

PROBATE JUDGE:

SALARY:

The estate of a Probate Judge who dies in office is not entitled to compensation as salary incident to such office between the date of the death of such Judge and the date of the appointment of a successor to him. Neither is the newly appointed Judge entitled to compensation between the date of the death of the previous Judge and the date of his appointment. Any balance of such salary unused constituting a part of excess fees collected by the Probate Judge should be paid into the school fund of such county.

January 27, 1951

lected by the Probate Judge should be paid into the school fund of such county.

2-3-51  
FILED

88

Honorable H. Tiffin Teters  
Assistant Prosecuting Attorney  
Jasper County  
Carthage, Missouri

Dear Mr. Teters:

We are hereby supplying the opinion you requested in your letter of January 6, 1951. Your letter follows:

"Will you please render an opinion of the following state of facts at your earliest convenience as it is necessary that the Probate Judge of Jasper County, Missouri make a final report for the year 1950.

"On February 24, 1950, Judge Grant Emerson, Probate Judge of Jasper County, Missouri, died and the office of Probate Judge became vacant. On the 2nd day of March, 1950, Judge Elza Johnson was appointed Probate Judge by the Governor of the State of Missouri to fill the vacancy thereby created. Judge Johnson was sworn in and assumed the duties of office on the 3rd day of March, 1950, and of course, thereafter performed the duties of the Probate Judge, including unfinished reports and accumulated business of the Court during the period of vacancy.

"Judge Johnson served the remainder of the year 1950 but was not reelected and on the 1st day of January, 1951, his successor was sworn into office. The

Honorable H. Tiffin Teters

County Auditor paid to Judge Emerson and his estate the proportionate part of the annual salary he had earned for the year 1950, including the date of his death, February 24, 1950. The County Auditor has also paid or caused to be paid to Judge Johnson the proportionate part of the annual salary from the date he was sworn in on March 3, 1950, until the end of the year. That part of the annual salary from February 24, 1950, to and including March 2, 1950, has not been paid.

"Laws of 1945, page 1514, provide that the annual salary of Probate Judges in counties now or hereafter having 70,000 and less than 250,000 inhabitants shall be \$6,000.00.

"It is contended by Judge Johnson that the salary is not a per diem salary but an annual salary and that the full \$6,000.00 has not been paid and as he is holding the legal title to the unexpired term either he or the estate of Judge Emerson is entitled to this salary between February 25, 1950 and March 2, 1950.

"In other words he is requesting how and to whom the unpaid part of said annual salary should be paid or would it go into the school funds of the County.

"Judge Johnson contends that salary paid for holding public office is an incident to the legal title to such office regardless of services rendered or how many days he is actually engaged in performing the duties of that office. He claims that he was appointed to serve the unexpired term of the former judge and he should be entitled to the unpaid part of the annual salary and the fact that he did not

Honorable H. Tiffin Teters

actually serve from February 25, 1950, to March 2, 1950, both inclusive, does not deprive him of the right to such compensation.

"He cites the following authorities for his contention:

46 C.J. 1014 Sec. 233	
Cunio vs. Franklin County,	315 Mo. 405, Lc407
State vs. Gordon	245 Mo. 12 Lc 27
King vs. Riverland	218 Mo. A. 490 Lc 493
Stratton vs. Warrensburg	167 SW2d 392 Lc 396
Luth vs. Kansas City	203 Mo. A. 110 Lc 113
State vs. Walbridge	153 Mo. 194 Lc 204
State vs. Gordon	245 Mo. 12 Lc 28-29

"Will you please advise this office as to your ruling in regard to this matter and whether the annual salary from February 25, 1950, to March 2, 1950, both days inclusive, should be paid to the estate of Judge Grant Emerson, to Judge Elza Johnson, or whether the same should be placed in the school funds of Jasper County, Missouri, as unexpended funds of the office of the Probate Court.

"We will thank you for an early reply as the annual report for the year 1950 cannot be completed until we get a ruling on this matter."

The question you submit is whether the estate of a former Probate Judge of Jasper County who died during his term of office, is entitled to the salary between the date of his death, February 24, 1950, and March 3, 1950, when the Governor appointed a Probate Judge to fill the vacancy, or whether the Probate Judge, who was appointed March 3, 1950, to fill the vacancy is entitled to compensation for the period of the vacancy, and if neither the estate of the deceased Judge, nor the appointed Judge,

Honorable H. Tiffin Teters

is entitled to compensation should the estimated amount of such part of the annual salary of the Probate Judge computable during such vacancy be placed in the school fund of Jasper County, Missouri, as unexpended funds of the annual salary of the Probate Judge.

The official manual of Missouri, popularly called the "Blue Book", page 750, lists Jasper County as having a population of more than 70,000 inhabitants, and as a second class county under the Constitution and statutes of this State.

Under the title of "Salaries and Fees" of Judges of Probate Courts in counties having more than 30,000 inhabitants, Section 3, page 1515, Laws of Missouri, 1945, reads as follows:

"The annual salary of probate judges in counties now or hereafter having 70,000 and less than 250,000 inhabitants shall be \$6000.00."

Section 5 of said Act, l.c. 1515, provides, among other things, that such Probate Judges shall be paid their salaries monthly by the counties in which they serve. Said Section 5, in part, so providing, reads as follows:

"In all counties now or hereafter having more than 30,000 inhabitants, the probate judges shall appoint their own clerks, assistants and stenographers, and shall determine their number and their salaries by order of record, and may remove them when in the discretion of such judges it is deemed advisable. All salaries of such judges and their appointees shall be paid monthly by the county, upon requisition issued by the judge of such court. \* \* \*."

It will be agreed by all that a vacancy in the office came about upon the death of Judge Emerson on February 24, 1950. 46 C.J. states the text on the meaning of vacancy, page 971, in Section 117, which reads, in part, as follows:

Honorable H. Tiffin Teters

"While the word 'vacancy' as applied to an office is one which has no technical meaning, an office is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent who has a lawful right to continue therein until the happening of some future event. On the other hand, an office is not vacant so long as it is supplied, in the manner provided by the constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which appertain to it. \* \* \* ."

Our Supreme Court in the case of State ex rel. vs. Ralls County Court, 45 Mo. 58, considered a case where a vacancy occurred in the office of sheriff of Ralls County upon the ouster of an individual who had been improperly certified as elected by the county clerk, and in so doing the county clerk had refused to count the votes of one of the precincts of the county. The county court of Ralls County appointed the same person as sheriff who had been ousted by the decree of the Supreme Court and called a special election to elect a new sheriff. The question of whether there was a vacancy in the term of the sheriff arose after the county court appointed a sheriff and ordered the special election and became one of the principal points in the case. The Supreme Court in giving its definition of what constitutes a vacancy, l.c. 60, said:

"\* \* \* Whether there was a vacancy or not did not depend upon the question of intrusion, but upon the further question not directly passed upon by the court, whether there was any one else entitled to hold the office. \* \* \*"

"\* \* \* If we are to understand by vacancy an interregnum, without reference to the right of any one to fill the place or the space, before the person entitled to it has qualified, then the action of the court created one; but such a vacancy as the County Court is authorized to fill implies a state of things where no one has any title to the office \* \* \* ."

Honorable H. Tiffin Teters

46 C.J. 1006, defines title to a public office as follows:

"Title to a public office means the right which claimant has to it, \* \* \*. A valid title must rest upon a legal appointment or election."

Upon the death of Judge Emerson, February 24, 1950, and until March 3, 1950, there was no incumbent in the office of Probate Judge of Jasper County who could claim title to the office. The operation of the office and the performance of the functions incident thereto were suspended and the office became dormant and vacant instantly upon the death of Judge Emerson. Not again until March 3, 1950 was there an incumbent in the office who was vested with and could claim title to the office, and incidentally, the compensation provided by law to be paid to the incumbent. If, as the authorities state, the right to compensation by an incumbent of public office to compensation depends upon a valid title to the office, then it must follow that Judge Emerson had no title to the office because of his death and left nothing to his estate by reason of his incumbency prior to February 24, 1950. It is likewise apparent and conclusive that Judge Johnson had no title to the office nor the right to claim title or compensation incident to the office as an incumbent thereto until his appointment by the Governor March 3, 1950. It is the occupant or incumbent of the office to whom compensation or salary is to be paid and not the office itself. Note the language of Section 3, supra. That section fixes the salary of the Probate Judge. That means the incumbent in the office.

Manifestly, Judge Johnson's appointment was not retrospective, with respect to title or compensation belonging to the office, but was prospective only for the future and unexpired portion of the term to which Judge Emerson was elected at the last previous General Election.

Your letter recites a number of authorities cited by Judge Johnson as in support of his belief that either the estate of Judge Emerson or he himself is entitled to such sum as compensation during such period.

Honorable H. Tiffin Teters

We have carefully read these authorities and we believe they do state the law of the case in both text and decisions to conclusively hold that neither the estate of Judge Emerson, deceased, nor Judge Johnson, as the appointee to fill the vacancy, is entitled to any sum unpaid out of the annual fixed salary of the Probate Judge of that class of counties during such period of vacancy in the office. The first authority cited by Judge Johnson, as your letter states, is 46 C.J., page 1014, Section 233. That section, in part, is as follows:

"The person rightfully holding an office is entitled to the compensation attached thereto; \* \* \* ."

We believe such quoted text would be sufficient authority alone upon which to base a proper and legal conclusion in this opinion that neither the estate of the deceased Judge, nor the living appointed Judge who succeeded him, are entitled to compensation for the period of the vacancy after the death of Judge Emerson to the date of the appointment of Judge Johnson, since no person held the office during such period. We will, however, quote from each of the decisions by our Appellate Courts noted in your letter and cited by Judge Johnson because they do show what our highest Courts have held, and are the basis of this opinion. While it is true that the salary of a public officer, such as the Probate Judge in this case, is an incident to the legal title to such office regardless of services rendered or the time in which he is actually engaged in performing the duties of the office, and all, or nearly all, of the cases cited by Judge Johnson so state, but there is not one of such authorities, text or decision, as we read them, that is not based positively upon the premise and assumption that there must be, and was in each of these cases an incumbent in the office who there claimed title or had legal title to the office. This was held to be a necessary condition by our Supreme Court in the case of State ex rel. vs. Walbridge, et al., 153 Mo. Rep. 194. That was a case where the Board of Police Commissioners of the City of St. Louis had improperly dropped a policeman from the police force of that city and was an appeal by said Board of Commissioners from the judgment of the Circuit Court of said city granting a peremptory writ of mandamus

Honorable H. Tiffin Teters

commanding the Board to rescind its previous order dropping the relator from the police force, to re-instate him and issue to him a warrant upon the city treasurer for compensation due him during the period of his removal from his office. The term of the office of the officer removed had expired during the pendency of the appeal. The Supreme Court said in its decision that it would be unavailing as a right or benefit to the removed officer to direct the Board to re-instate him. But the Court reversed the case, directing the Board of Police Commissioners of said city to issue relator a warrant upon the city treasurer for the full amount of his salary during the period of his being deprived of his office. On the point here being discussed, and saying that the removed officer was entitled to the office during all the time of his removal, and in effect that there must be an incumbent in an office in order to merit and receive compensation, l.c. 203, the Court said:

"\* \* \* To the office of policeman from which he was removed he had good title, he was in possession, and no one was disputing it. To that office the law attached a monthly salary, and to that salary he was entitled so long as the law remained in force and under it he lawfully held the office. 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 actually rendered. \* \* \* ."

In the case of Stratton vs. City of Warrensburg, cited by Judge Johnson, 167 S.W.(2d) 392, the Kansas City Court of Appeals in its decision in that case in effect and substance holding that one must be a legal incumbent of a public office before he may claim the compensation attached to the office, l.c. 396, said:

"\* \* \* The true rule is that the right to the compensation attached to an office is an incident to the legal right to the office and not to the exercise of the

Honorable H. Tiffin Teters

functions of the office. Cunio v. Franklin County, 315 Mo. 405, 285 S.W. 1007, and cases cited."

The exercise of "the legal right to the office" as said by the Court in the Warrensburg case means that such claim to the legal right to the office must be made by a living person who occupies the office, either by election or by appointment.

In the case of Cunio vs. Franklin County, 315 Mo. Rep. 405, the Supreme Court was considering a case of a claim for salary by Cunio, a probation officer, involving the legality of his appointment. The Supreme Court held that Cunio was not lawfully appointed and consequently was not entitled to maintain his suit against Franklin County for compensation. Basing its decision upon the question of the validity of Cunio's appointment and holding that he must necessarily have been lawfully appointed to the office in order to be entitled to compensation incident thereto, and that there must be an incumbent in an office entitled to the office before compensation can be paid to a claimant thereto, l.c. 407, the Court said:

"\* \* \* The decision turns on the fact of plaintiff's appointment to said office. If he was appointed thereto, he is entitled to the emoluments thereof.

"It is a well-established principle that a salary pertaining to an office is an incident of the office itself, and not to its occupation and exercise, or to the individual discharging the duties of the office.

"On the other hand, it is equally well settled that, if a person exercising the functions of an office is not entitled to the office, he cannot maintain an action for his services.

"In Luth v. Kansas City, 203 Mo. App. l.c. 113, the court said: 'In this State it is held that a salary is attached to and

Honorable H. Tiffin Teters

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, 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."

The case of Luth vs. Kansas City, 203 Mo. App. Rep. 110, was a suit for salary as chief clerk in the water department of the defendant city by Luth. The city, being aware of a contest between Luth and one Folk for the office, withheld salary from both claimants for a time, but, without waiting for the settlement of the question of title to the office between the two contestants, paid Folk the salary incident to the office as an officer de facto. Luth prevailed in the Circuit Court of Jackson County in his suit against the city, after establishing that he was the de jure officer and entitled to the place. The Kansas City Court of Appeals in affirming the judgment rendered for Luth by the Circuit Court, holding that the salary attached to a public office depends upon who is in possession of the legal title to the office, that is, the lawful incumbent, l.c. 113, said:

"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. \* \* \* ."

The case of Tom M. King vs. Riverland Levee District was decided by the St. Louis Court of Appeals, 218 Mo. App. 490. The decision recites that Tom M. King was collector of revenue of Pike County, Missouri, at the time the question arose because of which the suit was filed. The agreed statement of facts upon which the case was tried before the Circuit

Honorable H. Tiffin Teters

Court contained the stipulation that "Plaintiff was on the 1st day of March, 1919, duly elected and qualified as the collector of Pike County, Missouri, \* \* \* ." The action was for a claimed commission upon taxes of the levee district derived from a suit brought and sales had of the property on execution for delinquent levee taxes where money was paid by reason of such executions and sales and paid directly to the treasurer of the levee district by the sheriff. The Court held that the collector, King, was not entitled to commission on such funds on the ground that no statute specifically allowed the collector a commission on such funds, but that such funds, under the appropriate statute then in force, required the payment thereof by the sheriff directly to the treasurer of the levee district. In so deciding the case the Court held that there must be a statute authorizing the payment of compensation to a public officer for the performance of his duties and upon the point, l.c. 493, said:

"It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. \* \* \* ."

Our Supreme Court held that a public officer's right to compensation as an incident to office rests upon whether he is entitled to the office or not, in the case of State ex rel. Evans vs. Gordon, 245 Mo. 12. The suit was in mandamus by Evans, relator, Superintendent of Public Schools to compel Gordon the then State Auditor to issue to relator a warrant for salary which he claimed was due. Howard A. Gass contested the right to the office with Evans. Gordon, State Auditor, refused to issue his warrant to Evans because of a statute in force prohibiting the issuing of a warrant to a person involved in a contest for office. Gordon filed a demurrer to relator's petition, setting up the bar of the statute to the issuing of a warrant under the facts alleged in the petition. The Supreme Court sustained the respondent's demurrer, the effect of which was to hold that the relator, Evans, was not entitled to the warrant in payment of claimed salary at the hands of the State Auditor because it was not established that he had title to the office. In so doing the Court defined the right of a public officer to compensation where, l.c. 27, 28, the Court said:

"Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed, but is incidental to the office.

Honorable H. Tiffin Teters

"Throop on Public Officers (Sec. 443) says: 'It has been often held, that an officer's right to his compensation does not grow out of a contract between him and the State. The compensation belongs to the officer, as an incident of his office, and he is entitled to it, not by force of any contract, but because the law attaches it to the office.'

\* \* \* \* \*

"Not only is the right to compensation dependent upon statute, but the method or particular mode provided by statute must be accepted. On this point the Kansas City Court of Appeals says: 'It seems the general rule in this country, as announced by the decisions and text-writers, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute. And further, it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or to any different mode of securing the same. \* \* \* Such statutes, too, must be strictly construed as against the officer. \* \* \* ."

The effect of these decisions, is inevitably, we believe, to deprive both the estate of Judge Emerson and Judge Johnson from claiming any part of the unpaid annual salary of the Probate Judge of Jasper County, Missouri, because there was no incumbent in the office and no person had title thereto from February 24, 1950 to March 3, 1950.

The case of Nodaway County vs. Kidder, 129 S.W. (2d) 857, was before the Supreme Court of this State on appeal upon an action by Nodaway County against A. P. Kidder, Presiding Judge of the County Court of that county to recover an excess of salary and mileage paid to the Presiding

Honorable H. Tiffin Teters

Judge over and above the sum he was entitled to under existing statutes. The County prevailed in the Circuit Court. The Presiding Judge appealed to the Supreme Court. The Court affirmed the judgment in favor of the County and against Kidder, holding that the County had established that the defendant, Kidder, received public funds which were in excess of his salary, and that he had failed to meet the burden of showing his right to retain the excess funds over his compensation as established by law. The Court in so holding, gave expression to what has become a classic rule in the construction of the right of a public official to compensation for services, where, l.c. 860, the Court said:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment.  
\* \* \*."

No claim to the title of the office of Probate Judge being possible by Judge Emerson or Judge Johnson between February 24, 1950, and March 3, 1950, it seems clear under the above authorities that neither said estate nor Judge Johnson is entitled to any compensation from Jasper County during such period.

Your letter asks the further question whether, if neither the estate of Judge Emerson, nor Judge Johnson, is entitled to any percentage of such salary during such vacancy, should such part thereof be transferred to the school fund of said county.

As pointed out above, Jasper County is a county of the second class. It is subject to the statutes relating to budgets in second class counties, Laws of Missouri, 1945, page 603. Section 10923 of said Act, page 604, provides, in part, that all receipts of the county for operation and maintenance shall be credited to the general fund, and all expenditures for such purposes shall be charged to such fund. Also, as previously pointed out herein, Section 5, page 1515, Laws of Missouri, 1945, as quoted, provides that salaries of Probate Judges shall be paid monthly by the county, upon requisition issued by the Judge of such court.

Honorable H. Tiffin Teters

The only reference we find requiring payment into the county school fund of such counties, funds relating to the Probate Judge's office is in Section 6, page 1516, Laws of Missouri, 1945, which reads as follows:

"In all counties now or hereafter having more than 30,000 inhabitants, whenever the probate fees collected in any such county during any calendar year, irrespective of the date of accrual of such fees, exceed the sum actually expended during such calendar year for the hire of clerks, assistants and stenographers and the salary of the probate judge, a sum equal to such excess fees shall be transferred to the school fund of such county by the county treasurer within five days after the final report of fees and salaries paid is made by the probate judge."

In compliance with said section 6, supra, if the fees collected in said county during the calendar year exceeded the sum actually expended during such calendar year for the maintenance of the office of Probate Judge in said county, then such computed part of the Probate Judge's salary as was unpaid between February 24, 1950, and March 3, 1950, which is a part of such excess, because of the vacancy in such office, should be transferred to the school fund of such county under said Section 6.

#### CONCLUSION

It is, therefore, the opinion of this department by reason of the authorities herein cited and quoted:

1) That neither the estate of Judge Emerson, nor Judge Johnson, in person, is entitled to any part of the annual salary of the Probate Judge of Jasper County, Missouri, during the period of vacancy in said office, from February 24, 1950, to March 3, 1950, inclusive;

2) That the remaining balance of such salary unused and unpaid during such vacancy, if the fees collected in said county during the calendar year exceeded the sum actually expended during such calendar year for the maintenance of the

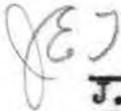
Honorable H. Tiffin Teters

office of Probate Judge in said county which is a part  
of such balance should be transferred to the school  
fund of such county under said Section 6.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney General

APPROVED:



---

J. E. TAYLOR  
Attorney General

GWC:ir