COUNTY ASSESSOR'S COMPENSATION:

De jure officer entitled to compensation instead of de facto officer who performed assessor's duties.

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January 12, 1943

1-17

FILED 41

Honorable W. H. Holmes
Prosecuting Attorney
Maries County
Vienna, Missouri

Dear Mr. Holmes:

Receipt is acknowledged of your letter of January 5, 1943, in which you request an opinion as follows:

"I would like your opinion with reference to the following situation, viz:

"Charles W. Leismann was elected Assessor of Maries County in 1940, entering upon the duties of his office, made the 1941 Assessment and about January 1st, 1942, volunteered and entered the U. S. Army and is now in service in Africa. January 1st, 1942, he also appointed Albert K. Spurgeon his Deputy who also entered upon his duties and on June 1st, 1942, the County Court made the following order with reference thereto, viz:

"In the matter of 1942 Assessment.
Now at this day the Court having under consideration the assessment of property in Maries County, Missouri, for the year of 1942, based on the ownership of property on June 1st, 1941, and the Court being aware that our County Assessor, Chas. W. Liesman is in the United States Army in the State of Texas and the duties of the office being attended to by his Deputy Mr. Albert Spurgeon, it is ordered by the Court that Mr. Albert Spurgeon proceed at once to make 1942 Assessment and if for any reason his legal capacity should be attacted and he thereby lose said position that Maries County shall

be obligated to pay him for all lists made and work done so long as he acts in capacity of deputy assessor under his present appointment.'

"As was anticipated, some time near this date, Gov. Donnell appointed Mr. Warren Gillispie to the office of Assessor Maries County, and before he took over, Mr. Albert Spurgeon had made some 170 lists or thereabouts on the 1942 Assessment and since that time Mr. Gillispie has been acting and made the remainder of the 1942 assessment and has made up the Assessor's books for 1942 and turned them over to the County Court on or about December 31st, 1942, and filed his bill for payment for assessing and making his books for 1942 in the sum of $708.53 for the State part and $763.98 for the County part, and on Dec. 31st, 1942, the County Court having previously advanced him $239.15 on this account issued to him a County warrant for $524.83 the balance of the County bill.

"The Court, before the delivery of the warrant, fearing that they might be called upon to pay the account twice or both to Gillispie and Spurgeon, if they were called upon to do so ordered this warrant not paid and are withholding the delivery of the same, pending investigation.

"You will understand, that this situation hinges very much on the same situation as in the case of State ex rel vs. Wade Wilson, decided by the Supreme Court recently with reference to the office of clerk of the Circuit Court of Henry County, Missouri.

"Under the Court order of June 1st, 1942, Spurgeon, as I am advised, would have due him the sum of $39.15 for the 170 lists, or thereabouts that he made, be-

fore turning over to Gillispie.

"Prior to the time when filings were to close for the August, 1942, primary election, Gillispie filed as a candidate on the Republican ticket and Spurgeon and two other parties filed on the Democratic ticket, but Spurgeon was nominated, leaving Gillispie and Spurgeon on their respective tickets for the November 1942 General election and Spurgeon was elected. However, when the votes were certified to the Secretary of States' office for the issuance of commissions, none was sent to our County Clerk for the Assessor's office for Mr. Spurgeon. I am advised, in this connection, that in a telephone conversation between our County Clerk and the Secretary of State's office that our Clerk was advised that they considered Charles W. Liesman was still Assessor of Maries County.

"With all these facts stated, for the advice and information of our County Court, who is entitled to the pay from Maries County for the Assessment made in 1942? It is well to bear in mind, in this connection, that the Assessor receives certain compensation for specific duties performed and is not on a salary basis.

"Should the County Court go ahead and release this warrant to Gillispie would they be obligated to pay Liesman or Spurgeon also if they were to file bill for it and ask for it?

"On January 4th, Spurgeon delivered to a member of the County Court a demand for the office, books, papers, etc., to be turned over to him.

"Hoping to receive your opinion as soon as convenient as to whom is entitled to be paid for the 1942 assessment, I am,"

The solution of your problem seems to hinge upon the determination of who held the title of the office of Assessor of Maries County during the year 1942, for the law seems to be well settled that the compensation of an officer is incident to the office, and the person who holds title to the office is entitled to the compensation attached thereto. In support of this statement the following cases are cited:

State ex rel. Evans v. Gordon, 245 Mo. 12, l.c. 28:

"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. l.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."

The same ruling is announced in the case of Luth v.

Kansas City, 203 M. A., local citation 113. An early case announcing the same rule is Mullery v. McCann, 95 Mo. 579, from which case the following quotation is taken from page 583:

> " * * * * * * The right of a de-jure officer who is ousted from his office by an intruder to recover from such intruder the fees received by him during his occupancy of the office, cannot be seriously questioned. But before such recovery can be had the plaintiff must show a valid title to the office, for it is only on the theory that he is de jure an officer that he can recover. * * * * * "

And the case of State ex rel. Abington v. Reynolds, 280 Mo. 446, is a later case than any of the above and follows the same rule and from which case the following quotation is taken at l.c. 455:

> " * * * * * * In ruling to the contrary the Court of Appeals contravened the opinion of this court in State ex rel. Evans v. Gordon, 245 Mo. l.c. 28, in which we held it to be settled law that compensation is an incident to the title to an office and that it belongs to the de jure officer, who may upon establishing his title thereto, recover the fees of same from a de facto officer who has received them. The rule should and does apply with more strictness to one who has usurped an office belonging to another and has received the fees of same. (Mayfield v. Moore, 53 Ill. 428, 5 Am. Rep. 52; Glascock v. Lyons, 20 Ind. 1, 83 Am. Dec. 299; 22 R. C. L. title 'Public Officers.' sec. 244.)"

The Abington Case is a case which involved the fees of a county collector.

In citing and relying upon the cases above and cases announcing a similar rule we are not unmindful of the fact that there are decisions of the Missouri courts which have held that the person who performs the duties of the office is entitled to receive the compensation; but the cases we have cited and are relying on are later than any we have found announcing the contrary rule, and for that reason we are following them.

In the quotations herein used are the words, de facto officer and de jure officer. In Volume 27 C. J. those terms are defined. The definition of the term, officer de jure, is found on page 927, paragraph 13:

> "An 'officer de jure' is one who is in all respects legally appointed and qualified to exercise the office; one who is clothed with the full legal right and title to the office; in other words, one who has been legally elected or appointed to an office, and who has qualified himself to exercise the duties thereof according to the mode prescribed by law."

As this definition is clear and unambiguous no Missouri cases are cited supporting it. The term, officer de facto, is defined on page 1053, paragraph 366:

> "An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. A person will be held to be a de facto officer when, and only when, he is in possession, and is exercising the duties, of an office; his incumbency is illegal in some respect; he has at least a fair color of right or title to the office, or has acted as an officer for such a length of time, and under such circumstances of reputation or acquiescence by the public and public authorities, as to afford a presumption of appointment or election, and induce

people, without inquiry, and relying on the supposition that he is the officer he assumes to be, to submit to or invoke his action; and, in some, although not all, jurisdictions, only when the office has a de jure existence."

Supplementing this definition of an officer de facto, the following quotation is taken from the case of Usher v. Telegraph Co., 122 M. A. 98, l.c. 111:

"It appears that Van Pool was elected by electors who were authorized to elect a special judge in certain contingencies. If we concede no such contingency as the statute contemplates had arisen, yet it is a fact that these electors, acting under a mistaken view of their right, did elect a special judge and that he assumed the duties of the office. He thereby became a judge de facto and his act in extending time for filing was a valid act. In State v. Carroll, 38 Conn. 449, it was laid down that, 'An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; (3) under color of a known election or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity

> in its exercise, such ineligibility, want of power or defect being unknown to the public; (4) under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such.' The third of these rules applies to this case. That case is cited and strongly approved in Perkins v. Fielding, 119 Mo. 149, 159, and Simpson v. McGonegal, 52 Mo. App. 540. As bearing directly on this question, see State v. Lewis, 107 N. C. 967; Ball v. United States, 140 U. S. 118, and McDowell v. United States, 159 U. S. 596. We do not regard the phrase occurring in the opinion in State v. Miller, 111 Mo. 549, viz., 'when the conditions giving the right of appointment existed,' as meaning to interfere with the rule as stated in the cases just cited."

This definition is cited with approval in the late case of State v. LaMance, 346 Mo., l.c. 491.

Missouri is a state in which there must be a legal office before there can be a de facto officer. There is an office of county assessor under the Missouri Law, Section 10943 R. S. Mo., 1939. From the statement of facts in your letter, it may be safely assumed that Charles W. Liesman was the duly elected de jure assessor of Maries County and no question was raised about his being such until he volunteered his service and entered the United States Army.

It is upon the occurrence of a vacancy in the office of county assessor the Governor has authority to make an appointment to fill such vacancy.

The law recognizes that the holder of an office may abandon his office and thereby forfeit his title and all rights appertaining thereto and this rule is recognized in Missouri in the case of Langston v. Howell County, 108 S. W.

(2d) 19, 336 Mo. 444, decided by Division I of the Supreme Court in June, 1937. The doctrine of implied resignation is also recognized where an officer voluntarily leaves the performance of the duties of the office and engages in some other endeavor which prevents performance of the official duties.

The writer has until quite recently considered that a voluntary enlistment in the armed forces should constitute an abandonment or an implied resignation of an office, thereby creating a vacancy, and in a written opinion to The Honorable Forrest C. Donnell, Governor of Missouri, expressed the belief that such was the law, and that the Governor would be authorized to make an appointment to fill a vacancy thereby created. This opinion related to the office of prosecuting attorney and was furnished to the Governor prior to the action of the Governor in appointing Mr. Gillispie assessor of Maries County. Governor Donnell, apparently following the previously given opinion, upon learning the facts of the entrance of Mr. Liesman into the army, in good faith undertook to make this appointment.

On December 7, 1942, the Supreme Court, en banc, rendered its decision in the case of State ex inf. McKittrick v. Wade Wilson, numbered 38087, not yet officially reported, which was a test case brought for the purpose of determining if induction of a county officer into the army under the Selective Service Law of the United States created a vacancy in the office. The Court held such induction did not create a vacancy, and the following quotation is taken from this case:

> "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."

The decision of the above case was written by Judge Douglas and concurred in by four other judges (Gantt and Hays J. J. being absent). The last sentence above quoted was not necessary to a decision in the case and is not a part of the law of the case, and it is not mandatory that it be followed. However, it appears it might be taken as a clear indication of the views of the five members of the Court, the writer and the four concurring judges, as to the effect of a voluntary enlistment by a county officer into the armed forces of the United States during the present emergency. The writer was connected with the Wilson Case, supra, and knows the Court had cited to it a number of cases involving absence by officers from their duties, both voluntary and involuntary, and feels the above sentence would not have been permitted to remain even as dictum had the judges not concurred it to be a true expression of the law. If this is true, then there existed no vacancy in the office of assessor of Maries County which would have authorized the Governor to make an appointment.

Your letter makes no mention of a resignation by Liesman or of any judgment of ouster against him or of his death. Gillispie entered the office under a purported appointment made in good faith but void because no vacancy existed.

Mr. Spurgeon, the deputy, was appointed under statutory authority and received his authority and such compensation as he was entitled to by and through his principal, the de jure officer, and could be entitled to no compensation except such as comes by reason of his lawful appointment as a deputy.

CONCLUSION

From the foregoing, the conclusion follows that Charles W. Liesman was the duly elected and qualified de jure assessor, who had not resigned, been ousted or died, during the period of time mentioned in your letter, and as such was entitled to any compensation accruing to the office of assessor of Maries County during that time.

Respectfully submitted,

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APPROVED:

ROY McKITTRICK
Attorney-General

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