CONSTITUTIONAL LAW:
STATUTES:
GENERAL ASSEMBLY:

1. A legislator, removed from his position as a result of an ouster suit wherein he is declared to have lacked the qualifications required for election, is a de facto officer when he holds office by some color of right or title.

2. It is well established in Missouri jurisprudence that the acts of a de facto officer are valid and effectual when they concern the rights of the public, until the officer's title is judged insufficient. Therefore, those measures that were approved by a bare constitutional majority with the ousted legislator a member of the majority, in the last session of the General Assembly, are valid.

OPINION NO. 96

February 2, 1970

Honorable Frank Bild
State Representative
District No. 47
Capitol Building
Jefferson City, Missouri 65101

Dear Representative Bild:

You recently requested an opinion of this office concerning the following question:

> "What is the status of bills adopted by the General Assembly by a bare constitutional majority, namely 82 votes, when one of those votes was cast by a State Representative who subsequently is declared to be a non-resident of his district and therefore not eligible to represent the district which he purported to represent, and which office he was holding at the time that this vote was cast?"

I presume that you are referring to the effect of a declaration of ineligibility by a court as a result of ouster proceedings initiated by the Attorney General.

Critical to the determination of whether the acts of a legislator subsequently ousted from his position are valid is a determination of his status as an officer. Clearly, a legislator is a public officer, according to the definition stated in the decision of State ex rel. Zevely v. Hackmann, 254 S.W. 53 (Mo. 1923), which stated:

> "A public officer is one elected or appointed in the manner prescribed by law, as an agent of the public in the performance of duties imposed by law and exercise of authority necessary and incidental to a proper discharge of such duties--. . ." (At 54)

It must then be determined whether the legislator is a de facto officer or a usurper during the period he serves in the legislature, prior to his ouster.

For the acts of the ousted representative to be valid, he must be characterized a de facto officer instead of a usurper. The decision of State ex rel. City of Republic v. Smith, 139 S.W.2d 929 (Mo. 1940) drew a distinction between de facto officers and usurpers. That decision stated:

> ". . .'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 ineligibility, want of power or defect being unknown to the public.' . . ." (at 933)

Accord, Alleger v. School District No. 16, Newton County, 142 S.W.2d 660 (Mo.App. 1940). See also 67 C.J.S., Officers, §135 et. seq.

A further relevant qualification to the de facto officer doctrine was elaborated by the decision in Alleger v. School District No. 16, Newton County, 142 S.W.2d 660 (Mo.App. 1940). That decision stated that if the public or affected third persons are not deceived by the acts of a de facto officer because they know that the officer is only de facto and not de jure, then the acts of the officer will not be validated insofar as they affect the persons with knowledge. However, it has been held that knowledge that an election has been contested or that a dispute has arisen concerning the legality of an election is not sufficient to preclude a person from relying upon the acts of one who is determined to be a de facto officer. Heyland v. Wayne Independent School District No. 5 of Wayne Tp., 4 N.W.2d 278 (Iowa 1942).

In general, one who is classified a de facto officer must, as a threshold requirement, have held office under color of right or title. 67 C. J.S., Officers, §138. However, the decisions of courts of this state have provided content to this term by describing what constitutes color of right or title.

According to the definition of de facto officer adopted by Missouri courts, a legislator would be a de facto officer, although he lacked the qualifications necessary to be a member of the legislature at the time of his election if he had been duly certified as elected, had taken the required oath of office, had been generally regarded by other legislators and the public as being a de jure legislator, had performed his duties for a length of time sufficient to raise the presumption of a colorable right by election to hold such office, and had performed such duties as might be performed by a qualified legislator. If an ousted legislator meets these standards, then he was an officer de facto.

Some decisions in other jurisdictions have addressed themselves to the question of the validity of an officer's acts when that officer subsequently is found to have been ineligible for his position. The case of Hogan v. Hamilton County, 132 Tenn. 554, 179 S.W. 128 (1915) is authority for the proposition that even if an official was ineligible to take office, the fact that he took the oath and was regarded as the occupant of that position was sufficient to make him a de facto officer. A similar conclusion was reached in the case of Attorney-General v. Megin, 63 N. H. 378 (1885), which held that when one who, though not legally elected, is declared so and inducted into office, he is a de facto officer.

The courts of the State of Missouri have played a leading role in the development of the de facto officer doctrine. The Missouri decisions have stated a general rule that the acts of an officer de facto are as valid and effectual where they concern the public

or the rights of third persons, until his title is judged insufficient, as though he were an officer de jure. The rationale supporting the postulation of the general rule was delineated in the case of St. Louis County Court v. Sparks, 10 Mo. 117 (1846). The court stated that, if a person is unqualified,

> ". . . his acts in the discharge of his duties are valid and binding. He may be guilty of usurpation, and be punished for acting without being qualified; but the peace and repose of society imperiously required that his official acts, so far as others are concerned, should be valid. This is true of the highest and lowest officers from the Governor to the Constable. . . ." (at 121)

The decision in Harbaugh v. Winsor, 38 Mo. 327 (1886) elaborated on the policy established by the Sparks decision. The Harbaugh decision indicated that to require third persons to ascertain whether an officer has been properly elected or appointed before submitting to his authority would be an onerous burden upon the governmental machinery of this state and upon the public. Commenting on the application of the de facto officer doctrine in Missouri, the Supreme Court of the United States, in Ralls County v. Douglass, 105 U.S. 728, 26 L.Ed. 957 (1881) commented:

> "In no State is it more authoritatively settled than in Missouri that 'the acts of an officer de facto (although his title may be bad) are valid, so far as they concern the public or the rights of third persons who have an interest in the things done,' . . ." (at 730)

Other leading Missouri cases holding that, so far as third persons and the public are concerned, there is no practical difference between the acts of de jure and a de facto officer include: School District of Kirkwood R-7 v. Zeibig, 317 S.W.2d 295 (Mo. 1958); Fort Osage Drainage District of Jackson County v. Jackson County, 275 S.W.2d 326 (Mo. 1955); State ex rel. City of Republic v. Smith, 139 S.W.2d 929 (Mo.App. 1940); In re Bank of Mt. Moriah's Liquidation, 49 S.W.2d 275 (Mo.App. 1932).

A case analogous to that at hand is the Fort Osage Drainage District case, supra. In that case, the Missouri Supreme Court held that where the acts of a drainage district board in levying a tax were acts of de facto officers, such tax levy was valid notwithstanding the fact that the board of supervisors of the district had not been legally and lawfully elected. Other jurisdictions have also held that the acts of a de facto officer are valid

insofar as they concern the rights of the public. E.g. United States ex rel. Watkins v. Commonwealth of Pennsylvania, 214 F.Supp. 913 (W.D.Pa. 1963); Borough of Pleasant Hills v. Jefferson Tp., 59 A.2d 697 (Pa. 1948); State v. Levy, 34 A.2d 370 (Vt. 1943). Watkins, supra, holds that the acts of malapportioned legislatures are valid despite the inherent denial of equal protection involved. See also, 67 C.J.S., Officers, §146.

CONCLUSION

It is the conclusion of this office that:

1. A legislator, removed from his position as a result of an ouster suit wherein he is declared to have lacked the qualifications required for election, is a de facto officer when he holds office by some color of right or title.

2. It is well established in Missouri jurisprudence that the acts of a de facto officer are valid and effectual when they concern the rights of the public, until the officer's title is judged insufficient. Therefore, those measures that were approved by a bare constitutional majority with the ousted legislator a member of the majority, in the last session of the General Assembly, are valid.

The foregoing opinion, which I hereby approve, was prepared for me by my assistant, Peter H. Ruger.

Yours very truly,

John C. Danforth

JOHN C. DANFORTH
Attorney General