upon its coming into being, and it being other than a county office, the power to fill the vacancy was lodged in the Governor by both the Superior Court Act and by the constitutional provision (section 13, Art. 6), which provides:

'When any office shall become vacant, he (Governor) shall, unless otherwise provided by law, appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed, and qualified according to law.'"

The general provisions in Ohio as to the appointing power of the Governor in respect of judges are found in article 4, section 13, of the constitution and section 142 of the General Code, reading as follows:

Section 13, *Article IV Constitution*:

"In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and qualified; and such successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened."

Section 142 *G. C.*

"If the office of a judge becomes vacant by reason of the expiration of the term of the incumbent, and a failure to provide therefor at the preceding election, such vacancy shall be filled by appointment by the governor. The person so appointed shall hold the office until a successor is elected and qualified. Such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after such appointment."

It may be urged that from a technical standpoint there is some difference between these general constitutional and statutory provisions and those which were before the courts in the New York and Oklahoma cases,—in other words, that the

Ohio constitutional provision deals only with a vacancy arising before the expiration of a regular term and the Ohio statutory provision only with a vacancy arising by expiration of term, and hence that neither the constitutional nor statutory provision may be applied to a vacancy arising through the creation of an office.

It is believed unnecessary, however, to speculate upon the question of whether the Ohio provisions are to be given the rather narrow construction just suggested; for in the case before you it is believed that section 1532-6 itself brings the present situation clearly within the purview of the New York and Oklahoma cases.

Section 1532-6 contains the sentence:

> "Vacancies occurring in the office of such additional judge in Lucas county shall be filled in the manner prescribed for the filling of vacancies in the office of judge of the court of common pleas."

Since the courts have said that no technical meaning is to be attached to the word "vacancy", it follows that the sentence just quoted is broad enough in its import to relate to a vacancy occurring through creation of the office, as well as to vacancies otherwise occurring. Therefore we have a rule set up by the statute itself in the sentence quoted that the appointment is to be made by the Governor; for both article 4, section 13, constitution, and section 142 G. C., are specific to the point that a vacancy shall be filled by appointment by the "Governor until a successor is elected and qualified."

It is believed that there is an additional reason for the conclusion that you are authorized at this time to make the appointment in question. Section 1532-6 contains this language:

> "* * * and on and after the *appointment* of such judge, there shall be assigned to *said judge* and his successors, elected or appointed in pursuance of this act, all cases under the juvenile court act," etc.

Clearly, the word "appointment" can have reference only to an initial appointment for the period from the date the act becomes effective until the election and qualification of the additional judge under the provision that the first election is to occur in the year 1924. Taking this fact into account, with the further facts that the General Assembly has clearly indicated an intention that the judgeship shall come into existence when the act becomes effective; that there is no appointing power other than the Governor; and that the act itself recognizes that vacancies are to be filled by appointment by the Governor, we have the legislative will shown by necessary implication, if not by clear expression, that the Governor is to make an interim appointment.

You are therefore advised that a vacancy in the office in question now exists and that you are authorized to fill it by appointment.

Respectfully,
C. C. Crabbe,
Attorney General.