COUNTY COURT:) Does not have to assign its reasons in the
) record for its refusal to approve the County
DEPUTY COUNTY CLERK:) Clerk's appointment of a deputy county clerk.

December 14, 1937.

p-15

FILED
3

Honorable Richard C. Ashby
Prosecuting Attorney
Chillicothe, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of November 27th, in which you request the opinion of this Department on the following question:

Under Section 11680, Revised Statutes of Missouri, 1929, an appointment of a deputy clerk made by the county clerk should be approved by the judge or judges, or a majority of them in vacation, or by the court. The question is, if the county court refuses to approve the appointment, does it have to give its reason for such refusal?

In an opinion to Honorable Randall R. Kitt, Prosecuting Attorney of Livingston County, dated March 15, 1935, this Department held that the "county court may refuse to approve the appointment of a deputy county clerk when they have reasonable ground to believe that said deputy is incapable of performing the duties of said office, for any reason, or is disqualified by virtue of the provisions of any statute or the constitution." We are enclosing copy of the above mentioned opinion.

Section 11680, supra, does not state that the county court is required to set forth its reasons for disapproval of a deputy clerk appointed by the county clerk.

Attached to your letter of request is a certified copy of the order of the county court of Livingston County made at the November Term, 1935, in which two members of the court refused to approve the appointment of a deputy county clerk, in which the court does not state the reasons for its disapproval. We have been unable to find any case in Missouri

or elsewhere where a confirming body, such as the county court in this instance, is required to state its reasons why it does not desire to approve or confirm an appointment made by a person who has the authority to make such appointment.

In 46 Corpus Juris, page 953, Section 68, it is said:

> "Where the appointment is made as a result of a nomination by one authority and confirmation by another, the appointment is not complete until the action of all parties concerned has been had."

And this statement of law is approved in Schulte v. City of Jefferson, (Mo. Ap.) 273 S. W. 170, in which the Kansas City Court of Appeals said (l. c. 172):

> "It is well settled--
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> "'Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete, until the action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken.' 13 Cyc. p. 1372; Meachem's Public Office and Officers, Sections 114, 124; 22 R. C. L. p. 433, Section 84.
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> "Plaintiff was not a de jure officer until at least confirmed by the council. If anything at all, he was a de facto officer, and such officer is not entitled to the emoluments of the office. 29 Cyc. 1393; Sheridan v. City of St. Louis, 183 Mo. 25, 39, 40, 81 S. W. 1082, 2 Ann. Cas. 480; Luth v. Kansas City, 203 Mo. App. 110, 113, 218 S. W. 901; Throop on Public Officers, Section 517."

In Troop on "Public Officers," page 491, Section 517, which might be applicable to the question you have in mind, it is stated:

> "Although, under the rule laid down by the courts in New York, a voluntary payment by the municipality of the salary of one who is merely an officer de facto, protects the municipality, yet if it refuses to pay the salary, he cannot recover it by action. As was said, in one of the cases, establishing the former rule, 'the right to the salary and emoluments of a public office attaches to the true, and not to the mere colorable title; and, in an action brought by a person claiming to be a public officer, for the fees and compensation given by law, his title to the office is in issue, and if that is defective, and another has the real right, although not in possession, the plaintiff cannot recover. Actual incumbency, merely, gives no right to the salary or compensation.' So, where a person claiming to be rightfully entitled to a municipal office, on the ground that he held over upon the failure of the appointing power to appoint his successor, applied for a mandamus, to compel the mayor to countersign a warrant of the city comptroller for his salary; and it appeared that the applicant's right to hold over was questionable; the court denied the application, saying: 'The salary and fees are incident to the title, and not to the usurpation and colorable possession of an office . . . . It does not follow' (because the acts of an officer de facto are valid) 'that a right can be asserted and enforced, on behalf of one who acts merely under color of office, as if he were an officer de jure. When an individual claims by

> action an office, or the incidents to the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield for defence; but cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the usurpation and the incidents of the office.'"

It must be kept in mind and it needs no citation of authority that there is a presumption of right action by an official and if the county court did not approve the appointment it was not essential that it make a record of its reasons for the rejection.

As a practical proposition a great many bodies have the power and authority to approve an appointment made by an executive officer and we do not find that that body is required to state its reasons why it does not approve a certain individual appointed. The Senate in Missouri has the authority to confirm certain appointments made by the Executive, but each individual Senator nor the body itself is not required to state its reasons in the record for not confirming a certain appointment. In certain municipalities the mayor or other executive officer is authorized to make certain appointments and the council or the body of aldermen must approve same.

In the absence of a statute which requires the county court to state its reasons for the disapproval of an appointment under Section 11680, R. S. Mo. 1929, we conclude that it is not necessary for the "judge or judges, or a majority of them in vacation, or by the court" to set forth the reasons for said disapproval.

It is, therefore, our opinion that the county court by its action taken, as set forth in the appended order, is sufficient and that the court was not required

to set forth its reasons in its order of non-approval of the appointment of the deputy county clerk.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG