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MEMORIAL BUILDING, OFFICES OF TRUSTEES OF COUNTY —SECTION 3068 G. C. REPEALED—FROM AND AFTER OCTOBER 5, 1945, EFFECTIVE DATE OF AMENDED SUBSTITUTE SENATE BILL 224, 96 GENERAL ASSEMBLY, SAID OFFICES ABOLISHED—PERSONS THERETOFORE HOLDING SUCH OFFICES WHOLLY WITHOUT POWER TO ENTER INTO ANY CONTRACT FOR USE OF MEMORIAL BUILDING.

SYLLABUS:

From and after the effective date of the act repealing Section 3068 General Code, to wit, October 5, 1945, the offices of the trustees of a county memorial building theretofore erected, were abolished, and the persons theretofore holding such offices were wholly without power to enter into any contract relative to the use of such memorial building.

Columbus, Ohio, February 19, 1946

Hon. W. Thurman Todd, Prosecuting Attorney
Mount Vernon, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

"As a result of your opinion, number 701, under date of January 22, 1946, holding that the Knox County Memorial Building Trustees had been abolished as of October 5, 1945, by reason of the repeal of former Section 3068, General Code, the question has arisen as to the validity of the acts of the trustees since October 5, 1945, and before they learned that the statute had been repealed, which created the board.

The primary action taken by the Board of Trustees, which causes me to write you again for opinion, was the entering into

a lease with the Union Theatre Corporation of Cleveland, Ohio, for the rental of a theatre within the building. The Board of Trustees advertised for bids, received and accepted the bid of the Union Theatre Corporation at sixty-five hundred dollars ($6500.00) per year for five (5) years, commencing January 1, 1946.

The County Commissioners of Knox County have requested that I secure your opinion as to whether the lease by the Memorial Building Trustees entered into after October 5, 1945, and before this Board of Trustees learned that the law creating the board had been repealed, constitutes a valid and binding lease under which the Board of County Commissioners now must continue to operate, and whether other acts by the Board of Trustees, if otherwise legally entered into, are valid or are invalid merely by reason of the repeal of the statute referred to.

I have examined opinion number 5114, 1936 Attorney General Opinions, Volume 1, page 71; also, State ex rel. Newman v. Jacobs, 17 Ohio, 143; State ex rel. Herron v. Smith, 44 Ohio State, 348; and Kirker v. Cincinnati, 48 Ohio State, 507.

All of these opinions seem to support the fact that the acts of the Memorial Trustees would be valid and binding and that the trustees would have been acting as de facto officers; however, the matter is of sufficient importance that the County Commissioners have requested me to get your opinion upon the matter."

In Opinion No. 701 rendered January 22, 1946, to which you call attention, I pointed out that by the provisions of Amended Substitute Senate Bill No. 224, enacted by the 96th General Assembly former Section 3068 General Code, was repealed, and that no new provision was made by the General Assembly for the appointment of any board to manage and control the county memorial building, which had been erected and placed in the custody and under the management of a commission appointed pursuant to said Section 3068. My conclusion, therefore, was that the office of the board of managers of such county memorial building was abolished and the management and control of such building passed to the county commissioners.

The question which appears to be raised by your present inquiry is whether the trustees who were in office when their office was abolished could continue as officers de facto, and being without knowledge that their offices no longer existed, could make a valid contract by way of a lease of such memorial building or a portion thereof.

In the opinion of the former Attorney General, found in 1936 Opinions Attorney General, page 71, to which you refer, it was held as shown by the second syllabus:

> "Where an office exists under the law and a person is elected or appointed to fill it, and duly qualifies and enters upon the discharge of his duties, he is a de facto officer and his acts in said position are valid, even though he may not possess the necessary qualifications for the office."

It will be observed that that opinion was predicated on the premise "where an office exists." I recognize the fact that officers who held an existing office under color of title may act as de facto officers though their title to the office is defective and their actions may be valid. That principle, however, can have no possible application to a case like the one here presented, where the office itself has been abolished.

It is said in 42 Am. Jur. page 907:

> "Where an office is duly abolished by the legislature or the people, it ceases to exist and the incumbent is no longer entitled to exercise the functions thereof, or to claim compensation for so doing, unless he is under contract with the state so as to come within the protection of the constitutional inhibition against impairment of the obligation of contract. Since a de jure office is generally essential to the existence of a de facto officer, persons cannot act as de facto officers of an office which has been abolished."

In 32 O. Jur. page 1074, it is stated:

> "The effect of the abolition of an office always is to terminate the term of the incumbent since he cannot be an officer or incumbent of an office which has ceased to exist; in other words, he cannot be a de facto officer of an office no longer in existence. He can recover no salary thereafter; and it is his duty to transfer to the proper authorities all property connected therewith."

In the case of Elyria v. Vandemark, 100 O. S. 365, it was held:

> "When a public office is abolished by duly constituted authority, the incumbent thereof ceases to be an officer, for he cannot be a de facto officer of an office no longer in existence."

In the course of the opinion, at page 369, the court said:

> "The authority to create an office and the power to abolish the same are coexistent, and hence the tribunal authorized to create an office may abolish such office at any time it chooses, either during or at the end of the term of any incumbent of such office. The incumbent would not be entitled to compensation thereafter, for he could not be a de facto officer of an office which was no longer in existence. It is well settled in this state that when an office is abolished by duly constituted authority the incumbents thereof cease to be officers, for there can be no incumbent without an office.

The cases to which you refer do not appear to me to raise any doubt as to the validity of the opinion which I am obliged to reach, namely that any action by the former trustees of the Knox County Memorial Building taken after the repeal of Section 3068, was the act of persons who are neither de jure officers nor de facto officers. The case of State, ex rel. Newman v. Jacobs, 17 Ohio, 143, involved a change to county lines, whereby Auglaize County was created out of Allen County and two of the Allen County Commissioners whose place of residence fell within the bounds of the new Auglaize County took part in the appointment of a county treasurer of Allen County. The court held:

> "The two commissioners whose places of residence, by the erection of Auglaize county fell within the limits of that county, and who, continuing to discharge their official duties, appointed the defendant a treasurer, were commissioners de facto, of Allen county, after the passage of the act erecting the county of Auglaize, and at the time when they made the appointment."

It will at once be seen that the positions which they held as county commissioners were not abolished, and having been duly elected as such commissioners and having continued to act after the erection of the new county they were regarded by the court, and very properly so, as, at least, de facto officers. The case bears no similarity to the question at hand.

The case of State, ex rel. Herron v. Smith, 44 O. S. 348, turned upon the question whether certain members of the legislature were properly seated when they took part in an enactment the validity of which was questioned. The court held:

> "The members so seated are, at least de facto members of the house to which they belong, and the validity of the title by which

> they occupy their seats can not be inquired into by the courts for the purpose of affecting the validity of laws enacted by the legislature in which they hold seats."

Plainly, nothing in that holding affects the question which we have here under consideration. In the case of Kirker v. Cincinnati, 48 O. S. 507, the court had under consideration a statute which had undertaken to do away with a "board of public improvements" for Cincinnati and to substitute a "board of city affairs," the appointing power being lodged in a different officer. The new act having been declared unconstitutional, the court was called upon to determine the legality of acts of the board members appointed thereto. It was said by the court:

> "The act did not in a legal sense create a new office. The board of city affairs was clothed with the same functions as the board of public improvements. If then, as can hardly be questioned, the identity of an office is to be determined by the functions that belong to it, the board of city affairs is, in law, the same as the board of public improvements: For there is nothing in a name by which the essence of things can be changed. The designation, board of city affairs, is only another appellation for the administrative functions with which it was clothed, as is, also, the designation, board of public improvements. So that the act of October 24, 1890, held unconstitutional, simply provided a mode for the removal of the then members of this administrative board, and the appointment of new ones."

In opinion No. 749 which I have just released under date of February 15, 1946, I had before me the question of the right of members of a soldiers' relief commission who had been appointed under the provisions of Section 2930 General Code, as it existed prior to its amendment by the 96th General Assembly, to act after the effective date of that amendment, pending the appointment of the new commission provided for by the amended section, containing a larger membership and having terms beginning at a different time from those in the former law. The contrast between that situation and the one you present, is evident. It was held that since the office had not been abolished, and there had merely been a change in the composition of the board, the members in office had a right to hold not as de facto officers but as officers de jure, until their successors were elected and qualified.

The fact that the commissioners of the memorial building referred to in your letter, were ignorant of the new legislation abolishing their office when they entered into the contract for the lease of a theatre within the memorial building certainly would not operate to create power where none existed. It is a well settled principle that every person who deals with a public officer must take notice of the extent of the authority conferred by law on such officer. 32 O. Jur., p. 940; Lancaster v. Miller, 58 O. S. 558; Frisbie v. E. Cleveland, 48 O. S. 226. That being the case, the officer, himself, must certainly be held to know the extent of his own authority, and to take notice of any legislative act which abridges or terminates it.

In specific answer to your question it is my opinion that from and after the effective date of the act repealing Section 3068 General Code, to wit, October 5, 1945, the offices of the trustees of a county memorial building theretofore erected, were abolished, and the persons theretofore holding such offices were wholly without power to enter into any contract relative to the use of such memorial building.

Respectfully,

HUGH S. JENKINS,
Attorney General.