

RECORDER OF DEEDS:

It is legal for the Recorder of Deeds to appoint the Circuit Clerk Deputy Recorder at Moberly

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August 5, 1935



Honorable Richard Chamier
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

This Department is in receipt of three separate letters requesting opinions regarding the appointment of deputies to the office of Recorder of Deeds in your County. The first request of July 22, 1935, is as follows:

"Randolph County maintains circuit court and county offices at two towns within the County, Moberly and Huntsville, which are more than five miles apart. Please advise me if it is proper for the Recorder of Deeds, who maintains an office in Huntsville, the County Seat, to deputize the Circuit Clerk as Deputy Recorder of Deeds for the purpose of issuing marriage licenses at Moberly, Missouri. It has been the custom in this County to so deputize the Circuit Clerk since the time the two offices were separated in 1892."

We shall first discuss the legality of the appointment of Circuit Clerk as Deputy Recorder of Deeds, the Circuit Clerk residing and performing his duties in the City of Moberly, and the Recorder of Deeds maintaining his office at Huntsville. This question involves the holding of two offices by one and the same person. In various counties where the Clerk of the Circuit Court is ex officio Recorder of Deeds, the Legislature recognizes the fact that there is no incompatibility or inconsistency in the same person holding both offices.

In the Laws of 1933, page 360, Section 11528, the Legislature amended the law relating to combining the offices of the Recorder of Deeds and the Circuit Clerk according to population, as follows:

"The clerks of the circuit courts shall be ex officio recorder in their respective counties, except in counties containing 20,000 inhabitants or more."

Section 11538, Laws of 1933, page 361 provides that counties having a population of 20,000 or more, the question of combining the two offices shall be submitted to the qualified voters at a general election. During the early history of our State the offices of County and Circuit Clerk were at one time combined and held by one and the same person. In the case of *State v. Lusk*, 48 Mo. 242, the Court said:

"A writ of quo warranto was sued out of the Cole Circuit Court against the defendant to test his right to hold the office of county clerk, he having been elected to and having entered upon the duties of the office of clerk of the Circuit Court. The relator claims that by this act he has in effect surrendered the office of county clerk, for the reason that the duties of the two offices are incompatible in law. If this were so, there is no doubt that the acceptance of the second office would vacate the first (*State ex rel. Owens v. Draper*, 45 Mo. 355); and counsel have given some forcible illustrations of the difficulty arising under some circumstances in holding both offices by the same person. But their incompatibility consists not so much in the nature of their duties as in the fact that both courts may be sitting at the same time, so that the clerk must be personally absent from one. But this difficulty has never been recognized in Missouri as necessarily constituting incompatibility in a legal sense, inasmuch as in one or even in both of the courts, the clerk may appear by deputy. Were the duties necessarily personal, the deduction of counsel would be sound, but as it is we have no right to pronounce the offices incompatible.

"Another and conclusive reason against the views of the relator arises from the customs of the State. From our earliest history, in a large portion of the State, those offices have been held by the same person, and no question has been raised as to their compatibility. With this general and well-known practice, we have had legislation declaring other offices incompatible, but none in regard to these. We are bound to regard it as a tacit legislative approval of the practice--an indorsement that demands the weightiest reasons to warrant us in disregarding it."

In the case of *State v. Kansas City*, 261 S. W. the question of a person holding two offices is exhaustively discussed, and the leading cases are contained therein at l. c. 115:

"The only point raised by appellants in this case, which was not decided adversely to appellants' contention in the Prior Case, is the contention that relator's appointment and acceptance of the office of deputy sheriff on January 1, 1921, and his discharge of the duties of that office up to the time of trial, was incompatible with the office of clerk of the board of public works. The evidence showed that the duties of relator as such clerk were clerical, and the law fixes his duties as deputy sheriff as being to attend to all the duties of a sheriff. In support of appellants' contention that such positions were incompatible, the following cases are cited: *State ex rel. v. Walbridge*, 153 Mo. 194, 54 S. W. 447; *State ex rel. v. Draper*, 45 Mo. 355; *State ex rel. v. Lusk*, 48 Mo. 242. And respondents cite as holding that such offices are not incompatible with each other, *State ex rel. v. Bus*, 135 Mo. 325, 36 S. W. 636, 33 L. R.A. 616 (court en banc) and *Gracey v. St. Louis*, 213 Mo. 395,

111 S. W. 1159.

"In State ex rel. v. Walbridge, 153 Mo. 194, 54 S. W. 447, the relator had been a policeman, whose terms was for a fixed period of four years, at a salary of \$75 per month, and on January 5, 1892, at his own request, and by order of the board of police commissioners of St. Louis, he was appointed turnkey, whose term was for an indefinite term, at a salary of \$50 per month, and it was held, citing the case of State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, that the two positions were incompatible with each other, and his appointment and acceptance of the position of turnkey terminated his term as policeman, and that his subsequent appointment and acceptance of the office policeman terminated his office of turnkey. We think that case is distinguishable from this because there, by agreement, there was an exchange of one office for the other, and policemen and turnkeys have some control over and are required to deal with or assist each other. In State ex rel. v. Draper, 45 Mo. 355, it was held that the office of circuit judge and a member of the Legislature could not be held at the same time, because the two offices were incompatible at common law, and, also, the Constitution prohibited any person holding any lucrative office under this state from being a member of the Legislature. In State ex rel. v. Lusk, 48 Mo. 242, the court held that the offices of clerk of the county court and clerk of the circuit court of Cole county were not incompatible, and one person could hold both offices at the same time, because the clerk could act by deputy in one or both courts. But the court added:

'Were the duties necessarily personal, the deduction of counsel would be sound, but as it is we have no right to pronounce the offices incompatible.'

"In State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, before the court, en banc, the question was most elaborately considered. MacFarlane, J., rendered the opinion, and it was held that the office of deputy sheriff and school director were neither incompatible at common law nor prohibited by the Constitution, and that the test was, not the physical inability of one person to discharge the duties of both offices at the same time, but some conflict in the duties required of the officers."

The Act of 1885, creating the additional Court at Moberly, Section 8, is as follows:

"All general laws now in force or which may hereafter be enacted regulating and governing courts of record, and all laws defining the practices and proceedings in such court, are declared to be in force and effect in the court whereby established."

Section 11542 R. S. Mo. 1929, relates to the appointment of deputies by the Recorder of Deeds, and is as follows:

"In all counties wherein the offices of clerk of the circuit court and recorder of deeds have been or may be separated, the recorder of deeds may appoint in writing one or more deputies to be approved by the county court of their respective counties, which appointment, with the like oath of office as their principals, to be taken by them and indorsed thereon, shall be filed in the office of the county clerk. Such deputy recorders shall possess the qualifications of clerks of courts of record, and may, in the name of

their principals, perform the duties of recorder of deeds, but all recorders of deeds and their sureties shall be responsible for the official conduct of their deputies. But no recorder now holding office shall appoint such deputy or deputies until he shall have entered into a new bond to the state in such sum, manner and form as is now required by law."

CONCLUSION

We are of the opinion that the Recorder of Deeds may appoint the Circuit Clerk at Moberly as a Deputy Recorder of Deeds; that the two offices are not incompatible and inconsistent, and the appointment should be made in conformity with Section 11577, quoted supra.

II

On July 24, you wrote this department as follows:

"On July 22, I sent you an opinion regarding conduct of the Recorder's office. Permit me to ask this further question. Could the Recorder, in Huntsville, give the marriage license to the Circuit Clerk, or his Deputy, in Moberly, already signed in blank and allow the Circuit Clerk to merely issue the license?"

Section 2978 R. S. Mo. 1929 relates to marriage licenses, and the pertinent part is as follows:

"The recorders of the several counties of this state, and the recorder of the city of St. Louis, shall, when applied to by any person legally entitled to a marriage license, issue the same, which may be in the following form: * * * * *"

Section 2980 R. S. Mo. 1929 states:

"If any recorder willfully neglect or refuse to issue a license to any person legally entitled thereto on application, on payment or tender of the fee provided for in the next preceding section, or shall fail or refuse to record such license, with the return thereon, as herein provided, * * * * *

Section 2983 contains the powers and limitations of the Recorder in issuing licenses. To permit the Circuit Clerk or his Deputy, at Moberly, to fill in the blanks contained in the marriage license would defeat the purposes of the statute, the vital one being the fact that the Recorder himself must be satisfied or make the finding that the applicants for licenses are qualified and entitled to the same. This he could not do if he merely placed the blank into a third party's hands with his signature.

In the case of State ex rel. v. Moore 96 Mo. App. l. c. 435, the court holds that it is the duty of the Recorder to record a license at the time it is issued. Speaking on this point, the Court said:

"The manifest purpose of the marriage-license statute was to make such licenses, returns thereto, and certificates of marriage, public records so as to give notice to all the world of the occurrence to which they severally relate. Their contents thereby become matters of public knowledge because the law requires them to be kept, authorizes them to be used, and secures to all persons access to them, that knowledge of them may be public. It would therefore seem that a construction of the marriage license statute that requires the recording of all licenses when issued would obviate and clear away the difficulties which present themselves under the contrary construction for which respondent contends. After a rather full examination of the

entire marriage-license statute in all its length and breadth, we have been unable to escape the conviction that the Legislature intended that the licenses authorized by it should be placed on record by the recorder issuing them when issued, and in accordance with that conviction we must so rule. This construction, it seems to us, will best subserve the purpose of the statute.

The respondent suggests that the rule in respect to recording such instruments as the law demands shall be recorded does not require them to be recorded until they are finished. Conceding this to be the general rule of practice prevailing in respect to such instruments, does the recording of a marriage license when it is issued violate it? When the blank form of the license has been filled out by the recorder and his hand and official seal affixed thereto, is not there a finished instrument? The return to be made thereon to him by the person solemnizing the marriage is the independent act of another. Such return is as distinct from the return as a writ of summons issued by a clerk of a court of record is from the return made thereon by the sheriff."

CONCLUSION

We are of the opinion that licenses issued in the manner as contemplated by your letter, would not constitute a legal procedure. The statutes make it the duty of the Recorder to determine whether the applicants are persons qualified to obtain a license, and we do not believe that he could delegate this authority to an outside person having no connection with his office.

III

On July 20 you made this office the following inquiry:

"The Randolph County Bar Association has requested the appointment, by the County Court, of a deputy to be stationed at Huntsville. The Court wishes to know if it is proper to allow one of the County officials at Huntsville, or one of their deputies, to take the office of deputy Circuit Clerk. If the above is not possible then can the county hire a private person to assume the duties of Deputy Circuit Clerk and to be stationed at the courthouse in Huntsville?"

It appears by the Act of 1885 creating the Court at Moberly, that no powers or changes were made with reference to the legally constituted Court at Huntsville. Section 5, page 117 of the Act of 1885, is as follows:

"The clerk of said court shall procure and keep a seal to be used as the seal of said court. He shall also keep an office at the said city of Moberly and shall appoint a deputy, resident of said city of Moberly, for whose acts he shall be responsible, and who shall in his absence have the care and management of all books and papers pertaining to said court, and exercise the powers and perform all the duties of the office in the absence of his principal."

Section 8, page 117 of the same Act, is as follows:

"All general laws now in force or which may hereafter be enacted, regulating and governing courts of

record, and all laws defining the practice and proceedings in such courts, are declared to be in force and effect in the court hereby established."

Thus it will be noted that the court created at Moberly, after the creation of the same, became amenable to the procedure, practice and rules the same as in the other Circuit Court.

In 1933, Section 11812 of the Revised Statutes of 1929 was amended at page 371 in reference to the appointment of deputy circuit clerks. Said section now reading 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."

We come to the conclusion that the above section is applicable to the appointment of deputies in your county. We

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are of the further opinion that the Circuit Clerk of the County could appoint some other county official at Huntsville to perform the duties of deputy circuit clerk at Huntsville; this conclusion being based upon the authorities as contained in your first letter relating to the appointment of deputy circuit clerk as deputy recorder of deeds at Moberly.

Referring to the last question contained in your letter, as to whether or not the County could hire a private person to assume the duties of the deputy circuit clerk to be stationed at Huntsville, we are of the opinion that under Section 11812 the County Court could not, of its own volition, make such an appointment, but the circuit clerk could appoint some person as deputy, with the approval of the County Court. This being on the condition that the fees from said office will compensate the additional deputy, as under Section 11814, page 372, Laws of Missouri 1933, it becomes the duty of the circuit clerk to pay the deputies out of the fees earned by his office. Said statute relating to the same being, in part, as follows:

"And quarterly such clerk shall pay into the county treasury the amount of any fees collected in excess of the sums permitted to be retained for services and pay of deputies and assistants, * * * * *"

Respectfully submitted,

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