OFFICERS: Deputy Circuit Clerk is an officer and entitled to receive compensation while lawfully holding title to office.

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Honorable Kelso Journey
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Mr. Journey:

Receipt is acknowledged of your letter of December 31, 1942, requesting an opinion from this office as follows:

"Will you please let us have your opinion, at the earliest possible date, on this question:

"John R. Wall was elected Circuit Clerk of Henry County in 1938 for a term of four years. Jessie L. Rucker was duly appointed as Deputy Circuit Clerk in 1938. Upon February 16, 1942, John R. Wall was inducted under the Selective Service Act into the Army of the United States as a private, and Jessie L. Rucker, as deputy circuit clerk, carried on the work of the Circuit Clerk's office until April 7, 1942, when she turned over the office to Wade Wilson, being a person appointed to the office of Circuit Clerk by the governor upon April 4, 1942, under threat of being held in contempt of the Circuit Court. Shortly after April 7, 1942, the Attorney General instituted a proceeding in quo warranto in the Supreme Court of Missouri to determine Wade Wilson's right to hold the office as Clerk of the Circuit Court of Henry County. The Supreme Court of Missouri in its decision entitled 'State of Missouri, ex inf. Roy McKittrick, Attorney General of the State of Missouri v. Wade Wilson', decided that there was no vacancy in the office of Circuit Clerk in Henry County and that the appointment of Wade Wilson was unauthorized. Upon December 14, 1942, Jessie L. Rucker took charge of the

office and is now carrying on the duties of same. For the period from April 7, 1942, to December, 1942, Jessie L. Rucker remained ready and willing to perform the duties of the office as the deputy circuit clerk of John R. Wall, and duly filed her demands for her salary. Is the County lawfully obligated to pay same?"

The authority for the appointment of a deputy clerk of the circuit court is found in Section 13299 R. S. Mo., 1939, which section is as follows:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

Section 13434 R. S. Mo., 1939, makes provision for the approval of deputy clerks by the Judge of Judges of the Circuit Court and authorizes the Judge or Judges to fix the compensation of such deputies. Section 13435 R. S. Mo., 1939, makes provision for the payment of the compensation to the deputies. This section is as follows:

"The salary of the clerk, and that of his deputies, and assistants, shall be paid out of the county treasury, in monthly installments, at the end of each month. The accounts of all deputies and assistants shall be stated in their names, respectively, and the correctness thereof shall be certified by the officers, respectively, in whose employment they are. The clerk and his deputies

and assistants shall present their accounts to the county court, and said court shall draw its warrant therefor upon the county treasurer, to be paid out of any money available in the treasury."

It is well established law in the State of Missouri that the compensation of the office is a mere incident to the office and the person who has title to the office is entitled to the compensation. Your attention is directed to the following cases:

Cavanee v. City of Milan, 99 M. A. 372, is a case in which a marshal who was unable to perform his duties due to illness was permitted to recover the compensation attached to his office for the time he was absent from the performance of his duties.

In the case of Bates et al v. City of St. Louis, 153 Mo. 18, the mayor of St. Louis was permitted to collect the salary attached to the office of mayor for a period of time while he was absent from the State of Missouri on personal business and performing none of the duties of the mayor.

A similar case is the case of State ex rel. Chapman v. Walbridge et al, 153 Mo. 194. In this case a police officer of the City of St. Louis was allowed to recover compensation for a period of time during which he performed no duties because of being improperly relieved from duty. The following quotation is taken from this case at l.c. 203:

" * * The legal right to the office carried with it the right to the salary. The board by its wrongful act could not deprive him of this legal right. The right of a public officer to the salary of his office, is a right created by law, is incident to the office, and not the creature of contract, nor dependent upon the fact or value of services actu-

ally rendered. (Givens v. Daviess Co., 107 Mo. 603; Gammon v. Lafayette Co., 76 Mo. 675; State ex rel. v. Carr, 3 Mo. App. 6; State ex rel. v. Brown, 146 Mo. 401; Fitzsimmons v. Brooklyn, 102 N. Y. 536; Andrews v. Portland, 79 Maine, 484; Memphis v. Woodward, 12 Heiskell, 499; People ex rel. v. Smyth, 28 Cal. 21; Carroll v. Siebenthaler, 37 Cal. 193; Koontz v. Franklin Co., 76 Pa. St. 154; Walker v. Cook, 129 Mass. 579; Hoke v. Henderson, 4 Dev. (N. C.) 1; City Council v. Sweeney, 44 Ga. 463; People ex rel. v. Brennan, 30 How. Prac. Rep. 417.) Hence, the fact that the relator after he was wrongfully and without warrant of law discharged from his position as policeman, and was thereby and thereafter prevented from discharging the duties of that position, and did not in fact discharge those duties or offer to do so, affords no ground for denying him his salary, and the court committed no error in awarding him a mandamus therefor."

The foregoing would indicate that the deputy circuit clerk would be entitled to receive the compensation attached to the position if such position is to be considered as an office even though prevented from performing the duties of the office. A search of the statutes, textbooks, and cases has failed to reveal any direct holding in the State of Missouri as to whether or not a deputy circuit clerk should be considered as an office.

In the case of Horstman v. Adamson, 101 M. A. 119, a suit involving the compensation of a deputy clerk of the county court, the language used by the judge would indicate that a deputy clerk of the county court would be considered an officer. The deputy clerk of the circuit court occupies a similar position.

Further, in the case of State ex rel. v. Bus, 135

Mo. 325, at l.c. 332, a deputy sheriff was held to be a public officer in the following language:

> "The right, authority and duty are thus created by statute; he is invested with some portions of the sovereign functions of the government to be exercised for the benefit of the public and is, consequently, a public officer within any definition given by the courts or text writers."

There is quite a bit of similarity between the position of deputy sheriff and deputy clerk of the circuit court. Each deputy is appointed by his principal with the approval of the Judge or Judges of the circuit court. Each deputy must take an oath of office. Each perform certain duties in the name of the principal, and there is no fixed tenure of office for either.

In the Maryland case of State to Use of Smith v. Turner, 101 Md. 584, 61 A. 334, 337, it was specifically ruled that a deputy clerk of the court in Maryland is an officer of the court and not an agent:

> "'Deputies,' being appointed in the language of the Constitution 'to perform the duties of the office,' are not mere servants or agents of the clerk of the court; they are agents and officers of the court."

Under the law of Maryland the deputy clerks are appointed by reason of the constitutional provision instead of under a statute as they are appointed in Missouri, but it is required that their appointment be approved by the Judge of the Circuit Court just as our statute requires the appointment of a deputy clerk to be approved by the Judge.

CONCLUSION

From the foregoing the conclusion is reached that a deputy clerk is a public officer, and as such is entitled to the compensation attached to the office while having lawful title to the office.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

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