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### Officers - Rights, Powers, Duties, and Liabilities - Occupancy of Office by De Facto Officer - Effect on Compensation of De Jure Officer

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Today, an absolute divorce may cut off a wife's dowery interest,<sup>12</sup> or her homestead right.<sup>13</sup> For this reason a number of jurisdictions allow alimony to be used as compensation to the wife for the loss of property interest.<sup>14</sup> Where the wife obtains a property settlement at the time of divorce, alimony terminates at the death of the husband.<sup>15</sup>

In summary it may be said that although the courts state as a principle that there must be strict compliance with the statutes in alimony decrees, a good measure of discretion is given the courts by North Dakota statute.<sup>16</sup>

Provisions should be made in the divorce decree awarding the wife her equitable share of the family property and in some cases alimony should be granted to the wife for the duration of her life. However, it is better to provide for a property settlement at the time of the divorce and award alimony to the wife, only if she is in need of support, such alimony terminating at the husband's death.

F C. ROHRICH

OFFICERS — RIGHTS, POWERS, DUTIES, AND LIABILITIES — OCCUPANCY OF OFFICE BY DE FACTO OFFICER — EFFECT ON COMPENSATION OF DE JURE OFFICER. — In an election dispute between plaintiff, the incumbent highway surveyor, and his election opponent, the opponent was appointed by the town council to replace the plaintiff. State law provided that plaintiff should continue in office for an additional two years or until a successor was duly elected and qualified.<sup>1</sup> Plaintiff did not acquiesce in the opponent's appointment and was reinstated after bringing quo warranto proceedings, but the town council refused his claim for compensation for the time he was out of office. The Rhode Island Supreme Court, in a case of first impression, held that payment of the salary to the de facto surveyor did not discharge the town from its liability to the de jure officer for the period during which he was excluded from office. *LaBelle v. Hazard*, 160 A.2d 723 (R. I. 1960).

The common law and majority rule in this country is that if a public body pays to a de facto officer<sup>2</sup> compensation to which the holder of an office is entitled, it is not bound to pay such compensation again to the de jure officer when he succeeds in having his right to the office judicially established.<sup>3</sup>

12. *Gum v. Gum*, 122 Va. 32, 94 S.E. 177 (1917).

13. N.D. Rev. Code § 14-0525 (1943).

14. *Sickey v. Sickey*, 329 Mich. 51, 44 N.W.2d 867 (1950); *Tyson v. Tyson*, 283 Mich. 192, 277 N.W. 882 (1938).

15. *Borton v. Borton*, 230 Ala. 630, 162 So. 529 (1935). See *Johnson v. Johnson*, 57 Kan. 343, 46 Pac. 700 (1896) "Alimony and a division of the property of the parties is essentially a different thing."

16. N.D. Rev. Code § 14-0524 (1943) "When a divorce is granted, the court shall make such equitable distribution of the real and personal property of the parties as may seem just and proper, and may compel either of the parties to provide for the maintenance of the children of the marriage, and to make such suitable allowances to the other party for support during life or for a shorter period as to the circumstances of the parties respectively. The court from time to time may modify its orders in these respects."

1. Public Laws of Rhode Island, 1948, c. 1998.

2. The rule applies only to officers and not to employees. For distinction between the two see *Francis v. Iowa Employment Security Commission*, 250 Iowa 1300, 98 N.W.2d 733 (1959); *Mootz v. Belyea*, 60 N.D. 741, 236 N.W. 358 (1931).

3. *Peru v. State*, 210 Ind. 668, 199 N.E. 151 (1935); *Brown v. Tama County*, 122 Iowa 745, 98 N.W. 562 (1904); *Saline County v. Anderson*, 20 Kan. 298, 27 Am.Rep. 171 (1878); *Bowlin v. Franklin County*, 152 Miss. 534, 120 So. 453 (1929); *Hallowell v. Buffalo County*, 101 Neb. 250, 162 N.W. 650 (1917).

The de jure officer's remedy is limited to an action against the de facto officer and the fact that the de facto officer is insolvent does not affect the application of the majority rule.<sup>4</sup> The basis of the rule is said to be public policy—the public should not be compelled to pay for the same services twice.<sup>5</sup> It is felt that public services cannot be performed efficiently unless prompt payment is made to public officers for their services and that public fiscal officers should not be required to obtain a judicial determination of an officeholders right to his salary before paying him.<sup>6</sup>

A very vocal minority hold that in the absence of waiver or estoppel, payment to a de facto officer is no defense to an action by the de jure officer for the salary of an office from which he has been wrongfully excluded.<sup>7</sup> The minority also base their rule on public policy, stating that no public good can be served by denying to a public officer his compensation merely because it has been wrongfully paid to one who was not entitled to receive it and who, if he has received it, is not entitled to keep it.<sup>8</sup> A leading minority case is *Ness v. City of Fargo*,<sup>9</sup> in which the Supreme Court of North Dakota held that the salary of a public officer is an incident to the office and the right to receive or enforce payment thereof goes with the legal title of the office. In this case, as in the principal case and most of the minority rule cases, the paying agency had notice of the dispute concerning the office and the de jure officer at all times sought to enforce his right to the office. But some minority cases hold that payment to the de facto officer is no defense even if the paying agency had no notice of the contest because the de jure officer did not contest his removal promptly.<sup>10</sup> Conversely, some majority cases hold that payment to the de facto officer is a defense even in the event of such notice,<sup>11</sup> but it is generally held that such payment must have been made in good faith to constitute a defense.<sup>12</sup> The court in the *Ness* case implies by way of dicta that North Dakota might steer a middle course between the two rules when it states: "It may be true that a de jure officer who has been excluded from office should be held to a stricter standard of conduct in order to be in a position to insist upon his legal right to salary where the office has been occupied by a defacto officer who has received payment for the services performed than in other classes of cases, and that the principles of waiver and estoppel may be applied against a de jure officer where they might not be applied in other cases . . ."<sup>13</sup> This seems to indicate that in a proper case North Dakota

4. *Saline County v. Anderson*, *supra* note 3; *Bowlin v. Franklin County*, *supra* note 3.  
5. *Capitol Managers v. Rusan*, 72 Colo. 197, 210 Pac. 328 (1922); *Brown v. Tama County*, 122 Iowa 745, 98 N.W. 562 (1904).

6. *Peru v. State*, 210 Ind. 668, 199 N.E. 151 (1935).

7. *Memphis v. Woodward*, 12 Heisk. 499, 27 Am.Rep. 750 (1873); *Markus v. City of Duluth*, 138 Minn. 225, 164 N.W. 906 (1917); *Ness v. City of Fargo*, 64 N.D. 231, 251 N.W. 843 (1933); *Board of County Commissioners v. Litton*, 315 P.2d 239 (Okla. 1957).

8. *Ness v. City of Fargo*, *supra* note 7.

9. 64 N.D. 231, 251 N.W. 842 (1933).

10. *Cowan v. State*, 57 Wyo. 309, 116 P.2d 854 (1941).

11. *Saline County v. Anderson*, 20 Kan. 298, 27 Am.Rep. 171 (1878); *Bowlin v. Franklin County*, 152 Miss. 534, 120 So. 453 (1929).

12. *Glenn v. Chambers*, 244 Iowa 750, 56 N.W.2d 892 (1953); *Markus v. City of Duluth*, 138 Minn. 225, 164 N.W. 906 (1917). *Contra*, *Hittell v. City of Chicago*, 327 Ill. 443, 158 N.E. 683 (1927) (Good faith in paying the salary to de facto incumbent is not necessary to relieve public body from obligation to pay de jure officer for the period before there was a judicial determination as to who was the de jure officer).

13. *Ness v. City of Fargo*, 64 N.D. 231, 251 N.W. 843, 845 (1933).

courts might hold that the public is not liable to a de jure officer during a period when he did not assert his right to office.<sup>14</sup>

Considering the relative infrequency of these cases it would seem that no public interest will be disserved by requiring a public body to pay to a de jure officer the compensation of the office to which he was elected and to which he has always maintained his right, even if this results in the salary being paid twice.

TIMOTHY Q. DAVIES

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14. See *City of Tulsa v. Emery Johnson*, 196 Okla. 213, 163 P.2d 993 (1945); *Chandler v. Hughes County*, 9 S.D. 24, 67 N.W. 946 (1896).

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