

RECORDER OF DEEDS: Clerk of circuit court and ex-officio
CLERK OF CIRCUIT COURT: recorder of deeds serves until his term
expires although by operation of law at
the next general election a recorder of
deeds must be elected.

August 23, 1941

Mr. Homer E. Martin
Circuit Clerk and Recorder
Texas County
Houston, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of August 20, 1941, which reads as follows:

"As you know a law has just been passed to lower the population from 20,000 to 19,000 in regard to the separation of the Circuit Clerk & Ex-Officio Recorder's Office which effects Texas, Cass and Bates Counties.

"Will you please advise me what the Circuit Clerk's salary will be?
When will this law become effective?
Is it absolutely necessary to separate the offices until my term expires?
Will the Recorder receive as his salary all the fees that he collects?"

Your first question is to the amount of salary a circuit clerk in counties of your population. According to the Decennial Census of 1940, the population of Texas County is 19,813.

Section 13408, R. S. Missouri 1939, partially reads as follows:

"The clerks of the circuit courts of this state shall receive for their services annually the following sum:
* * * * *
in counties having a population of seventeen thousand five hundred per-

sons and less than twenty thousand persons, the sum of twenty-one hundred (\$2100) dollars; * * * * *

Therefore, the salary of the Circuit Clerk in Texas County will be \$2100.00.

Section 13435, R. S. Missouri 1939, provides that the clerk and his deputies be paid monthly out of the county treasury.

Your second question reads as follows:

"When will this law become effective?
Is it absolutely necessary to separate the offices until my term expires?"

The law that you refer to as having been passed by the Sixty-first General Assembly is House Bill No. 367. It merely lowers the population of 20,000 inhabitants as set out in Sections 13147 and 13149, R. S. Missouri 1939, to read 19,000. The sections, as amended, read as follows:

"Section 13147. There shall be an office of recorder in each county in the state containing 19,000 inhabitants or more, to be styled 'The office of the Recorder of Deeds.'

"Section 13149. The clerks of the circuit courts shall be ex officio recorders in their respective counties, except in counties containing 19,000 inhabitants or more."

Article VI, Section 39 of the Constitution of Missouri provides for the election of the circuit clerk and reads as follows:

"The St. Louis Court of Appeals and Supreme Court shall appoint their own clerks. The clerks of all other courts of record shall be elective, for such terms and in such manner as may be directed by law: Provided,

that the term of office of no existing clerk of any court of record, not abolished by this Constitution, shall be affected by such law."

In compliance with Article VI, Section 39 of the Constitution of Missouri, supra, the Legislature enacted Section 13283, R. S. Missouri 1939, which reads as follows:

"At the general election in the year eighteen hundred and eighty-two, and every four years thereafter, except as hereinafter provided, the clerks of all courts of record, except of the supreme court, the St. Louis court of appeals, and except as otherwise provided by law, shall be elected by the qualified voters of each county and of the city of St. Louis, who shall be commissioned by the governor, and shall enter upon the discharge of their duties on the first Monday in January next ensuing their election, and shall hold their offices for the term of four years, and until their successors shall be duly elected and qualified, unless sooner removed from office."

This section provides for a term of four years for the circuit clerk so that your term does not expire until 1942. We find no exception as to the terms of circuit clerks that would change the time that their terms would expire.

In a recent case decided by the Supreme Court an exact question was passed upon as set out in your request. In the case of State v. Tennyson, 151 S. W. (2d) 1090, the court, on page 1090, said:

"* * Relator seeks to have respondent, the circuit clerk of Callaway County, ousted as ex officio recorder of deeds of said county. At the time of the general election in 1938 the population of Callaway County was less than twenty

thousand. (Census of 1930). At said election respondent was elected circuit clerk. Under the statute he became ex officio recorder of deeds. In 1940 the county had a population of 23,094, which fact was duly certified by the census bureau to the Secretary of State. On February 11, 1941, the Governor, assuming that a vacancy existed, appointed relator recorder of deeds of said county. It is admitted that he was duly commissioned; that he subscribed to the oath of office required by law; and that he tendered to the county court a statutory bond as recorder of deeds. The county court refused to approve the bond on the theory that a vacancy did not exist in the office. Relator made demand on respondent for the office, which was refused. * * * * *

The court further in its opinion said:

"The statute expressly creates the office of recorder of deeds in counties of twenty thousand or more population. Sec. 13147. It does not expressly create the office in counties of less than twenty thousand population. However, it provides that circuit clerks shall be ex officio recorder of deeds in such counties. Sec. 13149. It also provides that the circuit clerk in such counties, in addition to giving a bond as circuit clerk, Sec. 13285, Mo. St. Ann. Section 11666, p. 1800, shall also give a bond conditioned for the faithful performance of the duties of his office as recorder of deeds. Sec. 13150. Of course, a circuit clerk could not perform the duties of an office that did not exist. It follows that the change in the population of said county created no new office.

"Relator also contends that the absence of legislation expressly providing the time of separation of the offices of circuit clerk and recorder of deeds, on a statutory change in population, shows that the legislature intended an instant separation of the offices on official notice of said change.

"In this connection it should be noted that the courts indulge a strong presumption against a legislative intent to create a condition that might result in a vacancy in public office. 46 C. J. pp. 971, 972. It also should be noted that circuit clerks and recorders of deeds are elected at the same general election and each serve for a term of four years.

"The statute under consideration became effective June 24, 1933. On that date the offices of recorder of deeds and circuit clerk, ex officio recorder of deeds, came into existence. Even so, the legislature expressly provided that the office of recorder of deeds in counties of twenty thousand or more population, should not be filled until the general election in November, 1934, and every four years thereafter. Sec. 13155. It further expressly provided that a recorder of deeds in said counties shall continue in office until the end of the term, regardless of a change in population. Sec. 13154. These sections of the statute show that the legislature intended the question of a decrease in population to be determined as of the date of the election of recorder of deeds rather than determined at the time the census bureau notified the Secretary of State of a change in population.

"The legislature did not expressly

provide that, on a statutory increase in population, a circuit clerk should continue as ex officio recorder of deeds to the end of his term. However, a change in population does not affect the term of a circuit clerk. He continues as such until the end of his term. In this situation it must be ruled that, by clear implication, the legislature, on a statutory increase in population, must have intended the circuit clerk to continue as ex officio recorder of deeds until the end of his term. It is not conceivable that the legislature intended to avoid a vacancy on a statutory decrease in population, and, by the same enactment, to create a condition that might cause a vacancy on a statutory increase in population. It follows that the legislature intended the question of population to be determined as of the date of the election of circuit clerks and recorders of deeds rather than determined at the time the census bureau notified the Secretary of State of the change in population.

"There is no vacancy in the office of recorder of deeds of Callaway County, and the writ should be denied. It is so ordered."

Your third question is: Will the recorder receive as his salary all the fees that he collects?

Section 13426, R. S. Missouri 1939, reads as follows:

"Recorders shall be allowed fees for their services as follows:

"For recording every deed of instrument, for every hundred words .. \$0.10
In addition to the above fee for re-

ording deeds, they shall be allowed for recording every such instrument relating to real estate, a fee of ten cents, as a compensation for making and preserving direct and inverted indexes to every book containing deeds affecting real estate.

- For every certificate and seal... .50
- For recording a plat of survey, if not more than six courses..... .40
- For every course above six of the same..... .02
- For copies of plats, if not more than six courses..... .40
- For every course above six..... .02"

The above section sets out the specific charge for each act of the recorder of deeds. The limitation of fees that can be retained by the recorder of deeds in Texas County is set out in Section 13187, R. S. Missouri 1939, which reads as follows:

"The recorder of each county in which the offices of recorder of deeds and clerk of the circuit court are separate shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all the fees received by him, over and above the sum of four thousand dollars, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury, to form a part of the jury fund of the county."

Under the above section the maximum amount of fees to be retained by the recorder of deeds, exclusive of the salaries actually paid to his necessary deputies, shall not exceed four thousand dollars for any one year.

Mr. Homer E. Martin

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August 23, 1941

CONCLUSION

It is the opinion of this department that although the population of Texas County exceeds 19,000 at this time, there is no vacancy in the office of recorder of deeds.

It is further the opinion of this office that the offices of circuit clerk and ex officio recorder of deeds held by you shall not be separated until your term expires in 1942.

It is further the opinion of this department that at the next general election in 1942 a recorder of deeds must be elected.

It is further the opinion of this department that the recorder of deeds is limited to the sum of Four Thousand Dollars in the retention of fees, exclusive of salaries actually paid to his deputies as appointed by the county court.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

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