PUBLIC OFFICE: VACANCY VEL NON-EFFECT OF INDUCTION OF INCUMBENT. —[Missouri].—A clerk of circuit court, elected at a general election, was inducted under the Selective Service Act into the Army of the United States (ten months and twelve days) before his office expired. Respondent was, thereafter, appointed and commissioned by the Governor of the state to fill the vacancy in the office apparently pursuant to a statute.[1] The attorney general, as relator, brought a proceeding in quo warranto to challenge the respondent's right to hold the office of clerk of circuit court. *HELD:* Respondent was not entitled to the office since an induction of a clerk into the Army, resulting in his inability to perform the duties of the office did not work a forfeiture to create a "vacancy" under the statute empowering the Governor to fill the vacancy. *State v. Wilson.*

Whether a "vacancy" actually exists in a given situation is a difficult question since there is no technical meaning of that word as applied to an office.[3] The court in *State ex rel. Carson v. Harrison*[4] defined "vacancy" as follows:

> "An office is not vacant so long as it is supplied in manner provided by the constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and conversely, it is vacant, in eye of law, wherever it is unoccupied by a legally qualified incumbent who has a lawful right to continue therein until happening of some future event."

The court therein decided that although the incumbent's term of office expired, and the general assembly failed to elect a successor, there was no vacancy so as to authorize the governor to appoint the president of a benevolent institution. The decision reflects the general attitude of antipathy to declare vacancies in office except those caused by death, resignation, or removal. The court declared that a wiser and more prudent course, in case the electoral body failed to discharge its functions, was to allow the incumbent to hold over rather than to say that a vacancy had occurred and a successor should be appointed. It is submitted that the principal case is influenced greatly by the above mentioned attitude.

Our supreme court recently held in the so-called Grayston case that a judge of a circuit court who was called into the military service of the United States did not vacate his judicial position.[6] The constitutional limitation[7] of "no person holding an office of profit under the United States shall, during his continuance in such office hold any office of profit under

1. R. S. Mo. 1939 §13284.
2. State v. Wilson (Mo. 1942) 166 S. W. (2d) 499.
3. People v. Brundage (1920) 296 Ill. 197, 129 N. E. 500; State v. Harrison (1888) 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663; State v. Young (1915) 137 La. 102, 68 So. 241; Frantz v. Davis (1926) 144 Va. 320, 131 S. E. 784; People v. Edwards (1892) 93 Cal. 153, 28 Pac. 831; State ex rel. Wayland v. Herring (1907) 208 Mo. 708, 106 S. W. 984.
4. 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663.
5. Hutcheson v. Pitts (1926) 170 Ark. 248, 278 S. W. 639; State v. Boucher (1893) 3 N. D. 389, 56 N. W. 142, 21 L. R. A. 539; State v. Johnson (1925) 135 Wash. 109, 237 Pac. 12.
6. State v. Grayston (1942) 349 Mo. 700, 163 S. W. (2d) 335.
7. Article XIV, Sec. 4.

this state" did not apply in cases where a person entered into military service during times of emergency. The judge was called into the service of the National Guard; and the court made a distinction between those situations in which a person is drafted into the army during an emergency and those in which a person voluntarily enters the Army for the purpose of making it his profession. Another argument for sustaining the decision is found in the fact that the militia, even when called out for national emergency, basically retained its identity as a state organization.

There is conflict of authority on the question of whether induction of an incumbent into the services of United States creates a vacancy of office.[8] Our court has recognized the existence of this conflict.[9] Jurisdictions holding that a vacancy is created by an officer becoming a member of the armed forces, do so upon the ground that a public officer is prohibited from holding two incompatible offices.[10] The rule is one of public policy. The court in the Grayston case stated that because of our constitutional provisions[11] the office of judgeship and colonel was not incompatible.

The question arises whether a person may under our state laws hold a state office and at the same time be in the Army of the United States in active duty so as not to personally discharge the duties of his office. The court has held that the constitutional requirement for personally discharging the duties of the office was designed to prevent "farming out" the performance for the sake of convenience or profit,[12] and hence was not applicable to the situation herein presented.[13]

In connection with the principal case it is interesting to note that in our state the duties of a deputy are commensurate with that of the clerk[14] and the office of clerk of circuit court is a ministerial office.[15] The result

8. State v. Allen (1863) 21 Ind. 516, 83 Am. Dec. 367; Fekete v. City of East St. Louis (1924) 315 Ill. 58, 145 N. E. 692, 40 A. L. R. 650; Commonwealth v. Smith (1942) 343 Pa. 446, 23 A (2d) 440.

9. State v. Grayston (1942) 349 Mo. 700, 163 S. W. (2d) 335.

10. Kennedy v. Cook (1940) 285 Ky. 9, 146 S. W. (2d) 56; Ex Parte Archie Dailey (1922) 246 S. W. 91.

11. Article IV, Sec. 12. "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."

12. Article II, Sec. 18. "That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

13. State v. Grayston (1942) 349 Mo. 700, 163 S. W. (2d) 335; State v. Slover (1892) 113 Mo. 202, 20 S. W. 788.

14. Springer v. McSpadden (1872) 49 Mo. 299, 300—"Although the statute, when speaking of duties and powers of the clerk in respect to taking acknowledgements, refers to him alone, yet it by no means follows that he cannot act by deputy. The law, in prescribing the duties of clerks, invariably designates the clerk alone, yet the functions of his office may always be performed by deputy duly appointed."

15. State v. Hostetter (1897) 137 Mo. 636, 649, 39 S. W. 270.

of the case might be put in issue when Missouri records and judicial proceedings are taken over by a party to a sister state for recognition. A federal statute[16] provides for the attestation by the clerk of the court and the judge of these records and judicial proceedings. Many state courts, seemingly, have interpreted the statute to mean that the attestation must be done personally by the clerk.[17] In the early case of *Williams v. Williams*[18] our court has reiterated the general rule. It there stated that the transcript of judgment from a sister state, in order to satisfy the federal statute, must be attested by the clerk of the court in which the judgment was rendered and an attestation by a deputy in the name of the clerk is insufficient. There the transcript was signed as follows: "W. H. Moyston, Circuit Clerk, by James M. Anderson." The court, however, held that the admission of the transcript in evidence was not prejudicial error warranting a reversal of judgment since the judge certified the signature, signed by the deputy, to be that of the clerk. The court further held that such formal defect in the certificate would contravene the mandate of the statute which prohibits the courts from reversing judgment for error not materially affecting the merits of the action.

The court in the principal case did not mention the above cited federal statute in reaching its decision. In a criminal case the Kansas City Court of Appeals held that it was error to receive in evidence a record from the district court of Iowa showing that a witness of the defense had been convicted of a crime where the authenticating certificate was made by the deputy clerk in the name of the clerk.[19] The court therein stated the general rule and said:

> "It is true that our statute, and if it be assumed that the statute of Iowa also, makes the acts of the deputy in the name of his principal the acts of his principal. Yet the validity of the certificate of a foreign record does not depend upon the state laws. The state does not give authority to the clerk. The clerk derives his authority from the law of Congress, and not the law of the state."[20]

Thus a person taking a judgment or proceeding signed by the deputy for the clerk to another state having the same rule as that stated above may encounter difficulty getting full faith and credit to the same. Since the duties of the clerk may be performed by the deputies in Missouri, all acts being valid and effective within Missouri, a deputy performing the duties of an incumbent in military service may be unable to give the required authentication in jurisdictions following this general rule.[21] In sister states fol-

16. 28 U. S. C. A. Sec. 687.

17. See Kansas Pac. R. Co. v. Cutter (1877) 19 Kan. 83; Willock v. Wilson (1901) 178 Mass. 68, 59 N. E. 757; Morris v. Patchin (1862) 24 N. Y. 394, 82 Am. Dec. 311; Lothrop v. Blake (1846) 3 Pa. (3 Barr) 483; Ensign v. Kindred (1894) 163 Pa. 638, 30 Atl. 274, 35 Wkly. Notes Cas. 225; Edwards v. Smith (Tex. Civ. App. 1911) 137 S. W. 1161.

18. (1893) 53 Mo. App. 617.

19. State v. Foreman (1906) 97 S. W. 269.

20. Also. In accord: Priest v. Capitain (1911) 236 Mo. 446, 465, 139 S. W. 204, 210.

21. The clerk of the Circuit Court of the City of St. Louis, aware of the holding in the principal case, acting cautiously, will continue to sign per-

lowing the rule that a certificate of judgment by a deputy is sufficient if the presiding judge certifies that it is in due form of law, there is no need for a clerk of court to personally sign the certificates.[22]

It is submitted that the principal case may be justified upon the desire of our court to follow the national policy of re-employing all persons entering military service and all due consideration should be given to our fighting forces.[23] M. E.

SALES—IMPLIED WARRANTY OF WHOLESOMENESS—[Texas].—Plaintiff's husband bought from a retail merchant some sausage commercially known as "Cervelot." The manufacturer had advertised the sausage as being suitable for human consumption in the summer time. It was consumed soon after the purchase by members of plaintiff's family; and as a result of having eaten the sausage one child died and other members of the family became seriously ill. Plaintiff, whose husband had died from other causes, brought suit against the manufacturer for herself and as next friend for those members of her family who became ill. The jury found that the sausage, at the time of processing and manufacturing, was so contaminated and poisonous as to be unfit for human consumption. The jury also found that neither the plaintiff nor the defendant was negligent. The Texas District Court and Court of Appeals gave judgment for the plaintiff. *Held,* Affirmed. The manufacturer and vendor of sausage is liable to consumers for injuries caused them by poisonous and contaminated substances in the sausage at the time the manufacturer processed and sold the same, even though the manufacturer was not negligent in the processing thereof. The retailer of foods has an absolute duty to sell only wholesome food, and is liable to the consumer for a breach of such duty when the latter relies on the former in the selection of the food and has no opportunity to examine it. *Jacob E. Decker & Sons, Inc. v. Capps.*[1]

In addition to possible remedies against the retailer, there being no express warranty that the food is wholesome, there are two alternative remedies against the manufacturer open to the injured consumer of food sold for immediate human consumption. One is an action in tort for the negligence of the manufacturer and the other is an action for breach of

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sonally all judgments when he knows these are to be sued upon in other states.

22. Stedman v. Patchin (1861) 34 Barb. (N. Y.) 218.

23. Selective Service Act (1940) 50 U. S. C. A. (Sec.) 308.

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within 40 days after he is relieved from such training and service—

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay."

1. (Texas 1942) 164 S. W. (2d) 828.