

SALARY OF DEPUTY CIRCUIT CLERKS:

1. County Court has right to fix salary of deputy circuit clerks immediately on the becoming effective of section 11812, Laws 1933, page 371, without regard to present deputy clerks assumed fixed term of office.

12-27
December 21st
1 9 3 3.



Mr. O. O. Wyrick,
Clerk of Circuit Court,
Tuscumbia, Missouri.

Dear Mr. Wyrick:-

We have your letter of October 12, 1933, in which was contained a request for an opinion as follows:

"Under section 11812 of the Session Acts for 1933 the County Court is given the right to determine what the salary of the deputy of the Clerk of the Circuit Court shall be. I would like to have your opinion as to whether this applies to the present term or should it only apply beginning the next term?"

From a subsequent letter written by you, we judge the words "present term" in the letter above quoted to refer to the assumed present fixed term of office of the deputy clerk in question. We use the words "assumed present fixed term" since an examination of the pertinent law convinces us that the deputy circuit clerk has within the strict meaning of the word, no definite fixed "term" of office.

Section 11812, Revised Statutes of Missouri, 1929, under authority of which the deputy circuit clerk in question was appointed provides as follows:

"Sec. 11812. DEPUTIES AND ASSISTANTS, HOW APPOINTED-COMPENSATION. 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

12/21/1933

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."

Section 11812, Revised Statutes of Missouri, 1929, as re-enacted Laws 1933, page 371, provides as follows:

"Sec. 11812. DEPUTY AND ASSISTANT CIRCUIT CLERKS-COMPENSATION. 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.

It will be noticed that while both sections provide that the true appointing power shall designate the period of time that such deputy may be employed, there is a further provision that said deputy may be removed from office at any time by said appointing power. On these provisions do we base our opinion that such an office holder has no fixed term of office in the legal sense.

On this point the courts of Missouri have taken an identical stand in many cases but we deem it necessary to refer merely to one.

The case we refer to is the case of State ex rel. Rumbold vs. Gordon, 238 Mo. 168, decided by the Supreme Court of Missouri sitting in Banc, the opinion being written by Judge Lamm. In that case the court, all the judges concurring, held that an Adjutant-General appointed by and holding office under the Governor "during the term of the Governor and removable by him at pleasure" did not

12/21/1933

have a fixed "term of office" in the constitutional sense that increasing his salary during said term was in violation of Article XIV, Section 8 of the Constitution of Missouri. Judge Lamm in his opinion stated, at page 178, as follows:

"But the matter need not rest on mere parity of reasoning. Says a sound author (Mecham's Public Offices and Officers, sec. 385): 'The word "term", when used in reference to the tenure of office, means ordinarily a fixed and definite time, and does not apply to appointive offices held at the pleasure of the appointing power.'

"In accord therewith in another standard work (Throop on Public Officers, sec. 303): 'The word "term" is uniformly used to designate a fixed and definite period of time. * * * And an officer who holds his office at the pleasure of another officer * * * has no official term, within the meaning of a constitutional or statutory provision relating to such term.' Again (Sec. 304): 'Where an office is filled by appointment, and a definite term of office is not fixed by a constitutional or statutory provision, the office is held at the pleasure of the appointing power, and the incumbent may be removed at any time.' (Italics ours).

Judge Lamm then proceeds to review the decisions of the appellate courts of other states to the same effect, and then writes at page 179:

"In full accord with the general doctrine of the cited cases are our own appellate courts." Citing State ex rel vs. Alt, 26 Mo. App. l.c. 675-6; State ex rel vs. Stonestreet, 99 Mo. l.c. 371 et seq.; State ex rel. vs. Johnson, 123 Mo. 43, and quoting from the latter.

In addition to the above authority, a note in 37 L.R.A. (n.s.) 388, reviews a list of cases to the same effect.

In discussing the above angle of this matter, our intention is to show that the following provision of our Missouri Constitution does not apply to our case:

12/21/1933

"Article IV, Section 8, Constitution of Missouri; Compensation of officers, not to be increased nor term extended:-- The compensation or fees of no state, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

There is obviously nothing in this provision of the Constitution which prevents a decrease in the salary of an officer during his term (*Lycette vs. Wolff*, 45 Mo. App. 489), hence, we need not take the time to show that.

Having now shown that the Constitution does not prohibit a fixing of salary, whether by decrease or increase, in our present case, we proceed to a construction of the legislative power and the effect to be given thereto.

Section 11812, Revised Statutes of Missouri, 1929, above quoted, delegates to the circuit court the supervisory powers over deputy circuit clerks. The office of deputy circuit clerk is not created by the constitution but is merely an office created by statute. The legislature has, therefore, the power at any time to regulate such office as it deems best. The shifting therefore by the legislature of the above mentioned supervisory powers from the circuit court to the county court (Section 11812, Laws 1933, p. 371, above quoted), was clearly within its powers, and the provisions of the new statute should be given effect, as provided by our Constitution, Article IV, Section 36, ninety days after the adjournment of the session at which it was enacted. Said adjournment date in this case was April 25, 1933.

The law is well settled in this and other states on the above legislative power, hence, we deem it necessary to quote from only one leading case.

In *State ex rel. vs. Hedrick*, 241 S. W. 402, decided by the Supreme Court of Missouri, sitting in Banc, James T. Blair, Chief Justice, in a separate concurring opinion in which four other judges concur, passes on this question. In this case, Judge Blair, at page 419, quotes with approval from the case of Graham vs. Roberts, 200 Mass. 152, as follows:

O. O. Wyrick--#5

12/21/1933

"Where an office is created by law and one not contemplated, nor its tenure declared by the Constitution, but created by law solely for the public benefit, it may be regulated, limited, enlarged, or terminated by law, as the public exigency or policy may require."

When, therefore, our legislature at the 1933 legislative session transferred from the circuit court to the county court the power to fix the salaries of deputy circuit clerks, said power belonged to the county court as soon as the law became constitutionally operative, without regard to any assumed fixed term of office which any deputy circuit clerk then held or now holds.

Very truly yours,

CHARLES M. HOWELL, Jr.
Assistant Attorney-General.

APPROVED: _____
Attorney-General