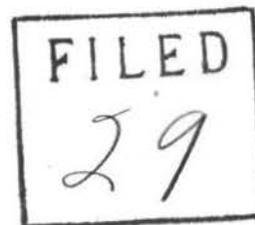


CLERK OR CIRCUIT COURT: Temporary military service does not vacate office:

April 3, 1943

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Honorable Bernard T. Flannery  
Clerk of Circuit Court  
County Court House  
Kansas City, Missouri

Dear Mr. Flannery:

The Attorney General wishes to acknowledge receipt of your letter of April 1, 1943, in which you request an opinion as follows:

"In view of the fact that I will be leaving Kansas City within the next two weeks for the Armed Forces, it is our desire to have an opinion from your office pertaining to the status of my term as Circuit Clerk.

The opinion is desired for our files and for the protection of my Chief Deputy, Mr. James R. (Bob) Byrnes, whom I am leaving in charge and to act in my stead."

In your letter you fail to state by what method you will enter the armed forces, whether by induction under the Selective Service Law, by voluntary enlistment, by acceptance of a temporary commission, or by reason of being on the reserve and called to active duty. This lack of information precludes our giving a positive and unqualified opinion upon the question asked. However, we are assuming that you are entering the armed forces temporarily for the duration of the existing emergency and are answering the question on that assumption.

The question of what effect entrance into the armed forces for the present emergency has upon the tenure and title to an office has been passed upon twice by the Supreme Court of this State. The most recent case is the case of State ex inf. McKittrick vs. Wade Wilson, reported in 166 S. W. Reporter, (2nd) series at page 599. This case involved the title to the office of Circuit Clerk of Henry County.

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The elected clerk, John Wall, had entered the army under the Selective Service Law and was stationed out-side of the State of Missouri. The Governor, deeming a vacancy to exist by reason of such absence from the State, appointed Wade Wilson as Circuit Clerk of Henry County, and this office brought an ouster proceeding against Wilson charging him with usurping the office. It is desired to call to your attention two brief quotations from this case, l. c. 501:

"It is our judgment that Wall did not forfeit his office by being drafted into the military service of his country. This would be equally true if he had volunteered for the duration, particularly in view of our universal military service."

and the second one, l. c. 502, as follows:

"We come to the conclusion that there is nothing in the law, constitutional, statutory or common, which requires us to hold that Wall has forfeited his office by becoming a soldier in the army. Therefore, the office was not vacant and the appointment of respondent was unauthorized."

If your entering into the armed service should be under the Selective Service Law the Wilson case rules specifically.

The first case decided by the Supreme Court involving the question was the case of State ex rel. McGaughey vs. Grayston, reported in volume 163 S. W. Reporter, (2nd) series, page 335. This case involved the title to the office of Judge of the Circuit Court of Jasper County. The Honorable Ray Watson, one of the Judges of the Circuit Court of Jasper County, was also a Colonel in the National Guard. When the National Guard was called to active duty by the Federal Government, Judge Watson left the State of Missouri in command of his regiment. The members of the bar of Jasper County, from time to time, elected a special

Judge to sit for Judge Watson. This case was a prohibition suit brought to prohibit Charles M. Grayston, who had been elected Special Judge on one occasion, from holding court. The petition charged that the Special Judge had no jurisdiction to try the case.

The decision was written by Judge Douglas and from the decision in this case, attention is called to the following quotations from, l. c. 337 and from l. c. 338.

"Historically the "Militia" or "militiamen" have been held to comprehend every temporary citizen-soldier who in time of war or emergency forsakes his civilian pursuits to enter for the duration the active military service of his country. The term "militia" was not used as restricted to the National Guard. Its early usage applied to each and every able-bodied citizen between the ages of 18 and 45. By our present Constitution it is the same today.

Article XIV, Sec. 4 of our Constitution Mo. R.S.A. provides: "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."

When Judge Watson was ordered into Federal service as Colonel of the Missouri National Guard was he then "holding and office of profit under the United States" within the meaning of this provision? It is our conclusion, and we so decide, that this provision was never intended to apply and does not now apply to the militiaman who enters the service of his country in time of emergency or war."

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"The separate identify of the militiaman as distinguished from the professional soldier who makes up the Regular Army was carried on long after the adoption of this constitutional provision and was recognized and

observed in the Civil War and in the Mexican Border Service in 1916 and in the first World War. This was also the case when, in an effort to avoid the restrictions on the use of the militia units, the "National Volunteers" were called for the Mexican War in 1846-8 and the Spanish-American War in 1898. In the war with Spain the Missouri militia units volunteered en masse and each unit of the militia became the identical unit in the volunteer service. In the Mexican War, Colonel Doniphan led a large number of Missouri troops on one of the most remarkable expeditions in modern military history.

It must follow that the provision before us has no application to a militiaman even though he is employed in the service of the United States during times of emergency or war."

There have been numerous cases in other States where similar questions have been passed on but as pointed out in the Wilson case, supra in l. c. 502, the decisions from other States are not particularly helpful because of the different statutory enactments and constitutional provisions. For that reason, this opinion is based solely upon the two Missouri cases mentioned herein.

A careful reading of the two cases brings the conclusion that temporary service in the armed forces during the existing emergency for an indefinite period does not have the effect of vacating an office under the statutes and decisions in Missouri.

#### CONCLUSION

If your entrance into the army, and service therein, is purely temporary and you are not contemplating permanently becoming a member of the regular establishment of the United

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States army, but are merely contemplating the performance of the patriotic duty, which every citizen owes to our Government during the present emergency, it is the opinion of this office that such service will not affect the title or tenure of your office for the term for which you were elected.

Respectfully submitted,

W. O. JACKSON  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

WOJ:mh