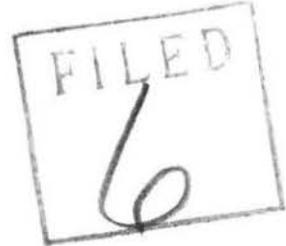


CIRCUIT CLERK AND EX-OFFICIO RECORDER OF DEEDS - not entitled to salary during time of suspension.

2-19

February 18, 1935.



Hon. E. W. Bennett,  
Member House of Representatives,  
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of February 13 enclosing statement of William H. Welch, former Circuit Clerk and Recorder of Deeds of Dent County. Your letter is as follows:

"The County Court of Dent County requests me to ask you for an opinion as to their liability in connection with the attached copies of a claim filed by William H. Welch against the county.

Mr. Nolen of your department assisted in the trial of the case against Mr. Welch, and I presume will remember the facts in connection therewith. I might add that in addition to the case tried by Mr. Nolen, Mr. Welch was suspended by the Judge of the Circuit Court for failure to attend to his office and for being intoxicated. After the first of January of this year a new prosecuting attorney went into office and he has dismissed all of the cases pending against Mr. Welch."

As the writer recalls, the original action was brought under Section 11201, R.S. Mo. 1929, which is as follows:

"If any public officer, whether state, county, city, town or township officer, shall be intoxicated while in the performance of any official act or duty, or shall become so intoxicated as to be incapacitated to perform any official act or duty at the time and in the manner required of him in the discharge of the duties of his office, he shall be deemed guilty of a misdemeanor in office, and punished by imprisonment in the county jail not exceeding six months, or by a fine of not less than fifty dollars, or by both such fine and imprisonment; and if there be no provisions made by law for the removal from office of such officer by impeachment, the court shall adjudge the defendant to have forfeited his office and declare the same vacant, and the same shall be filled as provided by law for filling such vacancy: Provided, that no court other than the circuit or criminal court of record shall have power to adjudge any such office to be forfeited and vacant."

Pursuant to Section 11201, supra, the Circuit Judge who presides over the Circuit Court of Dent County, either upon his own knowledge or from information obtained from others, suspended the Circuit Clerk during the time in which certain charges were pending.

Section 11682, R.S. Mo. 1929 provides;

"When any court, or the judge or judges, or a majority of them in vacation, shall believe from their own knowledge or from the information of others, on oath or affirmation, that the clerk of the court in which they preside has been guilty of a misdemeanor in office, they shall give notice thereof to the attorney-general or prosecuting attorney, stating the charges against such clerk, and requiring him to prosecute the same; and they may suspend such clerk from office until a trial can be had, and appoint a temporary clerk, who shall possess the same qualifi-

cations, take the same oath and give like bond as other clerks, and who shall possess the same power, perform the same duties and receive the like fees as other clerks, and shall continue in office until the regular clerk shall resume his office or a successor shall be elected: Provided, however, when the county court, or the judge or judges thereof of any county, shall prefer charges against the county clerk, as aforesaid, the said clerk shall remain in possession and perform the duties of his office by giving bond to the state with at least two solvent securities; said bond to be fixed and approved by the circuit judge of the county, conditioned that said clerk and his securities shall pay all costs, damages and fines which may be assessed against him upon his trial; and if said clerk shall fail to make and execute said bond within fifteen days after receiving notice to do so, then he may be suspended as provided for the clerks of other courts."

You state that the charges under the complaint, or information, have been dismissed and the Clerk now files the attached statement demanding salary during the period of time he was suspended. Dealing with this subject, 46 C.J. , page 1016, sec. 236, is as follows:

"An officer lawfully suspended is generally not entitled to compensation during the period of suspension, whether finally removed or not, and especially where the statute provides that a suspension shall create a vacancy. But where the suspending officer is without power to suspend or having power, exercises it in a manner in contravention of a statute, the suspended officer is entitled to the compensation of the office during the period of suspension; and in some jurisdictions it is held that, when an officer is suspended pending proceedings upon removal, the right to recover the compensation of the office is forfeited only in case of a conviction. An officer suspended without

cause from the performance of the duties of his office by the appointing power, but not removed, is entitled to the salary of the office during the period of the suspension, although the suspended officer may waive that right by express agreement or by conduct from which such an agreement or intention on his part may be fairly and reasonably inferred. An officer suspended under a statute which expressly provides that no salary shall be paid during the period of suspension is not entitled to the salary of the office during the period, although no person be nominated for the place or appointed to discharge its duties."

The question of an officer receiving a salary while suspended from office was discussed in the case of *Blackwell v. City of Thayer*, 101 Mo. App., l.c. 663-665, in which the Court said:

"An officer who is lawfully suspended from the performance of his duties can not recover his salary or wages for the period covered by the suspension, whether he is finally removed from office or not. *Westburg v. Kansas City*, 64 Mo. 493; *Howard v. St. Louis*, 88 Mo. 656; *Lewis v. St. Louis*, 12 Mo. App. 570. Those cases are directly in point, while *State ex rel. v. Carr*, 3 Mo. App. 6, turned on certain ordinances of the City of St. Louis. The vital question in this case is: Was Blackwell's suspension by the mayor and council a lawful act; that is to say, within their charter powers? The office of marshal in a city of the fourth class is elective, but the power is conferred on the mayor and council to remove an elective officer for cause on a hearing. R.S. 1899, sec. 5904. But does the power of removal carry with it the power to suspend pending the investigation of the charges? On this point there is said to be a conflict of authority with

the better opinion in favor of the doctrine that the power to remove does not include the power to suspend temporarily. Mechem on Public Officers, sec. 453. Whatever conflict there may be the point was settled in this state by the decision of the Supreme Court in State ex rel. v. Lingo, 26 Mo. 494. In that case the mayor of the City of St. Louis, pursuant to the charter and ordinances, had suspended Lingo from the office of superintendent of the city workhouse, which appears to have been an elective office at that time, and had appointed the relator. The charter authorized the mayor and council to regulate the election of all elective officers and to provide for removing from office any person holding an office created by the act or by ordinance and not otherwise provided for. Under that charter authority an ordinance had been passed providing for the suspension and removal of city officers, which authorized the mayor to suspend any officer who willfully violated his official obligations and to appoint a person to fill the vacancy for the time being. The question arose for decision whether the portion of said ordinance which authorized the suspension of elective officers by the mayor was valid, and it was held to be valid because the power to remove includes the power to suspend, even in the case of elective officers. That decision is conclusive as to the validity of a similar ordinance of the City of Thayer, which provided that pending the investigation of charges preferred against an officer, he might be suspended from exercising the duties of his office by a vote of not less than three-fourths of the board of aldermen. Blackwell was suspended by a vote of that majority; hence, his suspension was legal. See also State ex rel. v. Police Commissioners, 16 Mo. App. 48; Shannon v. Portsmouth, 54 N.H. 183."

CONCLUSION

We are of the opinion that the Circuit Clerk and Ex-officio Recorder of Deeds of Dent County is not entitled to the salary of \$3,513.26 during the time of his suspension, as per the attached statement, provided the procedure has been regular and according to the terms of the statute.

As to the item of \$143.10, we conclude that this is a controversial item arising from the audit, and it may or may not be correct. This item is purely a question of fact and we cannot, therefore, give you an opinion on same.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

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