

GENERAL ASSEMBLY: Whether officers drafted into the military forces of the United States may hold their offices under appropriate permissive legislation.

OFFICERS: Whether officers drafted into the military forces of the United States may hold their offices under appropriate permissive legislation.

March 1, 1943.

Honorable Alvin Jewell,
Member of General Assembly,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter requesting an opinion in answer to the following question:

“Is there any constitutional prohibition against an elective state, county, city or township officer, who is drafted into the army, appointing a deputy to fill the office during the time such elective official is away and is in the service, and not thereby forfeit the office?”

“Would a law, authorizing the appointment of deputies to serve in such cases, be constitutional?”

Preliminary to a discussion of your questions I desire to call your attention to the fact that, by an Act approved May 11, 1861, it was provided as follows:

“AN ACT providing for the appointment of deputies by certain public officers of this State, who have or may hereafter enter the military service of the United States, or of this State, and authorizing such deputies to perform all the duties of their principals. (Approved May 11, 1861.)

“Section 1. *Be it enacted by the General Assembly of the State of Indiana,* That all persons holding civil offices under the laws of this State, except judges, justices of the peace, notaries public, and such officers as are by the Constitution expressly required personally to perform the duties of their respective offices, who have or may hereafter enter the volunteer or militia forces called into service under the authority of the United States, or of this State, may appoint

deputies who shall during the absence of their principals in such service, have authority to perform all the duties appertaining by law to such office.

“Sec. 2. When under existing laws the duties of any office may be performed by deputy, the person holding such office shall not be deemed to have vacated the same by entering into the service named in the preceding section, but the duties of such office may be performed by deputy as if the principal had not entered into the military service.

“Sec. 3. Such deputies by this act authorized to be appointed shall take the oath required of their principals and be subject to the same regulations and penalties, and shall each file an official bond in the same manner and in the same penalty required by law of their principals.

“Sec. 4. There being an emergency for the immediate taking effect of this act, the same shall be in force from and after its passage.”

So far as I can ascertain this act has not been repealed, and, although it does not appear in any of the Indiana statute compilations, I think it is still in effect. Questions similar to the one submitted by you have been under consideration by the Supreme Court in several cases. Perhaps the earliest of these cases is the case of *Kerr v. Jones*, 19 Ind. 351. The question in that case grew out of the following facts. The Honorable Benjamin Harrison, afterward President of the United States, had been elected to the office of Reporter of the Supreme Court in October, 1860, for a term of four years. He accepted this office. On August 7, 1862, he was commissioned as Colonel of the 70th Regiment of Indiana Volunteers in the Army of the United States. He accepted that office and soon afterward departed with his command to enter upon active service, having, in the meantime, appointed a deputy Reporter. The question was as to whether Mr. Harrison could hold both offices, and the Court, on page 353, in considering the question, used the following language:

“On general principles the office of Colonel of Volunteers, as now existing, is lucrative and so is that of Reporter of the Supreme Court. Mr. Harrison can not

hold them both; therefore, unless the office of Colonel of Volunteers is an office in the militia, within the meaning of the Constitution; and if he can not hold them both, his acceptance of the colonelcy, being the later office, vacated that of reporter."

This decision, as will be observed, was put squarely upon the basis of the provisions of Section 9 of Article II of the Constitution, providing that,

"No person holding a lucrative office or appointment under the United States or under this State, shall be eligible to a seat in the General Assembly; nor shall any person hold more than one lucrative office at the same time, except as in this constitution expressly permitted; * * *"

In other words, the decision was based upon the constitutional provision forbidding the holding of two lucrative offices at the same time. As to men entering the armed forces of the United States as commissioned officers, or who become commissioned officers after entrance, the acceptance of such a commission would operate as an abandonment of the former state office. This rule was followed in the case of *Mehringer et al. v. State, ex rel.*, 20 Ind. 103, where the Court used the following language:

"The case of *Kerr v. Jones*, 19 Ind. 351, settled the proposition that the acceptance, by *Mehringer*, of the office of major vacated his former office of auditor."

The same question was before the court and the same conclusion reached again in the case of *Bishop v. State, ex rel.*, 149 Ind. 223, where the Court said, quoting from page 232:

"It could not be presumed that appellant intended to violate the constitution by accepting and holding the office of Postmaster if it was beyond the exception in question when he was the occupant of that of township trustee, and the results to be implied from his act in doing so, under such circumstances, would be that he intended completely to surrender and vacate the latter office and the law would attribute such a surrender as the necessary consequences of the act."

Obviously the Legislature cannot enact legislation, which would be legal, which would operate to grant to an officer the right to hold two lucrative offices at the same time.

I next desire to call your attention to the case of State, ex rel. Cornwell v. Allen, 21 Ind. 516, a case in which the question was as to whether the relator, Cornwell, had vacated his office of County Auditor of Vigo County by volunteering as a private, Company B, of the Indiana Volunteers, and thereafter, with said regiment, entering the military service of the United States for three years or during the war. The question was as to whether this constituted an abandonment of his office. The Court held that it did constitute such an abandonment, at the same time using the following language:

“A temporary disability to discharge the duties of the office might not, of itself, create a vacancy. In an office, capable of being served by deputy, the deputy of the principal might, doubtless, continue to act during the temporary disability of the principal; and, if no deputy had been appointed, perhaps the sureties of the principal might appoint.”

It will be observed that the question involved here did not depend upon whether there had been a resignation from the office of County Auditor but by virtue of presumption came to the conclusion that the County Auditor in that case should be held to have abandoned his office. It will be noted that one of the provisions of the 1861 Act, already referred to, was to the effect that when, under existing laws, the duties of any office may be performed by deputy, the person holding such office shall not be deemed to have vacated the same by entering into the service named in the preceding section (military service) but the duties of such office may be performed by deputy as if the principal had not entered into the military service. In other words, the Legislature thereby provided that entering into the military service should not be deemed as an abandonment of the office. I see no objection to such a provision, and it is interesting to note in that connection the case of Yonkey and Another v. The State, on the relation of Cornelison, reported in 27 Ind. at page 236. In this case the appellant, Yonkey, was Recorder of Clinton County, Indiana. During his term of office he went to Washington, D. C., and procured an appointment as assistant doorkeeper of the

House of Representatives. He left a deputy in charge of the office of Recorder and his family continued to reside in Clinton County. During the adjournment of Congress he returned to his family and took some personal oversight of his office, and during all the time he claimed to be a resident of Clinton County, paid his poll tax there, and voted there at the elections. The question as to whether Yonkey ceased to reside in Clinton County and thereby abandoned and vacated his office constituted the turning point in the case. The information contained the statement that appellant, Yonkey, had ceased to reside in said county of Clinton and thereby abandoned and vacated his office. This complaint or information was tested by demurrer and the lower court overruled the demurrer. Note the language of the Court on page 245:

“We sustained the ruling of the lower court in overruling the demurrers to the several paragraphs of the information, on the ground that it was averred in each paragraph that Yonkey had ceased to reside in Clinton county, without discussing the effect of any of the other facts alleged as a cause of forfeiture. But, from the evidence in the case, we think it too clear to admit of controversy, that Yonkey, in going to Washington, under the circumstances and for the purposes shown in evidence, did not lose his residence in Clinton county, or ‘cease to reside’ therein as alleged. As a general rule, where a man is the head of a family and is a house keeper, the domicil of the family is presumed to be his legal place of residence. It requires an intention in order to change the domicil, and therefore if a person leaves his place of residence temporarily, on business or otherwise, but with the intention of returning, he does not thereby lose his domicil, as he could not by such absence acquire one elsewhere. * * * Here, Yonkey resided with his family in Clinton county, and his family continued to reside there. It was his residence, and in going to Washington it is evident he did not intend to lose his residence in Clinton county or change it to Washington. He therefore continued to reside in Clinton county. Nor do we think the evidence justifies the conclusion that Yonkey vacated the office by non-user, or forfeited it by mis-

user. The statute authorized him to appoint a deputy, made it the duty of the deputy to take the oath required of his principal, authorized him to perform all the official duties of his principal, and subjected him to the same regulations and penalties, and made the principal responsible for all the official acts of his deputy.”

In the opinion the Court referred to the earlier case of *The State ex rel. Cornwell v. Allen*, 21 Ind. 516, already considered in this opinion, using the following language, quoting from page 246:

“In that case, it was held that Allen had abandoned the office of auditor of Vigo county by volunteering in the military service of the United States for the period of three years. The decision of the case was based upon the fact that Allen, by voluntarily entering the military service of the United States, a position that he could not abandon or leave at pleasure, had thereby permanently disabled himself to perform the duties of the office, or supervise the same. But it was said in the decision of that case, that ‘a temporary disability to discharge the duties of the office might not, of itself, create a vacancy. In an office capable of being served by a deputy, the deputy of the principal might, doubtless, continue to act during the temporary disability of the principal, and if no deputy had been appointed, perhaps the sureties of the principal might appoint.’ In the case at bar, Yonkey did not disable himself from returning at will to the discharge of the duties of the office in person. Without commending the conduct of Yonkey, or claiming that it was consistent with that good faith and sense of responsibility which should characterize the conduct of a public officer, we are constrained to say that, in our judgment, as a question of law, the evidence does not justify the finding and judgment of the court below.”

Note also the case of *State, ex rel. v. Scott*, 171 Ind. 349, quoting from page 361, upon the general subject of residence:

“It is an old saying, in such cases, that every man has a residence somewhere, and that he does not lose

the one he has until he has gained one in another place. On this same point this court, in *Culbertson v. Board, etc.*, *supra*, at page 370, quotes approvingly from *Bulkley v. Inhabitants, etc.* (1855), 3 Gray (Mass.) 493, the following: 'The general rule, and, for practical purposes, a fixed rule, is that a man must have a habitation somewhere; he can have but one; and therefore in order to lose one, he must acquire another. This is the test, the practical test. * * * One of the fixed rules on the subject is this: That a purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicile. The fact and intent must concur. He must remove, without the intention of going back. The question here is, whether he can abandon one, without acquiring another, and we think it has always been held that he cannot.'

We have referred to the above language on the subject of change of residence in support of the proposition that entering the military service of the United States, especially where the duration is subject to conditions which may make that service short or long, does not involve a change of residence.

I next desire to refer to the case of *State, ex rel. v. Huff*, 172 Ind. 1. In this case the question at issue was as to whether the relator had abandoned the office of assessor of Mitcheltree township in Martin county, the claimed abandonment being based upon a letter, to which I will refer, and upon the further fact that the relator was absent from the State of Indiana between December and March on account of his health and to visit a brother's grave. The letter involved was written by relator, bearing date of December 15, 1906, and addressed to the Board of Commissioners of the County of Martin. The letter stated that it was to certify that the writer, as assessor of Mitcheltree township hereby asked the Board of Commissioners to appoint Robert C. Armstrong as his successor, as assessor of said township, containing the further language:

"If you cannot appoint him as my successor, I decline to resign, and will have him appointed as my first deputy."

The facts are stated in the opinion of the Court. Two questions were involved; the first was the question as to whether the absence amounted to an abandonment of the office and the second was the question as to whether the letter referred to amounted to a resignation. On the question of abandonment, after stating the facts, the Court said, quoting from page 6:

“Giving this evidence the intendment most favorable to appellee, we think it clear that relator’s absence was only temporary; was with a fixed purpose of returning, not only to his residence but to his official duties; was at a time when there were no duties which he could be called upon to perform, or could perform, and there is no evidence to sustain the theory of abandonment. *In order to constitute an abandonment of office, it must be total, and under such circumstances as clearly to indicate an absolute relinquishment. Temporary absence is not sufficient.*” (Our emphasis.)

Returning now to the Act of 1861, upon the basis of the analysis of the foregoing cases, I think there is no constitutional objection to such an act, limiting the ones who may avail themselves of it as limited in said act and having regard also to the further provision that no one may hold two lucrative offices at the same time.

GENERAL ASSEMBLY: Effect of certain language in H. B. 16.

UNEMPLOYMENT COMPENSATION: Effect of proposed H. B. 16.

March 2, 1943.

Honorable Donald H. Hunter,
Member House of Representatives,
Indianapolis, Indiana.

Dear Mr. Hunter:

This will acknowledge receipt of your letter of March 1, 1943, requesting an opinion regarding the effect of the amend-