4492.

DE FACTO OFFICER—FILLING OF VACANCY IN COUNTY BOARD OF EDUCATION—PAYMENTS FOR SERVICES RENDERED BY SUCH OFFICER MAY NOT BE RECOVERED IN ABSENCE OF FUND OR EXCESS PAYMENTS.

SYLLABUS:

1. *In the event a court of proper jurisdiction declares a vacancy in the office of a member of a county board of education, the acts of such member, until the court determination of such question, are valid, regardless of the time of the institution of such proceeding.*

2. *The mere filing of an application with a probate court under the provisions of Section 7610-1, General Code, for the filling of a vacancy in a county board of education without said court being satisfied that such vacancy exists, does not prevent the county board of education from filling the vacancy in the manner provided by Section 4748, General Code.*

3. *Payments made to a de facto officer for services rendered may not be made the subject of a finding for recovery in the absence of fraud, collusion or excess payments for such services.*

COLUMBUS, OHIO, July 11, 1932.

HON. CHARLES S. LEASURE, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—Your recent request reads as follows:

"At the request of certain members of the Muskingum County Board of Education, I am asking for an opinion upon the following statement of facts.

The question has arisen as to whether or not the actions of one of the members of the county board would be considered void under the circumstances. The county board met and voted upon the appointment of a county superintendent. At the time of the board's action, an application was pending in the Probate Court of Muskingum County, setting out that one of the county board's members was not a resident of Muskingum County. The case has been heard but the decision has not been rendered. The member whose residence is in question voted in favor of this particular appointment. A bare majority voted in favor of this particular appointment. Should the Probate Court decide that the member is not a resident of Muskingum County, would the action of the County Board in the appointment of the county superintendent be valid by reason of the fact that it was necessary to have this member's vote to assure the appointment.

General Code Section 4748 sets out the causes of vacancy in a board of education, one of which is 'removal from the district'. The section then sets out the method of filling the vacancy which shall be done at the next regular or special meeting by a majority vote of the remaining members. It was claimed by the applicants in the Probate Court proceeding that the vacancy had occurred more than thirty days preceding the filing of the application and I assume that the same was filed under provisions of Section 7610-1 of the General Gode, which provides that if the county

board fails to fill any vacancy as provided by Section 4748 within a period of thirty days after the vacancy occurred the probate court shall, upon being advised and satisfied of the vacancy, act instead of the county board.

The specific question is, assuming that the court decides there is a vacancy, this: Is it a vacancy from the date of the member's removing from the county or is it a vacancy only from the date upon which the court renders its decision?

There is serious doubt in my mind as to the correct answer to the question. In 1928 O. A. G. 1891, the Attorney General's office held that a member of a board of education who has tendered his resignation from such board may continue to serve as a member of said board until his successor is elected and qualified.

Would any actions of the county board be valid which required the vote of the member whose residence is in question?

The second proposition is this. If a vacancy is created in the county board of education and the board fails to fill the vacancy within 30 days after the same has occurred and if after the expiration of said 30 days an application is filed with the probate court requesting the court to make the appointment and while the same is pending in the court, could the board by its own action fill the vacancy?

The third proposition is this. Should it be decided that this member was not a resident of Muskingum County and therefore could not act as a member of the board, but during which time he assumed to act in the capacity of a member of the board and was paid his salary, is he liable for the return of the amount of salary which he received from the date of his removal from the county until his successor was appointed?"

It is well settled that while the permanent removal of a member of a board of education from his school district creates a vacancy in the office, temporary removal does not. Whether or not removal from the district is permanent or temporary is in all cases a question of fact to be determined from the intention of the member so moving, considered in the light of all the circumstances connected with such removal. Opinions of Attorney General, 1930, 1479; 1929, 1327; 1927, 1057.

In the 1927 opinion above referred to, the then Attorney General in discussing the validity of the acts of a township board of education, the eligibility of one of the members of the board being questioned, stated as follows:

"I might say in conclusion, that in any event so long as the persons to whom you refer continue to exercise the function of the office of members of the boards of education of their respective townships, their acts as such members are valid, no matter where they reside, and the title to their office, which is dependent entirely on the determination of a question of fact, can only be definitely and finally determined in an action in quo warranto."

This is true, even if the person was disqualified by reason of his non-residence in the school district in question on the theory that his acts as a de facto member of the board would be valid until determination of his status. *Ex parte Strang,* 21 O. S. 610; *State* vs. *Gardner,* 54 O. S. 24; *Caldwell* vs. *Marvin, et al.,* 8 O. N. P. (N. S.) 387. See also 46 C. J. §378.

In view of the foregoing and in specific answer to your first inquiry, I am of the opinion that in the event a court of proper jurisdiction declares a vacancy in the office of a member of a county board of education, the acts of such member, until the court determination of such question, are valid, regardless of the time of the institution of such a proceeding.

Coming now to your second inquiry, namely, where a vacancy exists in an office of a county board of education and the board fails to fill the vacancy within thirty days after the same has occurred and an application is then filed with the probate court requesting the court to make the appointment, whether or not the board may at such time fill such vacancy by its own action.

Section 7610-1, General Code, to which you refer, reads in part as follows:

> "But in a city district, or in an exempted village district, or where the county board of education is unable or fails for any reason to fill any vacancies in such county board of education as provided by section 4748 of the General Code, within the period of thirty days after such vacancies occur, the probate court, or in counties in which the probate court and the court of common pleas have been combined, the court of common pleas, upon being advised and satisfied thereof, shall act instead of the county board of education."

From an examination of the above language, it would appear that before a probate court or a court of common pleas of a county wherein the probate court is combined with the common pleas, shall act instead of the county board of education in the filling of a vacancy, such court must be advised and *satisfied* that such vacancy exists. It follows that up to the time such court is advised and becomes satisfied that a vacancy exists in a county board of education, the county board has power to fill such vacancy in the manner provided by Section 4748, General Code.

It should be noted that Section 7610-1, General Code, does not require that an application be filed with the court to fill a vacancy in a county board of education, but that the court be "advised" that such vacancy exists. To hold that upon a court being advised that a vacancy exists in a county board of education, or as in this case upon the filing of an application in such court, the power of a board of education to fill a vacancy in its membership as provided by Section 4731, General Code, and Section 4748, General Code, terminates, would be to overlook the plain intent of the statute conferring power upon the court to act in the premises, namely, after being advised and *satisfied* that a vacancy exists.

Coming now to your third inquiry, I will assume for the purposes of this opinion that a proper court has decided that the member of the board of education in question was not a resident of the territory embraced by the county board. The termination of the connection of the de facto officer in question from the board would date from the time the court so declared. His status from the time he became disqualified by reason of non-residence to the time of adjudication would be that of a de facto member of such board. The question then becomes one of whether or not a de facto officer may keep the compensation paid him between the time of his removal from the school district and when his successor was appointed.

The courts have uniformly held that in the absence of fraud, collusion or excess payments for services performed or materials furnished, recovery cannot be had. Opinions of Attorney General for 1929, p. 545, citing cases at p. 548.

Applying this rule to the above question, it follows that payments made to a de facto officer for services rendered may not be made the subject of a finding for recovery in the absence of fraud, collusion or excess payments for such services.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4493.

CORPORATION "NOT FOR PROFIT"—DISTRIBUTES ELECTRICITY TO MEMBERS, COLLECTING ASSESSMENTS FOR SUCH SERVICE—LISTED AS A PUBLIC UTILITY.

SYLLABUS:

When a corporation not for profit, purchases electricity at wholesale, measured through a master meter, and distributes this current through its own lines, to its members, and collects from them by assessment in proportion to the current used by each member an amount sufficient to pay for the current, and maintains its lines and its overhead expense, such corporation not for profit, is a public utility, within the purview of Section 5415, *General Code.*

COLUMBUS, OHIO, July 11, 1932.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for opinion as to whether the G. L. & P. Company, organized under the corporation laws of Ohio as a corporation not for profit, is a public utility, within the meaning of the taxation laws of Ohio.

This corporation purchases electrical current from an electric power company, through a master meter, distributes this current among its members only, and collects from them, by assessment, an amount sufficient to pay for such current and maintain its lines.

The plan of operation of this company it appears, is to charge each member an initiation fee of five dollars, and to charge him for the electrical current used a sum equal to the cost of such current from the power company, and in addition thereto, an assessment for operating expenses equal to his pro rata share.

Section 5415, General Code, reads as follows:

> Sec. 5415. "The term 'public utility' as used in this act means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever, and herein referred to as * * electric light company, * * and such term 'public utility' shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations."

In Section 5416, General Code, which was also the next following section in the same act with Section 5415, General Code, I find this language: