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PUBLIC OFFICES AND OFFICERS: Justice of the Peace – Vacancy – removal from township.

Unless the elected justice of the peace abandons his residence within the township, there is no vacancy in the office which the township board is authorized to fill by reason of his extended absence or removal "from the township in which he was elected."

No. 4157 June 20, 1963.

Mr. Donald L. Munro
Prosecuting Attorney
Ontonagon County
Ontonagon, Michigan

Your request for an opinion states:

> "* * * one Elmer Johnson who had been elected as Justice of the Peace and acted as Justice of the Peace up until the late summer of 1962 at which time Mr. Johnson and his family moved to Illinois where he is presently employed. He has not been back in Ontonagon Township since that date and has performed no official functions as Justice of the Peace since leaving the Township in August of 1962. The opinion rendered by this office was based on the provisions of Section 6.1368 M.S.A.[1] which in part provides that township offices shall become vacant upon the happening of any of the following events: 'his ceasing to be a resident of the Township where his office is located.' In addition Article 7, Section 19, of the Michigan Constitution[2] provides:
>
> " 'Whenever a Judge shall remove beyond the limits of the jurisdiction for which he was elected or a Justice of the Peace from the Township in which he was elected, or by a change in the boundaries of such Township shall be placed without the same, he shall be deemed to have vacated the office.'
>
> "Mr. Johnson, who presently resides in Springfield, Illinois, has, however, advised the Township Clerk that he does not feel the office has been vacated; that he does not desire to lose his residence in Ontonagon Township, and I am enclosing for your information a copy of the letter from Mr. Johnson to the Township Clerk so that you might be in possession of all the facts.
>
> "I realize, as is pointed out in several old decisions from the Attorney General's Office which are listed under the Statutory reference hereinbefore referred to, that temporary removal from the State does not necessarily vacate Township Office. However, it would appear to me that the Constitutional provisions relating to the Justice of the Peace removing from the Township in which he was elected would constitute vacation of the office."

The letter from Mr. Johnson to the Ontonagon township clerk states:

> "I received your card relative to my residency in Ontonagon.

[1] C.L.S. 1956 § 168.368.
[2] 1908 Constitution.

"My work here has lasted longer than I had originally expected, but I do not wish to give up my residency in Ontonagon as I still have my home there and wish to continue to vote there."

One's residence is to be determined from his intention with respect thereto, as evidenced not only by his declarations but also by his actions indicating the same. At least until the late summer of 1962 Mr. Johnson was a resident of Ontonagon township. Insofar as his present residence is concerned, the issue presented is whether he has abandoned his residence in that township.

"* * *While bodily presence ordinarily is essential in effecting a domicil in the first instance, it is not essential to its continuance, the most important factor being the intent to establish a new domicil, coupled with acts evincing such intent."[3]

The long established rule adopted by the Supreme Court of Michigan recognizes that absence from one's place of residence for temporary periods does not result in abandonment.

An early Michigan case[4] in quo warranto involved inter alia one's qualifications as an elector which were dependent upon residence. In reversing the judgment entered on the jury's verdict in the trial court, the opinion stated with reference to the court's charge to the jury with respect to residence and qualification as an elector:

"* * * There was evidence given tending to prove, and the court instructed the jury, 'that if they should find that Robert McClatchey's family resided at the time of said election at Royal Oak, and had resided there for some years previous, and that he was in the habit of going there Saturday night and spending Sundays with them, though himself employed and living in Detroit during the week, he was not entitled to vote in Detroit.'

"The trouble with this charge is that it ignores entirely the question of the elector's intention in taking up or fixing his residence. Yet the intention of the party is one of the most important inquiries involved in such a question. No one will contend that a party loses his residence and rights as an elector because himself and family temporarily reside in some other city, township or ward, even although such temporary residence should extend over a series of years. The intention of the party, coupled with certain other facts, is what governs."

Recent decisions of the Michigan court dealing with one's residence have arisen in connection with other issues, such as jurisdiction and venue. However, the court has not departed from the fundamental rule as to residence and change thereof, as above set forth.

Accordingly, in the situation here presented the issue as to whether Mr. Johnson has ceased to be a resident of the township with the resulting vacancy under the statute in the office of justice of the peace, is one of fact. As pointed out by you, the Constitution[5] provides:

[3] Am. Jur., *Elections* § 56, p. 218.
[4] *Harbaugh vs. Cicott,* 33 Mich. 241, 252.
[5] Article VII, Section 19, of the 1908 Constitution.

> "Whenever * * * a justice of the peace [shall remove] from the township in which he was elected * * * he shall be deemed to have vacated the office."

Does this present a different test from that specified by the statute?

Such provision of the present constitution re-enacted without change in substance the corresponding provision of the 1850 constitution.[6] The issue has never been ruled upon by the Michigan Supreme Court under either the 1850 or 1908 Constitutions. Michigan court decisions recognize that the office of a justice is vacated if his residence is changed to a place outside the township, either by his own act or by a change in boundaries.[7] Research has disclosed but few out-of-state cases and most of them were decided at an early date.

The Nebraska court had before it similar constitutional and statutory provisions in a case[8] wherein a successor was elected to fill a vacancy in office resulting from the removal of the incumbent from the state. The constitution provided: "all offices created by this constitution shall become vacant by the death of the incumbent, by removal from the state, resignation," etc. The statute enumerated several events upon the happening of any of which a vacancy would result, including the incumbent "ceasing to be a resident of the state, district, county, township, precinct, or ward in which the duties of his office are to be exercised, or for which he may have been elected."

Daniel Brown was elected county judge in November, 1883, for a two-year term, commencing January, 1884. He qualified and assumed the office, but in June, 1884, left the state. He had sold his farm and some personal property, and took with him his family and remaining personal property. At that time he wrote the county board stating that he was going to be away for a few weeks and asking that defendant Hart be appointed to act during his absence. However, Brown never returned, and the office was filled in the November election of 1884 on the premise that a vacancy existed. Plaintiff was elected and brought action of ouster. The court granted the writ on the basis that the evidence showed Judge Brown had abandoned his residence in Nebraska. The opinion stated at pages 282-283:

> "* * * No doubt the word 'removal' was used in the constitution in the same sense as the words 'ceasing to be a resident of,' as used in the provision of the statute above quoted. * * *"

An action of quo warranto[9] before the court of appeals of Ohio presented a somewhat similar issue. The board of education of St. Bernard city school district claimed a vacancy existed by reason of relator's removal from the district. Relator had purchased a residence in Mt. Airy school district to which he moved with his family, where he was presently living and sending

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[6] Article VI, Section 22.

[7] *People ex rel. Berry vs. Geddes,* 3 Mich. 70. Also see *Faulks vs. People,* 39 Mich. 200.

[8] *Prather vs. Hart* (1885), 17 Neb. 598, 24 N.W. 282, 283.

[9] *State ex rel. Van Den Eynden vs. Paulson* (1928), 29 Ohio App. 121, 162 N.E. 653.

his children to the public school in that district. Relator claimed that he still owned a residence in St. Bernard, had retained some furniture there and expected at some future time to return to St. Bernard, but did not presently know when. In denying relator's petition, the court stated:

> "Section 4748, General Code, deals with vacancies in any board of education. The pertinent part of the section provides that:
>
> " 'A vacancy in any board of education may be caused by * * * removal from the district. * * *'
>
> "The lexicographers define removal as a change of place, especially of habitation.
>
> "The court is of opinion that, under the facts in this case, the relator removed from the district within the meaning of the statute."

An early case[10] before the Indiana Supreme Court was an action of quo warranto to determine title to the office of recorder of Clinton County. Yonkey having been elected in October, 1860, duly qualified and entered upon the duties of the office, which he continued to discharge until about December 1, 1863, when he left the office in care of one Merritt, whom he had appointed as deputy, and went to Washington, D.C. to serve as doorman in the House of Representatives. Merritt discharged the duties of the office until June, 1864, when he left the office in care of defendant Sims, who assumed to discharge the duties thereof for four weeks until Yonkey returned, reassumed his office, and appointed Sims as his deputy. In December, 1864, Yonkey returned to Washington, D.C., to resume his employment and left the office in charge of deputy Sims, who continued to discharge the duties of the office. On January 30, 1865, the board of commissioners of said county appointed Cornelison, the relator, to fill the vacancy in said office, occasioned by the abandonment thereof by Yonkey. Cornelison qualified for the office and demanded the same from Sims, who refused to surrender it, whereupon action was brought. Judgment was entered in the lower court for relator. The constitution required that "all county, township and town officers shall reside within their respective counties, townships and towns, and shall keep their respective offices at such places therein, and perform such duties as may be directed by law." The Supreme Court reversed the judgment entered in the trial court upon the ground:

> "* * * But, from the evidence in the case, we think it too clear to admit of controversy, that *Yonkey* in going to *Washington*, under the circumstances and for the purposes shown in evidence, did not lose his residence in *Clinton* county, or 'cease to reside' therein as alleged. * * *"

In a Kentucky case[11] appellant, who had been elected in 1870, qualified and entered upon the duties as county judge of Rowan County, brought action for usurping his office. Appellant had gone with his family to Bath County, a distance of only two miles from his former residence, to operate a portable saw-mill, remaining there for several months. The county clerk considering the office to have become vacant, issued a writ of election, and

[10] *Yonkey et al. vs. State ex rel. Cornelison* (1866), 27 Ind. 236.

[11] *Curry vs. Stewart* (1871), 71 Ky. 560, 563.

defendant was elected to fill the vacancy. Proof showed that plaintiff left his farm and some personal property in possession of a tenant. The Supreme Court stated that proof showed that at no time did he intend to abandon or change his residence or to become a resident of Bath County. In reversing the judgment entered in the trial court for defendant, the Supreme Court stated at page 563:

> "We do not doubt that under the provisions of the constitution, to which our attention has been drawn in the argument of this case, a permanent removal or change of residence by the appellant from Rowan to Bath County would have at once vacated his office, and constituted a valid defense for his successor in a direct proceeding like this. But we are of the opinion that the true meaning of the clause of the 35th section of article 4 of the constitution, that 'county and district officers shall vacate their offices by removal from the district or county in which they shall be appointed,' is that such offices shall become vacant by an actual change of residence from the district or county, as contradistinguished from a mere absence of the officer for some temporary purpose, and for a limited time, whether accompanied by his family or not, and whatever may be his mode of living during such absence."

As distinguished from the above decisions, the Indiana court held[12] that a county auditor who enlisted for a three-year term of duty in the federal armed forces during the civil war, and who following his induction left the state leaving the office unattended had abandoned the same, justifying the filling of the resulting vacancy at the next election, and that the fact that he was discharged and returned shortly after the election did not entitle him to resume the office. The court held that by enlisting for a three-year term to serve in a war being fought outside of the state's boundaries he had abandoned the office due to the resulting disability to perform the duties thereof throughout the remainder of his term of office, and stated at page 522:

> "Now, whenever the auditor voluntarily permanently disables himself to perform the duties of his office he, by that act, constructively resigns the office by abandonment of it. A temporary disability to discharge the duties of the office might not, of itself, create a vacancy. In an office, capable of being served by a deputy, the deputy of the principal might, doubtless, continue to act during the temporary disability of the principal; and, if no deputy had been appointed, perhaps the sureties of the principal might appoint. See *The State v. Pidgeon,* 8 Blackf. 132. But a disability designed to continue for the whole term of office must vacate the office. * * *"

The factual distinction between that case and the situation here presented is apparent.

As evidenced by the above cases, aside from the last cited, the term "removal" as used in constitutional or statutory provisions specifying the grounds for vacating a public office has generally been construed by the courts of other states as synonymous with a change of a permanent nature in one's domicil or residence. In that connection the record of the proceed-

[12] *State ex rel. Cornwell vs. Allen,* 21 Ind. 516.

ings of the 1961 Constitutional Convention, while not controlling on the issue here presented, are nevertheless, worthy of note.

Committee Proposal No. 96, section b, was introduced by the committee on the judicial branch as a replacement for Article VII, Section 19, of the 1908 Constitution, which proposal as submitted, read:[13]

> "WHENEVER A JUDGE SHALL REMOVE HIS DOMICILE BEYOND THE LIMITS OF THE TERRITORY FROM WHICH HE WAS ELECTED, HE SHALL BE DEEMED TO HAVE VACATED HIS OFFICE."

The committee report stated in support thereof:[14]

> "The Committee has in essence adopted the provisions of section 19 of Article VII of the Constitution of 1908. Due, however, to the elimination of the Justices of the Peace from the proposed new Article any reference to this office has been eliminated. In addition, the word 'territory' has been substituted for the word 'jurisdiction', inasmuch as the section refers to the physical moving of the judge from the territory from which he was elected."

While certain changes were thereafter made in such section prior to its final adoption as Article VI, Section 20, of the Proposed Constitution, such changes were not significant and were without bearing on the issue presented.

The Address to the People prepared and published by the Constitutional Convention made the following comment with respect to this section:

> "This is a revision of Sec. 19, Article VII, of the present constitution clarifying the previous language. The word 'territory' has been substituted for 'jurisdiction', inasmuch as the section refers to physical moving."

Definition of the term "domicile" as set forth in a leading text[15] is significant:

> "The term 'domicil' in its ordinary acceptation means a place where a person lives or has his home. In a strict legal sense that place is properly the domicil of a person where he has his true, fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning, and from which he has no present intention of moving."

Apparently the members of the convention construed the 1908 constitutional provision[16] as requiring a permanent change in residence as stated in the statute[17] in order to produce a vacancy.

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[13] Official Record, Constitutional Convention 1961, seventy-first day, February 2, 1962, page 757, referring to ninety-third day, March 6, 1962, page 1478 et seq., at which the Committee Proposal and its comments with respect thereto are printed.

[14] Official Record, Constitutional Convention 1961, ninety-third day, March 6, 1962, page 1479.

[15] 17A Am. Jur., *Domicil* § 2, page 194.

[16] Article VII, Section 19.

[17] Footnote 1.

As I view the cited provision of the 1908 Constitution and the implementing statutes, a vacancy authorizing the taking of administrative action to fill the same does not result on this ground unless there has been a permanent change in residence. Such conclusion is supported by the above cited authorities.[18]

The remedy in case of extended absence from office without permanent change of residence lies in removal proceedings by the Governor.[19] That is the general rule as recognized by text writers:[20]

> "The law contemplates that an incumbent of a public office shall devote his personal attention to the duties of the office to which he is elected or appointed, but does not contemplate that such officer shall lose his title to the office or that it shall become vacant because he may be absent for a period of time and for that reason, or for some other cause, does not personally give his time and attention to the performance of his duties. While such failure of duty may furnish grounds for removal, it does not ipso facto create a vacancy."

It necessarily follows in the situation here presented that unless Mr. Johnson has abandoned his residence in Ontonagon County or submits his resignation from the office, there is no vacancy to fill.[21]

FRANK J. KELLEY,
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[18] See also Throop, *Public Officers* §§ 424 and 425, page 413.
[19] C.L.S. 1956 § 168.369, M.S.A. 1956 Rev. Vol. § 6.1369.
[20] 42 Am. Jur., *Public Officers* § 138, page 980.
[21] C.L.S. 1956 § 168.370, M.S.A. 1956 Rev. Vol. § 6.1370.