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PUBLIC WORKS DIRECTOR—QUO WARRANTO ACTION—SUPREME COURT OF OHIO—APPOINTEE DE FACTO OFFICER PENDING COURT DECISION—DE JURE OFFICER—SECTIONS 154-3, 404 G. C.

SYLLABUS:

Status of the Director of the Department of Public Works discussed.

Columbus, Ohio, January 20, 1947

Hon. Joseph T. Ferguson, Auditor of State
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

> "I respectfully seek your opinion as to whether I may accept the signature of Frank Raschig, Director of Public Works on payrolls submitted from his Department for payment subsequent to the middle of January, 1947, in view of the quo warranto proceedings which have been instituted in the Ohio Supreme Court to determine who should head the Department of Public Works."

On July 22, 1946, Frank J. Lausche, the then Governor of Ohio appointed Frank L. Raschig to the office of Director of Public Works. On said date a commission was duly issued to the said Frank L. Raschig.

The provisions of law providing for the appointment of the Superintendent of Public Works, which officer, under the provisions of Section 154-3, General Code, is made the Director of the Department of Public Works, are set out in Section 404 of the General Code, which section reads:

> "There shall be a superintendent of public works of Ohio, who shall be a practical civil engineer and shall be appointed by the governor and shall hold his office for a term of one year from date of appointment and until his successor is duly qualified."

It will be noted that the above section provides that the Superintendent of Public Works, when appointed in accordance therewith, "shall hold his office for a term of one year from the date of appointment."

Notwithstanding such provision, the commission issued to Mr. Raschig on July 22, 1946 by the then Governor recited that Mr. Raschig was appointed to the office of Director of Public Works for a term to begin July 22, 1946 and end January 1, 1947. This latter fact, it appears, gave rise to the filing of a quo warranto action now pending in the Supreme Court, wherein one J. L. McCormick claims that he is entitled to the office in question by reason of his alleged appointment thereto on January 11, 1947. From the answer filed in said action, it would appear that it is Frank L. Raschig's contention that the purported appointment of J. L. McCormick is a nullity and is without any legal force and effect for the reason that on July 22, 1946, the then Governor of Ohio appointed Mr. Raschig to the office of Director of Public Works for a term of one year commencing on said date.

Be that as it may, since said issue is now pending before the Supreme Court for judicial decision and the answer to your question does not depend upon the determination thereof, I express no opinion with respect thereto.

It is a well established rule that a court of equity will not disturb an incumbent in office when a quo warranto suit, in which the title to such office is at issue, is pending. In other words, if the functions of a public office are being exercised by a person, a court will refuse to restrain such person from doing so, the ground for such refusal being that public interest requires that someone should continue to exercise the duties of a public office pending litigation as to its title.

With respect to the above rule, it is stated in State, ex rel. Attorney General v. The Board of Deputy State Supervisors of Cuyahoga County, et al., 70 O. S. 341, at pages 346 and 347:

> "The text books and numerous adjudicated cases have made common knowledge of the rule that in actions in *quo warranto* against an incumbent to try title to an office, the court will not enjoin the incumbent from the exercise of the functions of the office pending the determination of the question of title. This is for reasons of obvious and conclusive force. The public interests require that the functions of the office be performed by some-

one and to transfer their performance from the incumbent to the contestant would deny effect to the *prima facie* title of the former and anticipate the conclusion of the court in *quo warranto,* that, and not injunction, being the question of title.* * *."

On the other hand, the actual incumbent of an office will be protected, pending a contest as to his title, from interference with his possession and occupancy of an office and with the exercise of the functions thereof. High On Injunctions, page 1331; Brady v. Sweetland, 13 Kan. 41; State v. Superior Court, 17 Wash. 12; Reemelin, et al. v. Mosby, 47 O. S. 570; Harding v. Eichinger, 57 O. S. 371.

Even though it should be eventually adjudged that Frank L. Raschig is not entitled to the office in question, he is, nevertheless, during the pendency of the above action, to be regarded in law as a de facto officer and his acts, while acting as such, would be considered valid. In this connection, it is stated in 43 American Jurisprudence, pages 224 and 225:

> "The de facto doctrine was ingrafted upon the law as a matter of policy and necessity, to protect the interests of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law. It was seen that it would be unreasonable to require the public to inquire on all occasions into the title of an officer, or compel him to show title, especially since the public has neither the time nor opportunity to investigate the title of the incumbent. The doctrine rests on the principle of protection to the interests of the public and third parties, not to protect or vindicate the acts or rights of the particular de facto officer or the claims or rights of rival claimants to the particular office. The law validates the acts of de facto officers as to the public and third persons on the ground that, although not officers de jura, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid."

And at page 227 it is stated:

> "* * * Since the welfare and good order of society require that those engaged in the discharge of public duties should not be disturbed by claimants whose right to discharge such functions is as yet uncertain, courts of equity will protect from any unlawful intrusion those who are in office and who have entered at a time when they were recognized by all as being de jure officers. In granting equitable relief in such cases, the court does not necessarily adjudicate the title de jure, but merely the right de facto. * * *."

In view of the above, and in specific answer to your question, you are advised that, in my opinion, Frank L. Raschig, if not presently a de jure officer, is a de facto officer and all acts of his in connection with the discharge of the functions of his office, as to public and third persons, are valid and, consequently, it is your duty to accept and honor the signature of Frank L. Raschig, as Director of the Department of Public Works, on all payrolls submitted by such department, and, if such payrolls are in all other respects regular, it is your duty to issue your warrants in payment of the salary and wage amounts set out therein.

Respectfully,

HUGH S. JENKINS,
Attorney General.