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WILBERFORCE UNIVERSITY—MEMBER, BOARD OF TRUSTEES, COMBINED NORMAL AND INDUSTRIAL DEPARTMENT — VACANCY CREATED WHERE SUCH MEMBER MOVES TO ANOTHER STATE—BECOMES PERMANENT RESIDENT—IF SUCH MEMBER PARTICIPATES IN BOARD PROCEEDINGS, THEY ARE NOT ILLEGAL OR NUGATORY—SUCH UNIVERSITY MAY NOT GRANT FREE SCHOLARSHIPS TO STUDENTS, NON-RESIDENTS OF OHIO.

SYLLABUS:

1. *A member of the Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University who moves to another state, with the intention of making the said state his permanent residence, thereby loses his qualifications for membership on said Board, and a vacancy*

is created in the membership of said Board which may be filled according to law.

2. *The official actions of the Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University are not rendered illegal or nugatory by reason of the participation in the proceedings of the Board by one of the Trustees whose membership has legally terminated by reason of his having become a permanent resident of a state other than Ohio.*

3. *The Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University may not grant free scholarships to students who are non-residents of the State of Ohio.*

Columbus, Ohio, May 21, 1940.

Mr. D. Ormond Walker, President, Wilberforce University,
Wilberforce, Ohio.

Dear Sir:

This is to acknowledge receipt of your request for my opinion, which reads as follows:

“As a trustee of the Combined Normal and Industrial Department of Wilberforce University, I am asking that you kindly render an opinion on the following:

1. When a duly appointed and qualified member of the Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University moves to another State with the intention of making said state his new residence, is such person still a member of the Board of Trustees? Will G. C. 1688—O. A. G. 2598 apply?

2. When such a member attends a Board meeting after he moves to another state and participates in its deliberations and votes on such matters as come before the meeting, is the action taken by the Board legal?

3. May the Board of Trustees of the Combined Normal and Industrial Department grant free scholarships to students who are not citizens of the State of Ohio? Will O. A. G. 2836 apply?”

The Combined Normal and Industrial Department of Wilberforce University was created by Act of the General Assembly of Ohio in 1887. In pursuance of this Act and subsequent legislation it now functions by force of Sections 7975 to 7986-1, of the General Code of Ohio. While its

name indicates that it is a part of Wilberforce University, which is a private institution, as a matter of fact the said Combined Normal and Industrial Department functions entirely independent of Wilberforce University. It is maintained by appropriations made by the General Assembly of Ohio, the appropriation for the current biennium being in the amount of \$543,437.98, including approximately \$35,000 of student fees. Its land and buildings are owned by the State of Ohio, and its employes are paid by the State upon warrants of the Auditor of State drawn in pursuance of vouchers prepared by the superintendent of the department. Under the statute the selection of a superintendent for the Department by the Board of Trustees is subject to the approval of the State Controlling Board.

The entire government, management and control of the department are, by virtue of Section 7976 and 7981 of the General Code, reposed in a Board of Trustees composed of five members appointed by the Governor of Ohio and three members chosen by the Trustees of Wilberforce University and the President of Wilberforce University who is by virtue of his position constituted a Member of said Board of Trustees. The fact that three members of the Board of Trustees are chosen by the Trustees of Wilberforce University, and that the President of the university is Ex Officio Member of the Board of Trustees of the Combined Normal and Industrial Department does not make the department any the less a state institution. As stated by the Supreme Court of Ohio with respect to the Board of Trustees of this department, in the case of Board of Trustees v. Green, 113 O. S., 15-20:

“As constituted, the Board of Trustees of the Department is a separate entity established by the state, with entire control of the buildings and land used by the department and of the functioning of the department.”

A former Attorney General in an opinion published in the Opinions of the Attorney General for 1928, page 2126 (No. 2598) held, and I believe correctly so, that the Members of the Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University are public officers and their appointment is subject to the provisions of Article XV, Section 4, of the Constitution of Ohio, to the effect that:

“No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector; * * * ”

Of course, to possess the qualifications of an elector one must have been a resident of the State of Ohio for one year next preceding the time of determination of whether or not he is an elector. (Article V, Section 1, Constitution of Ohio). It clearly follows that a non-resident of the state is ineligible to appointment as a Member of the Board of Trustees in question. In the 1928 opinion referred to it is stated in the syllabus:

“Members of the Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University must be electors of the State of Ohio.”

While the law does not expressly provide that removal from the State of a Member of the Board of Trustees creates a vacancy or constitutes an implied resignation or abandonment of the office, it clearly follows in my opinion, from the fact that a member of the board must possess the qualifications of an elector, that when such member loses these qualifications he loses his membership on the board, and his seat thereby becomes vacant. Temporary removal, with an intention to return to the State of Ohio would not necessarily in all cases, at least, cause the person so removing to lose his status as an elector, but permanent removal clearly does cause the person so removing from the state to lose his residence in the state and thereby he ceases to be an elector in the State of Ohio, and to possess the right to be elected or appointed to or hold public office in the State of Ohio.

However, the actions and proceedings of the Board of Trustees are not rendered illegal by reason of one of its nominal members attending the board meetings and participating in the proceedings of the board after he ceases to possess the qualifications necessary to constitute him a legal or de jure member of the board. That is to say, a person acting as an officer under color of title to the office will be held to be a de facto officer or an officer in fact, even though he does not possess the qualifications fixed by law for the incumbent of the office and his official acts so far as third persons are concerned will be upheld. With respect to this subject it is said in Ohio Jurisprudence, Volume 32, page 1096:

“The general rule is that the acts of a defacto 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. * * Third persons are not supposed to know whether an officer has taken every necessary step to qualify himself, and therefore, it is sufficient for them to show that he is such de facto. One important consequence of the rule that the acts of a de facto

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

I come now to a consideration of your third question. In the reported Opinions of the Attorney General for 1915 at page 1827, will be found an opinion of the then Attorney General, wherein it is held categorically with respect to the Combined Normal and Industrial Department of Wilberforce University, as stated in the second branch of the syllabus of the said opinion:

"Students from other states attending such institutions for educational purposes only and having no habitation within this state other than such institutions which they are attending, and whose parents or families reside in another state, are not entitled to exercise the elective franchise nor to receive free scholarships limited by law to residents of this state."

The question submitted in response to which the above mentioned Attorney General's opinion was rendered was general in terms, that is, it related to any free scholarships regardless of how they might have been granted. The Attorney General in answering the inquiry stated that he assumed the free scholarships mentioned were the free scholarships covered by Section 7985, General Code, which provided that each senator and representative of the General Assembly of the state may designate one or more youth *resident of his district* who should be entitled to attend the Combined Normal and Industrial Department of Wilberforce University free of tuition. With respect thereto the then Attorney General said:

"It is very clear that the case which the dean describes cannot be brought within the terms of this section."

There is no statutory authorization for the Trustees of the Combined Normal and Industrial Department of Wilberforce University to grant free scholarships to anyone, so that in considering the question now before us we do not have the advantage of clear, positive statutory authorization. It would seem clear, however, that inasmuch as this department is an institution of the State of Ohio, Department of State Government, in a sense, and that the cost of maintaining it is met entirely from funds appropriated by the Legislature of Ohio, the greater part of which appropriation is appropriated from the State's General Revenue Fund, that part which comes from "student fees" or tuition fees being comparatively small, and no ex-

press mention is made of free scholarships to be granted by the Trustees, there can not be read into the law or the appropriation, an implied authorization to use any of the funds so appropriated for the education of youths who are residents of states other than Ohio. It would be a novel idea indeed, to use the money of the taxpayers of Ohio to educate non-residents of the state, especially without direct and positive authorization of the Legislature of Ohio.

I am of the opinion, therefore, in specific answer to the questions submitted:

First, a member of the Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University who moves to another state, with the intention of making the said state his permanent residence, thereby loses his qualifications for membership on said Board and a vacancy is created in the membership of said Board which may be filled according to law.

Second, the official actions of the Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University are not rendered illegal or nugatory by reason of the participation in the proceedings of the Board by one of the Trustees whose membership has legally terminated by reason of his having become a permanent resident of a state other than Ohio.

Third, the Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University may not grant free scholarships to students who are non-residents of the State of Ohio.

Respectfully,

THOMAS J. HERBERT,
Attorney General.