

COUNTY CLERK: DEPUTY; (1) Deputy county clerk  
must be approved by  
the county court,  
(2) County court may re-  
fuse to approve,  
for what reasons.

March 15, 1935



Honorable Randall R. Kitt  
Prosecuting Attorney  
Livingston County  
Chillicothe, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of March 5, 1935 requesting an opinion from this office, which reads as follows:

"The County Court of Livingston County has asked me to write you for an opinion upon the following question:

Is the County Court required to approve a deputy of the County Clerk, who has been duly appointed as a deputy by the County Clerk, and if it is not required to do so, in what instances can the County Court refuse to approve the appointment of the Deputy?

I gave the County Court a short time ago my opinion to the effect that if the Deputy Clerk has been duly appointed by the County Clerk and the deputy fulfills the requirements of Sections 11650 and 11680 R. S. Mo., 1929, then the approval of the appointment by the county Court is a ministerial act and in that case the County Court could be compelled to

March 15, 1935

to approve the appointment of the deputy.

I cite you in this connection the following cases:

Better Built Homes and Mortgage Company v. Nolte, Mayor, et al. 249 S. W. 743.

The State of Missouri ex rel John P. Strother, Respondent, v. Jos. V. Chase, et al., 42 Mo. App., 343.

I would appreciate your sending me your opinion upon this question at your earliest convenience."

I.

Section 11680 Revised Statutes Missouri 1929, reads as follows:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

The term "court," as used in Section 11680, refers to all courts of record including the county court. It therefore appears, with reference to the appointment of deputy county clerks, that two acts are necessary,

March 15, 1935

- (1) The appointment of such deputy by the county clerk,
- (2) The approval of such appointment by the county court or by two judges of the county court.

The duty to appoint a deputy county clerk is placed upon the county clerk and it is the duty of the county court to approve or disapprove such appointment.

Such is the construction placed upon a similar term "approved by the court" in *Butler v. Sullivan* 108 Mo. 630, l. c. 638. In that case the statute gave the county clerk the power to employ attorneys "with the approval of the county court" to aid the prosecuting attorney in the handling of tax suits. The Supreme Court, in construing this term in that case, l. c. 638, said:

"The statute neither authorizes the county court to employ counsel nor to charge the county with liability for his compensation. The power to employ an attorney is granted solely to the collector; this compensation and the liability therefor is provided for by the law. The only power granted to the county court is to approve or disapprove of such employment, and thereby fix the status of the attorney employed by the collector as to his right to such compensation when his right to, and the amount thereof, comes to be ascertained by the court in which the tax suit is determined, and the liability therefor fixed by the final judgment of such court."

22 R. C. L. Section 84, page 433, makes this statement:

"Wherever, under a constitutional or statutory provision, the appointment is required to be made with the approval of some officer or body, such

appointment must be approved before the person is legally entitled to the office."

In the case of State v. Stafford 34 Pac. (2nd) 1. c. page 379, the court said:

"Thus it is apparent that the phrases used in the two constitutional provisions and that employed in the act creating the Bureau of Agriculture do not differ in effect, but under each the appointments under consideration come within the general rule that 'where a person is appointed to an office under a constitutional or statutory provision that the appointment may be made with the approval of some officer or body, such appointment must be approved before the person is legally entitled to the office, except in the case of such a vacancy in the office that the duties of the office are no longer being discharged.' "

In Apfel v. Mellon 33 Fed. (2nd) 1. c. 806, the court defines the term "approve" or "give approval" as follows:

"We agree with the contention of the appellees. The statute provides that an association formed under the act shall not become a body corporate until after the articles of association and organization certificate have been duly made and filed, and after the Federal Reserve Board has approved the same and issued a permit to it to begin business. The word 'approved' naturally imports the exercise of judgment and discretion; and the power to approve ordinarily implies a power to disapprove.

To 'approve' or give 'approval' is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another.

The word 'approve' does not, ex vi termini, necessarily import the exercise of discretion, but from the connection in which the term is used it often involves the idea of discretion and adjudication, and is seldom construed as requiring a mere ministerial act. 4 C. J. 1464."

In the case of State v. Standard Oil Company 16 S. W. (2nd) 1. c. 582, the court said:

"The word 'direct' has many meanings, but, as used here, we think it means that, when the tax commission, on investigation, finds that a suit should be instituted, it has the authority to cause the Attorney General to institute such a suit, and the word 'approved' necessarily implies the exercise of discretion on the part of the tax commission in permitting such a suit to be instituted."

The city ordinance of the City of Jefferson provides that when a vacancy exists or shall occur in the regular police force of this city, it shall be the duty of the marshal, with the advice and consent of a majority of the members elected to the city council, to appoint some suitable and competent person to fill such vacancy. In the case of Schulte v. City of Jefferson 273 S. W. at page 170, the marshal of said city appointed the plaintiff a regular city policeman, but the city council refused to confirm said appointment. Plaintiff brought suit against the city to recover salary alleged to be due from defendant for performing the services of a police officer. The court, 1.c. page 172, said:

"(1) It is well settled -

"Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete, until the

action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken.' 13 Cyc.p. 1372; Meachem's Public Office and Officers, Secs.114, 124; 22 R. C. L. p. 433, Sec.84.

(2) Plaintiff was not a de jure officer until at least confirmed by the council. If anything at all, he was a de facto officer, and such officer is not entitled to the emoluments of the office. 29 Cyc. 1393; Sheridan v. City of St.Louis, 183 Mo. 25,39, 40, 81 S. W. 1082, 2 Ann. Cas. 480; Luth v. Kansas City, 203 Mo. App. 110, 113, 218 S. W. 901; Throop on Public Officers, Sec. 517."

In the case of Huls v. Lawrence 300 S. W. 1. c. 1018, the court states:

"The word 'approves' carries with it the idea of doing something more than merely substituting the answers of the jury for the judgment of the court. It shows that he did something more than to formally or mechanically, so to speak, accept the opinion of the jury."

The meaning of a power or duty conferred upon an official to approve or disapprove another official act, is set out in Makenson v. Dillon, et al. 171 Pac. 673, 1. c. 676, in the following language:

"The grant to New Mexico is to be effectuated by selection, not only of these lands granted in quantity, but also as indemnity, and they are

to be selected under the direction and subject to the approval of the Secretary of the Interior. The words 'subject to the approval' we do not regard as giving the Secretary of the Interior discretion to arbitrarily refuse a selection for no reason at all. These words are to be understood to mean that the Secretary of the Interior shall investigate and pass upon and render judgment as to whether the lands selected are within the terms of the grant, and, if so, it is his duty to list them to the State."

In view of the above, it is the opinion of this office that a person who has been appointed deputy county clerk, by the county clerk, must be approved by the county court before he is legally entitled to the office or the emoluments thereof.

The county court has the right to investigate and pass upon and render judgment as to whether the deputy county clerk has the necessary qualifications to hold said office; they may refuse to approve said deputy upon any reasonable grounds, but may not arbitrarily refuse to do so for no reason at all.

## II.

You ask in what instances can the county court refuse to approve the appointment of the deputy.

In our opinion, the county court could, in the exercise of its sound discretion, refuse to approve a deputy county clerk for many reasons. If said deputy was incompetent or incapable of performing the duties of the office for any reason, or if he were disqualified by virtue of the provisions of the statutes or constitution, they would certainly be justified in refusing to approve said appointment. In this connection, we call your

March 15, 1935

attention to Section 19, Article II of the Constitution of Missouri, which reads as follows:

"That no person who is now or may hereafter become a collector or receiver of public moneys or assistant or deputy of such collector or receiver, shall be eligible to any office of trust or profit in the State of Missouri under the laws thereof, or of any municipality therein, until he shall have accounted for and paid over all the public money for which he may be accountable."

It is, therefore, our opinion that a county court may refuse to approve the appointment of a deputy county clerk when they have reasonable ground to believe that said deputy is incapable of performing the duties of said office, for any reason, or is disqualified by virtue of the provisions of any statute or the constitution.

Yours very truly,

James L. HornBostel  
Assistant Attorney General

APPROVED:

---

ROY McKITTRICK  
Attorney General

JLH  
JET:LC