

In conclusion, therefore, in my opinion, 1965 PA 383, § 9(1)(L), *supra*, conflicts with the Bankruptcy Act and is, therefore, unconstitutional.

FRANK J. KELLEY,
Attorney General.

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RECALL: Filling vacancy created by recall.

TOWNSHIP BOARD: Vacancy in office of member of township board.

TOWNSHIP CLERKS: Vacancy in office of township clerk.

Upon recall of a township clerk, the township deputy clerk serves in place of a township clerk. The township deputy clerk serving in place of the township clerk is counted as a member of the township board for the purpose of determining whether there is a quorum to conduct township business.

Where there is a quorum available of a body charged with the responsibility of filling a temporary vacancy created by recall, the governor may not fill the vacancy by appointment.

Opinion No. 5082

August 17, 1976.

Executive Office
The Capitol
Lansing, Michigan 48901

You have requested an opinion concerning the power to fill the position of township clerk following the recall of the previous officeholder. Information supplied with your request and obtained through discussions with members of my staff indicates that the clerk of China Township in St. Clair County has been recalled from office. At the same election, the supervisor and one of the three township trustees were also recalled. Consequently, a quorum of the township board as normally constituted cannot be assembled. The deputy clerk, sitting with the two remaining trustees and the township treasurer would, however, bring the board up to sufficient strength to establish a quorum.

With this factual background in mind, your question may be stated as follows:

Where a township clerk has been recalled, and other township officials have also been recalled at the same election so that a quorum of the township board as usually constituted cannot be assembled, may the governor appoint persons to temporarily fill the positions rendered vacant by the recall election under the provisions of § 970 of 1954 PA 116, MCLA 168.970; MSA 6.1970, to fill the vacancy?

The statute in question, MCLA 168.970; MSA 6.1970, reads as follows:

“Upon the filing of the certificate of the canvassing board showing the recall of the officer as herein provided, the officer empowered by

law to perform the duties of such recalled official, in the event of such officer's absence, death, illness or inability to act, shall perform and discharge the duties of the office so vacated until the successor to fill such vacancy is duly elected and qualified as herein provided or until the vacancy is temporarily filled. *Where power to fill a vacancy by appointment exists*, then in such case such office shall be filled in the same manner by temporary appointment effective until a successor shall be duly elected and qualified as herein provided, *otherwise*, the governor of the state may fill such vacancy until said recalled officer's successor is elected and qualified." [Emphasis added]

As the emphasized language of the statute indicates, the governor may fill a vacancy created by recall only "where power to fill a vacancy by appointment" does not "otherwise" exist. Attention must therefore be directed to determining whether or not power to fill the vacancy does otherwise exist.

Power to make a temporary appointment to a township office is conferred upon the township board by RS 1846, chap 16, § 58; MCLA 41.58; MSA 5.42. That statute reads as follows:

"Whenever there shall be a vacancy, or when the incumbent shall, from any cause, be unable to perform the duties of his office, in either of the township offices, except that of justice of the peace and township treasurer, the township board may make temporary appointments of suitable persons to discharge the duties of such offices respectively; and such persons, so appointed, shall take the oath of office, or file the notice of acceptance required by law, and shall continue to discharge such duties until the office is filled by election or until the disability aforesaid be removed."

Inquiry must then center upon the ability of the township board in its present state to exercise the power conferred by this statute. Therefore, the question of the authority of the deputy clerk to sit on the township board in the absence of the recalled clerk thereby providing a quorum must be resolved.

The authority for a deputy clerk to act in the absence of the township clerk is found in RS 1846, chap 16, § 69; MCLA 41.69; MSA 5.61, which reads in pertinent part as follows:

"Each township clerk shall, . . . appoint a deputy, who shall take an oath of office and file the same with the clerk, and in case of the absence, sickness, death, or other *disability* of the clerk, such deputy shall perform the duties of such clerk, and receive the same compensation as the clerk would have been entitled to receive therefor." [Emphasis added]

As a consequence of the successful recall election, the clerk may no longer discharge the duties of his office; he is, therefore, "disabled" within the meaning of the statute, and the deputy clerk shall perform the duties of the clerk. A similar interpretation of the term "disability" is found in the case of *State v City of Newark*, 27 NJL 185 (1858). In that case, it was determined that a statute providing for the replacement of a commissioner upon

his "disability" was intended to and did include his resignation. The Court stated at page 198:

" . . . If accepted by a power which has a right to fill a vacancy, it becomes complete, and the officer is held to be no longer capable of acting. There is in such a case a disability which may be lawfully supplied."

This rule was cited with approval and applied in *McIntyre v Modern Woodmen of America*, 200 F 1, 5 (1912), wherein the resignation of a federal judge was held to constitute a "disability."

Following the decision in *Stewart v Royal Oak Township Clerk*, 16 Mich App 434; 168 NW2d 304 (1969), there is no longer any doubt that the deputy clerk can sit on the township board in the absence of the clerk. The only distinction between *Stewart* and the present case is that in *Stewart* the clerk was merely absent, while in the present case the clerk has been recalled.

In a case similar on the facts to the instant case, *Burns v Stenholm*, 310 Mich 639; 17 NW2d 781 (1945), the Michigan Supreme Court opted for the "practical solution" of allowing the situation to stand until an election would be held. In *Burns, supra*, the home rule city of Ironwood had lost two of its five commissioners, leaving a quorum of three. One of the three remaining commissioners refused to sit at any commission meeting called to select new commissioners resulting in a lack of a quorum for that purpose. This situation lasted from July of 1944 until February 20, 1945, when the Supreme Court decided the case. At the time the Court handed down the decision the City of Ironwood had scheduled an election to take place only a few weeks after the decision. The Court pointed out that:

"We note . . . that under the charter it becomes the duty of the three remaining commissioners to fill the vacancies by appointment; that two of the commissioners have endeavored to make such appointments, but their endeavors have been frustrated by the nonaction of the third commissioners; and that a biennial election in the city of Ironwood will be held in April, 1945, for the purpose of electing city officials as is provided for in the city charter. In our opinion the practical solution of the problem is for the election officials of the city of Ironwood to immediately take the necessary steps to follow the provisions of the city charter and to elect a commissioner at the April election in 1945 to fill the vacancy caused by the resignation of John A. Sabor, and at the same election to elect a commissioner to fill the unexpired term of the late Edward A. Marander." 310 Mich 648-649; 17 NW2d 785

It is therefore my opinion that a deputy clerk may serve on the township board after the recall of the clerk thereby providing the necessary quorum and permitting the board to appoint a temporary clerk. Consequently, under the circumstances you describe, the governor may not fill the vacancy.

FRANK J. KELLEY,
Attorney General.