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## Municipal Corporations: Right of Board of County Commissioners to Fill Vacancy

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# MUNICIPAL CORPORATIONS

## RIGHT OF BOARD OF COUNTY COMMISSIONERS TO FILL VACANCY

Incumbent township trustee was committed to the state hospital for insane. The Board of County Commissioners appointed X to fill the vacancy.<sup>1</sup> On appeal by taxpayers, Circuit Court declared appointment void. Appellate Court affirmed on the ground that insanity of an office-

15. 43 Stat. 936 (1925), 28 U.S.C.A. § 344 (b) (1928); Rule 38 (1939) Rules of the Supreme Court, 306 U.S. 716.
16. 43 Stat. 936 (1925), 45 Stat. 54 (1928), 28 U.S.C.A. § 344 (a) (1928); Rule 36 (1) (1939) Rules of the Supreme Court, 306 U.S. 714. See *Stephanson v. Daly*, 1 F. Supp. 865 (N.D. Ind. 1932).
17. Sufficiency of a petition for writ of error coram nobis and of evidence to sustain it are tested by the rules pertaining to motions for a new trial because of newly discovered evidence. *Swain v. State*, 215 Ind. 259, 18 N.E. (2d) 921 (1939); *Hicks v. State*, 213 Ind. 277, 11 N.E. (2d) 171, 12 N.E. (2d) 501 (1938); *Berry v. State*, 212 Ind. 294, 165 N.E. 61, 173 N.E. 705 (1930).
18. The trial court has no authority to grant a writ of error coram nobis while a petition for rehearing or an appeal is pending. *Partlow v. State*, 191 Ind. 657, 134 N.E. 483 (1922); *Westfall v. Wait*, 161 Ind. 449, 68 N.E. 1009 (1903); *State ex rel. Terre Haute v. Kolsem*, 130 Ind. 434, 435, 29 N.E. 595 (1892).
19. *Ex parte Botwinski*, 314 U.S. 586 (1942); *Jones v. Dowd*, 128 F. (2d) 331 (C.C.A. 7th, 1942); *Davis v. Dowd*, 119 F. (2d) 338 (1941).
20. Writ of error coram nobis must be brought in the court rendering judgment. See *State ex rel. Kunkel v. LaPorte Circuit Court*, 209 Ind. 682, 687, 200 N.E. 614, 616 (1936); *Partlow v. State*, 191 Ind. 657, 658, 134 N.E. 483, 484 (1922).
21. *Ex parte Davis*, 318 U.S. 412 (1943); *State ex rel. Kunkel v. LaPorte Circuit Court*, 209 Ind. 682, 687, 200 N.E. 614, 616 (1936). See Rules of the Indiana Supreme Court, Rule 2-40, adopted May 29, 1945, for procedure on appeal from an order on a petition for a writ of error coram nobis.
22. See n. 14 supra.
23. See n. 15 supra.
24. *Ex part Hawk*, 321 U.S. 114, 118 (1944).
  1. Appointment made in accordance with Ind. Stat. Ann. (Burns, 1933) § 65-106.

holder does not create a vacancy.<sup>2</sup> Held: reversed with instructions to dismiss. The court had no jurisdiction to review by appeal the appointment by the Board. *Board of County Comm'rs. of Dearborn Co. v. Droge*, 68 N.E. (2d) 650 (Ind. 1946).

The Board did not declare a vacancy, but merely filled it. Its action was purely ministerial,<sup>3</sup> and no appeal from it will lie, since not specifically authorized by statute.<sup>4</sup> If no vacancy existed, the Board's action was improper and can be tested in a proper action.<sup>5</sup>

The policy of many states is declared by constitutional or statutory provision precluding the insane from public office.<sup>6</sup> The protection of public interests requires that an office be considered vacant when the incumbent is completely incapacitated by insanity from performing his non-delegable duties.<sup>7</sup>

## TAXATION

### STATE TAXATION OF LEASEHOLD INTEREST IN PROPERTY OWNED BY FEDERAL GOVERNMENT.

Recent disapproval of property by the federal government, on lease and conditional sales terms, has sharply focused the problems inherent in the broad principle that federally owned property is exempt from state taxation.<sup>1</sup> Included in the question whether a state may tax a leasehold interest possessed by a person, otherwise not tax exempt, when the lessor is the United States. The solution to the above is dependent upon the answer to the following questions:

- a. May a leasehold interest in tax exempt property be separated from the interest of the owner in fee for tax purposes?
- b. Where the federal government owns the reversion, would such a tax be prohibited by the implied immunity of the federal government from state taxation?

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2. 66 N.E.(2d) 134 (Ind. App. 1946).
  3. *State v. Harrison*, 113 Ind. 434, 16 N.E. 384 (1887), 3 Am. St. Rep. 663 (1888).
  4. *State v. Circuit Court*, 214 Ind. 323, 15 N.E.(2d) 624 (1938); *Bunnell v. Board*, 124 Ind. 1, 24 N.E. 370 (1889); *Platter v. Board*, 103 Ind. 360, 2 N.E. 544 (1885); *Ind. Stat. Ann. (Burns, 1933) § 65-106*.
  5. The proper procedure would be for the claimant to the office to file an information in the nature of quo warranto as set forth in *Ind. Stat. Ann. (Burns, 1933) §§ 3-2001 to 3-2014*, and described in *McGuirk v. State*, 201 Ind. 650, 169 N.E. 521 (1930).
  6. Illustrative constitutional provisions are: *Minn. Const. Art VII, § 2*; *Nebr. Const. Art. III, § 23*; *R. I. Const. Art. II, § 4 and Art. IX, § 1*. The statutes usually disqualify a general class of persons, and the insane are included in that class by court interpretation: e.g., *Ky. Rev. Stat. (1942) § 446.010 (27)*; *Mass. G. L. 1932, c. 211, § 4*.
  7. *In re Killeen*, 121 Misc. 482, 201 N.Y. Supp. 209 (Sup. Ct. 1923); *People v. Robb*, 33 N. Y. S. R. 808, 11 N.Y. Supp. 383 (Sup. Ct. 1890).
  1. See Rice, "Problems of Intergovernmental Tax Immunity Arising out of Federal Contract Termination and Property Disposal" (1945) 54 *Yale L. J.* 665.