

MAGISTRATE COURTS:  
STATUTORY CONSTRUCTION:

Senate Bill 189 abolished the office of chief clerk of the magistrate courts of Greene County, Missouri, and created a vacancy to be filled by the Governor.



September 20, 1957

Honorable Lyndon Sturgis  
Prosecuting Attorney  
Greene County  
Springfield, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion construing Senate Bill 189, passed by the 69th General Assembly of the State of Missouri, and which became effective August 29, 1957.

This act specifically repealed Section 483.495, RSMo Cum. Supp. 1955, relating to organization of magistrate courts and the chief clerk and deputies of said courts, and enacted in lieu thereof a new section relating to the same subject matter and known by the same number. The pertinent part of said statutes reads:

"Section 483.495- -And there shall be a chief clerk of the magistrate court who shall be appointed by the various magistrates jointly, and who shall serve at the pleasure of the magistrates and until his successor is duly appointed and qualified. If within thirty days after this section becomes effective the magistrates are unable to agree upon the person to be appointed the judges of the circuit court of the county shall appoint such chief clerk."

"Senate Bill 189- - -

\* \* \* \* \*

"2. There shall be a chief clerk of the magistrate court who shall be elected by the qualified electors of the county at the general election of the year 1958, and every four years thereafter, and who shall serve until his successor is duly elected and qualified."

Honorable Lyndon Sturgis

The principal difference between Section 483.495, RSMo Cum. Supp. 1955, and Senate Bill 189 is that, under the former, the clerk was appointed by the magistrates jointly to serve at their pleasure and until his successor is duly appointed and qualified. In the latter it states there shall be a chief clerk who shall be elected by the qualified electors of the county at the General Election in 1958, and every four years thereafter, and shall serve until his successor is duly elected and qualified. The bill further increases the compensation of the chief clerk and deputies and also applies to different size counties, however, Greene County came within the former classification under the old statute as well as under the new act.

The term repeal is synonymous with abolish, rescind and annul, and means the abrogation or annulling of a previously existing law by the enactment of a subsequent statute. Dawson vs. Tobin, 24 N.W.2d. 739, 746, 747, 74 N.D. 713; City of Owensboro vs. Board of Trustees, City of Owensboro Employment Pension Fund, 190 S.W. 2d. 1005, 1008, 30 Ky. 113.

Senate Bill 189 for the most part follows the former law with regard to organization of certain magistrate courts, creation of the office of chief clerk, and appointment of deputy clerks. The question might be raised that it is, in fact, an amendment and not an outright repeal of the former law. However, the Supreme Court en banc has held to the contrary. In State v. Moore, 99 S.W. 2d. 17, 1.c. 19, the Supreme Court said:

"\* \* \* \*The caption of the act as it appears in Laws Mo. 1933, p. 360, reads as follows:

"Recorder of Deeds: Relating to Office, Term, Bond and Election of Recorder of Deeds.

"An Act to repeal Sections 11526, 11528, 11529, 11533, 11534 11535, 11538, 11539, 11540 and 11541 of the Revised Statutes of Missouri for the year 1929, the same being found on pages 3112, 3113, 3114 of Volume 2 of the Revised Statutes of Missouri for the year 1929, and being a part of chapter 74, article 1, entitled "Recorders of Deeds" and relating to "Recorders of Deeds," and to enact in lieu thereof seven new sections, pertaining to the same subject to be know as Sections 11526, 11528, 11529, 11534, 11535, 11538, and 11541."

\* \* \* \* \*

Honorable Lyndon Sturgis

"[4] Another point made by appellant if we properly interpret his brief, is this: Section 11526, R.S. Mo. 1929 (Mo. St. Ann. § 11526 p. 6696), provided 'there shall be an office of recorder in each county in the state, to be styled "the office of the recorder of deeds."' The repealing section in the 1933 act is identically the same, except that after the word 'state' there is inserted a limiting phrase, 'containing 20,000 inhabitants or more.' Mo. St. Ann. § 11526, p. 6696. Appellant says this is merely an amendment of the former section, and not a repeal of it as the title of the bill declares; and he asserts that the title of the act is for that reason misleading. This contention, if we are correct in thinking appellant makes it, does not call for extended discussion. The repeal of a law means its complete abrogation by the enactment of a subsequent statute. 59 C.J. §498, p.899; St. Louis v. Kellman 235 Mo. 687, 695, 139 S.W. 443, 445. Whereas the amendment of a statute means an alteration in the law already existing, leaving some part of the original still standing. 59 C.J. §421, p. 850; State ex rel. Gamble v. Hubbard, 148 Ala. 391, 394, 41 So. 903, 905; Aldridge v. Commonwealth, 192 Ky. 215, 218, 232 S.W. 619, 620. In the present instance there was an express repeal of the former section."

There can be no question that the Legislature may abolish any office not provided by the Constitution and an incumbent has no legal ground to complain. State ex inf. Barrett ex rel. Bradshaw v. Hedrick, 294 Mo. 21, 241 S.W. 402; State ex rel. Tolerton v. Gordon, 236 Mo. 142, 139 S.W. 2d. 403.

In view of the fact this office of chief clerk of the magistrate court was created by an act of the Legislature to serve only at the pleasure of the magistrates, under the foregoing decisions the Legislature could repeal the law creating said office which, in effect, abolishes said office, and the present incumbent, after the effective date of Senate Bill 189, August 29, 1957, no longer can claim title to such office. There is no provision in Senate Bill 189, supra, that in any manner would retain the present incumbent in said office. Said Bill does create the office of chief clerk of the magistrate court in such counties, and contains a provision for procedure for filling said office at the General Election in November, 1958. However, said Bill failed to adopt any procedure for filling said office during the interim of August 29, to the General Election in November, 1958.

Honorable Lyndon Sturgis

Therefore, we must conclude that the office of chief clerk of the magistrate courts in such counties as Greene County, was created by Senate Bill 189, as of August 29, 1957, and that a vacancy exists in said office until the General Election to be held in November, 1958, at which time such official must be elected.

It was held in State ex inf. Taylor v. Kirbuz, 208 S.W. 2d. 285, that where the Legislature creates an office with no restrictions for filling same a vacancy exists ipso facto. In so holding, the court said at l.c. 290:

"\* \* \* \*The bill presently creates the new office, and consolidates the functions of the two former offices. Witness this language, 'In all counties of class one in this state there is hereby created the office of county highway engineer and surveyor, to be known and designated as highway engineer,' etc. In State ex rel. Brown v. McMillan, 108 Mo. 153, 159, 18 S.W. 784, 785, it was said: 'We think that both authority and the spirit of our institutions favor the view that when an office is created, and no restrictions for filling the vacancy are imposed, a vacancy arises ipso facto.'\* \* \* \*"

Section 483.020, RSMo 1949, provides as follows:

"When any vacancy shall occur in the office of any clerk of a court of record so elected, by death, resignation, removal, refusal to act or otherwise, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office, who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed."

Clerks of magistrate courts are clerks of courts of record.  
Section 476.010, RSMo 1949.

We deem it unnecessary to determine whether the vacancy in the office of clerk of the magistrate court would be filled under such section however, because Section 4, Article IV of the Constitution of the State of Missouri provides for the filling of all vacancies in public offices not otherwise provided for by law by the Governor. The Governor, therefore, makes the appointment to fill the vacancy in this case whether it is one to be filled under the provisions of Section 483.020, supra, or under Section 4, Article IV, Constitution of Missouri.

Honorable Lyndon Sturgis

In view of the foregoing, we conclude that the Governor of the State of Missouri is vested with authority to make this appointment and said appointee shall serve until the next General Election in November, 1958.

CONCLUSION

It is, therefore, the opinion of this Department that Section 483.495, RSMo Cum. Supp. 1955, was repealed by Senate Bill 189, passed by the 69th General Assembly of the State of Missouri, which Bill became effective on August 29, 1957. The repeal of the above section abolished the office of chief clerk of the magistrate courts for such counties as Greene and created such an office as of the same date. This created a vacancy in said office until the General Election in November, 1958, which vacancy shall be filled by appointment of the Governor to serve until the General Election in November, 1958.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hamnett, Jr.

Yours very truly,

John M. Dalton  
Attorney General

ARH:mw