

CIRCUIT CLERKS: If Circuit Judge approves the appointment of a deputy to Circuit Clerk under Section 11812, Laws of Mo. 1937, p. 446, the county must pay the same; the amount of the salary must be taken into consideration even though the anticipated revenue may not be sufficient to pay the same under the Budget Act.

January 18, 1939



Hon. Paul N. Chitwood  
Prosecuting Attorney  
Reynolds County  
Centerville, Missouri

Dear Sir:

This Department is in receipt of your letter of January 13th, wherein you make the following inquiry:

"By Section 11786, Laws of 1937, page 445, the salary of Circuit Clerks in counties containing a population of ten thousand or less, was increased to \$1700 annually. Under this law our Circuit Clerk and ex-officio Recorder will receive an increase of \$600 although his duties have not been increased at all.

"Sections 11812-3 provide \* \* \* \*  
'The Clerk and his deputies and assistants shall present their accounts to the County Court, and said court shall draw its warrant therefor upon the County Treasurer, to be paid out of any money available in the treasury.'

"It appears that our Circuit Clerk wants a deputy to assist him, although it does not appear that his duties have been increased, or that he could not perform all the duties of both offices except during the May and November terms of the Circuit Court each year, if he

would give same his time and personal attention. As yet our County Court has not made up the Budget for 1939; but judging from the 1938 budget (when the expenditures exceeded the income) it is very doubtful if there will be any anticipated revenue to take care of the Circuit Clerk's deputy, as the Court has had trouble in meeting the actual running expense of the County each year.

"My opinion is that, even though the Circuit Judge should have made an appointment of a deputy circuit clerk as provided by the above mentioned law, that such appointment and the salary of the deputy would not be binding upon the court, or an encumbrance on any funds of the County, since there will be nothing with which to pay same.

"Please let me have your opinion in the matter so that I may properly advise the Court when they make up their budget."

The first phase of the main question which you present relates to the inference in your letter that the need of a deputy circuit clerk should be taken into consideration. Noting your statements to the effect that the duties of the circuit clerk have not increased, this does not appear to be a question which you or the county court have the power to pass upon.

Under Section 11812, Laws of Missouri, 1937, page 446, the circuit clerk is entitled to appoint his deputy or deputies, with the approval of the judge of the circuit court; said section being 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 Judge or Judges of the Circuit Courts, as such Judge or Judges shall deem necessary for the prompt and proper discharge of the duties of his office. The Judge or Judges of the Circuit Court, in its order permitting the Clerk to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which said order shall designate the period of time such deputies 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 Circuit Court may, at any time, modify or rescind its order permitting an appointment to be made."

It therefore becomes a matter for the Circuit Judge to determine the deputy or deputies which he "shall deem necessary for the prompt and proper discharge of the duties of his office," and if the Circuit Judge determines that he is in need of a deputy it would appear that the county is bound, the same as it is for any county officer, for the payment of same under Section 11813, Laws of Missouri, 1937, p. 447, which is as follows:

"The salary of the Clerk, and that of his deputies, and assistants, shall be paid out of the county treasury, in monthly installments, at the end of each month. The accounts of all deputies and assistants shall be stated in their names, respectively, and the correctness thereof shall be certified by the officers, respectively, in whose employment they are. The Clerk and

his deputies and assistants shall present their accounts to the County Court, and said court shall draw its warrant therefor upon the County Treasurer, to be paid out of any money available in the treasury."

We know of no additional duties which have been added to the office of circuit clerk. Under Section 11814a, Laws of Missouri, 1937, p. 447, the clerk is compensated for services as Clerk of the Juvenile Court, and we assume that you arrive at the compensation of the Clerk by adding \$200.00, as for counties of the population of Reynolds, to the amount allowed by Section 11786, Laws of Missouri, 1937, page 445.

Relative to the question as to whether or not the county is liable for the salary of the deputy circuit clerk, in the event one is appointed, we shall discuss the same independent of the ability of the county to pay the same, or as determined by the Budget Act.

In the decision of *Bates v. St. Louis*, 153 Mo. 18, l. c. 20, the court said:

"It is well settled law that 'a public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creature of law, and as an incident to the office. . . . "The salary belongs to him as an incident to his office, and so long as he holds it; and, when improperly withheld, he may sue for and recover it. When he does so he is entitled to its full amount, not by force of any contract, but because the law attaches it to the office." (Givens v. Daviess Co., 107 Mo. loc. cit. 608, 610; Fitzsimmons v. Brooklyn, 102 N. Y. 536; State ex rel. Chapman v. Walbridge, 153 Mo. 194.)

"As is well said in Throop on Public Officers, sec. 500, quoting from Robinson, J., in People v. Green, 5 Daly (N. Y.), pp. 268, 269:

"The right of an officer to his fees, emoluments, or salary, is such only as is prescribed by statute; and while he holds the office, such right is in no way impaired by his occasional or protracted absence from his post, or neglect of his duties. Such derelictions find their corrections in the power of removal, impeachment, and punishment, provided by law. The compensations for official services are not fixed upon any mere principle of quantum meruit, but upon the judgment and consideration of the legislature, as a just medium for the services which the officer may be called upon to perform. This may in many cases be extravagant for the specific services, while in others they may furnish a remuneration which is wholly inadequate. The time and occasion may, from change of circumstances, render the service onerous and oppressive, and the legislature may also increase the duties to any extent it chooses; yet nothing additional to the statutory reward can be claimed by the officer. He accepts the office "for better or worse"; and whether oppressed with constant and overburdening cares, or enabled from absence of claim upon his services, to devote his time to his own pursuits, his fees, salary, or statutory compensation constitutes what he can claim therefor, and is yet to be accorded, although he performs no substantial service, or neglects his duties. . . . The fees or salary of office are "quicquid honorarium," and accrued from mere possession of the office."

And again in the decision of *State ex rel. Ake v. Kansas City*, 221 Mo. App. 784, the court states that a county officer's right to a salary is a property right. Hence, we dispose of the question with the statement that it would appear that the county is liable for the salary of the deputy clerk.

Assuming that the county is liable and that the court approves the appointment of a deputy clerk and fixes his salary, can the county court refuse to include the same in the estimate of 1939?

Class 4 of the County Budget Act, Laws of Missouri, 1933, p. 341, provides as follows:

"The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together, with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

Under Section 11813, quoted supra, the deputy is entitled to receive his salary paid out of the county treasury in monthly installments at the end of each month the same as the clerk. He, therefore, has the same status, insofar as salary is concerned, as the clerk, and any salary allowed to him should be included in the estimate in Class 4. It is

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unfortunate that the anticipated revenue of the county cannot be estimated to such amount that it would include the salary of the deputy; yet, nevertheless, in the situation which you present, this salary must be taken into consideration.

Respectfully submitted,

OLLIVER W. NOLEN  
Assistant Attorney-General

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APPROVED:

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J. E. TAYLOR  
(Acting) Attorney-General