

from the office for more than  
three months due to illness.

May 1, 1946.

Mr. Milton G. Anderson  
County Attorney  
Richland County  
Sidney, Montana

Dear Mr. Anderson:

You have stated the county clerk and recorder of your county has been forced to be absent from his office for a period of more than three months by reason of illness, and is in fact absent from the county receiving medical care and attention at the veterans' hospital at Fort Harrison. I have examined the opinion which you rendered for your board of county commissioners on the question of whether a vacancy exists in the office of county clerk and recorder and on the further question of whether the office holder's salary should be paid to him in case no vacancy exists. I agree with your opinion rendered to the board.

Section 511, Revised Codes of Montana, 1935, exclusively enumerates the contingencies under which an office becomes vacant. (State ex rel. Chenoweth v. Acton, 31 Mont. 37, 77 Pac. 299.) Section 511 provides:

"An office becomes vacant on the happening of either of the following events before the expiration of the term of the incumbent:

- "1. The death of the incumbent.
- "2. His insanity, found upon a commission of lunacy issued to determine the fact.
- "3. His resignation.
- "4. His removal from office.
- "5. His ceasing to be a resident of the state, or, if the office be local, of the district, city, county, town, or township, for which he was chosen or appointed, or within which the duties of his office are required to be discharged.
- "6. His absence from the state, without the permission of the legislative assembly, beyond the period allowed by law.

"7. His ceasing to discharge the duty of his office for the period of three consecutive months, except when prevented by sickness, or when

**Opinion No. 152.**

**Offices and Officers—County Officers  
County Clerk and Recorder—Vacancies  
in Office.**

**Held:** A vacancy has not occurred in the office of county clerk and recorder by reason of the duly elected office holder's absence

absent from the state by permission of the legislative assembly.

"8. His conviction of a felony, or of any offense involving moral turpitude, or a violation of his official duties.

"9. His refusal or neglect to file his official oath or bond within the time prescribed.

"10. The decision of a competent tribunal declaring void his election or appointment."

As you have pointed out, only subdivisions 5 and 7 of the above quoted statute can reasonably be considered in the instant case; and their application to the facts discloses upon examination they do not apply. Although the county clerk and recorder is absent from Richland County by reason of his illness, he has not ceased to be a resident. He is merely out of the county for a "special or temporary purpose," as that term is used in Section 33, Revised Codes of Montana, 1935, which defines residence.

Likewise, subdivision 7 of Section 511, *supra*, cannot be brought to bear on the instant case in view of the fact the office holder's failure to discharge the duties of his office for a period of three consecutive months has been caused by sickness—and sickness is excepted from the provision of subdivision 7.

While the laws of Montana do not provide for sick leave, neither is there a prohibition against a public officer's taking a vacation for the benefit of his health. (Volume 19, page 350, No. 220, Report and Official Opinions of the Attorney General.)

The salary of county clerks is set out in Chapter 150, Laws of 1945; and such salary is specified on an annual basis with no provision or exception regarding absence from office occasioned by reason of illness.

The right of a public officer to compensation for the performance of duties imposed upon him by law does not rest upon contract, but is incidental to the right to hold office. (State *ex rel. Cutts v. Hart*, 56 Mont. 571, 185 Pac. 769.) The 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. (22 R. C. L. 525.) It has been held a state senator, too

ill to attend the legislative session, is nonetheless entitled to his salary. (Opinion No. 94, Volume 17, page 104, Report and Official Opinions of the Attorney General.)

I therefore join with you in the opinion a vacancy has not occurred in the office of county clerk and recorder of Richland County by reason of the duly elected office holder's absence from the office for more than three months due to illness. Since no vacancy exists, the present office holder is entitled to receive his salary.

Sincerely yours,  
R. V. BOTTOMLY,  
Attorney General