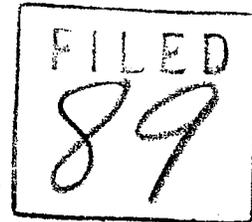


OFFICERS:
DEPUTY CIRCUIT CLERKS AND
EX OFFICIO RECORDERS:
FOURTH CLASS COUNTIES:
APPOINTMENT:
QUALIFICATION:
COMPENSATION:

By proceeding in nature of quo warranto the Supreme Court of Missouri found Elvis Mouser had usurped the office of Circuit clerk and recorder of Bollinger County, Missouri since January 8, 1955, and ordered him ousted from office and emoluments as of that date; that Mrs. Medford J. Taylor was the legally appointed and qualified clerk as of said date. Mrs. Juanette Wagner is the legally appointed and qualified deputy of Mrs. Taylor and is entitled to receive monthly compensation fixed in the circuit court's order approving appointment on January 10, 1955 from said date as long as she is so employed.

February 28, 1956

Honorable Donald P. Thomasson
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri



Dear Mr. Thomasson:

This department is in receipt of your recent request for our legal opinion. Said request reads in part as follows:

"The question is whether the Deputy Clerk of the Circuit Court of Bollinger County appointed by and signing her oath of office at the time as Mrs. Merrill Taylor, or the Deputy Clerk appointed by Elvis Mouser is to receive the pay as Deputy during the period this office has been in dispute.

"Mrs. Juanette Wagner was appointed by Mrs. Merrill Taylor and signed her oath of office on January 10, 1955. Mrs. Carol Wilkerson was appointed by Elvis Mouser and worked from January 1, 1955 until December 12, 1955."

Said facts were further clarified in your letter of January 6, 1956, which reads in part as follows:

"There was a Circuit Court Order approving the appointment of Mrs. Carol Wilkerson as the deputy of Circuit Clerk Mouser. The Order was signed by Judge B. C. Tomlinson and Dated January 5, 1955, which order stated that Carol Wilkerson's term was to begin January 1, 1955 and end December 31, 1955. Carol Wilkerson was employed from January 1, 1955 until December 12, 1955, which was the date of the Supreme Court decision in the case of State ex inf. Dalton v. Mouser. The Circuit Court Order has never been

modified or rescinded and Mrs. Wilkerson was never discharged during the period of time she was employed. The Bollinger County Court has paid no salary whatsoever to Mrs. Wilkerson.

"On January 10, 1955, a Circuit Court Order approving the appointment of Juanette Wagner as Deputy Circuit Clerk of Mrs. Merrill Taylor was signed by Judge B. C. Tomlinson, which Court Order contained the same stipulations as the Order approving the appointment of Carol Wilkerson. Mrs. Wagner was never employed, such order has never been modified or rescinded and Mrs. Wagner was not paid any salary by the County Court."

In an original proceeding in the nature of quo warranto, in which the State of Missouri ex inf. John M. Dalton, Attorney General, was relator and Elvis Mouser was respondent, decided by the Supreme Court of Missouri on December 12, 1955, it was the judgment of the court that the respondent be ousted from the office of Circuit Clerk and Ex Officio recorder of Bollinger County, Missouri. The respondent is the same party referred to as Elvis Mouser in the opinion request.

The order of the court is summed up in the conclusion of the opinion in the above mentioned proceeding and reads as follows:

"In holding as we do, it should be understood that the acts of respondent as de facto clerk of the circuit court and ex officio recorder of Bollinger County since January 8, 1955, insofar as they concern the public or the rights of third persons, are to be considered as valid as though he had been a de jure officer. State ex rel. City of Clarence v. Drain, 335 Mo. 741, 73 S.W. 2d 804, 805-806.

"It is the judgment of this court that respondent has unlawfully usurped the office of Clerk of the Circuit Court and Ex Officio Recorder of Bollinger County since January 8, 1955; that he be ousted of said office and its emoluments as of said date; and that all costs herein be taxed against respondent."

Bollinger County is a county of the fourth class, and by virtue of Section 59.090 RSMo 1949, the clerk of the circuit court of said county is also ex officio recorder.

Sections 483.380 and 483.385 RSMo 1949 are in regard to the appointment and payment of compensation of deputy circuit clerks and recorders of fourth class counties. Section 483.380 reads as follows:

"The circuit clerk and recorder in counties of the fourth class shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge of the duties of his office. The judge of the circuit court, in his order permitting the circuit clerk and recorder to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered on record, and a certified copy thereof shall be filed in the office of the county clerk. The circuit clerk and recorder may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment and the circuit court, may at any time modify or rescind its order permitting an appointment to be made."

Section 483.385 reads as follows:

"All annual salaries provided in sections 483.370 to 483.380 shall be paid out of the county treasury in monthly installments at the end of each month by warrant drawn by the county court upon the county treasury."

The definition, and general rule prevailing with reference to the appointment, status and tenure of deputy officials is given in Volume 67 C.J.S., pages 449 and 450. The same information regarding the de facto deputies of public offices is also given at page 452 of said volume of C.J.S. and we quote said references:

"The term 'deputy,' when used with respect to a deputy of a public officer, is usually defined as one who by appointment exercises an office in another's right or name, that is, one who has no interest in the office, but whose acts done under color of office are of equal force with those of the officer himself."

"The authority given by law to a ministerial officer is given to the incumbent of the office, and a deputy is ordinarily regarded as the agent or servant of his principal. On the other hand, where provision is made by statute for the position of deputy, such deputy is regarded as a public officer, and it has been held that, if the superior is denominated an 'officer,' then the deputy is also an 'officer,' but, where a statute confers a power only to be exercised for, and in the name of, the principal, a deputy is not an officer, so that, where a state constitution provides for only one officer in a particular office, the legislature may not confer on a deputy a power to be exercised in his own right so as to constitute him an officer.

"Deputies, whether common-law or statutory, are, where their terms are not fixed by statute, supposed to be appointed at the pleasure of the appointing power, and their deputation expires with the office on which it depends. Deputies must, from this point of view, be distinguished from assistants to whom a fixed term has been given by law.

"The general rule that the acts of officers de facto are valid and effectual where they concern the public or the rights of their persons applies to de facto deputies. A de facto deputy performing the functions of an office existing in law, and claiming the right by some color of authority, may be held accountable for his conduct as if he were duly and legally qualified."

From the opinion in the above cited case, we note that Elvis Mouser was elected circuit clerk of Bollinger County at the general election held in 1950, and his term of four years began on the first Monday in January, 1951, and would end when his successor was elected and had qualified, as provided by Section 483.015 RSMo 1949, which reads as follows:

"At the general election in the year 1882, and every four years thereafter, except as herein provided, the clerks of all courts of record, except the clerks of the supreme court, the courts of appeals, the probate courts, the magistrate courts, and except as otherwise provided by law, shall be elected by the qualified voters of each county and of the city of St. Louis,

who shall be commissioned by the governor, and shall enter upon the discharge of their duties on the first Monday in January next ensuing their election, and shall hold their offices for the term of four years, and until their successors shall be duly elected and qualified, unless sooner removed from office."

Mouser served the term for which he had been elected and at the general election in 1954, he was a candidate to succeed himself for the next ensuing term of four years beginning on the first Monday in January, 1955. Merrill J. Taylor, the only rival candidate, received a majority of the votes cast at such election and was elected to said office.

On December 4, 1954, following the election, and before he had qualified for the office, Merrill J. Taylor died. On January 6, 1955, the governor appointed Mrs. Medford J. Taylor as the successor to Mouser. Mrs. Taylor qualified on January 8, 1955, and one of her first official acts was the appointment of Mrs. Juanette Wagner as deputy circuit clerk and recorder, which appointment was approved by the circuit judge on January 10, 1955, although the term of such appointment has not been stated in the opinion request or in the letter of clarification. No question has been raised concerning the legality of the appointment of Mrs. Wagner, and for the purposes of our discussion herein it will be assumed that the appointment was legally made and in accordance with the provisions of Section 483.380 supra.

It further appears that Mouser has been holding the office and performing the duties of same since his election in 1950 and up to the time the opinion in State ex inf. Dalton vs. Mouser, supra, was handed down on December 12, 1955, and that Mouser had appointed Mrs. Carol Wilkerson as his deputy and that Mrs. Wilkerson worked from January 1, 1955 to December 12, 1955. Apparently, the provisions of said Section 483.380, supra, were attempted to be complied with as the circuit judge, by order duly entered of record, approved the appointment of Mrs. Wilkerson on January 5, 1955. Neither Mrs. Wilkerson nor Mrs. Wagner have received any compensation as deputy circuit clerk and recorder to date, and with these facts in mind, we understand the opinion request to inquire which of the two deputies is entitled to the compensation so that the county court can pay the proper party.

It is believed that the answer to this question as to who the legally appointed deputy is and who would be entitled to the compensation would be dependent upon the answer to the question as to who was the legally elected or appointed circuit clerk at the time of the deputy's appointment, as there could only be one such legally

appointed or elected circuit clerk during the period in question, and that circuit clerk would be the only one who would be authorized to appoint deputies in accordance with said Section 483.380.

In the case of State ex inf. Dalton vs. Mouser, the court held that Mouser had usurped the office of circuit clerk and recorder of Bollinger County since January 8, 1955, and that he be ousted as of that date from the office and its emoluments, and the court further stated in its opinion, that Mouser was a de facto clerk of the circuit court and ex officio recorder of said county since January 8, 1955, and that his acts, as such, insofar as they concern the public, or the rights of third persons are considered as valid as though he had been a de jure officer. The court further held that Mrs. Taylor was the legally appointed successor to Mouser. As such legally appointed clerk, Mrs. Taylor and no one else could appoint deputies under the provisions of said Section 483.380. Not being the legally elected or appointed clerk at the time, Mouser had no authority to appoint Mrs. Wilkerson as deputy clerk, and his action in that regard was a nullity. As an appointee of a de facto officer, Mrs. Wilkerson was a de facto deputy, and her performance of the duties of the office, insofar as the public and the rights of third persons are concerned, since January 8, 1955, are as valid as if she were a de jure deputy. However, she had no right to compensation as a de facto deputy against Mrs. Wagner, the de jure deputy.

It is unfortunate that Mrs. Wilkerson, who has performed the duties of deputy circuit clerk until December 12, 1955, is not legally entitled to compensation as such, but since her appointment was made by one who was not the circuit clerk, but only usurped the office, her appointment was illegal and she is not entitled to receive any compensation under the provisions of Section 483.385. It appears that any recourse that she might have to recover compensation for services rendered would be against Mouser personally and not against Bollinger County.

In view of the foregoing, it is our thought that Mrs. Wagner, the legally appointed deputy circuit clerk and recorder is entitled to compensation as such in accordance with the amount fixed in the circuit judge's order approving her appointment on January 10, 1955, and that Mrs. Wagner should be paid monthly compensation as long as she is employed as deputy circuit clerk and recorder. The county court should issue the proper warrants on the county treasury to cover said compensation.

CONCLUSION

It is the opinion of this department that when, in the original proceeding in the nature of quo warranto, the Supreme Court of Missouri found that Elvis Mouser had unlawfully usurped the office of circuit clerk and ex officio recorder of Bollinger County since January 8, 1955, and ordered him ousted from said office and its emoluments as

Honorable Donald P. Thomasson -7-

of that date, and further found Mrs. Merrill J. Taylor to be the legally appointed and qualified circuit clerk as of said January 8, 1955; that Mrs. Wagner, appointee of Mrs. Taylor, is the legally appointed and qualified deputy circuit clerk and ex officio recorder of said county. As such deputy, Mrs. Wagner is entitled to receive the monthly compensation, fixed by the circuit court in its order approving her appointment on January 10, 1955, from said date, as long as she is so employed.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC/bi