322.

MEMBER PUBLIC UTILITIES COMMISSION LAWFULLY EXERCISING DUTIES OF OFFICE—WHEN VACANCY OCCURS DURING SESSION OF SENATE GOVERNOR IS WITHOUT AUTHORITY TO MAKE A RECESS APPOINTMENT—MEMBER NOT ENTITLED TO RECEIVE INCREASED SALARY.

1. *The present member of the Public Utilities Commission, who was appointed by the governor and confirmed by the senate in* 1917, *and who has continued in office, to the present time under his original appointment, is now lawfully exercising the duties of the office.*

2. *When a vacancy occurs in the office of member of the Public Utilities Commission during a session of the senate, the governor is without authority to make a recess appointment, and a person who would be appointed by the governor under such circumstances could not lawfully assume the office. It is only in cases when a vacancy occurs when the senate is not in session, that a valid recess appointment may be made under section* 12 *of the General Code.*

3. *A member of the Public Utilities Commission who continues in office after the prescribed statutory portion of his term, is not entitled to receive the increased salary provided for by a legislative act which was passed and became effective prior to the so-called hold-over portion of his term.*

COLUMBUS, OHIO, May 15, 1923.

HON. A. V. DONAHEY, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Your letter of recent date was duly received, in which you inquire:

1. Whether Mr. C. C. Marshall is now lawfully serving as a member of the Public Utilities Commission of Ohio;

2. Whether you may at this time lawfully make a so-called recess appointment of a successor to Mr. Marshall; and,

3. Whether Mr. Marshall is entitled to receive salary at the rate of $6,000 per annum covering the period of time from February 1st to April 30th, 1923.

These questions will be considered in the order stated.

1. The Public Utilities Commission of Ohio was created by the act passed April 18, 1913 (103 Ohio Laws, 804), and it was then and is now expressly provided therein (section 487 G. C.) that the commission shall consist of three members "who shall be appointed by the governor with the advice and consent of the senate." In order that the newly created commission might begin to function without unnecessary delay, it was provided therein that immediately after the act takes effect, the governor should, "with the advice and consent of the senate", appoint three members for terms to expire, respectively, on the first day of February in the years 1915, 1917, and 1919, and "thereafter", it was also provided, each member shall be "appointed and confirmed" for a term of six years. The act also provides that "vacancies shall be filled in the same manner for unexpired terms."

It will thus be seen that the act made provision for three classes of members, to-wit, (a) the original members, whose terms were made to expire at a definitely

fixed time, (b) the members to be appointed thereafter, and (c) appointees to fill vacancies for unexpired terms, and, further, that all appointments, no matter in which class they might belong, were and are required to be made in the same manner—that is, by the governor "with the advice and consent of the senate," and not by the governor alone.

The only conclusion to be drawn from section 487 G. C. is, that a member who has once been appointed and confirmed by the senate is entitled to continue in office until his successor also is so appointed and confirmed, subject only to the authority conferred upon the governor by section 12 G. C. to make recess appointments as hereinafter explained. And not only that section, but section 8 G. C., which provides that "A person holding an office or public trust shall continue therein until his successor * * * is appointed and qualified", also vouchsafes to the incumbent of office such right. State v. Howe, 25 O. S. 588; State v. Bryson, 44 O. S. 457; State v. Boucher, 3 N. D. 389 (21 L. R. A. 539); 22 Ruling Case Law, page 433; 29 Cyc., p. 1372.

In state v. Howe, supra, the court held:

> "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.
>
> 2. Section 20 of the second article of the constitution, which enjoins upon the general assembly the duty of fixing the term of office and the compensation of all officers not provided for in the constitution, imposes no restraint on the power of the general assembly to extend the tenure of an officer beyond his term, and until his successor is qualified, in a case where the duration of such tenure is not limited by the constitution."

In the opinion the court said:

> "The plain and obvious import of the language of this statute is, that a vacancy shall not occur at the end of three years from the incumbent's appointment. It is true, a successor may be appointed by the governor, by and with the advice of the senate, either before or after the expiration of the three years; and when so appointed and qualified, the right of the incumbent to hold the office ceases whenever the three years from the date of his own appointment have elapsed. In such case, there is no interregnum or vacancy in the office. It passes in succession. The end of one tenure, and the beginning of the next, occur at the same instant. But if no successor be qualified, the old incumbent continues in office, not as a mere *de facto* officer or *locum tenens,* but as its rightful and lawful possessor until such successor be duly appointed and qualified."

Later on in the opinion, at page 597, the court also said:

> "Let it be conceded that the term must be fixed to a certain and definite period, so that the expiration of the period closes the term of an incumbent, and brings in the term of a successor, if one be duly appointed and qualified. In such case there would be no vacancy in the office, and

the successor must be a person appointed by the governor, by and with the advice of the senate. But it is claimed, if a successor be not appointed by the governor and senate, at the expiration of the incumbent's term, a vacancy then occurs. Undoubtedly, this would be so, if the incumbent may not lawfully hold over *pro tempore*. But the right to so hold over is given by this statute, as we have shown, if it be competent for the legislature to confer it."

State v. Boucher, supra, was a case in which the governor had sent the name of a successor appointee to the senate for confirmation while it was in session, but the senate adjourned without confirming the appointment. It was held that the incumbent in office, who had previously been appointed and confirmed for a term of two years and until his successor is appointed and qualified, was lawfully entitled to continue in office until his successor was appointed and confirmed. In the opinion the court said:

"There is no doubt in our minds that the statute in question must be so construed as to mean that successors shall be appointed by the same power and authority which appointed their predecessors, i. e., by and with the advice and consent of the senate. The legislature having adjourned without day, and the senate failing to confirm successors to * * * (the incumbents) it follows as of course that their successors cannot be legally appointed until the legislature shall reassemble, unless a vacancy has occurred or shall occur in their offices. It is the policy of the statute, as well as the clearly expressed purpose, to require the action of both the governor and senate in filling the important offices * * *, and not to allow them to be selected by the independent action of the executive, except in those cases of vacancies, not frequently occurring, where an executive appointment can be made temporarily to fill an actual vacancy."

The case of State v. Bryson, supra, also announces the same doctrine.

In People v. Bissell, 49 Calif., 407, it was held that:

"A person does not become the successor of another in an office filled by appointment of the governor, which requires the confirmation of the senate, until his appointment has been thus confirmed.

If the term of the incumbent of an office, filled by an appointment of the governor, which requires the confirmation of the senate, has expired, but he still continues to discharge its duties, there is no such vacancy in the office as will authorize the governor to fill it by the appointment of a successor, without the consent of the senate first had."

The general trend of the authorities is also stated in 22 Ruling Case Law, page 433, as follows:

"Wherever under a constitutional or statutory provision the appointment is required to be made with the approval of some officer or body, such appointment must be approved before the person is legally entitled to the office. If on the expiration of the term of a public officer, an appointment of a successor is made by the governor but it is not con-

> firmed by the state senate as required by a law of this type, such successor does not obtain the right to enter on the duties of the office, but the former incumbent may hold over until a successor is properly appointed and confirmed."

You are therefore advised that Mr. Marshall is now lawfully serving as a member of the commission.

2. It is assumed that the second question is predicated upon the fact that the six-year portion of Mr. Marshall's tenure expired on February 1st, 1923, and that by reason thereof a vacancy occurred in the office at that time.

It would seem, under the doctrine of such cases as State v. Howe, State v. Boucher, and State v. Bryson, supra, that the mere fact that the fixed portion of Mr. Marshall's tenure may have terminated on the date mentioned did not have the effect of creating a vacancy in the office, for the reason that there can be no vacancy as long as the office is in the possession of one who is lawfully entitled to hold it, which, as we have already pointed out, Mr. Marshall is entitled to do until his successor is appointed and confirmed by the senate, or an authorized recess appointment is made.

The procedure to be followed in making appointments which are subject to confirmation by the senate, is prescribed by section 12 G. C., reading as follows:

> "When a vacancy in an office filled by appointment of the governor, with the advice and consent of the senate, occurs by expiration of term or otherwise during a session of the senate, the Governor shall appoint a person to fill such vacancy and forthwith report such appointment to the senate. If such vacancy occurs when the senate is not in session, and no appointment has been made and confirmed in anticipation of such vacancy, the governor shall fill the vacancy and report the appointment to the next session of the senate, and, if the senate advise and consent thereto, such appointee shall hold the office for the full term, otherwise a new appointment shall be made."

Treating the vacancy, for the purpose of section 12 G. C., as having occurred on February 1, 1923, we are met with two unsurmountable obstacles to a recess appointment at this time, viz.:

(1) The vacancy occurred at a time when the senate was not only in session, but actually transacting business, and (2) recess appointments are only authorized to be made when the vacancy occurs "when the senate is not in session."

The statute appears clear on this point, and there is also judicial authority in support of the construction given. Thus, *In re* District Attorney of the United States, 7 Fed. Cases, No. 3924, the provision of the Federal Constitution providing that "The president shall have power to fill all vacancies that may *happen during the recess* of the senate", was involved. The court held that the president could not make a temporary appointment in recess, if the senate was in session when the vacancy occurred, and that an appointee who assumed the office under such circumstances, "is no more in office of right than he would have been if commissoned by the president during a session of the senate without their advice and consent." And likewise, Schenck v. Peay, 21 Fed. Cases, No. 12451, is to the same effect.

The second question is answered in the negative.

3. With respect to the third question, the authorities strongly indicate that Mr. Marshall is not entitled to receive the increased salary in question, because of section 20 of Article II of the Ohio Constitution which prohibits a change in salary during the term. It is proper to say, however, that the exact point now involved has never been definitely settled by the Supreme Court of this state. At the time Mr. Marshall assumed the office the annual salary was $4,500, and the act increasing the salary to $6,000 per annum was passed and became effective during the six-year portion of the term for which he was appointed (108 O. L. 1154). While it is true that the fixed portion of his tenure expired on February 1st, 1923, and the amount he now seeks covers only the period of time from and after that date, nevertheless, he has continued in office under his original and only appointment by reason of the failure of the senate to confirm his successor, as required by section 487 G. C., and also under authority of section 8 of the General Code, and under the authorities hereinafter referred to, the so-called hold-over period appears to be as much a part of the term as the fixed six-year period. Mr. Marshall made an unsuccessful attempt to secure the increased salary for the period of his tenure prior to February 1st, 1923, but the Supreme Court held (Donahey v. Marshall, 101 O. S. 473) that the amendatory act did not apply to his case as then presented, because of the constitutional provision hereinbefore referred to. Cases holding that the hold-over period is a part of the term of office, some of which are directly to the effect that a hold-over incumbent is not entitled to receive increased salary during such period, are State v. Wright, 58 O. S. 540; State v. Metcalfe, 80 O. S. 242; State v. Speidel, 62 O. S. 156; Peterson v. Benson, 32 L. R. A. (N. S.) 949; Baker City v. Murphy, 35 L. R. A. 88; State v. Smith, 87 Mo. 158; Grand Haven v. Guaranty Co., 128 Mich., 106; 22 Ruling Case Law, 555; and 1921 Opinions of Attorney General, Vol. 1, page 502.

Respectfully,
C. C. CRABBE,
Attorney General.

323.

STATUS OF TITLE, 103.86 ACRES OF LAND SITUATED IN XENIA TOWNSHIP, GREENE COUNTY, STATE OF OHIO.

COLUMBUS, OHIO, May 9, 1923.

Trustees of The Combined Normal and Industrial Department, Wilberforce University, Xenia, Ohio.

GENTLEMEN:—You have submitted an abstract and requested my opinion as to the status of the title to 103.86 acres of land situated in the County of Greene, State of Ohio, Xenia Township, more fully described in said abstract.

An examination has been made of said abstract and it is believed that said abstract with the supplement submitted therewith shows the title to said premises to be in the name of John A. McClain, free from incumbrances and defects excepting as hereinafter noted.