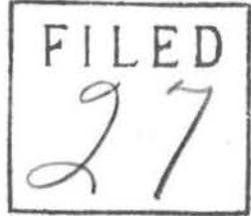


January 29, 1945



Honorable T. A. Esterly
Assistant Prosecuting Attorney
of Jasper County
Carthage, Missouri

Dear Sir:

We are in receipt of your letter of December 12, requesting an opinion from this department, which said letter is as follows:

"The County Court of this county has requested me to ask your office for an opinion as to the salary to which the Recorder of Deeds is entitled and further how many deputies the recorder may have and who may determine the number of deputies he may have, how they are appointed and how much they are to be paid.

"As you know, this county according to the last census had a population of about 78,000 with no city over 45,000. It is my understanding that the misunderstanding in this case has arisen since the repeal of certain laws by our 1941 legislature."

Sections 13498, 13499, 13500, 13501, 13502, 13503 and 13504, R.S. Mo. 1939, being Article 6 of Chapter 99, were enacted by the Legislature in 1933 as new sections and are found in Laws of 1933 at page 375.

Section 1 of that Act fixed the salary of Recorders of Deeds at \$3,200 per annum, page 376, Acts 1933. Section 1 of said Act was amended by the Legislature in 1937, Session Acts of 1937, page 442, by increasing the salary to \$4,000.

These sections, thus amended, constituted Article 6, Chapter 99, R.S. Mo. 1939. The Legislature of 1941 repealed outright said Article 6, Chapter 99, including all said sections relating to the salaries and appointment of deputies

of Recorders of Deeds in counties containing a population of from 75,000 to 90,000 inhabitants, the Act so repealing the same appearing in the Laws of 1941, page 531. The Legislature failed to enact any new sections to take the place of the sections and article repealed. The emergency clause of the repealing Act of 1941, states that said sections were repealed because the result of the 1940 decennial census of the United States was about to be published, and that the population of certain counties in the State would show a change.

The question then, of what statute, after the repeal in 1941, of Article 6, Chapter 99, R.S. Mo. 1939, if any, provides a method for the payment of Recorders of Deeds in such counties must, it seems, be determined by the construction of what was the intention of the Legislature in passing the Act of 1933, Laws of 1933, page 375, that is, whether they intended to repeal the old fee statute method of compensation to Recorders of Deeds, which was Section 11568, R.S. Mo. 1929, and whether the Legislature of 1941, in repealing the Act of 1933, which was carried into the Revised Statutes of 1939 as Article 6, Chapter 99, as aforesaid, acted upon the theory that the Legislature of 1933, had not repealed Section 11568, R.S. Mo. 1929, and that Section 11568 was still in force as providing a method of payment of said officers in counties where the offices of Recorder of Deeds and clerk of the Circuit Court are separate regardless of the question of population.

Nowhere does the Act of 1933, Laws of 1933, page 375, in terms expressly repeal any section of Article 2, Chapter 74, R.S. Mo. 1929 of which Section 11568 is a part, and which provided the old method of paying Recorders of Deeds in all counties of this State where the offices of Recorders of Deeds and Clerk of the Circuit Court are separate by permitting them to retain certain fees for their compensation. The Act of 1933 did substitute the salary method of paying Recorders in counties having a population of from 75,000 and not more than 90,000 inhabitants for the old fee method.

This, it would seem, comes strictly within the rule laid down in Crawford on Statutory Construction where this text work discusses the doctrine of repeal by implication. If repeal there was at all of Section 11568, it was by implication only, by the Act of 1933, and necessitates arriving at an understanding of the intention of the Legislature of 1933 and of the Legislature of 1941.

Crawford on Statutory Construction -- Interpretation of Laws, on repeal by implication, in Section 308, states:

"* * * The construction of the new law becomes an important consideration, since its meaning and scope will determine whether a repeal takes place, and if so, its extent. And usually one of two questions will arise: (1) whether the new law is intended as a substitute for the old; or (2) whether the new is irreconcilably inconsistent with the old, so that the former is thereby terminated. In brief, the problem will be simply to determine what is the legislative intention -- whether the old law shall cease or whether it shall be supplemented."

It surely was not the case that the Legislature of 1941, intended by the repeal of Article 6, Chapter 99, R.S. Mo. 1939, to deprive the counties of this State where the offices of Recorder of Deeds and Clerk of the Circuit Court are separate and also having 75,000 and less than 90,000 inhabitants, such as Jasper County, of all methods of paying compensation to Recorders of Deeds in such counties for their services. By the outright repeal of Article 6, Chapter 99, R.S. Mo. 1939, the Legislature apparently recognized that the Act of 1933 was passed as a cumulative substitute only for the fee method of payment of such officers in counties of 75,000 to 90,000 inhabitants, and were aware that the statute permitting the retention of fees by Recorders, Section 11568, R.S. Mo. 1929, was not intended to be repealed as to counties where the offices of Recorder of Deeds and Clerk of the Circuit Court are separate.

In other words, the Legislature of 1933 by the enactment of the new sections substituting the salary plan instead of the retention of the fees plan to pay Recorders of Deeds in counties having 75,000 and less than 90,000 inhabitants, for their services, merely exempted such counties of which class Jasper County is one, from the fee plan as provided in Section 11568, Article 2, Chapter 74, R.S. Mo. 1929, covering all counties in the State; that said Act of 1933 in no sense repealed nor did the Legislature thereby intend to repeal Section 11568, and that when Article 6, Chapter 99, 1939, was repealed in 1941, the exemption of such counties created in 1933 expired and such counties were left thereby exactly where they were under Section 11568, R.S. Mo. 1929, providing for the retention of fees for the payment for the services of Recorders of Deeds of such counties prior to the passing of the Act of 1933 by the Legislature.

Convincing evidence and circumstances to determine that the Legislature of 1933 did not intend to repeal Section 11568, R.S. Mo. 1929, lie in the fact that said section was carried into the revision of 1939 and there appears word for word as Section 13187, Article 2, Chapter 89, R.S. Mo. 1939, indicating that the Revision Committee also held the view that Section 11568 had been undisturbed by any change, amendment or repeal by implication, and that it was in full force at the time of the revision.

The language and scope of the Act of 1933 throw some light upon the question of the intention of the Legislature in passing that Act from which it may be said that it was intended only to enact new sections providing a cash method for a fee method of paying Recorders of Deeds, as an aid and substitute only for the population class of Jasper County, and that a repeal of Section 11568 was not intended. The Act of 1933, and Section 11568, R.S. Mo. 1929, were not so irreconcilably inconsistent that Section 11568 was eliminated when the new Act was passed in 1933. The last sentence of Section 1 of the Act of 1933, Laws of 1933, page 376, is as follows:

"* * * Said salaries to be in lieu of all other salaries, fees, commissions or emoluments of whatsoever kind under and by reason of the terms of any statutory provisions outside of this article."

It will be observed at once that the Legislature using the language just quoted distinctly recognized other "statutory provisions" as being in existence outside of Article 6, Chapter 99. Reading Section 6 of said Act of 1933 on page 377, Laws of 1933, we find that it did no more than make the fee mode of payment to Recorders "ineffective". Section 6, itself and the index to the sections on page 375, declare that the old statute was merely "ineffective". Section 11568, R.S. Mo. 1929, was thus designated as incomplete and inadequate or ineffective and was not rendered void or destroyed by outright repeal or by implication by the Act of 1933.

The word "Effective" is defined in Webster's Dictionary page 819, in the 6th definition, as follows:

"In actual operation; -- Said of a statute or judicial order limited by its terms to begin at a designated time."

The word "ineffective" is defined in Webster's Dictionary, page 1271, in the second definition, as: "not capable of performing the required work or duties; inefficient; incapable; as ineffective troops or workmen".

The word "ineffectual", which is a synonym of "ineffective", has been defined and distinguished from a word or words which would signify a complete setting aside, destruction or elimination of a statute, or any word which would mean an express word of repeal.

In the case of Noll vs. Alexander et al, 282 S.W. 739, l.c. 742, the Springfield Court of Appeals had for consideration two sections of the Revised Statutes of 1919 covering the question of changes of venue involving the definite question of whether an order of change of venue vested jurisdiction in the Court to which the venue was to be transferred instantly unless bond be given, and whether the Court to which the venue was changed ever obtained jurisdiction of the person where the plaintiff, Noll, never appeared and never gave bond in the Court to which the change of venue was directed. In that case Noll had sued Alexander and others for false imprisonment. Noll lost in the Circuit Court. He appealed to the Springfield Court of Appeals. He urged that, under Section 3980, R.S. Mo. 1919, the order granting a change of venue in the case was void, and that the Court to which the change was sent did not obtain jurisdiction of his person because no bond was given at the time of the order and in the Court making the order. In its discussion of the issue and in giving effect to the terms of the statutes then being discussed, the Springfield Court of Appeals, l.c. 742, said:

"The statute set out above does not provide that, if bond is not given, the order granting the change of venue shall be void. It merely says that the order granting a change of venue shall not be 'effectual' until bond is given. There is a vast difference in the meaning of the two words. 'Void' means of no force or validity. 'Ineffectual', as used in this statute, means without complete power to proceed to final judgment. * * *"

So here, if Article 6, Chapter 99, R.S. Missouri, 1939, which was repealed by the Act of 1941, had used the word "void" or "repealed" or some word of like meaning or import, the conclusion would be inevitable that an outright repeal of Section 11568, R. S. Mo. 1929, was intended. But the Legislature used no such word. In addition to the language

used in the last sentence of Section 1 of the Act of 1933, hereinabove quoted, and which recognized other "statutory provisions", outside of said Article 6, being in existence, the Legislature in Section 6 of that Act said:

"Sec. 6. All conflicting provisions ineffective, -- All provisions of law outside of this act, allowing any fee, compensation, or emolument to either of the before mentioned officers, to be paid out of the Treasury of any such county, or hereby declared to be ineffective as to any and all such counties, * * * "

Repeal by implication is not favored, and the presumption is always against repeal by implication where express terms are not used. The Act of 1933, Laws of 1933, page 375, did not mention Section 11568, R.S. Mo. 1929. The Legislature passed that Act as a new article, supplementing the old fee statute, and while recognizing that there were some "statutory provisions outside of this article" still in existence, it was not provided that such other laws were repealed or should be considered eliminated, but merely suspended them by saying that they were to be "ineffective" as to such counties.

These principles of law are stated and discussed by many of our text authorities and in many of our Supreme Court decisions.

59 C.J. 905, Section 510 lays down the rule as follows:

"The repeal of statutes by implication is not favored. The courts are slow to hold that one statute has repealed another by implication, and they will not make such an adjudication if they can avoid doing so consistently or on any reasonable hypothesis, or if they can arrive at another result by any construction which is fair and reasonable. Also, the courts will not enlarge the meaning of one act in order to hold that it repeals another by implication, nor will they adopt an interpretation leading to an adjudication of repeal by implication unless it is inevitable, and a very clear and definite reason therefor can be assigned. Furthermore, the courts will not adjudge a statute to have been repealed by implication unless a legislative intent to repeal or supersede the statute plainly and clearly appears. The implication must be clear, necessary, and irresistible. * * * "

The rule that repeal of statutes by implication is not favored by the Court is stated in the case of State ex rel. Moseley, et al. vs. Lee et al., 319 Mo. 976, l.c. 989, where the Court said:

"* * * The repeal of statutes by implication is not favored by the courts, (36 Cyc. 1071; Road District v. Huber, 212 Mo. 551, 562; State ex rel. v. Bishop, 41 Mo. 16, 24.) The question of repeal is one of intention (Curtwright v. Crow, 44 Mo. App. 563, 568), and the presumption is always against the intention to repeal by implication where express terms are not used. (36 Cyc. 1071, 1072; Gasconade County v. Gordon, 241 Mo. 569, 582; State ex rel. v. County Court, 41 Mo. 453, 459)"

The Lee case above quoted cites the case of Curtwright vs. Crow, 44 Mo. App. 563, on the rule that repeal is a question of intention. The Crow case, l.c. 568, states that rule as follows:

"But after all the question of repeal is one of intention, and where the courts can give effect to the manifest intention of the legislature, without violating any constitutional inhibition, it is their duty to do so. Where two acts are passed at the same session of the legislature, on the same subject-matter, they must be construed together. * * *"

That repeal by implication may only occur when necessity demands it is stated by our Supreme Court in the case of White vs. Greenway et al., 303 Mo. 691, l.c. 697, 698, where the Court said:

"A repeal occurs by implication only when necessity demands it. (State ex rel. v. Wells, 210 Mo. l.c. 620; Manker v. Faulhaber, 94 Mo. 440; 26 Cyc. pp. 1073-1077.) The opinion in the Wells Case quotes from a textbook, as follows:

" ' A repeal by implication must be by necessary implication. It is not sufficient to establish that the subsequent law or laws cover some, or even all, of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the

old law is repealed by implication only pro tanto, to the extent of the repugnancy.' (Anderson's Law Dict., p. 879)."

The same rule as announced in the Greenway case, supra, quoting Anderson's Law Dictionary, page 897, is stated verbatim in State ex rel. v. Wells, 210 Mo. 601, l.c. 620.

Section 13147, Article 1, Chapter 89, R.S. Mo. 1939, as amended by the Laws of 1941, page 525, requires that there shall be an office of Recorder of Deeds in each county in this State containing 19,000 or more inhabitants. Section 13155 of said Article 1, Chapter 89, provides that such Recorders of Deeds shall be elected on the first Tuesday after the first Monday of November 1934, and every four years thereafter, with other provisions therein stated. Section 13160 of Article 1, Chapter 89, 1939, provides that in all counties where the offices of clerk of the Circuit Court and Recorder of Deeds have been or may be separated, and this is the case in Jasper County, that the Recorder of Deeds may appoint in writing one or more deputies to be approved by the County Court of their respective counties, with other provisions therein contained. These sections of Article 1, Chapter 89, have not been repealed and are independent of the sections contained in Article 6, Chapter 99, which were repealed as above stated, by the Legislature in 1941, Laws of 1941, page 531. Article 2 of Chapter 89, R.S. Mo. 1939, deals with the charging and collection of fees by Recorders of Deeds. Section 13187 of said Article 2, Chapter 89, requires that the Recorder of each county in this State where the offices of the Recorder of Deeds and the clerk of the Circuit Court are separate, without reference to the population of such county, shall keep a true account of all fees received, and make a report thereof to the County Court, and that further:

"* * * 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."

These provisions and conditions are practically identical with Section 11568, R.S. Mo. 1929, and would apply to Jasper County.

This section, 13187, appears to cover the question of compensation for such deputies also. This same section was in our Revised Statutes of 1889 as Section 7450. The same constitutional provision then existed as now exists, Section 13, Article 9, Const., regarding the payment of salaries of deputies and assistants by a Recorder of Deeds before making settlement and turning over any excess of fees to his county. The matter of construing said terms of both the Constitution and the statute was before our Supreme Court in the case of State ex rel. v. King, 136 Mo. 309. The Court in that case, l.c. 318, 319, said:

"Under these provisions, is a recorder entitled, as a matter of right, to retain out of the fees of his office an amount sufficient to pay reasonable compensation to necessary assistants, or is the allowance left entirely to the discretion of the county court?"

"The constitution is positive in its terms, and contains no words from which a discretionary power can be implied. The statute can not be given such construction as will cause a conflict with the constitution. The statute existing when the constitution was adopted would be repealed by such a construction. To give the statute effect, then, the word 'may' can not be given a meaning which could deprive the recorder of his right to an allowance for assistants if they were necessary to secure the proper and expeditious performance of the duties of the office. It is also a well recognized rule of construction that the word 'may' should be interpreted to mean 'shall' when referring to a 'power given to public officers, and (which) concerns the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner.' Such an interpretation is demanded 'for the sake of justice and the public good.' Steines v. Franklin Co., 48 Mo. 178, quoting from Newburgh Turnpike Co. v. Miller, 5 Johns. Chy. 113."

CONCLUSION.

Considering the facts submitted, and applying the above statutes and authorities cited and quoted to them, it is the opinion of this department that by the enactment by the Legislature of 1933 of the Act that went into the revision of

1939 as Article 6, Chapter 99, Jasper County, because of its population classification, was exempted from the terms of Section 11568, Article 2, Chapter 74, R.S. Mo. 1929, which provided the retention of fees plan for the compensation of Recorders of Deeds of all counties in the State for their services, and that when Article 6, Chapter 99, R. S. Mo. 1939, was repealed outright in 1941, the exemption of Jasper County created in 1933 was removed and said county was left thereby exactly where it was prior to the enactment of Article 6, Chapter 99, R.S. Mo. 1939, in regard to the method of payment of its Recorder of Deeds for his services as authorized under the terms of said section 11568. Said section 11568, provided that said Recorder retain fees received by him up to the sum of \$4,000 for each year of his official term for his compensation and that out of the remainder of such fees and emoluments he should pay such amounts for deputies, and assistants, in his office as the County Court may deem necessary.

That the Recorder of Jasper County has the right under Section 13160, Article 1, Chapter 89, R.S. Mo. 1939, to appoint in writing, one or more deputies or assistants to be approved by the County Court of said county, and that under Section 13187, Article 2, Chapter 89, R.S. Mo. 1939, which is the same section as section 11568, R. S. Mo. 1929, such deputies or assistants as the County Court may deem necessary may be paid by the Recorder of Deeds of said County out of the fees collected by his office.

That under the decision rendered in the case of State ex rel. v. King, the Recorder may determine what is a reasonable amount to be paid his necessary deputies and assistants, and may pay the same to them out of the fees of his office before making settlement with the County Court, at which time he should be given credit therefor.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

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