RECORDER OF DEEDS: When population of county exceeds 20,000, circuit clerk and recorder are separate, the recorder's office to be filled by election in 1942 and every four years thereafter.

June 13, 1940

6-28

FILED 5

Miss Evelyn Barclay
Circuit Clerk
Adair County
Kirksville, Missouri

Dear Miss Barclay:

We are in receipt of your request for an opinion, dated June 4, 1940, as follows:

> "As you probably know the 1940 Census of Adair County may go over 20,000 and if so the Recorder of Deeds office will be vacant, as I am now serving as Ex-Officio Recorder of this county. If this should happen would you please give me your opinion as to when this would be effective, that is, when would an appointment be made and what procedure would I have to take as the Circuit Clerk of this County."

At its 1933 session, the state legislature repealed a major portion of the laws then existing in regard to the office of recorder of deeds in the various counties of the state, and enacted several new sections. Those with which we are concerned are found in Laws of Missouri, 1933, at page 360, and are as follows:

> "Sec. 11526. Office of recorder of deeds. -- There shall be an office of recorder in each county in the state containing 20,000 inhabitants or more, to be styled, 'The office of the Recorder of Deeds.'"

> "Sec. 11528. Circuit clerks to serve in certain counties. -- The clerks of the circuit courts shall be ex officio recorders in their respective counties, except in counties containing 20,000 inhabitants or more."

The first question presented is whether the legislature, by the use of the words "containing 20,000 inhabitants or more", intended these sections to apply to only such counties as contained that population in 1933, or whether it was intended that the guide should be the result of the census thereafter taken.

In State ex inf. Grain v. Moore, 98 S. W. (2d) 17, our Supreme Court en banc concurred in the following language of an opinion by Judge Ellison, l. c. 24:

> " * * * Section 11528 thereof provides there shall be a separate office of recorder of deeds in each county in the state 'containing 20,000 inhabitants or more.' Section 11528 says the clerks of circuit courts shall be ex officio recorders in their respective counties 'except in counties containing 20,000 inhabitants or more.' The two sections obviously refer to counties which from time to time contain the specified populations. That valid classifications of counties may be made on a population basis is well established. There is no merit or substance to this contention. Davis v. Jasper County, 318 Mo. 243, 300 S. W. 493, 495." (Italics ours)

It is obvious that a change in the population of the various counties may work a separation or combination of the offices of circuit clerk and recorder of deeds, and it becomes necessary to consider just when this separation or combination shall occur.

Section 654, R. S. Mo. 1929, provides that the population shall be based on the United States census of this state.

Title XIII, Section 202, of the United States Code of Laws provides that the period of three years, beginning the 1st day of January, 1930, and every tenth year thereafter, shall be known as the decennial census period, and such census shall be completed within that period.

Section 206 of the same title provides that the census shall be taken as of the 1st day of April.

Our Supreme Court discussed the effective date of the United States census in Kay v. Moniteau County, 134 S. W. (2d) 81. In that case the plaintiff contended that the census was not complete until 1936, while the facts showed that the county court of Moniteau County ascertained the census of that county at a much earlier date. In discussing the method of payment of plaintiff's salary, the court stated, l. c. 83:

> "'For the purpose of paying this salary, the population is to be "ascertained" by the county court itself, and two methods for its ascertainment of that fact are prescribed by the statute. The one is to multiply by five the whole number of votes cast in that county, at the last preceding presidential election; the other is by notice or knowledge on the part of the county court of the population of the county as ascertained by the decennial census. The statute by its terms made the first rule or method of ascertainment applicable, until the second became available.' (Italics Ours.) Since the county court paid plaintiff the salary authorized under the census method, it is immaterial to plaintiff as to how the court acquired knowledge of the census. The census method was available and the court was bound under the law to be guided thereby."

If, therefore, the forthcoming census has any effect on the offices above referred to, that change will not take place until the final results of the 1940 census become available to Adair County. However, we fail to find any specific statute contemplating the separation of the offices during the term of a circuit clerk, and must look to other sections pertaining to the office in an attempt to ascertain the intent of the legislature in such event.

Section 11535, Laws of Missouri, 1933, at page 361, provides:

> "On the first Tuesday after the first Monday in November, 1934, and every four years thereafter, an election shall be held for said office of recorder in each county of the state where the office of clerk of the circuit court and recorder of deeds are separate, * * * "

Section 11541, Laws of Missouri, 1933, page 362, provides:

> "At the general election to be held in the State of Missouri in 1934 and every four years thereafter, in all counties where the office of Circuit Clerk and Recorder are separate, a recorder of deeds shall be elected."

Section 11538, Laws of Missouri, 1933, at page 361, provides for an election in counties having a population of 20,000 or more for combining the offices of circuit clerk and recorder where such offices are separate. There is no provision for separating the offices in case they are combined.

A reference to Article I, chapter 74, R. S. Mo. 1929, discloses that, under the laws repealed by the 1933 legislature, formerly in counties containing

10,000 inhabitants, the county court was empowered to separate the offices of circuit clerk and recorder of deeds, and the governor was empowered to appoint a recorder when such separation was made. There is no provision in the new law for such appointment, and Section 10216, R. S. Mo. 1929, which is the general section under which the governor fills all vacancies, applies only to offices originally filled by election by the people.

A separation in the instant case would create and effect a new office, and there is no authority for filling such vacancy. If, on the other hand, it could be said that such office was filled by the election of the circuit clerk, then there is no vacancy since he was elected for a four year term.

A similar situation has arisen in this state with regard to the office of county treasurer. In 1933, the legislature abolished the separate office of county treasurer in certain counties and combined it with the office of county collector, effective January 1, 1936. The legislature of 1937 recreated the office of county treasurer by Section 12130, Laws of Missouri, 1937, page 425, which is as follows:

> "There is hereby created in the several counties of this State, now or hereafter having a population of less than 40,000 inhabitants according to the last Decennial United States Census, a county treasurer, <u>to be appointed by the Governor</u>, and to take office immediately after the effective date of this Act and who shall enter upon the discharge of the duties of his office after his said appointment and qualification and who shall hold his office for a term ending on the first day of January, 1939, and until his successor is elected and qualified, unless sooner removed from office. Provided, that nothing in this section shall apply to counties under township organization."

We cite this section to call attention to the fact that certain authority was given to the governor to make appointments to fill the new offices created.

In view of this fact, and especially because of the two sections above cited providing for an election in 1934 and in each four year period thereafter, the next being 1942, it seems impossible to escape the conclusion that the legislature intended no change to be made separating the offices of circuit clerk and recorder except at such four year periods.

This is further supported by Section 11534, Laws of Missouri, 1933, at page 381, which is as follows:

> "That in the event any person has been elected or may hereafter be elected to the office of recorder of deeds in a county in which the office is a separate office at the time of such election, such office shall remain a separate office for the entire term for which such person has been or may be elected."

It is the conclusion of this department that an increase in the population of the county to 20,000 inhabitants or more, if shown by the 1940 census, will not create the separate office of recorder of deeds in such county in 1940, and that such separate office cannot come into existence prior to January 1, 1943, under existing laws.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

RLH:VC