COUNTY ASSESSOR)
OFFICER)
COMPENSATION)
QUO WARRANTO)

County officer ousted from office by quo warranto entitled to compensation of office for official duties until his successor is elected or appointed and qualified. In performing any acts of the office subsequent to filing of an information against him in quo warranto proceedings, he is acting as a de facto officer and such acts are valid.

JOHN M. DALTON
~~XXXXXXXXXX~~

FILED
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February 4, 1953

John C. Johnsen
~~XXXXXXXX~~

Honorable ~~Earl Saunders~~
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting this department to render an official opinion on the questions presented in the attached letter to you under date of January 14, 1953, from Mr. Wallace V. Coleman, Clerk of the County Court of Jefferson County, Missouri, which reads:

> "The County Court of this County has instructed me to procure an opinion from you concerning the status of Martin E. Burgess, former assessor of Jefferson County, Missouri.
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> "On the 24th day of July, 1952 an information in Quo Warranto was filed in the Circuit Clerk's office of Jefferson County, Missouri, upon the information of J. W. Thurman, Prosecuting Attorney, against Martin E. Burgess, seeking to oust Mr. Burgess from his office as Assessor. In due time the case was tried in the Circuit Court of Phelps County, Missouri, and upon November 19, 1952, a judgment was entered by said court decreeing that Martin E. Burgess had forfeited all right to the office of Assessor of Jefferson County, Missouri on July 24, 1952, and ordering him ousted and removed from said office as of said date.
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> "On December 26, 1952 and after his motion for new trial had been overruled, Mr. Burgess filed a notice of appeal, and on January 2, 1953, the Clerk of the Supreme Court of Missouri acknowledged receipt of notice of appeal, together with docket fee in said case.

> "No bond of any kind was given by Mr. Burgess in connection with his appeal.
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> "Query No. 1. What is the status of Martin E. Burgess insofar as the office of assessor is concerned while his case is pending on appeal in the Supreme Court?
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> "Query No. 2. If the Supreme Court affirms the judgment of ouster, will Mr. Burgess be entitled to compensation for any services he may have rendered subsequent to July 24, 1952, the effective date of the ouster judgment?
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> "Query No. 3. In the event Mr. Burgess undertakes to assess property in Jefferson County, Missouri, in the year 1953, will the assessments be valid and will he be entitled to compensation for any assessments so made by him?"

There is no statutory authority for staying a judgment of ouster and forfeiture of office in a quo warranto proceeding. In fact, numerous decisions of the Supreme Court in this State hold that the judgment in such instances shall even date back to the filing of said information, and further, that if such officer continues to hold such office and perform the official duties of that office, he is usurping the office from and after the filing of the information against him, and in several instances, said officer was fined for usurping the office. Volume 74 C.J.S., Section 50, page 274, lays down the general rule in such instances and reads in part:

> "A judgment of ouster rendered in a quo warranto action or proceeding is not retroactive; but the judgment of ouster may be made to take effect as of the date of the filing of the information on which the proceeding is based."

In State v. Wymore, 132 S.W. (2d) 979, l.c. 988, the court held that the county prosecuting attorney should be ousted as of August 24, 1937, the date of filing an information against him and until the end of his first term of office. Further, for usurpation of said office from August 24, 1937, to the end of said term, he was fined one dollar and costs. In so holding, the court said:

> " * * * He is ousted from the office of prosecuting attorney as of Aug. 24, 1937, and until the end of his first term. For the usurpation of said office from said date until the end of said term he is fined one dollar and taxed all of the costs of this action."

See also State v. Graves, 144 S.W. (2d) 91, l.c. 98, wherein the court held that ouster should lie as of May 10, 1939, the date the information was filed and until the end of the present term of office, and also assessed a fine against the respondent. Inso holding, the court said:

> "We conclude therefore that our commissioner properly found that respondent, by failing to perform the duties of his office, has forfeited the same under Section 11202, R.S. Mo. 1929, Mo. St. Ann. § 11202, p. 6143. He should therefore be ousted from the office of prosecuting attorney of Jackson county as of May 10, 1939, and until the end of his present term of office. For the usurpation of said office from said date to the date of the judgment herein a fine of $1,000 should be assessed against respondent, and the costs of this action should be taxed against him. It is so ordered."

See also State v. Williams, 144 S.W. (2d) 98, l.c. 105, 106 (31-32).

All of the above decisions herein were rendered by the appellate court several months subsequent to the rendition of judgment of ouster in the lower court. Apparently in each case pending on appeal, said officials continued to perform the official functions of their offices and the courts held that they were usurping their offices.

In view of these decisions, it would appear that such officials having been ousted from their offices are not entitled to be compensated for any services rendered in any official capacity subsequent thereto. This particular phase, however, is not discussed in any of the foregoing decisions.

The general rule is that the right to compensation of an

office is an incident to the legal right to such office and not to the exercise of the functions of the office. In so holding, the appellate court in Stratton v. City of Warrensburg, 167 S.W. (2d) 392, l.c. 396, said:

> "It appears that the office of street commissioner was one to be created by ordinance and was so created. The weight of authority seems to be that an ordinance cannot be suspended by a mere resolution or by an act of the council of less dignity than the ordinance itself. 43 C.J. p. 568, § 898. Appellant's statement of the applicable rule of law in reference to the right to the salary of an office is not sufficiently comprehensive. The true rule is that the right to the compensation attached to an office is an incident to the legal right to the office and not to the exercise of the functions of the office. Cunio v. Franklin County, 315 Mo. 405, 285 S.W. 1007, and cases cited.
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> "The controlling question for determination here is not the existence of the office in question, but the right or title to said office, and whether or not under all the facts and circumstances plaintiff was possessed of such right and title during the period for which he claims compensation."

In view of the foregoing general rule of law, we might be inclined to hold that such ousted officials are not entitled to compensation of their office subsequent to the filing of an information if it were not for the fact that under the Constitution and laws of this State, such public officials as county assessors, elected to office, are required to hold their respective offices until their successors are duly appointed or elected and qualified.

In State v. Tyler, 159 S.W. (2d) 777, l.c. 781, which is a criminal case, an objection was raised on the ground that the indictment filed therein was signed by W. W. Graves, Prosecuting Attorney of Jackson County, on September 6, 1940, and that he had been ousted from that office prior thereto, and, therefore, had no legal status as prosecuting attorney of Jackson County. The court held that its official record

disclosed that the original opinion of the court was handed down and filed therein September 3, 1940, ousting W. W. Graves, the Prosecuting Attorney, and his motion for rehearing was overruled on November 9, 1940. He had been elected for a two-year term which would have normally expired on December 31, 1940. The court further held that during the interim between the filing of the opinion of the court ousting him from office and a determination of his motion for rehearing that his official acts are not null and void in the absence of a successor being appointed or elected and qualified. In so holding, the court said:

> " * * * Section 12989, R.S. 1939, Mo. St. Ann. § 11363, p. 617, provides: 'If any vacancy shall happen from any cause in the office of * * * prosecuting attorney * * *, the governor, upon being satisfied that such vacancy exists, shall appoint some competent person to fill the same * * *.' See, also, § 11509, R.S. 1939, Mo. St. Ann. § 10216, p. 3704. Section 12988, R.S. 1939, Mo. St. Ann. § 11362, p. 617, provides: 'The * * * prosecuting attorneys * * * shall be commissioned by the governor, and shall hold their offices until their successors are elected, commissioned and qualified.' (See, also, § 12934, R.S. 1939, Mo. St. Ann. § 11309, p. 597). Section 12820, R.S. 1939, Mo. St. Ann. § 11196, p. 6141, reads: 'All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified.' Our constitution, Art. 14, § 5, also provides: 'In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified.' These (and possibly other) statutory and constitutional provisions are designed to and evidence a public policy on the part of the state to prevent an interregnum between the termination of an incumbent's right to an

> office or the expiration of his official term and the qualification of his successor in the public interest. Prosecuting attorney Graves was not a mere usurper or intruder and, whatever may have been his legal status as between himself and the state, we are of opinion that, if not a de jure officer, he was at least a de facto officer (see State ex rel. v. Smith, 345 Mo. 1158, 1165, 139 S.W. 2d 929, 933 (5-8), defined) during the interim between the filing of the original opinion ousting him from office and the determination of his motion for rehearing thereon, no successor having been appointed, commissioned and qualified, in so far as the public and third persons may be concerned, and such acts of an official nature as he may have performed during said period are not null and void and may not be successfully first attacked in a motion for new trial by an accused after taking his chances with and being disappointed by the verdict of the jury. (Cases cited.) * * * "

The law in the State today follows that cited in State v. Tyler, supra.

Section 105.010, RSMo 1949, provides that all officers elected or appointed by authority of the laws of this State shall hold their offices until their successors are elected or appointed, commissioned and qualified.

Section 105.030, RSMo 1949, provides the procedure for filling vacancies caused in any manner.

Article VII, Section 12, Constitution of Missouri, still provides that except as otherwise provided in the Constitution and subject to the right of resignation, all officers shall hold office for the term thereof and until their successors are duly elected or appointed and qualified.

In State ex rel. Evans v. Gordon, 149 S.W. 638, we find a very thorough discussion on the right of such a de facto officer to the compensation of the office. In that case, the court holds that of course if there is a de jure officer, he is entitled to the compensation of the office and the de facto officer cannot claim any compensation. The court cites several Missouri decisions holding in fact that in the absence of a

de jure officer that the de facto officer is entitled to the compensation of the office. In so holding, the court said at l.c. 642:

> "It is also settled law that, as the compensation is incident to the title, it belongs to the de jure officer. As to the right of the de facto officer to draw the salary during his incumbency, the authorities are not harmonious. Both Throop and Mechem lay down the rule, based upon New York decisions, that the de facto officer has no right to the salary, and this because a claim for salary must be based upon title. (Throop on Public Officers, § 517; Mechem's Public Offices & Officers, § 331. And such is the holding in many jurisdictions. Our court, in several cases, adheres to the contrary doctrine. State v. Draper, 48 Mo. 213; State v. Clark, 52 Mo. 508; State v. John, 81 Mo. 13; Dickerson v. Butler, 27 Mo. App. 9; State ex rel. v. Walbridge, 153 Mo., loc. cit. 202, 54 S.W. 447. All the authorities, however, agree that the de jure officer, on establishing his title, may recover from the de facto officer the compensation which the latter has received."

In Dalton v. Fabius River Drainage District, 184 S.W. (2d) 776, l.c. 782, we again find the court announcing the rule that compensation is incident to the office and belongs to the de jure officer, and he has a right to recover from the de facto officer. However, we still think that since there is no de jure officer or another claiming compensation of the office, since the present official is required to hold the office until someone relieves him, he is certainly entitled to the fee. The court, in so holding, said:

> "The rule in most states, including our own state, with respect to compensation for services performed by a public officer, is that such compensation is an incident to the office and belongs to the de jure officer, and he has the right, upon establishing his title to the office, to recover from the de facto officer whatever sums have been paid to that officer by way of salary, fees or emoluments, even though

> the latter may have performed the duties of the office. 43 Am. Jur. § 386, p. 167.
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> "The last above named authority also states that: 'One who intrudes into or usurps a public office has no right to the salary or emoluments attached to the office, and as respects his right to retain as against the de jure officer any compensation paid to him for performing the duties of the office, he stands even in a less favorable position than an officer de facto. The rule that holds the latter liable to the de jure officer should and does apply with more strictness to one who has usurped the office, and in case the compensation or emoluments of the office are paid to him, he becomes liable for them to the de jure officer in an action for money had and received.' 43 Am. Jur., § 387, p. 168. (Emphasis ours.)
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> "The de facto doctrine has been invoked in many cases to protect the interests of the public in connection with the acts of persons exercising the duty of an officer without actually being one in strict point of law. The case at bar affords an example of the necessity for the application of that doctrine. It is said that the de facto doctrine 'rests on the principle of protection to the interests of the public and third parties. * * * The law validates the acts of the de facto officers as to the public and third persons on the ground that, although not officers de jure, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid.' 43 Am. Jur. § 470, p. 225."

We believe, giving these decisions a reasonable construction, that the court fully intended to hold that if there is a de jure officer appointed or elected and qualified that he is entitled to the emoluments of the office, even if he is not performing the duties of said office. However, if there is no de jure officer or anyone appointed to replace said de facto officer and perform such official duties and he continues to

perform such functions that under the law, he is required to carry on and is entitled to the emoluments of the office.

Therefore, in view of the fact it is necessary that someone perform the official duties of the office of this county assessor, pending a final determination as to his actual status in the quo warranto proceedings ousting him from said office, assuming that no successor in office has been appointed or elected and qualified, and furthermore, under the foregoing statutes and Constitution of this State, which provide that such officer is required to continue to perform the functions of his office until his successor is appointed or elected and qualified, we are inclined to believe that such person is entitled to the compensation of such office until his successor is appointed or elected and qualified.

As to the validity of any official action on the part of this assessor, subsequent to the filing of the information in the quo warranto proceedings against him, the decisions seem to hold that any such official acts performed by him are not null and void for the reason that if he is not acting as a de jure officer, he is at least a de facto officer. (See the above quotation from State v. Tyler, supra.)

In State ex rel. City of Republic v. Smith, 139 S.W. (2d) 929, 345 Mo. 1158, the court defined a de facto officer as one who holds office by some color or right of title. See also St. Louis County Court v. Sparks, 10 Mo. 117, 45 Am. Decennial 355.

It was held in State ex rel. City of Clarence v. Drain, 73 S.W. (2d) 804, 355 Mo. 424, that the acts of a de facto officer, although title may be bad, are valid so far as public rights of third persons may have an interest in the things done, and their official acts cannot be impeached collaterally. In so holding, the court said at l.c. 805, 806:

> "The petition of the plaintiffs shows that the mayor and the board of aldermen of the city were de facto officers and assumed the duties and performed the functions of such officers in all matters connected with the bond election. '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. Official acts

cannot be impeached collaterally.' Harbaugh v. Winsor, 38 Mo. 327; Wilson v. Kimmel, 109 Mo. 260, 19 S.W. 24; Hill v. S. S. Kresge Co., 202 Mo. App. 385, 217 S.W. 997."

Therefore, in view of the foregoing decisions, we conclude that any acts of this county assessor of an official nature are valid notwithstanding the judgment of ouster.

CONCLUSION

Therefore, it is the opinion of this department that the status of Martin E. Burgess, insofar as the office of county assessor is concerned, pending his appeal in the quo warranto proceedings from a judgment ousting him from said office pending in the Supreme Court, is that in the nature of a usurper of office; however, he is in fact a de facto officer until his successor is appointed or elected and qualified.

Whatever action the Supreme Court may take on the judgment of ouster against said county assessor, he is still entitled to compensation of the office for official services rendered at least until such time as his successor is appointed or elected and qualified.

As a de facto officer, any purported official acts of the office of county assessor performed by him shall be valid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

ARH:VLB