

MARRIAGES: Order of Circuit or Probate Court for issuance of a marriage license immediately should be followed by the Recorder of Deeds.

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July 1, 1943

Mr. John A. Byrne  
Clerk of the Circuit Court and  
Ex-officio Recorder  
Knox County  
Edina, Missouri



Dear Sir:

We are in receipt of your letter of June 28th, 1943, in which you request an opinion from this department, as follows:

"Because of the attitude of our Probate Judge in the matter of making orders for the issuance of Marriage Licenses immediately, I am asking an opinion from your office in the following cases:

"1. A couple coming in from an adjoining State who are not aware of this new marriage law which requires a wait of three days. Probate Judge holds that he may order the issuance immediately.

"2. A boy in the service who is home on a furlough must return to duty before the three day period has expired. Is this sufficient reason for obtaining order from Probate Court?

"3. Is this office required to issue the Marriage License upon an order by the Probate or Circuit Court even though there is no unusual condition present.

"I am not quite clear as to whether or not an application received by telephone or in

writing can be accepted by this office. Please give your opinion in this case, also."

Section 1, Article VI, of the Constitution, reads as follows:

"The judicial power of the State, as to matters of law and equity, except as in this Constitution otherwise provided, shall be vested in a Supreme Court, the St. Louis Court of Appeals, circuit courts, criminal courts, probate courts, county courts and municipal corporation courts."

Under the above section of the Constitution the judicial power is granted to the courts to perform certain duties connected with a judicial function. It was so held in the case of State v. Coleman, 152 S. W. (2d) 640, Par. 8:

"The judicial power granted to the courts by the constitution is the power to perform what is generally recognized as the judicial function--the trying and determining of cases in controversy. It includes those incidental powers which are necessary and proper to the performance of that function. The power to punish civil contempts, as above defined, is, for example, necessary to the existence of a court of equity, and the power to punish as contemnors those who actively interfere with the functioning of any court is equally necessary for its existence."

House Bill No. 20, designated as Section 3364 of Chapter 20, as passed by the Sixty-second General Assembly, reads partially as follows:

"\* \* \* Provided, however, that said license may be issued on order of the Circuit or probate court or a judge thereof in vacation of the County in which said license is applied for, without waiting three days as herein provided, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable. \* \* \*"

Under the above proviso it can readily be seen that the circuit or probate court is performing a judicial function when he passes upon the application wherein he finds a good cause shown, or such unusual conditions as to make such marriage advisable. Clearly this is a judicial function. As to the question of good cause shown the Supreme Court of this state in the case of *Buttinger v. Ely & Walker Dry Goods Co.*, 42 S. W. (2d) 982, Par. 3, said:

"The statute provides that notice of the injury shall be given to the employer not later than thirty days after the accident unless the commission shall find that there was good cause for failure to give such notice. The term 'good cause' has no fixed meaning, but must depend upon the circumstances of each case to be determined by the sound discretion of the court. Words and Phrases First Series, vol. 4, page 3113; Brackett's Case, 126 Me. 365, 138 A. 557; Maryland Casualty Co. v. Robinson, 149 Va. 307, 141 S. E. 225."

In other words, each particular case depends upon the particular facts presented when an application is made to the circuit court or probate court for the issuance of a marriage license at a time earlier than three days from the time the application is made.

Under the Constitution of this state the judicial power is vested solely in the courts and not in the judges. That

the judicial power is vested solely in the courts was held in the case of Clark v. Austin, 101 S. W. (2d) 977, l. c. 981, where the court, in construing section 1 of Article VI of the Constitution, which vests the judicial power of the state in the courts named in the section, said:

"Under the Constitution of this state, the judicial power is vested solely in the courts. Const. art. 6, sec. 1, and article 3; Missouri River Telegraph Co. v. First Nat. Bank, 74 Ill. 217; In re Day, 181 Ill. 73, 54 N.E. 646, 50 L.R.A. 519. \* \* \* \* \*"

It will be specifically noticed in the partial section of House Bill No. 20, supra, that it specifically states "or a judge thereof in vacation of the County in which said license is applied for." It has been consistently held by the Supreme Court of this state that a judge in vacation is not a court within the constitutional provision defining judicial power, as set out in Section 1 of Article VI of the Constitution of Missouri. The Supreme Court in the case of State v. Lollis, 33 S. W. (2d) 98, Par. 3,4, said:

"It will be noted that the act in question invests the judges of circuit courts in vacation with jurisdiction and authority to hear and determine contests of primary elections. Section 1 of article 6 of the Constitution provides that the judicial power of the state, as to matters of law and equity, except as otherwise provided in the Constitution, shall be vested in the courts named in said section. A judge of a court in vacation is not a court. It, therefore, logically follows that, if the hearing and determination of the contest of a primary election in the manner provided in said act is the exercise of judicial power, a law which attempts to confer such power on a judge in vacation would be in violation of section 1 of article 6 of the Constitution which lodges such power in the courts."

This case was where a judge of a circuit court in vacation attempted to decide a matter of law in reference to an election contest.

Later on, the Supreme Court, in the case of State v. Duncan, 63 S. W. (2d) 135, approved the holding in the case of State v. Lollis, supra. In the case of State v. Duncan, 63 S. W. (2d) 135, l. c. 142, the court, in approving State v. Lollis, supra, said:

"The section next says if the petition be filed and presented in vacation the judge to whom it is presented shall forthwith convene the court in special session for the hearing of the contest. If the petition should be presented to the judge of an adjoining circuit, it may be doubted whether he could convene in special session the court of another county and circuit, where the suit is pending, of which he is not judge, or whether he could 'designate the day' when that court would hold the hearing (as the section provides a few lines earlier), but these objections are not made by relator, nor would they affect the operation of the act in most cases or invalidate it as a whole."

The court in that case also, at page 143, said:

"Likewise, in considering a cause involving what is now section 2, R. S. 1929 (Mo. St. Ann., Sec. 2), authorizing a probate judge in vacation to refuse letters and dispense with a probate administration, this court held in Parsons v. Harvey, 281 Mo. 413, 421, et seq., 221 S. W. 21, 23, the statute was constitutional, and, citing earlier cases, that section 1, art. 6, supra, of our Constitution, does not forbid the exer-

cise in vacation of quasi judicial powers subsidiary to the case pending, but is aimed at the trial of issues and pronouncement of judgment. And, although the statute did not expressly require confirmation by the probate court in term of the action taken in vacation, this court said the vacation order would not be final, and that parties aggrieved could challenge the action of the judge by taking timely steps before the court. On the broad question of what is judicial power, see, also, Johnson v. Wabash R. Co., 259 No. 534, 543, 168 S. W. 713, 715; Lusk v. Atkinson, 268 No. 109, 116, 188 S. W. 703, 704; State ex rel. Phillips v. Barton, 300 No. 76, 86, 254 S. W. 85, 87; Ex parte Lewis, 328 No. 843, 846, 42 S. W. (2d) 21, 22."

This case was also an election contest, but the act under which the contest was brought provides specifically that if a petition for the contest was filed and presented in vacation the judge to whom it is presented shall forthwith convene the court in special session in hearing for the contest.

Under House Bill No. 20, supra, there is no provision that the court in vacation shall immediately convene court in a special session. In view of the above cases and authorities that part of the proviso which reads "a judge thereof in vacation" is unconstitutional and the only way that a license can be allowed by the probate court or circuit court is when the court is in session.

As said before, good cause shown, depends on the particular facts in each case and if the circuit court or probate court find that there is sufficient reason for ordering the issuance of a marriage license without requiring the three days' notice, that is purely a judicial matter and is final.

#### CONCLUSION

It is, therefore, the opinion of this department that if a probate court or a circuit court, or a judge of either court, when in session, makes an order for the issuance of

a marriage license immediately that order should be followed by the recorder of deeds and the license issued.

In answer to the latter part of your request, in reference to the mode of making application, we are herein enclosing a copy of an opinion rendered by this office on June 4, 1943, to the Honorable Mark Morris, Prosecuting Attorney, Pike County, Bowling Green, Missouri, in which we held that an application for marriage license under the provisions of Section 3364 of House Bill No. 20, enacted by the 62nd General Assembly, need not be personally presented to the Recorder of Deeds by the persons desiring to procure the license to marry. It may be mailed or sent by messenger and if properly executed and shows the persons qualified to contract matrimony, the Recorder of Deeds may issue the license.

The conclusion in the enclosed opinion does not cover applications by telephone, but, in reading the law as cited in the opinion, a telephone call would be sufficient the same as if the application was mailed or sent by messenger.

Respectfully submitted,

W. J. BURKE  
Assistant Attorney-General

APPROVED:

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ROY MCKITTRICK  
Attorney-General

WJB:CP