

OFFICERS: Prosecuting Attorney relinquishes right to compensation by accepting Commission in the Navy and reporting for duty.

May 9, 1942

Hon. Arthur Thomason
Clerk of the County Court
Clay County
Liberty, Missouri

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Dear Sir:

Under date of April 28, 1942, you wrote this office requesting an opinion as follows:

"No doubt you are acquainted with the situation here in Clay County as to our Prosecuting Attorney. About three weeks ago he enlisted in the Naval Reserve for the duration of the war and he has an assistant attending to his duties.

"What we would like to know is: Will it be permissible or lawful for the County Court to issue a warrant in favor of Conn Withers for his duties performed in his office.

"We will appreciate your immediate consideration of this letter and a prompt answer."

Later, in response to an inquiry from this office, you furnished the additional information that Conn Withers had reported for active duty and was a commissioned officer.

The right of a public officer to the salary of the office is a right created by law and is an incident to the office. State ex rel. v. Walbridge, 153 Mo. 194, l. c. 203, C. J. Vol. 46, p. 1015 and State ex rel. Gordon, 245 Mo. 12, l. c. 28

from which case the following quotation is taken.

"It is also settled law that, as the compensation is incident to the title, it belongs to the de jure officer. As to the right of the de facto officer to draw the salary during his incumbency, the authorities are not harmonious. Both Throop and Mechem lay down the rule, based upon New York decisions, that the de facto officer has no right to the salary, and this because a claim for salary must be based upon title. (Throop on Public Officers, Sec. 517; Mechem's Public Offices and Officers, Sec. 331.) And such is the holding in many jurisdictions. Our court, in several cases, adheres to the contrary doctrine. (State v. Draper, 48 Mo. 213; State v. Clark, 52 Mo. 508; State v. John, 81 Mo. 13; Dickerson v. Butler, 27 Mo. App. 9; State ex rel. v. Walbridge, 153 Mo. 1. c. 202.) All the authorities, however, agree that the de jure officer, on establishing his title, may recover from the de facto officer the compensation which the latter has received."

Also in the case of Luth v. Kansas City, 203 M. A., page 110 these two cases were followed at 1. c. 113:

"In this State it is held that a salary is attached to and depends upon the legal title to the office and that the de jure claimant is entitled to the salary even though he has not occupied the office or performed the duties thereof. (State ex rel. v. Walbridge, 153 Mo. 194, 203; State ex rel. v. Gordon, 245 Mo. 12, 28,

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29.) And following the logical result of the rule stated in those cases it was held in *Sheridan v. St. Louis*, 183 Mo. 25, 38-40, that a de facto officer who has performed the functions of the office cannot recover the salary attached to such office. *Throop on Public Offices* and *Mechem on Public Office and Officers* cited in those decisions sustain them."

From your letter it seems the sole question is whether or not a warrant should be issued to the person who was duly elected and qualified as prosecuting attorney of the county and no question has arisen as to payment to some other person or as to the title to the office.

It is apparent from the foregoing that title to the office carries with it the compensation provided by law for the officer so long as title to the office remains in the officer.

Section 5 of Article XIV of the Constitution provides that all officers elected or appointed shall hold office during their official terms, subject to the right of resignation, and until their successors are chosen and qualified, subject to the right of resignation. The Constitution and Statutes also authorize and make provision for the ousting of officers for certain causes. Your letter makes no mention of the expiration of the term for which Mr. Withers was elected, or of an ouster or a resignation. Mr. Withers would then be entitled to receive the compensation attached to the office, unless his acceptance of a Commission in the Navy or Navy Reserve and going on active duty would deprive him of his right to receive the compensation of the office.

In considering this question it is desired to call attention to Section 4 of Article XIV of the Constitution of Missouri, as follows:

"No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

A person in civil life becomes an officer of the Navy by becoming an applicant for a commission recommended for appointment and being appointed by the President in accordance with Section 851, Title 34, U. S. C. A. Taking the oath of office, required by Section 16, Title 5, U. S. C. A. And the pay of such person as an officer of the Navy commences upon the date of his acceptance of the Commission. Section 862, Title 3, U. S. C. A.

From your brief statement of facts under the Sections of the statutes it would seem that Mr. Withers has accepted an office of profit under the United States. For an office of profit is an office to which there is attached compensation and the amount of the compensation is not material. *Baker v. Board of County Commissioners*, 59 Pac. 797.

Mr. Withers has accepted an office of profit under the United States, which is contrary to the provisions of Section 5, Article XIV of the Constitution of Missouri, supra. By so doing he has impliedly resigned his office under the State of Missouri. A resignation may be written, oral or by implication. 46 C. J. p. 979, paragraph 132, provides:

"A resignation of a public office, to be effective, must be made with the intention of relinquishing the office, accompanied by the act of relinquishment. It is not necessary that a resignation from a public office be couched in any particular words, it being only necessary that the incumbent evince a purpose to relinquish the office. Where no particular mode of resigning an office is provided by constitutional or statutory requirements, no formal method is necessary; it may be by parol, or it may be implied."

The Governor did not immediately name a successor to Mr. Withers and the duties of the office were performed by a deputy under the supervision and direction of Mr. Withers. There is authority for the appointment of a deputy prosecuting attorney. Section 12962, R. S. Mo. 1939.

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Mr. Withers had evidence of title, his certificate of election and commission, although he had resigned the office he still continued to function, and there was no other claimant for the office or the salary. Discharging the duties of the office and having color of title would constitute him a de facto officer.

A de facto officer is one who holds an office by some color, right or title and assumes to perform the duties of the office. *City of Republic v. Smith*, 139 S. W. (2d) 929. In the case here under consideration, Mr. Withers, while having impliedly resigned, had evidence of title and no successor had been appointed and he was discharging some duties and supervising and directing others.

A de facto officer without color of title cannot claim the compensation attached to an office. *Sheridan v. St. Louis*, 183 Mo. 25. Yet there is a long line of cases holding that a de facto officer in possession of the office and performing the duties may recover the compensation. *Dickerson v. City of Butler*, 27 Mo. App. 9; *State ex rel. v. Gordon*, 236 Mo. 142; *State ex rel. v. John*, 81 Mo. 13; *Hunter v. Chandler*, 45 Mo. 457.

CONCLUSION

From the foregoing it is believed there is authority for paying the salary of the office of prosecuting attorney to Mr. Withers, until his successor is chosen or, until he abandons the performance of duties in connection with the office.

Respectfully submitted,

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Assistant Attorney-General

WOJ:CP

APPROVED:

ROY McKITTRICK
Attorney-General