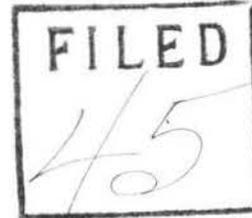


CIRCUIT CLERKS: Salary of Clerks and deputies affected by
Sections 11786 and 11812, p. 369, Laws 1933.

October 25, 1933



Hon. Dale H. Johnson
Circuit Clerk
Bollinger County
Marble Hill, Missouri

My Dear Mr. Johnson:

We acknowledge receipt of your letter of recent date wherein you request an opinion of this office on the following matter:

*Please advise me as to whether Section 11812 of Missouri Session Acts 1933, in relation to Salaries and Fees of Circuit Clerks and Deputies is in force at this time.

The Section above quoted is one portion of the committee's substitute for Senate Bill 74 which was passed by the 57th General Assembly and approved on May 1, 1933. Not having any emergency clause this law became effective on the 24th of July 1933. For convenience we will divide your inquiry into the following subdivisions:

I.

SALARIES AND FEES OF CIRCUIT CLERKS IN
OFFICE ON JULY 24, 1933, NOT EFFECTED
BY COMMITTEE SUBSTITUTE SENATE BILL 74.

On page 369 of the Missouri Laws 1933, we find Section 11786 as enacted by the 57th General Assembly. This section provides the maximum amount of fees that may be retained by circuit clerks in counties having a population not exceeding 80,000 persons, such counties being classified according to population. This section contains the following proviso, l.c. 370:

"* * * Provided, further, that, until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

By reason of this proviso it was plainly the intent of the Legislature that all Circuit Clerks holding office on the effective date of the law would continue to be paid under Section 11786 as contained in the R. S. Mo. 1929, and such is the opinion of this office.

II.

APPOINTMENT OF DEPUTY CIRCUIT CLERKS CONTROLLED BY SECTION 11812, p. 37, SESSION ACTS 1933.

Section 11812 as amended and reenacted by the 57th General Assembly 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 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."

The only change made in this section pertinent to your inquiry was that the approval of the appointment is now to be made by the county court instead of the circuit court and it is now the county court that can modify or rescind its order or reduce the compensation theretofore fixed instead of the circuit court as provided in the former law. It is to be noted that there is no proviso in this section respecting deputy clerks as was placed in Section 11786 respecting the Circuit Clerks. It is therefore apparent that this law was to be immediately effective insofar as determining the manner of appointment and removal of deputy circuit clerks.

It has been so held by an official opinion of this office dated October 17, 1933, wherein this conclusion is reached:

"* * * 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."

III.

DEPUTY CLERK CONTINUING TO ACT IS DE FACTO OFFICER.

In the event the county court has failed to make any order approving the appointment of the deputy clerk as contemplated by Section 11812 as amended, the acts of such deputy are not to be considered as illegal and void. He would fall within the classification of a de facto officer.

In 46 C. J. 1053, Sec. 368, we find the following definition of de facto officer.

"An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. A person will be held to be a de facto officer when, and only when, he is in possession and is exercising the duties of an office, his incumbency is illegal in some respect; he has at least a fair color of right or title to the office."

Touching the validity of his acts as de facto officer, we find this statement in 46 C.J. 1060, Sec. 378:

"The acts of an officer de facto are as valid and effectual where they concern the public or the rights of third persons, until his title to the office is judged insufficient, as though he were an officer de jure, and the legality of the acts of such an officer cannot be collaterally attacked in a proceeding to which he is not a party. But to be valid, the acts

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of a de facto officer must comply with the requirements of applicable law, to the same extent and in the same manner as valid acts of de jure officers.* * * **

It is therefore the opinion of this office that the acts of any such deputy circuit clerk are to be given full force and effect, and that such deputy would be entitled to the compensation provided by law until he was removed as provided in Section 11812, p. 371, Missouri Laws 1933.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

APPROVED:

Attorney General.

HGW:MM