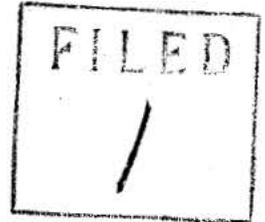


COUNTY COURTS:

*Co. Clks*

County clerk may not take acknowledgments of various types of conveyances of real estate but may take all oaths or affirmations as are required by law or that may be incident to the exercise of the powers and duties of his office or incident to the powers and proceedings of the county court in which he is clerk.

January 6, 1947



*1/15*

Honorable George P. Adams  
Prosecuting Attorney  
Audrain County  
Mexico, Missouri

Dear Mr. Adams:

This will acknowledge receipt of several communications requesting an official opinion from this department. For the sake of brevity we have restated your questions, which we have construed to be as follows:

First, is the county clerk authorized to take all types of oaths and affirmations?

And, secondly, is the county clerk authorized to take acknowledgments in the conveyance of real estate?

Section 12 of Senate Bill 483, of the 63rd General Assembly, reads as follows:

"The clerk of the county court shall have power and is authorized to administer oaths and affirmations in all matters and proceedings incident to the exercise of the powers and duties of his office, and incident to the powers and proceedings of the county court of which he is clerk; and shall have power and authority to administer oaths and affirmations, and to take and certify depositions within the respective counties in all cases where oaths or affirmations are required by law to be administered. And, when required, he shall affix thereto his jurat and the

seal of the county court of which he is clerk."

It will be noted that this section does not give the county clerk the broad power of taking any oath or affirmation but rather limits him to taking oaths and affirmations that are required by law to be taken and oaths and affirmations that are incident to the powers and duties of his office or incident to the powers and proceedings of the county court.

In considering the second question presented to us we direct your attention to Section 3408, R. S. Mo. 1939, which provides:

"The proof or acknowledgment of every conveyance or instrument in writing affecting real estate in law or equity, including deeds of married women, shall be taken by some one of the following courts or officers: First, if acknowledged or proved within this state, by some court having a seal, or some judge, justice or clerk thereof, notary public, or some justice of the peace of the county in which the real estate conveyed or affected is situated; second, if acknowledged or proved without this state, and within the United States, by any notary public or by any court of the United States, or of any state or territory, having a seal, or the clerk of any such court, or any commissioner appointed by the governor of this state to take the acknowledgment of deeds; third, if acknowledged or proved without the United States, by any court of any state, kingdom or empire having a seal, or the mayor or chief officer of any city or town having an official seal, or by any minister or consular officer of the United States, or notary public having a seal."

This section specifically provides that the clerk of a court having a seal may take acknowledgments of every

conveyance or instrument in writing affecting real estate. This presents the question of whether or not the county court is still a "court" under the Constitution of 1945. In the case of State v. Horn, 79 S. W. (2d) 1044, the Supreme Court of Missouri adopted the following as a definition of a "court": (l. c. 1045)

"\* \* A court has been defined to 'consist of persons officially assembled under authority of law, at the appropriate time and place, for the administration of justice. A time when, a place where, and persons by whom judicial functions are to be exercised are essential to complete the idea of a court in the general legal acceptance of the term.' \* \* "

You will note that one of the requirements is that a court has the power to perform judicial functions. However, the judicial power of the state was vested in certain named courts by Section 1, Article V of the Constitution of 1945, which reads as follows:

"The judicial power of the state shall be vested in a supreme court, courts of appeals, circuit courts, probate courts, the St. Louis courts of criminal correction, the existing courts of common pleas, magistrates courts, and municipal corporation courts."

This section is the same in substance as Section 1, of Article VI of the Constitution of 1875, which 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."

The above section was under consideration in the case of State ex rel. McDonald v. Lollis, 33 S. W. (2d) 98. In this case the question before the court was whether or not a circuit court in vacation had the authority to hear and determine election contests. In determining this question the court stated at l. c. 99 and 100:

"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."

"The hearing and determination of the contest of a primary election in the manner provided in the act in question being the exercise of judicial power, that part of the act which attempts to vest a judge in vacation with jurisdiction and authority to exercise such power is violative of section 1, article 6, of the Constitution of the state which vests the judicial power of the state, as to matters of law and equity, in the courts therein named, except as otherwise provided in the Constitution."

Further evidence that the Constitutional Convention never intended the county court to have judicial powers, is shown by the fact that the county court was named as one of

those bodies wherein the judicial power of the state is vested in the Constitution of 1875 but was excluded in the like section in the Constitution of 1945. Also, the section of the Constitution of 1945 that provides for the county courts is now found in the article headed "Local Government" and not in the article headed "Judicial Department" where it was found in the Constitution of 1875. And lastly, the officers comprising the county court were referred to as "judges" in Section 36 of Article VI of the Constitution of 1875, whereas now they are referred to as "members" in Section 7, Article VI of the Constitution of 1945. Therefore, since the legal definition of "court" requires that it have power to exercise judicial functions, and since the judicial power of this state is vested in certain named bodies by the Constitution of 1945, which does not include the county court, we must arrive at the logical conclusion that a county court is not a "court" in the legal sense.

We believe that there can be no doubt that "court" as used in Section 3408, supra, should be given the strict legal definition and that it was the intention of the General Assembly that clerks of this type of courts should have the power to take acknowledgments for a conveyance of real estate and not clerks of any administrative tribunal which might possess some quasi judicial powers.

#### Conclusion

Therefore, it is the opinion of this department that the county clerk may take oaths and affirmations in all matters and proceedings incident to the exercise of the powers and duties of his office and incident to the powers and proceedings of the county court of which he is clerk. It is further our opinion that the county clerk is not authorized to take acknowledgments of conveyances or instruments in writing affecting real estate.

Respectfully submitted,

PERSHING WILSON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

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