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1. MEETING—BOARD OF COUNTY COMMISSIONERS—TO ORGANIZE—FIRST MONDAY OF JANUARY OF EACH YEAR—ADJOURNED MEETING—VALIDITY OF REGULAR BUSINESS—SECTION 305.05 RC.
2. SECTION 305.09 RC DIRECTORY AS TO PLACE OF MEETING—BOARD OF COUNTY COMMISSIONERS HAS LIMITED DISCRETION IN MATTER.
3. ORGANIZATIONAL MEETING ADJOURNED TO PRIVATE HOSPITAL ROOM—FOREIGN COUNTY—PURPOSE TO OBTAIN VOTE OF SICK MEMBER—ELECTION FOR OFFICE, BOARD PRESIDENT—“BREAK A TIE”—JUDICIAL PROCEEDINGS—TEST INCUMBENT’S TITLE TO OFFICE OF PRESIDENT.
4. WHERE COMMISSIONER HOLDS OFFICE OF PRESIDENT UNDER APPARENT COLOR OF TITLE—DUTIES REGULARLY AND PUBLICLY DISCHARGED—WITHOUT CHALLENGE—IRRESPECTIVE OF ANY IRREGULARITIES IN ELECTION HE IS AT LEAST PRESIDENT DE FACTO—OFFICIAL ACTS NOT SUBJECT TO COLLATERAL ATTACK BY PUBLIC OR THIRD PERSONS.

SYLLABUS:

1. Under Section 305.05, Revised Code, the organizational meeting of a board of county commissioners is to be held on the first Monday of January of each year, but the board may by a majority vote adjourn the meeting to a future date and any regular business of organizing which is conducted, at such adjourned meeting is as valid as if transacted on the first Monday of January.

2. Section 305.09, Revised Code, is directory as to the place where a board of county commissioners may meet and vests the board with limited discretion in that matter which must be reasonably exercised.

3. Whether a board of county commissioners has reasonably exercised its discretion when it adjourned an organizational meeting to a private hospital room in another county to obtain the vote of a sick member and thereby break a tie in an election for the office of board president is a question of fact which can be resolved only in judicial proceedings to test an incumbent’s title to the office of president.

4. If a member of a board of county commissioners holds the office of president under apparent color of title, and if he has been regularly and publicly discharging the duties of that office without challenge, then, irrespective of any possible irregularities in his election, he is at least president de facto and his official acts are not subject to collateral attack by the public or third persons.

Columbus, Ohio, August 31, 1955

Hon. Ray Bradford, Prosecuting Attorney
Clermont County, Batavia, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Would you please give me your opinion on the following: By authority of Section 305.05 of the Revised Code of the State of Ohio, the Board of County Commissioners organizes on the first Monday of each year, by the election of one of its members as president for a term of one year, etc.

“On Monday, the 3rd of January, our Board of Commissioners met at their regular place of business and at the regular office in the Court House at Batavia, Ohio, with two members present, the third member of the Board of Commissioners being at this time confined in the hospital in Cincinnati, Ohio. The nominations for president for the Board of Commissioners for the term of one year were made as follows:

“One commissioner nominated the commissioner who was confined in the hospital, and the other commissioner nominated the other of the two commissioners present at the meeting, which, of course; resulted in a tie vote; therefore no president of the board would be elected at this time.

“The Board of Commissioners, that is, the two of them, moved that the meeting be adjourned to the hospital in Cincinnati to further complete the business. A vote was taken of the third member of the board confined in the hospital, all of the commissioners being present, together with the Auditor and the Clerk of the Board of Commissioners, and by vote of two to one, the commissioner who was in the hospital was elected president of the board. The meeting was still held open and the commissioners returned to their office at Batavia, Ohio.

“Would you please give me your opinion as to whether or not the president of the board so elected has been elected legally.”

Section 305.05, Revised Code, to which you refer in your request, provides as follows:

“The board of county commissioners shall organize on the first Monday of January of each year, by the election of one of its members as president for a term of one year. * * *”

It is not clear from your request whether the meeting at the hospital occurred on the first Monday of January as specified in the statute or at a later date, but since business transacted at adjourned sessions of the board have as much validity as though transacted at a regular session, this is not critical. In *Robert W. Turpin v. John Hagerty*, Recorder, 12 Ohio Decisions, 161, affirmed, per curiam, by the Supreme Court of Ohio, 70 N.E., 1133, the Hamilton County Common Pleas Court construed Section 305.06, Revised Code, formerly Section 846, Revised Statutes, which sets the dates for regular board sessions on the first Mondays of March, June, September, and December. The court adopted with approval the following statement from 1 Dillon on Municipal Corporations (4 ed.), Section 287:

“A regular meeting, unless special provision is made to the contrary, may adjourn to a future fixed day, and at such meeting it will be lawful to transact any business which might have been transacted at the stated meeting, of which it is indeed but the continuation. * * *”

The holding of *Mirande, Ex Parte*, 73 Cal., 365, 14 Pac. Rep., 888, is cited in the *Turpin* case as follows:

“* * * where a board of supervisors meets on a regular day fixed therefor by an ordinance passed in conformity with the county government act of March 14, 1883, it has power to adjourn from time to time until its business is completed; and an ordinance passed at an adjourned meeting is not invalidated.”

The court then concludes:

“* * * the court is of the opinion that the adjourned meetings or the adjourned sessions of the county commissioners are continuations of the regular sessions provided by the statute, as applicable to the case at bar.”

It is my opinion that this rule applies with as much effect and force to an organizational meeting. Therefore the adjournment of such a meeting to a date other than the first Monday of January is permissible and the election of a president at the adjourned meeting as valid.

The above, however, does not provide a complete answer. Section 305.09, Revised Code, provides the additional requirements that:

“All the proceedings of the board of county commissioners shall be public, at the office of the county auditor, or the usual office of the board, and, as far as possible, in conformity with the rules of parliamentary law.”

Formerly this section read, Section 849, Revised Statutes :

“All proceedings of the board shall be public, at the office of the auditor, or the usual office of the commissioner, *and not elsewhere, * * **”
(Emphasis added.)

The omission of this negative clause may well be thought to convert this provision into one which is merely directory. It does not appear in the history of the act whether the change was a result of statutory amendment or editorial deletion, but, even assuming the latter, the clause has not been in the act since the General Code revision in 1910 and the weight of authority is that a substantial change contained in a revision of statutes amounts to an amendment thereof. *State v. Hollenbacher*, 101 Ohio St., 478; *State v. Toney*, 81 Ohio St., 130.

Section 305.11, Revised Code, provides that when a board of county commissioners is not in session, its record book “shall be kept in the auditor’s office, and open at all times to public inspection.” In the course of its consideration of the mandatory or directory nature of this provision, as formerly set out in Section 2407, General Code, the court in *State ex rel. Landis v. Butler County Commissioners, et al.*, 40 Ohio Circuit Decisions, 139 gave incidental consideration to former Section 2405, General Code, now Section 305.09, Revised Code. Noting that in many counties the board of county commissioners has no regular office and does not meet in the auditor’s office but in that of some other county official, the court said with respect to these two sections: “In the opinion of the court these statutes are at best directory.”

Even if we concede that Section 305.09, Revised Code, is directory only, it does not follow that there could in no case be an abuse of discretion by the board in selecting a meeting place. In the case at hand, the board after convening in its regular office, adjourned to a private hospital room in another county, a place comparatively inaccessible to the public. It may well be, considering the fact that the meeting was an organizational one and the election of a board president was the sole business to be transacted, that the circumstances justified the action. However, it is not within my province to resolve questions of fact involving a possible abuse of discretion.

At most, I can but point out that the board member holding the office of president is holding not as an usurper or intruder but under apparent color of title, and if he has been publicly exercising the regular duties

of the office without challenge, then he is at least de facto president (Waite v. Santa Cruz, 184 U. S., 302, 323, 46 L. Ed., 552, 566, 22 Sup. Ct. Rep., 327) and his acts are valid as to the public and third persons as though there were no question of any election irregularities. State, ex rel., v. Herdman, 1 Ohio Law Abstract, 347.

In specific answer to your request, I am of the opinion that:

1. Under Section 305.05, Revised Code, the organizational meeting of a board of county commissioners is to be held on the first Monday of January of each year, but the board may by a majority vote adjourn the meeting to a future date and any regular business of organizing which is conducted at such adjourned meeting is as valid as if transacted on the first Monday of January.

2. Section 305.09, Revised Code, is directory as to the place where a board of county commissioners may meet and vests the board with limited discretion in that matter which must be reasonably exercised.

3. Whether a board of county commissioners has reasonably exercised its discretion when it adjourned an organizational meeting to a private hospital room in another county to obtain the vote of a sick member and thereby break a tie in an election for the office of board president is a question of fact which can be resolved only in judicial proceedings to test an incumbent's title to the office of president.

4. If a member of a board of county commissioners holds the office of president under apparent color of title, and if he has been regularly and publicly discharging the duties of that office without challenge, then, irrespective of any possible irregularities in his election, he is at least president de facto and his official acts are not subject to collateral attack by the public or third persons.

Respectfully,

C. WILLIAM O'NEILL
Attorney General