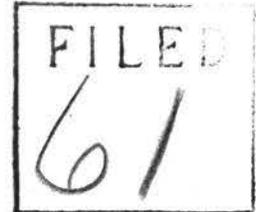


OFFICERS:
MUNICIPAL CORPORATIONS:
DE FACTO AND DE JURE
OFFICERS:
ACTS OF:

The official acts of municipal officers
whether they are acting as de jure or
de facto officers have the same force
and effect upon the third persons
and the public.

May 19, 1938

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Mr. L. E. Merrill,
City Attorney,
Brunswick, Missouri.

Dear Sir:

This is in reply to yours of May 14, 1938, requesting an official opinion from this department based upon the following letter:

"In accordance with our conversation with Mr. Taylor, we are requesting a ruling on the following matter, pertaining to a City of the Fourth Class.

If a majority of the Board of Aldermen, at the time of their election, were indebted to the city for delinquent city taxes, but filed their oaths of office, were declared elected by the Board and assumed and carried on the duties of the office in the usual manner, were the acts of the Board in making orders, adopting resolutions and passing ordinances (including tax ordinances) a nullity, or could such ordinances be enforced on the theory that the aldermen were de facto officers?

If an alderman, who had served for several terms, was at the time of his first election, qualified with respect to the payment of taxes, but at successive elections was

disqualified in this respect, is he such an officer of the city as a hold over, that his acts would be valid?

We would appreciate very much your opinion on these matters."

The qualifications of a member of the board of aldermen of a city of fourth class are set out in the following sections: Section 6964, R.S. Mo. 1929 provides as follows:

"No person shall be an alderman unless he be at least twenty-one years of age, a citizen of the United States, and an inhabitant and resident of the city for one year next preceding his election, and a resident of the ward from which he is elected. Whenever there shall be a tie in the election of aldermen, the matter shall be determined by the board of aldermen; so, also, in case the election of an alderman be contested."

And Section 6969 R.S. Mo. 1929 provides as follows:

"All officers elected or appointed to offices under the city government shall be qualified voters under the laws and Constitution of this state and the ordinances of the city. No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office, or who is not a resident of the city."

The above qualifications are necessary before a person can legally be elected to and qualify for the office of an alderman of a city of fourth class, that is, before

he can become an officer de jure. If such person is elected without such qualifications and he assumes the duties of the office of alderman, then he is acting as a de facto officer.

In the case of *In re Oak Street; Kansas City v. McTernan*, 308 Mo. 1.c. 508, the court said:

"At the time of the passage of the Oak Street Ordinance the Lower House of the Common Council of Kansas City consisted of sixteen members. When the ordinance was voted upon it received a majority of one. One of those who voted for it was Harry Sandler who had previously moved from the ward in which he had been elected. Section 3, Article II, of the Charter provides that 'if, after his election he (a member of the Lower House) shall move from such ward, his office shall thereby be vacated.' The record shows that Sandler continued to attend the meetings of the Council and to participate officially in its proceedings, including the passage of the ordinance in question, for a long period of time after his removal from the ward from which he had been elected. The fact of his removal, however, was not at the time known to the other city officials, or to the public generally. Under the circumstances he was a de facto alderman, and for reasons of public policy his actions as such must be deemed valid and binding."

In the case of *Perkins v. Fielding*, 119 Mo. on the question of de facto officers, at 1.c. 159 the court said:

"Chief Justice Butler in the celebrated case of State v. Carroll, upon an exhaustive review of all the English and American authorities

of note, lays down the following rules, among others, upon the subject: 'An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were 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. * * * 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.' State v. Carroll, 38 Conn. 449, loc. cit. pp. 471, 472. The principles announced in the able and exhaustive opinion in this case have been variously applied and the case universally followed in subsequent cases, and the language of the learned chief justice has become almost a text upon the subject for subsequent law writers. Many of the cases are cited and the application of the principles thereof pointed out in 5 Am. and Eng. Encyclopedia of Law, note 1, pp. 96 to 103 inclusive, and in note 1, 1 Dillon on Mun. Corp. (4 Ed.), sec. 276. See, also Adams v. Lindell, 5 Mo. App. 197, approved in 72 Mo. 192. Judge Dillon in the text to which the note is apprehended says: 'In this country the doctrine is everywhere declared, that the acts of de facto officers, as distinguished from the acts of mere usurpers, are valid, and the principle extends not

only to municipal officers generally, but also to those composing the council, or legislative, or governing body of a municipal corporation.'" * * * * *

Volume 46 Corpus Juris, page 1060, section 378, the rule as to such officers is stated as follows:

"The acts of an officer de facto are as valid and effectual where they concern the public or the rights of third persons, until his title to the office is judged insufficient, as though he were an officer de jure, and the legality of the acts of such an officer cannot be collaterally attacked in a proceeding to which he is not a party." * * * * *

In the case of In re Bank of Mt. Moriah's Liquidation, 49 S.W. (2d) 275, l.c. 276, the rule is also set out in the following language:

"In the absence of a statute so providing, it is generally held that a failure to qualify, although it affords cause for forfeiture of the office, does not create a vacancy, and even though it is irregular and improper to induct one into office, without giving the required bond, such a one is legally in office, and so remains until removed by judicial process, and if the oath is taken or the bond filed at any time before proceedings are taken to declare a vacancy, it is sufficient."

And in the same case at l.c. 277, the court said:

"* * * So far as third persons and

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the public are concerned there is no practical difference between the acts of a de jure and a de facto officer. 22 R. C. L. pp. 601, 602; 46 C.J. pp. 1060, 1061."

In each of the questions which you have submitted, it appears that the aldermen who have not paid their taxes, would be within the classification of officers designated as de facto officers, and as stated in the above cases and citations so far as third persons and the public are concerned, there is no practical difference between the acts of a de jure officer and a de facto officer. In other words, the official acts of these aldermen have the same force and effect upon the third persons and the public regardless of whether they have properly qualified to the offices which they now hold.

CONCLUSION

This office is, therefore, of the opinion that the official acts of members of a board of aldermen whether such aldermen are officers de jure or de facto officers are valid and binding upon third persons and the public, and that all orders, resolutions and ordinances of such board of aldermen can be enforced regardless of whether the aldermen have properly qualified for the office in which they are now acting.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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