

COUNTY CLERKS: County Courts cannot persist in keeping a county clerk on a fee basis until the expiration of the term for which the county clerk was elected.

September 22, 1937.

10-7



Mr. William H. Tellman
Clerk of the County Court
Cole County
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, reading as follows:

"Will you please send me an opinion on Laws of Missouri, Section 11811, page 440, Act of Legislature 1937, whereby county clerks are put on a salary, payable monthly, instead of on a fee basis, payable quarterly.

"Can the county court persist in keeping the county clerk on a fee basis until the end of our term, December 31, 1938, if our budget permits us to draw full salary beginning September 6, 1937, when the new law became effective."

Formerly, until the passage of Section 11811, Laws of Missouri, 1937, at page 440, the county clerks were paid on a fee basis. The county clerks were permitted to retain up to a certain amount according to the population of the various counties. If the amount permitted to be retained was not received or earned during the year, the clerks were limited to the amount received and earned. Laws of Missouri, 1933, page 369.

The pertinent part of Section 11811, supra, which we have considered in determining your request for an opinion, reads as follows:

"The clerks of the county courts of this State and their deputies and assistants shall receive for their

services annually, to be paid out of the county treasury in monthly installments at the end of each month by warrant drawn by the county court upon the county treasury, the following sums:"

Other parts of this section relate to the amount of salaries to be paid dependent upon population, together with amounts for deputy hire; duty of clerk to charge fees and collect the same accruing to their offices; and reports of fees collected. No where in this section is it mentioned, nor may it be contemplated that the county clerk is to remain on a fee basis until the end of the term for which he is elected. In considering this section we have considered the law before its repeal. As was said in the case of State v. Henson, 137 S. W. 968, 969:

"In ascertaining the intent of the law makers, it is always permissible and appropriate to consider the condition of the law prior to the passage of the Act to be construed."

We have noted from sections 11811, Laws of Missouri, 1933, page 370, that amended section 11811, R. S. Mo. 1929, which reduced the amount of fees a county clerk was permitted to retain as salary in some instances, contained this proviso:

"Provided, further, that until the expiration of their present term of office, the person holding the office of County Clerk shall be paid in the same manner and to the same extent as now provided by law provided that this act shall not apply to counties in which such clerks now or may hereafter receive a fixed salary in lieu of all fees, commissions and emoluments."

Thus when we consider the latter section with the previous section of the law, it becomes obvious that the Legislature did not intend the county clerks, now holding office, were to receive fees earned up to a certain amount for one year's service, until the expiration of their present term, but that they should be paid on an annual basis from and after the passage of the Act. Had the Legislature intended that they were to be paid in the same manner as before, the enactment of the present section until the expiration of their terms of office, it is reasonable to assume it would have been provided for. *Pembroke v. Houston* 79 S. W. 470, 471; *Pate v. Ross* 84 S. W. (2d) 931, 963.

Your will have noted from the pertinent part of the section above set forth that the county clerks shall receive for their services annually, certain salaries to be paid out of the county treasury, in monthly installments, at the end of each month, by a warrant drawn by the County Court upon the County Treasury. The use of the word "shall" in the pertinent part of this section indicates a mandate, and when the word "shall" is used in the sense as is indicated by this section, the statute is mandatory. *Ex parte Brown*, 297 S. W. 445; *State ex rel Stevens v. Wurdeman*, 246 S. W. 189.

We observe that Section 11811, supra, as amended by the Laws of Missouri, 1936, did not increase the salary which the county clerks had been permitted to retain under the provisions of Section 11811, Laws of Missouri, 1933. The changing from a fee basis to a salary of public officers has heretofore met with the approval of the Supreme Court of this State in the case of *State ex rel Emmons v. Farmer* 271 Mo. 306, although in that case the question before the Court was the compensation of circuit clerks. In a very recent opinion by this department, directed to the Honorable Walter G. Stillwell, Prosecuting Attorney for Marion County, Hannibal, Missouri, we said:

"The almost identical question was before the Supreme Court involving the compensation of the circuit clerks in a similar situation in

September 22, 1937.

in State ex rel. Emmons v. Farmer, 271 Mo. 306, and evidently the Legislature had before it this case when House Bill No. 177 was introduced, and attempted to meet and comply with the principles as announced in this case. It is a very similar situation and in substance the court held that the fixing of the salaries of circuit clerks at the same amounts they were permitted to retain in any one year from the fees collected by them, is not violative of the constitutional provision declaring that "the compensation of no state, county or municipal officer shall be increased during his term of office."

CONCLUSION.

In view of the above it is the opinion of this department that the County Court can not persist in keeping a county clerk on a fee basis until the expiration of the term for which the county clerk was elected.

Respectfully submitted

RUSSELL C. STONE
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

RCS:AH