

TOWNSHIP
OFFICERS:

Township officers who failed to qualify as provided by Statutes are de facto officers and full credit may be given their official acts unless the third party has knowledge of the failure to qualify

March 9, 1942

Honorable Mark Wilson
Prosecuting Attorney
Henry County
Clinton, Missouri

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FILE

Dear Sir:

We have for answer your letter of the fifth of March, 1942, which is as follows:

"The Township officers in one of our townships have failed to comply with sections 13954-13955, R. S., 1939, in regard to their qualifications.

We would like to know if these officers can legally perform their duties as township officers and if full effect can be given to any duties and acts they perform."

Section 13954, R. S., 1939, provides as follows:

"Every person chosen or appointed to the office of township trustee and ex officio treasurer, member of the township board, township collector, or township clerk, and ex officio township assessor, or constable, before he enters on the duties of his office and within ten days after he shall be notified of his election or appointment, shall take and subscribe, before some justice of the peace, such oath or affirmation as is prescribed by law."

and section 13955, R. S., 1939, provides as follows:

" Such person shall, within ten days thereafter, cause such certificate, together with his acceptance of the

office to be filed in the office of the township clerk; his neglect or refusal so to do shall be deemed a refusal to serve."

In an early case, i.e., State v. McAdoo, 36 Mo., 453 the Supreme Court said as follows:

"* * * It appears from the record, that at an election held in Laclede county on the 5th day of September last, for sheriff of said county, the defendant and several other persons were candidates for the said office of sheriff, and that he received the highest number of votes cast, but had failed to take, file and subscribe the oath required of candidates by the Constitution of this State, within fifteen days next preceding the election.

By section 8 of Art. II. of the Constitution, no vote in any election by the people shall be cast up, nor shall any certificate of election be granted to any person who shall not within fifteen days next preceding such election have taken, subscribed and filed said oath.

McAdoo, having omitted to comply with the requirements of the Constitution, was ineligible; and the casting up the votes, and issuing the certificate to him, were acts unauthorized by law, and null and void. We are of opinion, therefore, that, in exercising the rights and privileges, and receiving the emoluments of said office, he has been guilty of usurpation, and we accordingly adjudge that he be ousted therefrom.

Having no evidence that he acted from any other than mistaken views, we for-

bear imposing any fine on him, and only order that he pay the costs. Judge Holmes concurs, Judge Lovelace absent."

This law has never been changed.

In State v. Smith, reported in 139 S. W. (2d) 929, 345 Mo., L. C. 1158 the court sets out and upholds the following:

"Moreover, we are of the opinion that Dr. Mitchell was at least a de facto alderman. 'An officer de facto is to be distinguished from an officer de jure, and is one who has the reputation or appearance of being the officer he assumes to be but who, in fact, under the law, has no right or title to the office he assumes to hold. He is distinguished from a mere usurper or intruder by the fact that the former holds by some color of right or title while the latter intrudes upon the office and assumes to exercise its functions without either the legal title or color of right to such office. Where one is actually in possession of a public office and discharges the duties thereof, the color of right which constitutes him a de facto officer, may consist in an election or appointment, holding over after the expiration of his term, or by acquiescence by the public for such a length of time as to raise the presumption of a colorable right by election, appointment, or other legal authority to hold such office. The duties of the office are exercised under color of a known election or appointment which is void for want of power in the electing or appointing body, or for some defect or irregularity in its exercise, such as ineligibility, want of power or defect being unknown to the public.' McQuillin Municipal Corporations, 2nd Ed., Revised Vol. 2, Sec. 500, Page 204"

In the case of *Alleger v. School District No. 16, Newton County*, 142 S. W. (2d) 660, the court upholds the doctrine as set out below:

"* * * * But in *State ex rel v. Perkins*, 139 Mo. 106, loc. cit. 117, 40 S. W. 650, loc. cit. 652, where this question arose, it was stated: 'The foundation stone of this whole doctrine of a de facto officer, as gathered from all the authorities, seems to be that of preventing the public or third persons from being deceived to their hurt by relying in good faith upon the genuineness and validity of acts done by a pseudo officer. However much color of authority may clothe the person who assumes to perform the function of an office and discharge its duties, yet, if the public or third persons are not deceived thereby, -if they know the true state of the case, -the reason which gives origin or existence to the rule which validates the act of an officer de facto ceases; and with it ceases, also, all of its ordinary validating incidents and consequences.'

In the case of *State ex rel v. Seay*, 64 Mo. 89, the court writing the opinion states:

"The law abhors vacancies in public office and great precautions are taken to guard against their occurrence. The policy of the law is to have someone always in place to discharge the duties of public offices, and in a doubtful case the construction of the law fixing the tenure of an office would be greatly influenced by that consideration; but where, as in this case, there is a casus omissus resulting from giving the language of the law the only construction of which it is fairly susceptible, the courts must leave it to the law-making power to make provisions to avoid such a consequence."

Hon. Mark Wilson

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CONCLUSION

It is therefore the opinion of this office that the township officers are usurpers in their offices and cannot legally hold the same, but that full effect can be given to any acts performed by them prior to their removal from office providing that third parties who may have been injured by their acts did not have knowledge of their lack of qualification for their offices.

Respectfully submitted,

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APPROVED:

~~ROY McKITTRICK~~
Attorney-General

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