

OFFICERS: Induction into the armed forces does not
CIRCUIT effect title or compensation.
CLERK:

February 17, 1943

Honorable Macee Maness
Prosecuting Attorney
Ripley County
Doniphan, Missouri



Dear Mrs. Maness:

The Attorney-General desires to acknowledge receipt of your letter of February 12, 1943, in which you requested an opinion from this office. The request, omitting salutation and signature is as follows:

"The Circuit Clerk and ex-officio Recorder of this county expects to be called to the service in the near future. He would like to know if he can continue to handle his office and receive the compensation therefor, leaving the office in charge of his deputy and employing an assistant who would be paid by the clerk out of his salary.

"I would appreciate an opinion on this."

It has been definitely settled in this State that the induction of a county officer into the armed forces under the Selective Service Law does not effect the office where the officer has a deputy that may perform the duties of the office. This was decided by the Supreme Court en banc in the case of State ex inf. McKittrick v. Wilson, number 38087. Decision was rendered December 7, 1942. The facts of this case were that John Wall was the elected and qualified Cir-

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cuit Clerk of Henry County having a properly appointed and qualified deputy. Wall was inducted into the Army under the Selective Service Law and for a few weeks was at Ft. Leavenworth and made weekly trips back to Henry County where he was in and about the office supervising the work and advising his deputy. Later, he was removed to California and could not continue to make these weekly trips back to Henry County. As there were a number of cases similar to this one where officers had been inducted into the armed forces and the law was not definitely settled as to the effect of induction, the Governor considered it advisable that a test case should be tried to determine the question. Accordingly, he appointed Wade Wilson Clerk of the Circuit Court of Henry County and issued to him a commission advising this office of the appointment and directing that a suit be brought to oust his appointee. The suit was brought and decision rendered as heretofore indicated. From the decision in the case the following brief quotation is taken:

"The question for decision is whether Wall's induction into the army under the Selective Service Act resulting in his inability personally to perform the duties of his office caused him automatically to forfeit his office.

"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."

In addition to this quotation to which we are calling attention a mimeographed copy of the decision is herewith enclosed.

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The Circuit Clerk and Ex Officio Recorder of Ripley County with the consent of the Circuit Court may appoint one or more deputies. Section 13299 R. S. Mo., 1939:

"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."

From your letter it is inferred that the clerk has appointed a deputy. If this was true then under the Wilson Case his induction into the Army would have no effect upon his tenure of office.

In regard to your inquiry concerning the compensation attached to the office difficult questions frequently arise where there is a controversy over the compensation of the office between a de jure officer and a de facto officer. Under the facts as stated by you there would be no controversy of this nature, and the duly elected and qualified circuit clerk and ex officio recorder would be entitled to the compensation for the compensation is merely incidental to the office. In support of this statement the following brief quotations are cited:

State ex rel. Vail v. Clark, 53 Mo. 508, l.c. 512, 513:

" * * * * * The commission issued to the relator invested him with the title, and is prima facie evidence of his right to the office. It gave him the possession and the power to exercise its functions, of which he could be deprived only on due process, in the manner prescribed by law. State ex rel. Vail vs. Draper, 48 Mo., 213. He alone is entitled to the emoluments of the office, until the State, by a proper proceeding, has revoked the authority with which it has invested him. Meanwhile the auditor cannot rightfully withhold the salary.
* * * * *

609: Givens v. Daviess Co., 107 Mo. 603, l.c. 608,

"A public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creation of law, and as an incident to the office. * * * * *

Bates v. St. Louis, 153 Mo. 18, l.c. 20:

"It is well settled law that 'a public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creature of law, and as an incident to the office. . . . "The salary belongs to him as an incident to his office, and so long as he holds it; and, when improperly withheld, he may sue for and recover it. When he does so he is entitled to its full amount, not by force

of any contract, but because the law attaches it to the office." * * * * *

28: State ex rel. Evans v. Gordon, 245 Mo. 12, 1.c.

"It is also settled law that, as the compensation is incident to the title, it belongs to the de jure officer. * * * * *

136: American Jurisprudence, Vol. 43, Sec. 342, p.

"Compensation does not constitute any part of the public office to which it is annexed. It is a mere incident to the lawful title or right to the office, and belongs to the officer so long as he holds the office. When an office with a fixed salary has been created, and a person duly elected or appointed to it has qualified and enters upon the discharge of his duties, he is entitled, during his incumbency, to be paid the salary, fees, or emoluments prescribed by law. * * * * *

CONCLUSION

The induction of the Circuit Clerk and Ex Officio Recorder of Ripley County into the armed forces of the United States under the Selective Service Law will in

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no way effect his tenure of office. It is suggested that if the clerk feels the deputy or deputies already provided for would not be able to take care of the duties of the office at all times he ask permission of the Judge of the Circuit Court to appoint another deputy to be paid by the clerk. By doing this the validity of acts done in the clerk's office could never be questioned as they might be if some person who was not properly deputized was in the office performing some of the duties.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

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