QUO WARRANTO:
OFFICERS: Cities of the Fourth Class.

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February 27, 1934

Honorable Morris E. Osborn
Prosecuting Attorney
Shelbyville, Missouri

Dear Mr. Osborn:

We acknowledge receipt of your letter dated February 8, 1934 as follows:

"The other day when I saw you in Jefferson City, it was my intention to talk with you about the subject matter of this letter, but realizing how busy you were, I did not at that time care to bother you. However, I talked with your assistant, Mr. Noland,

Clarence is a 4th class city. For some time the citizens thereof have had several elections on water works. The results of the last election shows that the necessary two-thirds voted in favor of the program. Soon thereafterwards a temporary restraining was granted by Judge Drain to prohibit the issuance of the bonds. The order was dissolved a few days ago owing to the failure of petitioners to post a bond.

Now complaint has been made to this office that the Mayor and several members of the board have never taken a statutory oath etc. And I have been asked to file Quo Warranto proceedings to oust them.

Mr. Rendlin, attorney of Hannibal, is sending the data necessary to inform you of the facts in the matter. I wish

you would give me your department's opinion as to whether the mayor and Board members can be ousted on these grounds.

If you rule that Quo Warranto will oust them, will your department handle the matter."

1.

Section 6970 Revised Statutes Missouri 1929, applying to cities of the fourth class, reads as follows:

"Every officer of the city and his assistants, and every alderman, before entering upon the duties of his office, shall take and subscribe to an oath or affirmation before some court of record in the county, or justice of the peace in the township, or the city clerk, that he possesses all the qualifications prescribed for his office by law; that he will support the Constitution of the United States and of the state of Missouri, the provisions of all laws of this state affecting cities of this class, and the ordinances of the city, and faithfully demean himself while in office; which official oath or affirmation shall be filed with the city clerk. Every officer of the corporation, when required by law or ordinance, shall, within fifteen days after his appointment or election, and before entering upon the discharge of the duties of his office, give bond to the city in such sum and with such sureties as may be designated by ordinance, conditioned upon the faithful performance of his duty,and that he will pay over all moneys belonging to the city,as provided by law,that may come into his hands. If any person elected or appointed to any office shall fail to take and subscribe such oath or affirmation, or to give bond as herein required, his office shall be deemed vacant. For any breach of condition of

> any such bond, suit may be instituted thereon by the city, or by any person in the name of the city to the use of such person."

In the case of Edwards v. Kirkwood 162 Mo. App. 576, the court had under consideration the validity of the acts of the city attorney of the City of Kirkwood who had failed to take and subscribe an oath of office. The court at page 582 of the opinion said:

> "Admitting that he had not duly qualified by taking the oath of office, beyond question there was evidence in the case from which the trial court had a right to draw the inference that plaintiff was de facto city attorney of the city of Kirkwood at the time of entering into this contract and covering the period of the performance of the services for which he sued. It is true that section 9323,Revised Statutes 1909, provides that if any person elected or appointed to any office shall fail to take and subscribe the oath of office, his office shall be deemed vacant. But we have always recognized in this state that we may have officers de facto as well as de jure. (State v.Douglass, 50 Mo. 593; Wilson v. Kimmel, 109 Mo.260, l.c.264,19 S. W. 24; County of Ralls v. Douglass,105 U, S. 728,l. c. 730.) In State ex rel.Lemon v. Board of Equalization of Buchanan County, 108 Mo. 235, l.c. 241, 18 S. W. 782, it is held that although the law requires an oath of office to be taken, it is not indispensable; it is a mere incident of the office, constituting no part of the office itself."

In Simpson v. McGonegal 52 Mo. App. 540, the Kansas City Court of Appeals at page 545 of the opinion, defined a de facto officer in the following language;

> "The definition of an eminent English judge is often repeated in the books: 'An officer de facto is no other than

> he who has the reputation of being such, and yet is not a good officer in point of law.' Or, as more fully put by BUTLER, C. J.,in perhaps the ablest opinion on the subject in this country: 'An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons.' State v. Carroll, 38 Conn. 449."

In the case of State v. Dierberger 90 Mo. 369, the question considered was as to the validity of the acts of a deputy constable who had failed to execute the oath of office. The court at page 374 of the opinion said:

> "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."

And again on page 375:

> "The appointment made and constituted him a deputy; and though he failed to take the oath he was an officer de facto."

The holding as to officers being officers de facto proceeds upon the theory of protecting the interests of the public so far as the acts of those are concerned who have assumed to discharge the duties of an office and upon which assumption the public has relied.

Section 1618 Revised Statutes Missouri 1929, under the title of Quo Warranto, provides in part:

> "In case any person shall usurp,intrude into or unlawfully hold or execute any office or franchise, the attorney-general

> of the state,or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other count having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto,at the relation of any person desiring to prosecute the same* * * *."

2.

It is true that in the case of State ex rel Attorney General v. Steers 44 Mo. 223, it is held that:

> "A person derives his title to an office by his election, and not by his commission* * *."

Similar statements are made in subsequent decisions of the Supreme Court of this state but such a holding is not inconsistent with Section 6970, above quoted, because it is there provided that if any person elected or appointed to any office shall fail to take and subscribe such oath or affirmation his office shall be deemed vacant, thus assuming that the person elected acquired title to the office by an election but that the office thereafter became vacant because of the failure of the person elected to perform certain statutory requirements.

3.

The case of State ex inf. Ellis v. Dr. L. H. Ferguson, number 32,395, decided by the Supreme Court, and not yet reported, was an action to oust the Mayor of the City of Monett, Missouri, a city of the third class for an alleged violation of Section 13 of Article XIV of the Constitution of the State of Missouri, and it was there held that the Mayor of the City of Monett was a public officer, the court saying,

> "The first question is: Is the mayor of a city of the third class a public officer? The answer must be Yes."

The same rule would necessarily apply to the elective offices of a city of the fourth class.

4.

Section 1618, supra, gives to the prosecuting attorney the same authority to institute actions in quo warranto as it gives the attorney general. The right of prosecuting attorneys to institute a quo warranto proceeding is expressly held in State ex inf. Norman v. Ellis 325 Mo. 154.

CONCLUSION

From the foregoing, we are of the opinion that the offices of the mayor and members of the board of aldermen of the City of Clarence, Missouri, who have failed to take and subscribe, respectively, the oath of office as provided in Section 6970 Revised Statutes Missouri 1929, are vacant and a proceeding in quo warranto instituted by the prosecuting attorney of Shelby County will lie to oust such persons from exercising the privileges and powers of such offices.

Should it appear that the persons above referred to were elected to succeed themselves, and if it should appear that they had after such prior election taken and subscribed the oath of office, then a different situation might arise. In other words a question then would be presented as to whether or not such persons would not be entitled to hold their respective offices under a prior election until their successors were duly elected and qualified.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC