

- CLERKS OF COURTS OF RECORD: (1) Power of Circuit Clerk to appoint deputy;
- (2) Sec. 11812, Laws of 1933, p. 371 governs appointment of deputy since July 24, 1933.

October 17, 1933.

10-23



Honorable Stanley Wells,  
County Clerk - Johnson Co.,  
Warrensburg, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of October 5, 1933 in which was contained a request for an opinion as follows:

"I am under this cover mailing you a certified copy of a Circuit Court Record, and asking you to give me your opinion in this matter as to the validity of this order.

This order commences with the expiration of a prior order made for a six months period, and if you will note it was made prior to the Laws passed by the fifty-seventh General Assembly, which go into effect July 24th, 1933."

The appointment and order was evidently made under Sec. 11812, R.S. Mo. 1929, which is as follows:

"Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the circuit court, as such court shall deem necessary for the prompt and proper discharge of the duties of his office. The circuit court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant, and shall designate the period of time such deputy or assistant may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may, at any time, discharge any deputy or assistant, and may regulate the time

of his or her employment, and the circuit court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it."

The Legislature in 1933 repealed the above section and passed a new section in lieu thereof, same being Sec. 11812, Laws of Missouri, 1933, p. 371, which is as follows:

"Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the county court, as such court shall deem necessary for the prompt and proper discharge of the duties of his office. The County Court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant, which, in counties having 12,500 persons and less, shall not exceed the amount allowed deputy or assistant to the county clerk for the actual time employed and shall designate the period of time such deputy or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the county court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it."

But there remains another section which deals with the appointment of Circuit Clerks. This section is found under "Clerks of Courts of Record", being Sec. 11680, R.S. Mo. 1929, and provides as follows:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

## I.

Does Sec. 11812, Laws of Mo. 1933 take  
precedence over Sec. 11680, R.S. Mo. 1929?

When the court approved the appointment, and the attached order was made, the same was, in our opinion, legal. The statute was in full force and effect until superseded by the new statute on the 24th day of July, 1933. In an early case of *Kean v. Cushing*, 15 Mo. App. 96, it was said by the Court:

"Until the date on which an Act takes effect, the Act has no force or validity for any purpose, not even of imparting notice of its existence."

But the question arises as to which statute is now in effect, Sec. 11680 or the new section 11812, both quoted supra, and which one should be followed in the appointment of a deputy circuit clerk. As stated before, Sec. 11680, supra, covers all classes of clerks - the new section, 11812, supra, applies only to circuit clerks. Can it then be said that the new section is in conflict with the old section?

In the case of *State ex inf. Barrett, Att'y. Gen., v. Imhoff*, 238 S.W. 122, l.c. 125, the Court, in passing on a special statute in its relation to a general statute, said:

"That the two statutes are in conflict it is evident. We have said, not once, but a number of times, that where there are two acts, and the provisions of one have special application to a particular subject and the other is general in its terms, and if standing alone would include the same matter and thus conflict with the special act, then the latter must be construed as excepted out of the provisions of the general act, and hence not affected by the enactment of the latter. This, of course, on the assumption that the general act is in other respects valid, and would, but for the exception, suffice to prescribe thereafter the county court's course of procedure."

And again, this rule is followed in the case of *Hurlburt v. Bush*, 284 Mo. 397, l.c. 405, wherein the Court said:

"Where there are two acts and the provisions of one apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that if standing alone it would include the same matter, and thus conflict with each other, then the former act

must be taken as constituting an exception to the latter or general act, and not a repeal of the former, and especially is this true when such general and special acts are contemporaneous.\*\*\*\*\* The provisions of the general statute are not in conflict with those of the special one. As persuasive evidence that the enactment of the latter was not intended to amend or repeal the former, there is an absence from the general statute of the usual provision that 'all acts and parts of acts in conflict herewith are hereby repealed.'"

Therefore, under these decisions the new statute which deals with only the procedure in the appointment of the deputy circuit clerk does not in any wise repeal the old section, i.e., 11680, supra, but is one out of a general class, and it is the opinion of this department that the new section, 11812, Laws of Mo. 1933, p. 371, should be the guide in the future as to the appointment of deputy circuit clerks.

## II.

### Is the County Court bound by the order made on July 23, 1933?

Having held in the prior question that the new section controls the appointment of deputy circuit clerks, we are confronted with the question as to whether or not the order made on July 23, 1933 and attached hereto, wherein an appointment of deputy circuit clerk was made for a period of seven months from said date, would be effective for that length of time irrespective of the new statute. Under the new statute the circuit clerk has the power to appoint the deputy, and may at any time discharge him and may regulate the time of his employment, but the County Court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation. So, in the last analysis, the controlling power is within the County Court.

Referring to the length of time a deputy clerk may be appointed, the Supreme Court has decided the matter in the case of *Horstman v. Adamson*, 101 Mo. App. 119, l.c. 124, as follows:

"The question thus presented is whether a contract is valid, and for breach of which the law will afford redress in damages, entered into between a clerk of a county court and a deputy appointed by him by the terms of which the latter was to continue as deputy at a stipulated salary for the whole period that the county clerk should remain in office under his commission,

especially when the breach of such contract by the removal of the deputy prior to the expiration of the full term was without cause and impelled by willful and malicious motives. Any such contract was in the judgment of the writer, illegal, void and incapable of enforcement as opposed to public policy for several reasons. The appointment of plaintiff as such deputy by defendant as county clerk of Lawrence County was made under the provisions of the law, by which every clerk is authorized to appoint one or more deputies who are required to be at least seventeen years of age, and possess all other qualifications of their principals; the appointments are required to be approved by the court of which the clerk is an official, and the deputies when so appointed and qualified by taking the same oath as the clerk, are authorized in his name to perform his duties, and the clerk is made accountable on his official bond for the action of his deputies. R.S. 1899, sec. 527. The statute and the appointment of plaintiff in conformity to it, alike fail to define the period for which the deputyship shall continue. The rule is well established that an appointment to office for a definite term confers upon the incumbent the right to serve out the full official period, unless forfeited by misconduct, for the permanence of the official tenure negatives the authority of the appointing power of removal at will. But where the law conferring the authority, under which the appointment is made, is silent as to any limitation of the right of removal, and the official term is unlimited, the absolute power of removal is an incident to the power of appointment to be invoked and applied at pleasure, without notice, and without legal liability for the results. These principals have been frequently recognized in numerous decisions, alike by the Federal courts as well as by the courts of many States, including our own."

Likewise, in the case of *State ex inf. Barrett, Attorney General, v. Hedrick*, 294 Mo. 21, l.c. 64, the Court said:

"If the simple power to appoint is conferred and no term is fixed by law and nothing else appears, then the appointee may be removed at pleasure, by the appointing authority, without notice, the preferment of charges or the assignment of reasons. (Throop on Public Officers, sec. 354; Mechem's Public Officers, sec. 445)

The reason of the rule is found in the unreason of its alternative, which, as Mr. Mechem says, would be that the tenure of such appointee then would be 'subject to no will but his own'; i.e., he would, in such case, hold at his own pleasure, a predicament in which courts have refused to place the public. This is the law in this State. In *State ex rel. Campbell v. Police Commissioners*, 14 Mo. App. l.c. 302, it was said: 'It is not disputed that the power of removal at pleasure is incidental to the power of appointing, in the absence of any inconsistent limitation in the law which creates the authority to appoint.' This decision was fully approved by this court on appeal.'"

Under the above decisions, it is the opinion of this department that the County Court of your county has the power, and has had the power, since the 24th day of July, 1933 to approve or disapprove the appointment of a deputy circuit clerk, and to fix the compensation and period of employment thereof, irrespective of any prior orders referring to the same subject.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

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