School Board, Vacancy On—Quo Warranto Proper Proceeding to Test Title to Office—District Judge, Member Of.

A vacancy in the office of a member of a school board is not ipso facto created by absence from meetings.

Where there is a dispute to the office of membership on the school board, right to the office should be tested by quo warranto proceeding.

A district judge cannot act in the capacity of school trustee.

December 26th, 1919.

Mr. Merle C. Groene,
Deputy Attorney, Fergus Co.,
Lewistown, Montana.

Dear Sir:

Your communication relative to the difficulties of S. D. No. 1, Fergus County, is now before this office for consideration, upon a full statement of the facts, together with your views and authorities supporting the same.

As whatever oral instructions were heretofore given in this matter through the State Superintendent to the County Superintendent, they were given upon a brief and incomplete statement and understanding of the facts. They are now reversed or modified to conform to the views herein expressed.

It appears from your statement that there is a controversy in District No. 1 as to who constitute and are lawfully entitled to represent the district on the school board. It appears from the statement that this controversy arose under the following circumstances:

District No. 1 was originally a district of the second class, and was functioning as such up until the time of the commencement of the action by Edouard Sutter against the district, seeking to enjoin the entering into of a contract for the erection of a school building, and that during this action it was determined that the district had the required number of population to entitle it to classification as a first class district. Whereupon the County Superintendent appointed two additional members to the board. Four of the members of the original board were holding their offices under the following circumstances: One was at the time of his election as a member of the school board a duly qualified and acting district judge. Within a week or ten days after his qualification as a trustee under his election, he resigned his office as judge and thereafter continued to act as a member of the board. Another member of the board was, by the Governor of this state, appointed to fill a vacancy in the office of District judge, and thereafter duly qualified as for this office, but apparently still continued to act as a member of the board. Two other members of the board were absent from three consecutive meetings. Thereupon the County Superintendent, assuming that their offices had become vacant by reason thereof, appointed two new members to fill the assumed vacancy. She also appointed two members to fill the places on the board of the member

who had been appointed and qualified as district judge, and of the one who had been elected trustee while holding the office of district judge, this on the assumption that the offices were vacant by reason of the constitutional provision that no district judge shall hold any other public office while he remains in the office to which he has been elected or appointed.

It appears that as to the two members appointed to increase the board from that of a second class to that of a first class district their right to the offices is not contested. As to the remaining four members appointed by the County Superintendent, their right to the offices is contested by the members alleged to be disqualified and who refuse to vacate the same. Under Subdivision 6, Section 502 of the General School Laws, the School Board is sole judge of the question of vacancy for absence from three consecutive meetings by one of its members. A vacancy in office is not created *ipse facto* by reason of absence; the absentee may offer a good excuse and the excuse be accepted by the board. In the event the absence is not excused, a vacancy occurs which the clerk of the board must immediately report to the County Superintendent, who is authorized to fill the same by appointment, provided that in districts of the first and second class such appointments shall be subject to confirmation by a majority of the remaining members of the board, if those remaining constitute a majority of the total number of the board.

It appears from the findings of the Court in the case above referred to, that the minutes of the board were silent upon the question of excuse for absence. From your statement it appears that the minutes were amended to show upon good excuse being offered, the absence from three consecutive meetings was excused by the board, and this, it appears, was done before any action on the part of the County Superintendent to fill these places by appointment. This action on the part of the remaining members of the board, who constitute a quorum, cannot be questioned. They were either *de jure* or *de facto* officers.

It is a well settled principle of law that the acts of one, who although not the holder of a legal office, was actually in possession of it under some color of title, or under such conditions as indicated the acquiescence of the public, in his action, could not be impeached in any suit to which such person was not a party.

29 Cyc. 1389.

Therefore, at the time of appointment to fill this vacancy, no vacancy in fact existed, and the action of the County Superintendent did not have the effect of creating a vacancy, and was, therefore, void.

Smythe v. Lapsley, 64 S. W. 733, 35 Cyc. 896.

In the case of Judge Briscoe, appointed a district judge while a *de jure* officer of the School Board, his acceptance of the former office would undoubtedly disqualify him as a member of the School Board.

In the case of DeKlab, who was occupying the office of district judge when elected a member of the School Board, but who immediately resigned as judge, and thereafter qualified and acted as a trustee, he must

have contemplated resignation of the first office when he accepted the second, and it would appear that he is in fact a *de jure* officer. However, the title to an office cannot be questioned in a collateral proceeding.

In a case where the court passed upon a statutory provision declaring that when a commissioner accepts another office his former office shall become vacant, this provision cannot alone make an office unoccupied. The legal effect of the words in such circumstances is, that the office has no occupant who holds by good title in law, and that the appointing power may at once be exercised to fill it; or for an elective office, the people may elect, and no adjudication is required to declare the vacancy, although the newly appointed or elected officer may find it necessary to resort to *quo warranto* proceedings to obtain actual possession of the office.

Oliver v. Jersey City, 48 Lia. 414.

Where the person regularly appointed or elected to fill an office attempts to take possession and is resisted by an incumbent, he will be compelled to try the right and oust the incumbent.

State ex rel. Leal v. Jones, 81 Am. Dec. 403.

Where an office is not disputed, and one in actual possession steps out with no intention of abandoning the office, and the other claimant, with full knowledge of the fact, steps in and proceeds to do business, the one who previously had possession of the office is considered to be the officer *de facto*.

29 Cyc. 1391, Draidy v. Theritt, 17 Kan. 468.

The board would, therefore, at present be constituted as follows: Noble Walker, Chairman of the Board, whose right to his office has never been questioned; the two members appointed to make up the board to the required membership of a first class district; and J. E. Owen and Roy Long, all of whom are *de jure* members of the board; and H. L. DeKlak and Jack Briscoe, *de facto* members of the board, who cannot be ousted therefrom if they refuse to surrender their offices, except in a proceeding in *quo warranto* to try their title thereto.

Butler v. Phillips, 88 Pac. 480.
Oliver v. State, 48 L. R. A. 412.
North v. City of Battle Creek, 152 N. W. 195.
State ex rel. Buckner v. Mayor of Butte, 41 Mont. 385.

Respectfully,

S. C. FORD,

Attorney General.