OFFICERS: Salary does not attach until legal office created.

4-22

July 20, 1935.

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Hon. George Kitchen,
Marshal, Kansas City Court of Appeals,
Kansas City, Missouri.

Dear Sir:

We wish to acknowledge your request for an official opinion under date of July 6, 1935, wherein you state as follows:

> "In keeping with your advice of yesterday when Forrest Smith and I were in your office, I am writing you.
>
> "I will give you briefly in detail the contents of this letter. The Kansas City Court of Appeals has never had a real librarian, but has compelled the Marshal to perform the duties of librarian upon the salary of the marshal. The marshal as a matter of record has been acting or ex officio librarian.
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> "The recent Legislature made an appropriation of $3,000 for a librarian covering the years of 1935 and 1936, and a librarian will be appointed within the next few days. However, he can only be paid out of this appropriation from the date of his appointment. I have consulted two of the judges and they have expressed their willingness to pay me out of this appropriation from the beginning of 1935 to the time that the librarian is appointed, if there be no legal bar in the way.
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> "The requisition would be made as acting librarian. If this can be done, I will then be receiving about $100 per year for having performed the duties of librarian in addition to the work as marshal.

> "I have conferred with two or three lawyers, James P. Aylward, Jerome Walsh, and John C. Loos, who take the position that there would be nothing improper about it.
>
> "The Springfield Court of Appeals, with a smaller library, and handling only about 35 or 40 percent of the cases of this court has paid a librarian at the rate of $1200 to $1500 per year for a number of years and in addition has paid a marshal a statutory salary.
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> "I believe I have covered about everything necessary to convey to you all the particulars of this proposition, and will add that I will be paid for the months of January, February, March, April, June, and a few days of July only, and will greatly appreciate an opinion from you as you suggested yesterday."

Section 13413, Laws of Missouri, 1931, page 261, authorizes the appointment of a librarian by the Supreme Court and provides in part that

> "The supreme court shall appoint a librarian of the state library * * *.

Section 1902, R. S. Mo. 1929, authorizes the appointment of officers and attendants by the Kansas City Court of Appeals and provides that

> "Said Kansas City court of appeals shall, so far as in its judgment may be necessary, have, unless otherwise provided by law, such officers and attendants as are provided for the supreme court, who shall possess the same qualifications, and perform like duties, and be subject to the same laws and regulations in all respects, so far as may be applicable, as those required of and imposed on like officials and attendants of the supreme court."

Clearly, then, the Kansas City Court of Appeals has the same authority to appoint a librarian as has the Supreme Court. However, such office is only created when in the judgment of the Kansas City Court of Appeals it "may be necessary." The Court at the time of the writing of your letter had not exercised its judgment, although, as you state, they contemplate doing so "within the next few days." You state that the Court never had a real librarian but that you as Marshal were compelled to perform the duties of librarian.

Section 5 of House Bill No. 167 as passed by the recent 58th General Assembly, appropriated a salary for a librarian of the Kansas City Court of Appeals

> "for the biennial period beginning on the first day of January, 1935, and ending on the thirty-first day of December, 1936."

The question then arises whether the office of librarian is created and becomes a legal office as of the first day of January, 1935, or at the date of the appointment by the Court of a person qualified to fill the position of librarian.

Our court in the case of State ex rel. Hueller v. Thompson, 289 S. W. (Sup. Ct. of Mo.) 338, l. c. 340, in holding that general legislation can not be injected into an appropriation act, said:

> "This provision has no other character than that of general legislation, and to inject general legislation of any sort into an appropriation act is repugnant to the Constitution (article 4, sec. 28, Constitution of Mo.), and the appropriation bill, as provided by the Constitution (article 4, sec. 28), may have a plurality of subjects, while a bill for general legislation may have but one.
>
> "An appropriation bill is just what the terminology imports, and no more. Its sole purpose is to set aside moneys for specified purposes, and the lawmaker is not directed to expect or look for anything else in an appropriation bill except appropriations."

And again in the recent case of State v. Smith, 75 S. W. (2d) 828, l. c. 830, the Supreme Court of Missouri said:

> " * * * Besides, legislation of a general character can not be included in an appropriation bill."

To hold, therefore, that the office of librarian was created and became a legal office as of January 1, 1935, by virtue of Section 5 of the Appropriation Act (House Bill No. 167, 58th General Assembly, supra) would be clearly in violation of the principle hereinabove set out that legislation of a general character can not be included in an appropriation bill. The Kansas City Court of Appeals has been vested with the authority to create the office of librarian, and we are of the opinion that the office is not created until the Court has exercised its discretion or judgment in the matter.

This raises the question whether or not the person performing the duties of librarian from the first day of January, 1935, until the date of the Court's appointment is a de facto or de jure officer.

In the case of Ex Parte Babe Snyder, 64 Mo. 58, l. c. 62, the court said:

> "Numerous cases can be instanced from the books, where the acts of an incumbent of an office have been held valid, upon the ground that such incumbent was an officer de facto. But an officer of that description necessarily pre-supposes an office which the law recognizes. And a quite extensive research has failed to discover an instance where an incumbent has been held an officer de facto, unless there was a legal office to fill; * * * ."

And in State ex rel. Abington v. Reynolds, 218 S. W. 334, l. c. 337, the court said:

> " * * * and, there being no de jure office, there could be no de facto officer."

It may then be said that, there being no legal office to fill until the creation of same by the Kansas City Court of Appeals, the person holding it would not even be a de facto officer.

Which brings us to the ultimate question whether or not such person who holds office, not being de facto or de jure, is entitled to compensation.

In Cunio v. Franklin County, 285 S. W. 1007, l. c. 1008, the Supreme Court of Missouri, Division No. 1, in answering the above question said:

> "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."

And further:

> "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."

From the above and foregoing it is our opinion that you would not be entitled to pay for performing the duties of librarian from January 1, 1935, until the date of appointment. It is only with the creation of the office that the salary as an incident of the office attaches.

Yours very truly,

James L. HornBostel,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JLH:

MW:HR