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March 25, 1959  
Opinion No. 59-55

REQUESTED BY: Honorable James P. Boyle, Jr.  
Yavapai County Attorney

OPINION BY: WADE CHURCH, The Attorney General

QUESTIONS:

1. Are County Assessors required to take and subscribe both to the oath required of public officers in A.R.S. § 38-231, and the special oath required of County Assessors in A.R.S. § 11-542?
2. Can the remuneration of a County Assessor be withheld for his neglect or failure to take the oath prescribed by § 11-542?

CONCLUSIONS:

1. County Assessors are required to take and subscribe to both oaths.
2. No.

Title 38, Chapter 2, Article 4, Section 38-231, entitled, "Officers required to take oath; form" reads as follows:

"Before any officer enters upon the duties of his office, he shall take and subscribe the following oath:

State of Arizona, County of \_\_\_\_\_  
I, \_\_\_\_\_, do solemnly swear that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies whatever, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so help me God."

The above quoted section applies to all public officers, including county assessors. Section 38-442 of Arizona Revised Statutes entitled:

"Persons acting as public officers without qualifying; penalty, effect of acts" provides that:

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"A. A person who exercises a function of a public office without taking the oath of office, or without giving the required bond, is guilty of a misdemeanor.

B. This section shall not affect the validity of acts done by a person exercising the functions of a public office in fact, where persons other than himself are interested in maintaining the validity of such acts."

It is noted that the above quoted oath requires all public officers to swear that they will support the Constitution of the United States and the Constitution and the laws of the State of Arizona, and that they will faithfully and impartially discharge the duties of their respective offices.

A.R.S. § 42-227 requires that all taxable property shall be assessed at its full cash value and A.R.S. § 42-201 defines "Full cash value for assessment purposes."

It would, accordingly, appear that the general oath of office required by A.R.S. § 38-231 is sufficient to qualify the county assessor to perform all the duties required of his office. However, the legislature has seen fit to require county assessors to take and subscribe to an additional or supplemental oath. This requirement is set forth in A.R.S. § 11-542 and reads, in part, as follows:

"B. The assessor and his deputies shall take and subscribe the following oath or affirmation:

'I do solemnly swear (or affirm) that I will well and truly discharge the duties of assessor of the county of . . . and will, to the best of my knowledge and ability, truly and fairly assess, without favor or partiality, all the taxable property of said county at its full cash value.'

Title 11, Chapter 3, Article 7, Arizona Revised Statutes, pertaining to the powers and duties generally of county assessors fails to prescribe any penalty for failure of the county assessor to take and subscribe to the special oath above quoted, such as is set forth in A.R.S. § 38-442 applying to the general oath of office required of all public officers.

An examination of the laws and statutes of the State of Arizona discloses that the Legislature has required that all public officers subscribe and take the general oath of office and that in addition

thereto county assessors take and subscribe to the special oath required by A.R.S. § 11-542 since 1901. Both oaths of office have been continued in the statutes in substantially the same form since that year.

In view of these facts, the Attorney General is constrained to hold that under the laws of this State county assessors are required to take and subscribe to both oaths notwithstanding the fact that the general oath provided by A.R.S. § 38-231 apparently covers all the official duties of the county assessor.

In the event the county assessor enters upon the duties of his office without taking and subscribing to the additional oath required by A.R.S. § 11-542, he has not qualified as a de jure officer but is acting as a de facto officer.

A de facto officer has been defined to be one who comes in by the forms of an election or an appointment, and thus acts under the claim and color of right, but, in consequence of some informality, omission or want of qualification, could not hold his office if his right was tried in a direct proceeding by an information in the nature of quo warranto.

A de facto officer is one who is in possession of an office and discharging its duties under color of authority, by which is meant authority derived from election or appointment, however irregular or informal, so that the incumbent is not a mere volunteer.

The Supreme Court of Arizona in the case of Rogers v. Frohmler (1942) 130 P.2d 271; 59 Ariz. 513, held that 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 involved the interests of the public and third persons where the duties of the office were exercised under color of a known and valid appointment or election, but where the officer who failed to conform to some precedent, requirement or condition as to take an oath, give a bond or the like.

The Supreme Court of Arizona further held in the case of Juliani v. Darrow (1941) 119 P.2d 565; 58 Ariz. 296, that a de facto officer, even though legally he is not eligible for the position, may recover the salary attached to the office for duties discharged pursuant to apparent authority and in good faith when there is no de jure officer claiming the salary.

In view of the above, it is the opinion of the Attorney General that county assessors are required to take and subscribe to both oaths required by the statutes of this state.

Honorable James P. Boyle, Jr.

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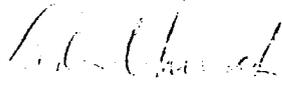
It is the further opinion of the Attorney General that in the event a county assessor fails to subscribe to the additional oath required in A.R.S. § 11-542, that he is acting as a de facto officer, and that such acts are valid.

It is also the opinion of the Attorney General that he is entitled to recover the salary attached to the office for duties discharged pursuant to such apparent authority and in good faith, when there is no de jure officer claiming the salary. For that reason his remuneration may not be withheld for his neglect or failure to take the oath prescribed in A.R.S. § 11-542.

Attention is invited, however, to the fact that a refusal as distinguished from mere neglect or failure to take the oath of office may be an important element tending to negative the proposition that one so refusing is a de facto officer. In the event there is an absolute refusal to take the oath required by A.R.S. § 11-542, such action may amount to a refusal to qualify for the office of county assessor or to accept the office to which he has been elected.

In the case of Brown v. State, Court of Criminal Appeals of Texas, (January 29, 1902), 66 SW 547, it was held that the refusal of a person appointed deputy sheriff to take the required oath of office amounted to a refusal of such person to qualify as a deputy sheriff and for that reason he was not functioning as a de facto officer.

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