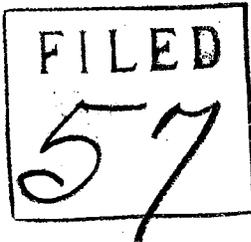


RECORDER OF DEEDS: Deputy recorder has no authority to record
DEPUTY: instruments after the death of the officeholder
PUBLIC RECORDS: by whom he was appointed; such attempted
recording may not be given legal effect by
a subsequent ratification of person appointed
to fill the vacancy.



January 28, 1954

Mr. Frank W. May
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office, which request reads, in part, as follows:

"As you no doubt know, Forrest Robinson, Recorder of Deeds of St. Francois County, passed away on December 20, 1953, and no successor has been appointed to fill that office up to the present time. As a result a question has come up, upon which I am requesting an official opinion.

* * * * *

"In order not to bring this important office to a standstill, Mr. Robinson's chief deputy has kept the office open and doing business, since the death of her principal. However, it would seem that death would revoke this agency, as it would any other, and the deputy, while acting in good faith, has only the barest color of authority.

"The question is, what has been the effect, if any, of the recording of instruments by the chief deputy? Will all instruments recorded during this period have to be re-recorded? Will the successor in office who will be appointed under Article IV, Section 4 of the Constitution of Missouri, have to ratify the acts of this chief deputy, in order to give them legal effect?"

Mr. Frank W. May

We assume for the purpose of discussion that certain instruments were entered in the records by a duly appointed deputy after the death of the recorder by whom he was appointed. The question then is what effect is to be given to such entries? In other words, have these instruments been properly recorded?

Section 59.010, RSMo, 1949, provides that there shall be an office of recorder in each county in the state. Section 59.120, RSMo, 1949, provides that the recorder "shall record all instruments of writing authorized and required to be recorded," in books furnished by the county court. Section 59.330, RSMo, 1949, provides "it shall be the duty of the recorder to record:" then proceeds to enumerate certain instruments. Section 59.400, RSMo, 1949, specifies the manner in which a reporter shall place an instrument upon record. Section 59.600, RSMo 1949, provides a penalty for failure of the recorder to perform the duties imposed by Chapter 59.

Reading the above noted provisions, in connection with other provisions, relating to the office of recorder of deeds, we are led to the conclusion that the duties imposed by the recording acts are personal to the person duly elected, qualified and occupying the office.

The rule in regard to the acts of deputies in this state is stated in the case of Halter v. Leonard, 223 Mo. 286, l.c. 293, as follows:

"* * *It is a well settled rule of law that all official acts done by a deputy should be done in the name of the principal. ' A deputy is one who, by appointment, exercises an office in another's right, having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable.' (9 Amer. and Eng. Ency. Law (2d), 369; Carter v. Hornback, 139 Mo. 238.)"

Following this rule to its logical conclusion it would, of course, be apparent that a deputy could not act as such in the absence of a principal in existence. Noting specifically such conclusion the court in the case of Herring v. Lee, 22 W. Va. 661, l.c. 667, said:

"* * *These definitions clearly show that there must be an officer or principal in existence and capable of acting for himself at the time the deputy or agent is acting for him. When the

Mr. Frank W. May

officer or principal is dead and that fact is known or he is otherwise disqualified to act for himself he cannot act by deputy or agent. Hunt v. Rousmanier, 8 Wheat. 174; Story's Ag. Sec. 488. So if in any manner the principal's power over the office or subject-matter of the agency becomes extinct, the authority of the deputy or agent to act also ceases. Story's Ag. Sec. 499. This must be so of necessity; for unless there is an office in the possession or under the control of the officer he cannot perform the duties of his office, and to hold that the officer could act by deputy in such case would be to hold that he could do by deputy what he had not the power to do himself. Such a position is contrary to both law and reason. * * *

See also 43 Am. Jur. Public Officers, Sec. 460, page 219, wherein it is stated:

"* * *His principal is responsible for his acts, he is removable at the pleasure of his principal, and his authority ceases at the latter's death or disqualification. * * *"

It is also stated that entries made in a record book by an unauthorized person are void. We note 76 C.J.S., Records, Sec. 17, page 123, wherein the rule is stated as follows:

"In order to constitute a valid record it must be made by an officer having the authority to do so, or, as stated otherwise, it is essential that it be made by the person whose duty it is to make the record, or the transcription of an instrument into the record books must be made by or under the superintendent of the officer therefor. An entry made in a record book by an unauthorized person is void. * * *"

In view of the foregoing cited cases and authorities, we are of the opinion that in the instant case the authority of the deputy ceased at the death of the recorder, consequently, the acts of the deputy in placing certain instruments in the record book are void and of no effect being without authority of law.

Mr. Frank W. May

You next inquire whether the person appointed to fill the office may ratify the acts of this deputy to give them the required legal effect. We, in this regard, refer to two recognized rules of the Law of Agency, (1) the existence of a principal at the time an act is performed is essential to the ratification of the Act, (2 C.J.S. Sec. 40,) and, (2) there can be no ratification of an act which could not have been legally done by the ratifier himself in the first instance. 2 C.J.S., Agency, Sec. 37, page 1074.

Applying the above noted rules it is our opinion that the person to be appointed to fill the vacancy cannot ratify said acts since the deputy was not purporting to act for a principal in existence. Furthermore, the appointee could not ratify and give effect to acts prior to his appointment since he himself had no authority to act as of that time.

CONCLUSION

Therefore, it is the opinion of this office that instruments placed in the record book by a deputy recorder after the death of the officer by whom he was appointed and prior to the time that the vacancy in office is filled as provided by law, are without sanction of law and void.

We are further of the opinion that such acts may not thereafter be given legal effect by subsequent ratification of the person appointed to fill the vacancy.

This opinion, which I hereby approve, was written by my assistant, Mr. Donal D. Guffey.

Yours very truly,

DDG:mw

JOHN M. DALTON
Attorney General