OFFICERS: Acts performed before taking oath of
JUSTICE OF THE PEACE: office are acts of a de facto officer
and valid as to third parties.

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September 17, 1942

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Honorable Kelso Journey
Assistant Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Mr. Journey:

Under date of May 19th, 1942, you wrote this office requesting an opinion, as follows:

> "You furnished this office an opinion of March 9, interpreting sections 13954 and 13955, R. S., 1939, concerning de facto township officers.
>
> "Upon the township officers' election they subscribed to the statutory oath before a justice of the peace, who was elected upon the same date, but who never qualified as provided by statute. The question now is: 'Was the justice of the peace a de facto officer and was the oath administered by him sufficient to qualify the members of the township board?'
>
> "I would appreciate your earliest attention to this matter."

Your request came to the writer after two previous assignments.

Section 6 of Article XIV of the Constitution of Missouri requires that all officers, both civil and military, under authority of the State of Missouri, shall take and subscribe to an oath. There have been numerous cases

in which the failure of an officer to take the prescribed constitutional oath has been raised.

In the early case of State v. Dierberger, 90 Mo. 369, the question was raised as to the acts of a constable. The Supreme Court went into that question at length at l. c. 374, from which the following quotation is taken:

> "The more difficult question arises from the failure of the defendant to take an oath of office. Here it may be stated that the uncommunicated intentions of the constable had nothing to do with the case, and the evidence in that behalf should have been excluded. The defendant accepted the appointment for what it purported to be, and his right to act as a deputy must be tested by it and the failure to take an oath of office. The statute, section 3887, provides that a deputy sheriff shall file his appointment, with the oath endorsed thereon, with the clerk of the circuit court, and as no such statutory provision is made, either as to the oath or its preservation, with respect to deputy constables, the opinion seems to prevail, to some extent, at least, that the latter are not required to take an oath. But section 6, article 14, of the constitution requires all officers under the authority of the state, before entering upon the discharge of the duties of their respective offices, to take and subscribe an oath or affirmation to support the constitution and to faithfully demean themselves in office. Clearly the deputy constable is an officer under the authority of the state. He should take the oath, and until he does so, he is not an officer de jure; and the further question is, was he an officer de facto.

"In State v. Carroll, 38 Conn. 449, the conclusion among others is reached, that one is an officer de facto, where the duties of the office are exercised under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent, requirement, or condition, as to take an oath, or give a bond. So the acts of a justice of the peace were held to be valid as to third persons, though he had not taken an oath which the statute made a condition precedent to his right to act as such. Murgate Pier Co. v. Hannan, 3 Barn. & Ald. 265. The same principle applies in respect to a ministerial officer, as where a deputy constable or sheriff fails to take the oath of office. Lisbon v. Bow, 10 N. H. 167; Merrill v. Palmer, 13 N. H. 184.

"The act of the defendant here in question was probably his first act as deputy, but we do not see how that can make any difference, for the constable had the undoubted right to make the appointment, and the appointment was in every way a good, formal and valid appointment. The appointment made and constituted him a deputy; and though he failed to take the oath he was an officer de facto. The principle of law is well settled that the acts of such an officer are as effectual when they concern the public, or the rights of third persons, as though they were officers de jure. 21 Am. Dec. 213; 19 Am. Dec. 63, and notes; 50 Mo. 593; 72 Mo. 189."

In the case of Aiken v. Sidney Steel Scraper Co., 197 Mo. App. 673, a question was raised concerning the acts of a circuit judge who had failed to take his oath of office.

From this case the following lengthy quotation is taken, at l. c. 680:

> "However, we would prefer to pass by this mere technical objection and determine the broad question whether the failure to take the oath of office required by the statute is necessary to the legality of action taken by an officer duly elected and commissioned. For, as said above, we take judicial notice that Judge Buckner was elected and we should presume that the governor performed his duty in delivering a commission to him. The oath of office does not make the individual an officer. It merely relates to the manner in which he shall perform the duties of the office. It is perhaps true that were it known that an officer had not taken the oath of office he could be prevented from entering upon its duties generally, or in any particular case, until he had taken that step. It may be that the emoluments of the office could be withheld from him; but the oath is no more than an invocation to God that he will be faithful to the trust reposed in him, and it is not a necessary prerequisite to the validity of his official acts.
>
> "So it is stated to be the law that an oath of office 'is not indispensable, it is but a mere incident to the office and constitutes no part of the office itself.' (Mechems Public Offices, sec. 255.) In Clark v. Stanley, 66 N. C. 59, 60, it is said that, 'Public officers are usually required to take an oath, and usually a salary or fees are annexed to the office, in which case it is an office "coupled with an interest."

But the oath and the salary or fees are mere incidents, and constitute no part of the office.'

"On the same subject we take the following from 23 Am. & Eng. Encyc. of Law (2 Ed.) 355: 'The failure of a person duly elected or appointed to an office to take the prescribed oath or give a bond, as required, or either, does not, when he has proceeded to exercise the functions of the office, invalidate his acts so far as the public or third persons are concerned. As to them, his acts are as valid as though he were an officer de jure. His title to the office cannot be attacked collaterally, but only by direct proceedings in the nature of quo warranto. The failure to qualify constitutes a ground for ousting him from the office.'

"A failure to qualify by filing a bond when required, does not vacate the office. (State v. Churchill, 41 Mo. 41; State v. County Court, 44 Mo. 230.) In Sproul v. Lawrence, 33 Ala. 674, it is said that the election gives the right and invests him with title to the office. And that is the view taken in this State, even the commission being held to be mere evidence of his title.

"From these views it follows, that the fact that Judge Buckner failed to take the required oath of office following his election to the short term, falling between the expiration of his appointment and the beginning of his full term, did not invalidate his official acts taken during that time."

Both of these cases, and several others, hold that where one is duly elected or appointed, but fails to take

the oath of office that person is a de facto officer and his acts are valid as to third persons. The same principle should apply to a justice of the peace.

CONCLUSION

The conclusion follows that the justice of the peace was a de facto officer and the oath administered by him would be sufficient to qualify the members of the Township Board.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General of Missouri

WOJ:CP