

Township Collectors:  
OFFICERS:

Township collector may appoint deputy to perform ministerial duties, "Abandonment" of office is question of fact, failure to personally perform duties must be decided by ouster suit.

August 18, 1944

Honorable H. A. Kelso  
Prosecuting Attorney  
Nevada, Missouri



Dear Mr. Kelso:

This will acknowledge the receipt of your letter of August 3, 1944, requesting an opinion of this office, omitting caption, which is as follows:

"In my official capacity as Assistant Prosecuting Attorney of Vernon County, Missouri, I would like an opinion from your office on the following set of facts:

"In Vernon County, Missouri, a county under township organization, the township collector of one township is unable to perform the duties of his office and desires to appoint a deputy to act in his behalf. I am unable to find any authority for him to do this.

"Will you please advise whether or not in your opinion there can be a deputy collector appointed?"

Your letter of August 15, contained the following question.

"One further question-- If the collector is to be away from now on till the end of his term of office is the office vacated."

I.

There is no specific statutory authority invested in a township collector to appoint a deputy in this state.

It may be stated as a general rule however, that where the acts to be performed are ministerial in their nature, they may be performed by deputy. Thus in Mechem on Public Officers, Sec. 568, it is stated:

"Where however, the question arises in regard to an act which is of a purely mechanical, ministerial, or executive nature, a different rule applies. It can ordinarily make no difference to any one by whom the mere physical act is performed when its performance has been guided by the judgment or discretion of the person chosen. The rule therefore, is that the performance of duties of this nature may, unless expressly prohibited, be properly delegated to another."

In *Small v. Field*, 102 Mo., 104, the court stated:

"\* \* \* But at common law a ministerial officer had authority to appoint a deputy. \* \* \* thus, a sheriff, though his patent of office does not say he may execute his office per se vel sufficientem deputatum suum, yet he may make a deputy. \* \* \*

"The office of clerk of a court seems to be one which from its nature and constitution implies a power or right to execute it by deputy. Whenever nothing is required but superintendency in office a ministerial officer may make a deputy. \* \* \* And the rule is general that a deputy may do every act which his principal might do. \* \* \*"

The office of township collector would seem to be even more ministerial than that of a clerk of court or sheriff inasmuch as the collector merely collects the taxes assessed against the residents of his township and accounts for them. He has no discretion in either the amounts to be collected or to be accounted for. It would seem therefore that this office is ministerial in its nature and the collector may appoint a deputy. However, inasmuch as there is no specific statutory authorization for compensation for a deputy township collector, he could not be paid from the public treasury. As is stated in 43 Am. Jur. 222 Sec. 465: "\* \* \* Deputies appointed by a public official cannot be paid from the public treasury in the absence of express statutory authority for such payment."

## II.

You also want to know whether the fact that your township collector is absent from the district, and may not return until the end of his term, creates a vacancy in the office. Of course, an office may become vacant ipso facto by abandonment, but in order to constitute an abandonment of office, the abandonment must be total and under such circumstances as to clearly indicate an absolute relinquishment. Moreover, the officer should manifest a clear intention to abandon the office and its duties, although his intention may be inferred from conduct, 43 Am. Jur. Sec. 173. Whether your township collector has abandoned his office here by leaving his district is a question of fact which would have to be determined by proper court action. The mere leaving of the district would not in itself constitute an abandonment.

Of course, while the collector of the township is out of the district he will not be personally performing the duties of his office.

Section 18 of Art. 11 of the Missouri Constitution requires that no person shall hold any state office without personally devoting his time to the performance of the duties to the same belonging.

Section 12828 R1 S. Mo., 1939, provides:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or wilfully fail to refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office and may be removed therefrom in the manner hereinafter provided."

Hon, H. A. Kelso

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It has been held however, that neither the constitutional provision or the statute in themselves create a vacancy but that they must be determined by an ouster suit. In State v. Wilson, 166 S. W. (2d) 499, the court stated: "Unless an office is abandoned or relinquished an officer is entitled to a trial on the charge of failing to personally devote his time to the performance of his duties. Such failure may be excusable." Of course, should your collector be in military service the Civil Relief Act would probably prevent any ouster suit at this time.

CONCLUSION.

It is therefore, the opinion of this office that a township collector has a common law right to appoint a deputy to perform ministerial duties. Collector's absence from district is not in itself an abandonment but this is a question of fact to be determined by the courts. A charge of failing to personally perform the duties of an office must be decided by an ouster suit.

Respectfully submitted

ROBERT J. FLANAGAN  
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APPROVED;

ROY McKITTRICK  
Attorney General

RJF:LeC