4386.

APPROVAL, BONDS OF VILLAGE OF FLUSHING, BELMONT COUNTY, OHIO, $13,660.00.

COLUMBUS, OHIO, July 2, 1935.

Industrial Commission of Ohio, Columbus, Ohio.

4387.

MAYOR—ABANDONMENT OF OFFICE CONSTITUTES IMPLIED RESIGNATION.

SYLLABUS:

1. *Abandonment of the office of mayor of a city constitutes implied resignation of the office, and is a ground for vacancy under section 4274, General Code.*

2. *Questions relating to abandonment of the office of mayor of a city discussed.*

COLUMBUS, OHIO, July 2, 1935.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This is to acknowlelge receipt of your recent communication reading as follows:

> "We are unable to find in our files any interpretation of law relative to the removal of a mayor of a city, except in the manner provided in sections 4268 and 4269 G. C.
>
> Therefore, we find it necessary to submit the questions contained in the inclosed letter to you for an opinion."

The enclosed letter referred to in and attached to your communication, reads as follows:

> "The opinion of your department upon the following questions is respectfully requested:
>
> 1. May the council of a municipality declare by resolution the office of Mayor vacant when the Mayor has been out of the city, in another state, his whereabout unknown, for a period of over ninety days?
>
> 2. May the Auditor safely pay the salary of Mayor to President of of Council who is now serving as Mayor when resolution as stated above has been passed by council?
>
> 3. Could the legality of any legislation be questioned which would be passed by council and signed by the present Mayor?
>
> 4. Would the procedure as stated above in any way effect the validity of bonds issued?

Facts relative to the above are as follows:

> Mayor of city left for South in February this year informing President of Council that he would be gone for thirty days. At end of thirty days a letter was received stating that he desired an extension of another thirty days. Neither of the letters were from the same town and council did nothing towards granting an extension. Council on April 22nd, passed resolution declaring the office of Mayor vacant. Since then President of Council has been serving as Mayor. No payment has been made of mayor's salary to President of Council since passage of resolution.
>
> While the General Code of Ohio provides for the removal of a Mayor, yet in view of the fact that city council has taken the action that they have, your opinion on the questions contained herein would be greatly appreciated."

Sections 4273 and 4274, General Code, are pertinent to consider in connection with the questions raised, reading as follows:

> Sec. 4273. "When the mayor is absent from the city, or is unable for any cause to perform his duties, the president of the council shall be the acting mayor. While the president of the city council is acting as mayor, he shall not serve as president of council."
>
> Sec. 4274. "In case of the death, resignation or removal of the mayor, the president of council shall become the mayor, and serve for the unexpired term, and until his successor is elected and qualified. Thereupon the president pro tem of council shall become president thereof, and shall have the same rights, duties and powers as his predecessor. The vacancy thus created in council shall be filled as other vacancies, and council shall elect another president pro tem."

From the foregoing, it will be noted that temporary absence of the mayor from his office does not cause a vacancy therein. It is only by reason of death, resignation, or removal that a vacancy occurs in the office of mayor. The word "removal" undoubtedly was intended to have reference to removal under sections 4268 and 4269, General Code, which provide:

> Sec. 4268. "In case of misconduct in office, bribery, any gross neglect of duty, gross immorality, or habitual drunkenness of any mayor, upon notice and after affording such mayor a full and fair opportunity to be heard in his defense, the governor of the state shall remove him from office. The proceedings for his removal shall be commenced by the governor putting on file in his office a written statement of the alleged causes for the mayor's removal, and he shall cause a copy of such statement to be served upon the mayor not less than ten days before the hearing of the matter. Pending such investigation by the governor, he may suspend the mayor for a period of thirty days."
>
> Sec. 4269. "The proceedings had by the governor upon such removal shall be public. A full detailed statement of the reasons of such removal shall be filed by the governor in the office of the secretary of state, and shall be made a matter of public record therein. The decision of the governor, when so filed, with the reasons therefor, shall be final."

Section 4274, General Code, was first passed in 1902 (96 O. L. 63) as section 132

of the Municipal Code passed in that year. Sections 4268 and 4269, General Code, were also passed in 1902 (96 O. L. 95) as section 226 of the Municipal Code passed in that year.

Since 1913, when the legislature enacted sections 10-1 et seq., General Code, there has been an additional method of removing a mayor as well as other officers by the petition method upon grounds therein enumerated. However, it is evident that the vacancy claimed herein does not occur on account of removal under sections 4268, 4269 or 10-1, et seq., General Code.

In Volume 2 of McQuillan on Municipal Corporations, page 184, under section 515, entitled "Resignation of Officer", it is stated:

> "The resignation of an office is the act of giving it up and is synonymous with surrender, relinquishment, *abandonment* or renunciation."

In Section 516 of the same text, entitled "Resignation by Implication or Abandonment of Office", it is said:

> "An office may be vacated by abandonment. Abandonment may be treated as a constructive resignation * * * . A resignation of a public office may be either express or implied. A resignation by implication may take place by an abandonment of official duty without leave of absence or without good cause shown. But what acts will constitute abandonment or implied resignation of an official depends, of course, upon the circumstances of the particular case and the controlling law * * *. The absence must be so long continued as to raise the presumption that abandonment was intended. So the resignation of an officer cannot be presumed in all cases because of failure to perform the duties appertaining to the office. That is to say that, in the absence of affirmative action on the part of the incumbent, mere neglect of official duties is not invariably sufficient to constitute an abandonment."

Thus it is possible that, since section 4274, General Code, makes "resignation" a ground for vacancy in the office of mayor, and abandonment is implied resignation, the office of mayor may be vacated by abandonment. However, as shown by the text cited, the courts do not state definitely the length of time an officer must be absent from his duties to constitute abandonment.

In the case of a county commissioner, section 2398, General Code, provides:

> "The absence of commissioner from the county for a period of six months, shall be deemed a resignation of the office."

It might be argued that the legislature in passing section 2398, General Code, has recognized as public policy that a period shorter than six months should not ordinarily be regarded as sufficient length of absence to constitute implied resignation.

However, it was held in the case of *People* vs. *Hanifan,* 6 Illinois Appellate, 158, that an absence for five months was sufficient to constitute abandonment. In such case, it was stated that lapse of time is not the important element in determining whether there has been abandonment; the main consideration is to determine whether there has been a manifestation of clear intention by the officer to wilfully abandon the office and its duties.

In Volume 43, Corpus Juris, 649, 650, section 1073, under the heading "Implied Resignation", it is stated:

"The abandonment of an office constitutes an implied resignation, and although it is not specifically provided that a councilman's removal from the borough shall leave a vacancy in his office, yet where the facts disclose a removal and an actual abandonment of office, a vacancy is created. A single wilfull absence or act of delinquency does not constitute abandonment. The absence must be so long continued as to justify the presumption of abandonment, *and the time necessary to raise such presumption must be a mixed question of law and fact to be determined from the circumstances of each case.*" (Italics the writer's)

Hence, it would be a question of law and fact to be determined from the circumstances whether or not the mayor in the present case abandoned his office. There are obviously not enough of the surrounding facts and circumstances in the enclosure you present, for me to state an opinion on the matter.

In view of the fact that if and when there is a vacancy in the office of mayor under section 4274, General Code, "the president of council *shall* become the mayor", thus leaving a vacancy in such office, and "thereupon, the president pro tem of council *shall* become president thereof," thus leaving a vacancy in the office of the councilman who is president pro tem, it would appear to be necessary for council to determine whether the surrounding facts and circumstances of the absence of the mayor have as a matter of law and fact constituted abandonment of the office or implied resignation therefrom. The last sentence of section 4274, General Code, clearly shows that it is the duty of council to fill any vacancy in council and office of president pro tem by the president pro tem becoming president of council and the president of council becoming mayor.

I presume that the first two specific questions presented arise because of an opinion of one of my predecessors, reported in Opinions of the Attorney General for 1927, Vol. III, page 2152, wherein it was held, as disclosed by the syllabus:

"When, for any reason, the mayor of a city is unable to perform the duties of his office, and the president of council thereby becomes acting mayor, said president of council is not entitled to compensation provided for the office of mayor during the period while he is so acting, but is entitled only to compensation provided for the office of president of council."

In this opinion it was pointed out that salary is an incident to an office—attached to the office. In other words, as long as a person legally holds an office, he is entitled to the salary attached to it. Thus, if council in its study of the facts surrouding the absence of the mayor has concluded that there has been an implied resignation in law, the mayor's office is then vacated, and the president of council *shall* become mayor, and thus he becomes entitled legally to the salary attached to the office of mayor.

In view of the fact, as stated above, that I have not all the surrounding facts in the matter of the absence of the mayor before me, it is impossible to express a definite opinion on your first question.

As for your second, third and fourth questions, it appears to me that the president of council who becomes mayor would be at least a de facto mayor, if not a de jure mayor. While the authorities in Ohio are divided on the question of the right of a de facto officer to maintain an action for the salary pertaining to the office, it appears to be clear that a salary paid to a de facto officer cannot be recovered by the public corporation which has made payment thereof, at least where the de facto officer has actually rendered the services for which he was paid. It is uniformly held that the

acts of a de facto officer are valid so far as the public and third persons are concerned, and cannot be collaterally attacked.

In Volume 32, Ohio Jurisprudence, 1098, under the topic "Public Officers", subtopics "De Facto Officers", "Right to Compensation", it is stated:

> "As a general rule, a de facto officer is not entitled to maintain an action for the salary, fees, or other compensation pertaining to an office. This general rule has been followed in a decision rendered by the former Cincinnati superior court and one court of common pleas, while another court of common pleas has declared that a de facto officer is entitled to compensation. And it would seem to follow from this holding that a de facto officer could maintain an action for the salary, fees, or other compensation pertaining to an office.
>
> The reason for the general doctrine is that the right to the salary and emoluments of a public office attach to the true, not merely the colorable title; and in an action brought by a person claiming to be a public officer for the fees or compensation given by law, his title to the office is in issue, and if that is defective and another has the real right, although not in possession, the plaintiff cannot recover. Actual incumbency alone gives no right to the salary or compensation. The right to recover is denied, not upon the ground of actual fraud upon his fault, for it often happens that he is not under a claim of right but under a prima facie title which he cannot or may not know to be invalid. Nor is it denied upon the ground that he is a mere volunteer and that the government should not be obliged to pay him for his services, for in most cases they are rendered in good faith and under the expectation, both on his part and on the part of the public, that he is to receive the emoluments of the office. The principle is that the right follows the true title, and the court will not aid him by permitting him to recover the compensation which rightfully belongs to another. But a salary which has been paid to a de facto officer cannot be recovered back by the public corporation which has made payment thereof, at least where he has actually rendered the services for which he was paid."

At page 1097 of the same volume of Ohio Jurisprudence above referred to, it is stated under section 242, entitled "Validity as to Third Persons and Public; Collateral Attack":

> "The general rule is that the acts of a de facto officer are to be upheld as valid, in so far as they involve the interests of the public and of third persons, until his title to the office is adjudged insufficient. * * * One important consequence of the rule that the acts of a de facto public officer are valid as far as the public and third person are concerned is that the official acts of a de facto officer cannot be collaterally attacked."

In support of the foregoing, numerous Ohio cases are cited by the text.

In view of the foregoing, it would appear that if the auditor of the city pays the salary of the mayor to the new incumbent, who is transacting the duties of the mayor's office, there would be no right for the municipality to recover it.

As for the third and fourth questions, it would appear that since the acts of a de facto officer are valid so far as the public is concerned, the legislation and bond issue would be valid.

It is believed that a more specific answer to the questions submitted may not be given.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4388.

APPROVAL, CONTRACT FOR GENERAL WORK FOR PROJECT KNOWN AS T. B. COTTAGE, HAWTHORNDEN FARM, CLEVELAND STATE HOSPITAL, CLEVELAND, OHIO, $120,595.00, SEABOARD SURETY COMPANY OF NEW YORK, N. Y., SURETY—ROBERT H. EVANS & CO., COLUMBUS, OHIO.

COLUMBUS, OHIO, July 3, 1935.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works for the Department of Public Welfare, and The Robert H. Evans & Co., of Columbus, Ohio. This contract covers the construction and completion of contract for General Work for a project known as T. B. Cottage, Hawthornden Farm, Cleveland State Hospital, Cleveland, Ohio, in accordance with Item No. 1 and Item No. 6 (Alt. G-5) of the form of proposal dated May 13, 1935. Said contract calls for an expenditure of one hundred twenty thousand five hundred ninety-five dollars ($120,595.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also submitted a certificate of the Controlling Board showing that said board has released moneys for this project, in accordance with section 1 of House Bill No. 69 of the second special session of the 90th General Assembly.

In addition, you have submitted a contract bond upon which the Seaboard Surety Company of New York, N. Y., appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the Workmen's Compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon, and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
JOHN W. BRICKER,
Attorney General.