

OFFICE OF DEPUTY COUNTY CLERK: LEGISLATORS: Members of the General Assembly may not be appointed Deputy County Clerk during the term for which he is elected to the General Assembly.

January 15, 1942



Hon. Claude E. Curtis
Prosecuting Attorney
Lebanon, Missouri

Dear Mr. Curtis:

This is in reply to your letter of recent date wherein you request an opinion from this department based on the following statement of facts:

"Will you please advise whether, in your opinion, a member of the Missouri House of Representatives may be legally appointed as Deputy County Clerk, and whether such person may hold both positions?"

Section 12 of Article 4 of the Constitution of Missouri applies to this question. It is as follows:

"No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

You will note that this section prohibits the appointment of any member of the General Assembly during his term of office, "to any office under this State," etc. This department, under date of October 23, 1941, by an opinion to Governor Donnell relating to a member of the General Assembly being appointed to the office of Recorder of Deeds,

treated the subject of "any office under this State." We are enclosing a copy of this opinion for your information.

Since your question applies to a "deputy", we think the case of State v. Buck, 135 Mo. 325 may be pertinent because it relates to a "deputy" officer. There the court said (l. c. 332):

"Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts; they are required to take the oath of office, which is to be indorsed upon the appointment and filed in the office of the clerk of the circuit court. After appointment and qualification they 'shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff.' R. S. 1889, secs. 8181 and 8182.

"The right, authority and duty are thus created by statute; he is invested with some portions of the sovereign functions of the government to be exercised for the benefit of the public and is, consequently, a public officer within any definition given by the courts or text writers.

"It can make no difference that the appointment is made by the sheriff, or that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public. * * * *"

The statute provides for the appointment of deputy county clerks as follows: (Sec. 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, whosshall 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."

In the case of *In Re. Rothwell*, 44 Mo. App. 215, 221, in speaking of the powers and duties of a county clerk's deputy, the court said:

"* * * The clerk is entitled to appoint a deputy by the consent of the judges, and when so appointed such deputy may perform the duties of the clerk. R. S. 1889, sec. 1977. Besides the rule is that 'where a public officer is authorized to appoint a deputy, the authority of that deputy, unless otherwise limited, is commensurate with that of the officer himself.' * * *"

Also, in the case of *State ex rel. Blakemore v. Rombauer*, 101 Mo. 499, the court in considering whether or not the office of circuit clerk is "an office under this state" said at l. c. 503:

"* * * * If the title to the office of such a clerk is not a title to an office under this state, then it is difficult to see what meaning can be given to the words of the clause in question. "

And, in the case of *State ex rel. v. Bus*, 135 Mo. 335, the court in speaking of county officers said:

"* * * Officers of a county, though not named, would be included under the expression 'officers under the state.' * * * *"

By the same process of reasoning, we think the office of county clerk is "an office under this state". Since the

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deputy clerk's office is in the same class as the principal, it is also "an office under this state."

CONCLUSION

From the foregoing, it is the opinion of this department that a member of the General Assembly may not be legally appointed to the office of deputy county clerk during the term for which such person is elected to the General Assembly.

Respectfully submitted,

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APPROVED:

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