

CIRCUIT CLERKS:

Circuit clerks and recorders in counties of more than 20,000 and less than 200,000 cannot be separated by another election under Section 11538.

March 21, 1938

Mr. Richard H. Musser,
Prosecuting Attorney,
Johnson County,
Warrensburg, Missouri.



Dear Sir:

This will acknowledge receipt of your request dated March 17, 1938, for an official opinion, which is as follows:

"I have been asked by the Democratic Committee of this County to determine whether or not there is any possible means of divorcing the offices of the Circuit Clerk and the County Recorder which were merged by a majority of 40 in the 1936 election in this County.

A number of people in this County deem it advisable to do this. May we have your opinion, please as to whether it is possible to have a referendum vote on this in the election this fall and what course would be the best to pursue."

Section 11538, Laws of Missouri, 1933, page 360 provides as follows:

"In any county now or hereafter having a population of 20,000 and less than two hundred thousand inhabitants, the question of combining the offices of circuit clerk and recorder may be submitted or resubmitted, to the qualified voters at the general election to be held in the year 1936, or any four or multiple of four years thereafter. Such question may be submitted by the county court upon its own motion, and shall be submitted by the court upon

the petition of tax paying citizens who comprise at least one per cent of the qualified voters of the county. * * * * * If a majority of those voting on such question vote in favor of abolishing such office, then after the expiration of the term of office of the recorder then in office, the circuit clerk of such county shall be ex officio county recorder and subject to all the provisions of this chapter pertaining to counties of less than 20,000 inhabitants."

And Section 11541, Laws of 1933, page 362, reads as follows:

"At the general election to be held in the State of Missouri in 1934 and every four years thereafter, in all counties where the office of Circuit Clerk and Recorder are separate, a recorder of deeds shall be elected."

Section 11538, supra, mentions a fact that a vote may be had in counties having a population of twenty thousand (20,000) and less than two hundred thousand (200,000) inhabitants and may be submitted in the year 1936, or resubmitted every four years or any multiple of four years thereafter. This section only applies to the submission or resubmission of the combining of the office of circuit clerk and recorder and not for the separation of the circuit clerk and recorder.

The constitutionality of this section was upheld in the case of State ex inf. Crain, Prosecuting Attorney, ex rel. Peebles, v. Moore. In this case which was in the nature of a quo warranto, E. K. Peebles was elected recorder of deeds of Christian County at the general election in November, 1934, but the Secretary of State refused to commission him because of the enactment of Laws of Missouri, 1933, page 360, making the circuit clerk ex officio recorder in counties containing less than twenty thousand (20,000) inhabitants. Christian County is one of these, its population according to the census of 1930 being thirteen thousand one hundred sixty nine (13,169). At the same election L. L. Moore was elected circuit clerk. In due course he qualified and was commissioned as circuit clerk and ex officio recorder under the new law, and entered upon the performance of the duties of both offices. The appellant who

was elected recorder of deeds through the prosecuting attorney instituted the quo warranto proceeding in the Circuit Court of Christian County to oust the respondent Moore from office of recorder. The cause was submitted on an agreed statement of facts presenting only one question--whether the Laws of Missouri, 1933, page 360, was constitutional. The circuit court upheld the law and it was affirmed by the Supreme Court, the opinion being written by Chief Justice Ellison and concurred in by the Supreme Court.

The population of Johnson County, Missouri, according to the 1930 census was twenty two thousand four hundred thirteen (22,413) and having over the population of twenty thousand (20,000) as set out in Section 11538, the county court on its own motion or upon petition of tax paying citizens who comprise at least one per cent of the qualified voters of the county could by proper advertisement have the question submitted to a vote of the county.

The court in passing on the constitutionality of Section 11538, went further and tested the constitutionality of all of the sections and in their opinion in paragraph 2 they stated and not by dictum but specifically passed on other questions in reference to the Law of 1933 in regard to recorder of deeds.

In the case of State v. Moore, supra, in which Christian County was involved which had a population of less than twenty thousand (20,000) inhabitants and did not come under the section, the Laws of 1933, page 360, in reference to the election for the purpose of combining the circuit clerk and the recorder, but the court, on account of the constitutionality of the whole act being attacked, decided to pass upon the constitutionality of each paragraph of Section 11538 as amended.

Paragraph 2 of the same case reads as follows:

"* * *His contention is that the act attempts to delegate legislative power to the county court, by permitting that court to adopt or reject the law requiring the office of recorder to be a separate office in counties having 20,000 inhabitants or more. It is to be doubted whether appellant is entitled to raise that question, since Christian County, in which he claims the office of recorder does not have a population large

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enough to bring it within the provisions of section 11538. Citizens Mut. Fire & Lightning Ins. Soc. v. Schoen (Mo. Sup. Div.2) 93 S.W. (2d) 669, 670. But nevertheless we shall consider the assignment because appellant maintains the whole law is rendered void by the alleged defect."

* * *

Also in paragraph 7 of the opinion in that case the Court further said:

"* * * * * In other words, the statute does not delegate to the people the power to discontinue and recreate the separate offices of recorder at pleasure, but only permits them to vote on the question of joining the two offices; and when there has been such joinder it would seem the voting power of the people under the section is exhausted."

In view of this opinion by the Supreme Court, and which was plainly passed upon, Section 11538 only applies to the combination of the office of circuit clerk and recorder of deeds and does not apply to the separation once they have been combined under Section 11538. In other words, in the opinion of this case that one vote by the people combining two offices exhausts any further vote upon the question.

CONCLUSION

In view of the above authorities and the pointed decision in the case of State v. Moore, it is the opinion of this office that it is impossible to have a referendum vote or another election on this question at the election this fall.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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