

CIRCUIT CLERKS:

Deputy circuit clerks are appointed by the circuit clerk and approved by the circuit judge subject to discharge at any time.

December 17, 1940

12-30



Honorable Tom R. Moore
Circuit Judge-Elect
Ozark, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of December 11th, 1940, requesting an opinion from this department, which is as follows:

"However, if not imposing on good nature, as Circuit Judge-Elect of this District, I would like for you to give me your reflection relative to the deputy hire in counties of the class of Christian, Stone, Taney, Ozark and Douglas, in the office of Circuit Clerk and Ex-Officio Recorder.

"In 1933, as is shown by the Session Act of the Fifty-Seventh General Assembly, pages 369-372 inclusive, a question arose as to the compensation of a deputy or assistant Circuit Clerk and whether the same was governed by deputies and assistants in the County Clerk's Office, as reflected in Section 11811, on page 370 thereof; but I find in the Laws of 1937, page 445, that that Act was in part amended and certain Sections enacted in lieu thereof, one of them being Section 11786, on page 445 and 11812 on page 446.

"The question that I would like to have your reflection on is this: Is there any limit to the amount that a Judge can fix as compensation for a

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deputy circuit clerk? And, Is there any limit to the number of deputies that a circuit judge can designate? And, also, in case a person had been appointed for four years as Deputy Circuit Clerk of a County, but the Circuit Court, and the salary fixed at a given sum, could said court at a later date change such compensation? And by such last mentioned Sections, I find in the concluding portion thereof these words: '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 an appointment to be made.'

"As a concrete illustration, some two years ago in Christian County, the Circuit Court designated certain parties as Deputy Circuit Clerks and fixed their compensation at so much per month; and in such appointment, as above, I have been informed, appointed them for the full four year term, but no where in such act do I find where after such appointment has been made, the Circuit Court has any authority to reduce the compensation allowed; and such appointment being made for four years, I would like to have your construction of that Section of the Statute or Laws under the Act of the Legislature of 1937."

Under Section 11812, R. S. Missouri 1929, the appointment of deputies was made by the circuit clerk approved by the circuit court. Section 11812 was amended by the Session Laws of 1933 at page 369, which required the approval of the appointment of deputy circuit clerks by the county court. This session law was amended by the Session Laws of 1937, page 446, to be known as Sec-

tion 11812. This section reads 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 Judge or Judges of the Circuit Courts, as such Judge or Judges shall deem necessary for the prompt and proper discharge of the duties of his office. The Judge or Judges of the Circuit Court, in its order permitting the Clerk to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which said order shall designate the period of time such deputies 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 Circuit Court may, at any time, modify or rescind its order permitting an appointment to be made."

It will be noticed under the above section that the approval of the deputy circuit clerks must be made by the circuit court which may consist of one judge or more than one judge. It will also be noticed that the clerk of the circuit court who makes the appointment may at any time discharge any deputy and may regulate the time of his or her employment. It further states that the circuit court, meaning the judge or judges, may modify or rescind its orders permitting an appointment to be made. The language in the above section is unambiguous and permits the clerk of the circuit court and the judge of the circuit court to discharge a deputy circuit clerk at any time. The term "approved by the circuit court" was construed in the case of *Butler v.*

Sullivan, 108 Mo. 630, l. c. 638. In that case the statutes gave the county clerk the power to employ attorneys "with the approval of the county court" to aid the prosecuting attorney in the handling of tax suits. The Supreme Court, in construing this term in that case at l. c. 638, said:

"The statute neither authorizes the county court to employ counsel nor to charge the county with liability for his compensation. The power to employ an attorney is granted solely to the collector; this compensation and the liability therefor is provided for by the law. The only power granted to the county court is to approve or disapprove of such employment, and thereby fix the status of the attorney employed by the collector as to his right to such compensation when his right to, and the amount thereof, comes to be ascertained by the court in which the tax suit is determined, and the liability therefor fixed by the final judgment of such court."

The city ordinance of the City of Jefferson provides that when a vacancy exists or shall occur in the regular police force of this city, it shall be the duty of the marshal, with the advice and consent of a majority of the members elected to the city council, to appoint some suitable and competent person to fill such vacancy. In the case of Schulte v. City of Jefferson, 273 S. W., l. c. 170, the marshal of said city appointed the plaintiff a regular city policeman, but the city council refused to confirm said appointment. Plaintiff brought suit against the city to recover salary alleged to be due from defendant for performing the services of a police officer. The court, l. c. 172, said:

"It is well settled--

"Where the appointment is made as

the result of a nomination by one authority and confirmation by another, the appointment is not complete, until the action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken.' 13 Cyc. p. 1372; Meachem's Public Office and Officers, Secs. 114, 124; 22 R. C. L. p. 433, Sec. 84.

"Plaintiff was not a de jure officer until at least confirmed by the council. If anything at all, he was a de facto officer, and such officer is not entitled to the emoluments of the office. 29 Cyc. 1393; Sheridan v. City of St. Louis, 183 Mo. 25, 39, 40, 81 S. W. 1082, 2 Ann. Cas. 480; Luth v. Kansas City, 203 Mo. App. 110, 113, 218 S. W. 901; Throop on Public Officers, Sec. 517."

Although the 1937 Session Laws, page 446, provide that the circuit clerk shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge or judges of the circuit court, as such judge or judges shall deem necessary for the prompt and proper discharge of the duties of his office, yet the circuit clerk is limited in the appointment of his deputies by the County Budget Act of 1933, page 340, and Session Laws of 1939, page 656, Missouri Statutes Annotated, Par. 12126a, page 6433.

There is no question but that where the power of appointment is given to any specific officer and the power is silent as to the full term of the appointment of deputies made by a specific officer, it is implied that the power of discharge would be lawful. In the case of Horstman v. Adamson, 101 Mo. App. 119, l. c. 124, the

court said:

"* * * * 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. * * * * *"

Also, in the case of State v. Hedrick, 241 S. W. 402, 1. c. 416, 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, section 354; Mechem's Public Officers, section 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. loc. cit. 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."

Also, in that case at page 418, the court said:

"It is also held in several decisions that if the Legislature is empowered to create an office, it may provide for removal from that office as it wills. 'In creating an office the government can impose such limitations and conditions with respect to its duration and termination as may be deemed best, and that in such a case the incumbent takes the office subject to the conditions which accompany it.' In *re Carter*, 141 Cal. loc. cit. 320, 74 Pac. 998; *State v. Houston*, 94 Neb. loc. cit. 453, 143 N. W. 796, 50 L. R. A. (N. S.) 227. Even in case a 'Constitution creates an office but makes no provision for the period of its term or method of removal from it, the power of the Legislature to act in the public interest in these respects is well settled.' *Op. of Justices*, 117 Mass. 603; *Wales v. Belcher*, 3 Pick. (Mass.) 508; *Op. of Justices*, 216 Mass. loc. cit. 606, 104 N. E. 847.

"In case the Legislature is invested with 'power to provide the mode of filling, fix the term and prescribe the duties of such officers, it necessarily follows it may, in its discretion, not only discontinue them altogether, but determine the manner and by what tribunal an incumbent may be removed.' * * * * *

CONCLUSION

In view of the above authorities it is the opinion of this department that the appointment of a deputy circuit clerk by the circuit clerk for any term can be countermanded and the deputy circuit clerk discharged without reason.

It is further the opinion of this department that where the judge of a circuit court makes an order approving any appointment of a deputy made by the circuit clerk, the judge of the circuit court, even if he should be a newly elected officer as the judge of the circuit court, may at any time modify or rescind the order of the "circuit court" permitting an appointment to be made.

It is further the opinion of this department that since the Legislature did not see fit to place a limitation on the number of circuit clerks to be appointed and approved by the circuit court or the amount of compensation to be allowed by the circuit clerk, it is then in the discretion of the circuit clerk as to the number of deputies and the compensation which must be approved by the judge, or judges, of the circuit court. The compensation and the number of deputies, of course, must come within the County Budget Act of 1933 and 1939.

Respectfully submitted

APPROVED:

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