1869

PUBLIC OFFICES — APPOINTMENT BY GOVERNOR — REFUSAL OF SENATE TO ADVISE AND CONSENT—NEW APPOINTMENT MUST BE MADE—FAILURE OF SENATE TO ACT—*DE FACTO* TENURE OF OFFICE: RECOVERY OF COMPENSATION NOT TO BE MADE, FURTHER PAYMENTS MAY BE RECOVERED—AUDITOR OF STATE MAY CHALLENGE RIGHT OF *DE FACTO* OFFICER TO COMPENSATION, §115.32 R.C.

SYLLABUS:

1. Where the appointment of an individual to an office, required by law to be filled with the advise and consent of the senate, is made when the senate is not in session, and is reported to the senate as provided in Section 3.03, Revised Code, and where the senate rejects such reported appointment, or fails to act thereon prior to *sine die* adjournment of the senate, it becomes thereafter the duty of the governor, under Section 3.03, Revised Code, to make a new appointmnt to fill such vcancy; and the *de jure* tenure in such office of an individual so appointed in advance of such session and reported to the senate for its advice and consent, is terminated upon such rejection or upon such *sine die* adjournment without action thereon. Paragraph one of the syllabus of Opinion No. 6224, Opinions of the Attorney General for 1956, p. 101, approved and followed.

2. The rule that recovery by the public authorities cannot be had in the case of payment of compensation and other perquisites of office to a *de facto* officer is based upon the notion that a mutual mistake of law has been made upon the supposition that such officer is actually a *de jure* officer. Upon a judicial determination of the *de facto*

status of any such officer further payments of compensation, *etc.*, to him are not authorized by law, and any payments so made may be recovered as provided in Section 117.10, Revised Code. Paragraph five of the syllabus in Opinion No. 6224, Opinions of the Attorney General for 1956, p. 101, explained.

3. Where there is a failure of the senate to act, prior to *sine die* adjournment, on the requested confirmation of a nominee, or of a "recess" appointee under the provisions of Section 3.03, Revised Code, the provision in that section that thereafter a "new appointment shall be made" (1) authorizes the governor to make such appointment following *sine die* adjournment of the senate, (2) permits him a reasonable time in which to do so, and (3) permits continued *de facto* incumbency in such office during such reasonable time. The Auditor of State, by virture of his duty under Section 115.32, Revised Cide, to determine the legality of all claims for payment from the state treasury, may challenge the right of any such *de facto* officer to any compensation or other perquisites attached to such office in any such case where he deems the action of the governor in making such new appointment to be unreasonably delayed.

Columbus, Ohio, March 21, 1958

Hon. James A. Rhodes, Auditor of State
State of Ohio, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Section 3335.02 provides that the government of Ohio State University shall be vested in a board of 7 trustees who shall be appointed by the Governor, *with the advice and the consent of the Senate.*

"A trustee was appointed but failed to obtain confirmation of the Senate when his name was submitted to a special session in 1956 when his original appointment expired. Thereafter, on June 18, 1957, the same name was submitted for a 7 year term but again failed to receive the consent of the Senate. In the opinion of the Attorney General rendered February 6, 1956, No. 6224, your predecessor held:

" 'The term "new appointment" as employed in Section 3.03, Revised Code, signifies the appointment of an individual other than the one as to whose appointment the senate fails to advise and consent as provided in such section, rather than the mere formality of renaming the same individual to the same office.'

" 'Where the reappointment of an individual to an office in which he has previously been confirmed by the senate is reported to the senate, and that body fails to act thereon prior to sine die adjournment, and such officer on the date of such adjournment holds office by virtue of the provisions of Section 3.01, Revised

Code, his continuation in office thereafter, as provided in such section, is "until his successor is * * * appointed and qualified," and not for the full term designated in such appointment.'

"In view of the decision in the case of State ex rel. vs. Johnson, 8 C.C. (N.S.) 535, a formal opinion is respectfully requested:

"1. Does the trustee whose nomination has not been consented to by the Senate, though twice submitted for such consent, still hold office as a trustee of The Ohio State University?
"2. If you hold that this appointee by the Governor is a lawfully appointed trustee de facto, does his appointment hold for a seven year term or does he serve until his appointment has been consented to by the Senate?

"3. Does the failure to accept the 'advice and consent of the Senate' on two succeeding occasions bar the aforesaid trustee from holding office?"

In addition to the facts supplied in your query I note in the Ohio Senate Journal, July 29, 1949, that Mr. Ketner was appointed by the governor and confirmed by senate for a term beginning on that date and ending on May 13, 1956. This suggests the possibility of a present *de jure* tenure in office under the rule in *State ex rel.* v. *Howe,* 25 Ohio St., 588, the syllabus in which reads in part:

"1. Where an officer appointed by the governor, by and with the advice and consent of the senate, is authorized by law to hold his office for a term of three years, and until his successor is appointed and qualified, and no appointment of a successor is made by the regular appointing power at the expiration of his term of three years, the office does not become vacant; but the incumbent holds over as a *de jure* officer until his successor is duly appointed and qualified."

However, I am informed that the records of the governor's office disclose that Mr. Ketner was given a "recess" appointment by the governor on June 26, 1956, that he thereafter qualified under that appointment by taking a new oath of office as required by Section 3.22, Revised Code, and thereafter a copy of such oath was filed with the Secretary of State on July 6, 1956. In this situation I invite attention to the second paragraph in Opinion No. 6224, Opinions of the Attorney General for 1956, p. 101, which reads:

"2. Where an officer has been appointed with the advice and consent of the senate for a stated term and his appointment as his own successor following the expiration of such term is reported

> to the senate which fails to act thereon prior to sine die adjournment, such officer will continue in office thereafter under the provisions of Section 3.01, Revised Code, only where his tenure on the date of such adjournment was by virtue of the provisions of that section; but where, following such reappointment the individual concerned qualified anew in such office by taking an oath of office and filing the same with the secretary of state as provided in Section 121.11, Revised Code, his tenure in office is controlled by the provisions of Section 3.03, Revised Code, and upon the failure of the senate to advise and consent to such appointment his de jure tenure is terminated as provided in such section and a 'new appointment' must be made as therein provided."

I find myself in accord with the conclusion thus stated and with the reasoning advanced by the writer in support of it, and I thus conclude that it is fully applicable here.

In arriving at this conclusion I am not unaware of the provisions of Article VII, Sections 2 and 3, Ohio Constitution, as they pertain to trustees of state institutions. As in the case of Section 3.03, Revised Code, the constitutional provisions direct the governor to make appointments and fill vacancies with the advice and consent of the senate. Whether under Section 3.03, Revised Code, or Article VII, Sections 2 and 3, Ohio Constitution, the reasoning is equally sound that where the "individual concerned (has) qualified anew" his tenure in office is not controlled by Section 3.01, Revised Code, so as to constitute him a holdover officer. We must, therefore, regard the individual here in question as having lost his *de jure* tenure upon *sine die* adjournment of the senate, without action on his nomination, in January 1956. It follows, then, that since that date he has been a *de facto* officer only.

Your chief, if not only, interest in this matter I assume, is concerned with your duty under Section 115.32, Revised Code, to approve as to legality such claims as may be advanced by this individual for reimbursement of expenses incurred as *de facto* trustee, there being no compensation provided for this office. More specifically, I do not understand you to inquire concerning the validity of his acts as trustee during the period indicated above as that of his *de facto* incumbency.

On the point of expense claims, I entertain no doubt but that the rule applicable to compensation of *de facto* officers would be equally applicable to their claims for other perquisites of office. This brings us

to a consideration of the fifth paragraph of the syllabus in Opinion No. 6224, Opinions of the Attorney General for 1956, p. 101, which reads:

> "5. Salary paid to a de facto officer cannot be recovered by the public authorities where such officer, acting in good faith, has actually rendered the services for which he was paid."

I am fully in agreement with this statement that compensation paid to a *de facto* officer cannot be recovered where all concerned have acted in good faith. Cited in support of this conclusion by the writer of the 1956 Opinion, *supra.,* p. 110, is 43 American Jurisprudence, 239, and the cases therein cited as authority for this proposition make it clear that the rule is based chiefly on the circumstances that compensation paid to a *de facto* officer is usually accomplished *under a mutual mistake of law.* To like effect is *State, ex rel. Dickman* v. *Defenbacher,* 151 Ohio St., 391, at page 395.

Now a *de facto* officer is defined in 32 Ohio Jurisprudence, 1080, as follows:

> "An officer de facto is variously defined or described by the authorities. Lord Ellenborough has given the following definition: 'A de facto officer is one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law.' Another and a more comprehensive definition is as follows: A person is a de facto officer where the duties of the office are exercised: 'First. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. Second. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like. Third. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public. Fourth. Under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such. He has also been described as one who actually performs the duties of his office with apparent right under claim of color of appointment or election. He is neither an officer de jure because not in all respect qualified and authorized to exercise the office, nor a usurper who presumes to act officially without any just pretense or color of title."

Careful consideration of these authorities impels the conclusion that the reason for the rule against recovery of compensation, *etc.,* from a *de facto* officer is that, until discovery and determination of his *de facto* status, he is regarded by himself and by the authorities concerned as a *de jure* officer, and that *this* constitutes the mutual mistake of law which invokes the rule.

This being so, I am quite unable to agree that an officer whose *de-facto* status has been discovered and determined could thereafter be paid compensation, *etc.,* attaching to his claimed office under this rule of immunity from recovery. Rather it would seem to be the duty of the authorities concerned, upon such discovery and determination, (1) to regard his tenure prior thereto as that of a *de facto* officer, and (2) to treat his current claim to the office as that of an intruder. In this point, relative to claims for compensation by *de facto* officers, I said, citing an informal opinion of my immediate predecessor, in my Informal Opinion No. 10, Opinions of the Attorney General for 1957, p. 46:

> "As to any claim for an increase in salary effective January 15, 1957, it may be noted that in Amended Senate Bill No. 1, effective January 15, 1957, the General Assembly by an amendment of Section 141.03, increased the salary of the Director of the Department of Mental Hygiene and Correction to $25,000. On that date, it should be remembered, that the individual here in question was merely a de facto officer and he did not become a de jure officer, in the capacity of Assistant Director, *acting as director,* until February 15, 1957. Consequently, during the period January 15, 1957, to February 15, 1957, it would not appear that he could properly claim any increase in salary, for, as indicated in Informal Opinion No. 437, Opinions of the Attorney General for 1955, a de facto officer has no claim enforceable in law to the salary of the office which he purports to hold."

Here it is necessary to note the following statement in Opinion No. 6224, *supra,* at page 110:

> "It is plain that if these officers should continue to discharge the duties of the offices concerned, and if they are paid the compensation provided therefor during the temporary period of their service between the sine die adjournment of the recent session of the Senate and the date on which their status as de facto officers is terminated by the making of a new appointment by the governor, as required under the provisions of Section 3.03, Revised Code, no finding for recovery of sums so paid could be made under the provisions of Section 117.10, Revised Code. See 43 American Jurisprudence, 239, Section 491. * * *"

In the first place this is *not* a statement that such *de facto* officers *should* be paid, after their discovery or determination to be such, the compensation provided for the offices which they purport to fill, but merely a statement of the legal situation brought about *if* such payment were to be made where such officers continued in good faith to discharge the duties of their claimed offices. In view of the plain statement in *State ex rel.,* v. *Johnson,* 8 C.C. (N.S.), 535, quoted in Opinion No. 6224, *supra,* that until the governor met the duty of making a "new appointment" the officer who failed of confirmation "was a de facto, but not a de jure official", it seems proper to conclude that following the failure of confirmation of his nominee the governor is allowed a reasonable time in which to make such "new appointment", and that meanwhile the incumbent, who has failed of confirmation, may be considered a *de facto* officer.

This notion of a reasonable time in which to act was evidently the basis of the statement of policy set out in the final paragraph of the syllabus in Opinion No. 6224, *supra,* as follows:

> "6. Public policy dictates the continued and effective administration of the state's business and neither technical barriers nor partisan considerations should be permitted to intervene counter to the public interest."

Notwithstanding this necessity to allow a reasonable time within which a new appointment is to be made, and within which an incumbent may be regarded as a *de facto* officer rather than a mere intruder, I should point out that the task of *determining* that a particular officer (1) has been, for a particular period, a *de facto* rather than a *de jure* officer, and (2) is henceforth to be regarded as a mere intruder, is clearly one for the judiciary. It is my opinion, however, that any of the several administrative officers concerned may properly *challenge* the *de jure* status of any such officer, and specifically that you may do so by virtue of your authority, set out in Section 115.35, Revised Code, to decide the legality of payment of compensation, *etc.* to officers whose *de jure* status you question, and in this way to bring the matter before the courts for decision.

In passing it may be noted that what may be regarded as a reasonable time for making new appointments is undoubtedly subject to wide variance according to the circumstances involved. In the fact situation considered by the writer of the 1956 Opinion, *supra,* some fourteen offices were involved, many of them of considerable importance and such as to require

the exercise of special knowledge, skills and experience. These circumstances clearly made the task there of making new appointments one of some difficulty, certainly, one may readily suppose of greater difficulty that that which we are here concerned.

It is my opinion, therefore, that the fifth paragraph of the syllabus in the 1956 Opinion, *supra,* should be interpreted in light of the definition of the term "de facto officer" to which I have invited attention above, and in light of my discussion hereinbefore of the necessity of permitting the governor a reasonable time in which to make new appointments as provided in Section 3.03, Revised Code. In this situation it is necessary to conclude, as I do in the instant case, that, if you deem, as a matter of fact, the governor's action here in making a new appointment to have been unreasonably delayed, any claim the *de facto* incumbent may hereafter make to the perquisites of the office which he purports to fill may properly be questioned by your office pending a judicial determination of his status.

In view of the conclusions thus reached it becomes unnecessary to consider the question of re-nomination to the senate of an individual who has failed of confirmation for the same office in the senate of a preceding General Assembly. I may say in passing, however, that in view of the fact that the senate has not heretofore been considered a continuing body, I should be inclined to regard as valid the confirmation of such an appointment by the senate of a succeeding General Assembly, and particularly so where such nomination is made by a governor other than the one by whom the unsuccessful nomination was made.

Accordingly, in specific answer to your inquiry, it is my opinion:

1. Where the appointment of an individual to an office, required by law to be filled with the advice and consent of the senate, is made when the senate is not in session, and is reported to the senate as provided in Section 3.03, Revised Code, and where the senate rejects such reported appointment, or fails to act thereon prior to *sine die* adjournment of the senate, it becomes thereafter the duty of the governor, under Section 3.03, Revised Code, to make a new appointment to fill such vacancy; and the *de jure* tenure in such office of an individual so appointed in advance of such session and so reported to the senate for its advice and consent, is terminated upon such rejection or upon such *sine die* adjournment without action thereon. Paragraph one of the syllabus, Opinion No. 6224, Opinions of the Attorney General for 1956, p. 101, approved and followed.

2. The rule that recovery by the public authorities cannot be had in the case of payment of compensation and other perquisites of office to a *de facto* officer is based upon the notion that a mutual mistake of law has been made and upon the supposition that such officer is actually a *de jure* officer. Upon a judicial determination of the *de facto* status of any such officer further payments of compensation, *etc.,* to him are not authorized by law, and any payments so made may be recovered as provided in Section 117.10, Revised Code, Paragraph five of the syllabus, Opinion No. 6224, Opinions of the Attorney General for 1956, p. 101, explained.

3. Where there is a failure of the senate to act prior to *sine die* adjournment, on the requested confirmation of a nominee, or of a "recess" appointee under the provisions of Section 3.03, Revised Code, the provision in that section that thereafter a "new appointment shall be made" (1) authorizes the governor to make such appointment following *sine die* adjournment of the senate, (2) permits him a reasonable time in which to do so, and (3) permits continued *de facto* incumbency in such office during such reasonable time. The Auditor of State, by virtue of his duty under Section 115.32, Revised Code, to determine the legality of all claims for payment from the state treasury, may challenge the right of any such *de facto* officer to any compensation or other perquisites attached to such office in any such case where he deems the action of the governor in making such new appointment to be unreasonably delayed.

Respectfully,
WILLIAM SAXBE
Attorney General