COUNTY COUNSELOR) County court of Jackson County authorized to appoint county counselor for a term ending December 31, 1954.

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February 4, 1953

Honorable Henry H. Fox, Jr.
Judge of County Court
Western District
Court House
Kansas City 6, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department, which request reads as follows:

> "During the month of July, 1952, the County Court of Jackson County made an order concurred in by the Eastern and Western Judges and voted against by the Presiding Judge, which order appointed the county counselor for Jackson County for a period of two years ending during the month of July, 1954. Since that time both the Eastern and Western Judges have been succeeded by the newly elected judges.
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> "It is contended by the county counselor, who is the recipient of this appointment, that the newly sworn county court, which became operative January 1st, 1953, can not alter that authority and that he can not be discharged from office until the expiration of the appointment. He further contends that if this court should move to discharge him and secure a new county counselor, he will litigate the matter in such a manner as to tie the hands of the court in making payment to other county offices.

> "In particular, we call your attention to the phrase in Section 56.630, which reads as follows:
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> "'And the county court shall appoint and commission as other officers are commissioned, a county counselor.'
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> "My questions are as follows:
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> "(1) Has the county court the authority to select a county counselor of its own choosing as of January 1st, 1953.
>
> "(2) Is there any method by which the court would be prohibited from paying other county officers in the event the answer to question one is in the affirmative.
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> "(3) Aside from the statutory provisions for such other officers, what is the particular method by which officers of the county are commissioned.
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> "Your official opinion is requested regarding the above matters."

You have proposed three separate and distinct questions which we will answer in the same order as they appear in your opinion request. The first question which you have proposed is:

> "(1) Has the county court the authority to select a county counselor of its own choosing as of January 1st, 1953."

The statutes relating to the office of county counselors and providing for the appointment of such official are found originally in the Laws of 1887, pages 129 to 131, inclusive. They first became the subject of construction by an appellate court in the case of State ex rel. Rosenthal v. Smiley et al., Judges, reported 263 S.W. at page 825. In that case, through inadvertence, it was held that the commencement of the term of the county counselor provided for in the statutes mentioned would, in each county affected by such statutes, be the date upon which the original appointment was first made.

It was further held that the term of two years therein provided for would expire two years from the date of such original appointment, and that each successive term would be related to such original term in continuity. With respect to this portion of the opinion the court reached an erroneous conclusion as appears from a subsequent opinion of the same court in the case of State ex rel. Jones v. Smiley et al., Judges, reported 300 S.W. 459. The reason for such later declaration by the court appears from the opinion in the last case mentioned. We direct your attention to the following excerpt from the opinion, l.c. 464:

> "The right result was reached in the Rosenthal Case in ruling that the new county court, coming into office on January 1, 1923, could appoint a county counselor. The opinion was in error, however (as we now see in view of section 2, Laws of 1887, p. 130, which was not repealed by the revising act of 1889), in holding that the term of office of the county counselor of St. Louis county then established and which began on December 1, 1922, continued for two years thereafter.
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> "In construing only sections 783, 784, and 786, R. S. 1919, the opinion in the Rosenthal Case was eminently correct. The existence of section 2, Laws of 1887, p. 130, as a valid and existing statute, was not suggested by counsel for either party, and certainly was not known to counsel contending for the validity of the order of the county court made January 2, 1923, else its existence would have been suggested. The judges of this court have enough to do without tracing the origin and subsequent history of statutes presented for construction, when no question concerning such origin and history is presented by counsel.
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> "As section 2, laws of 1887, p. 130, is still a valid and existing law and

> fixes the term of the office of county counselor of St. Louis county, to which office the respondents had the right, in January, 1925, to appoint a county counselor, to a term of two years, beginning January 1, 1925, the order of respondents on January 3, 1925, appointing John A. Nolan as county counselor for St. Louis county was a valid and lawful order and the trial court very properly refused to quash such order."

Section 2 of the Act of 1887, referred to in the quoted excerpt, read as follows:

> "Immediately upon the going into effect of this act the county court of such county may, in their discretion, appoint a county counselor, who shall enter upon the discharge of his duties at once, and shall discharge the duties of said office until the first day of January, 1889, and until his successor is duly appointed and qualified, and thereafter a successor shall be appointed, who shall hold his office as is provided in section one of this act."

From the foregoing it is quite apparent that in all counties affected by the original county counselor's act the term of such officer commenced on January 1 of the odd numbered calendar years and terminated on December 31 of the even numbered calendar years, and that without regard to the date upon which the original appointments in the various counties had been first made. We, therefore, are of the opinion that throughout the entire period from the date of passage of the original county counselor's act mentioned, supra, until the adoption of the Constitution of 1945, there was in existence, either in fact or potentially, the office of county counselor in Jackson County with a term commencing and ending in accordance with the above rule.

With the adoption of the Constitution of 1945 a new question presented itself. The constitution became effective on March 30, 1945. As the situation then existed in Jackson County, there was a county counselor whose term would not

expire until December 31, 1946. In connection with this phase of the opinion we direct your attention to Section 3 of the Schedule appended to the Constitution of 1945. It reads as follows:

> "Effect on existing terms of office. --The terms of all persons holding public office to which they have been elected or appointed at the time this Constitution shall take effect shall not be vacated or otherwise affected thereby."

The provision quoted, as we view it, had the effect of preserving the tenure of the incumbent of the office of county counselor in Jackson County until the expiration of the then current term, to-wit: December 31, 1946. Support is given this construction by virtue of the opinion of the Supreme Court in State ex inf. Taylor, Attorney General, v. Kiburz, reported 208 S.W. (2d) 285. There in construing the effect of Section 3 of the Schedule, quoted supra, that court said, l.c. 288:

> "* * * § 3 of the Schedule says, 'The terms of all persons holding public office to which they have been elected or appointed at the time this Constitution shall take effect shall not be vacated or otherwise affected thereby.' This provision was intended to protect the then incumbents, and conferred upon them the right to hold for the remainder of their respective terms; but it has no reference to their successors because it does not purport to speak with reference to the office itself. * * *"

It remains to also inquire as to the effect of the adoption of the Constitution of 1945 upon Section 2 of the act found Laws of 1887, pages 129 to 131, inclusive. This is of significance for the reason that in the case previously mentioned, viz., State ex rel. Jones v. Smiley et al., Judges, 300 S.W. 459, the fact that such Section 2 was still

in force at the time the opinion in that case was written was declared by the court to be the determining factor in the conclusion reached.

We have examined the acts of the intervening General Assemblies and do not find any repeal having been effectuated of Section 2 of the act found Laws of Missouri, 1887, pages 129 to 131, in the period between the date of the decision and the present date.

To determine whether or not the adoption of the constitution had the effect of repealing this section we must again resort to the Schedule appended to the Constitution of 1945. We direct your attention to Section 2 of such Schedule, which reads as follows:

> "Effect on existing laws.--All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

In view of the fact that Section 2 of the act found Laws of Missouri, 1887, pages 129 to 131, is in no wise inconsistent with any of the provisions of the Constitution of 1945, we are of the opinion that such section yet remains in full force and effect. Therefore, the adoption of the Constitution of 1945 did not affect the office of county counselor as it then existed in Jackson County.

No action was taken by any General Assembly convening subsequent to the adoption of the Constitution of 1945 with respect to county counselors generally until the passage of an act of the 64th General Assembly, found Laws of Missouri, 1947, Volume II, page 210, effective July 18, 1948. It is apparent that this act was passed pursuant to the directive contained in Section 8, Article VI, Constitution of 1945, reading as follows:

> "Classification of counties--uniform laws.--Provision shall be made by

> general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

You will observe that the repealing portion of this act did not refer to nor purport in any manner to repeal Section 2 of the act found Laws of 1887, pages 129 to 131.

The newly enacted county counselor's act read in part as follows:

> "Section 12990. Law department established in first-class counties--appointment, qualifications, and salary of county counselor.--There is hereby established in counties of the first class a law department, and the county court shall appoint and commission, as other officers are commissioned, a county counselor who shall be in charge of the law department and who shall possess the qualifications required by law of judges of the circuit court. The salary of the county counselor shall be $6500.00 per annum, payable monthly.
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> "Section 12992. Term of office--appointment of assistants.--The county counselor shall hold office for a term of two years and until his successor is duly appointed, commissioned and qualified, * * *"

What was the legal effect of the passage of these statutes? Primarily, it brought the laws relating to the

office of county counselor into harmony with the constitutional provision, quoted supra. Comparison of the prior acts relating to the same office indicates that no substantial change was made in the office itself or the duties thereof. Those duties remained substantially those at all times discharged by the county counselor, viz., the rendering of legal advice to the various divisions of county government and officers upon matters of a civil nature and the representation of the county in civil litigation. We do not believe that the repeal and re-enactment had the effect of creating a new office. The general rule is that the mere repeal of an act creating an office and the continuation of the duties previously discharged by another officer or by one filling an office mentioned in the re-enacting statutes does not create a new office. To this effect see 67 C.J.S., "Officers," Section 9, citing Allen v. U. S. Fidelity and Guaranty Company, 109 N.E. 1035 (Ill.), and State v. Powell, 142 N.E. 401 (Ohio).

It has further been held that the repeal of a statute creating an office and the re-enactment of a replacement statute, containing provision for appointment, does not create a new office when the old duties are continued nor is re-appointment of the then incumbent required.

In Ford v. Boyd County, 197 N.W. 953 (Nebraska) the Supreme Court of Nebraska had for consideration that precise situation. In disposing of the contention that the then incumbent of an office must necessarily be reappointed the court said:

> "Defendant contends that plaintiff's appointment was valid only until the taking effect of section 2395, Comp. St. 1922, and that thereafter she was not authorized to act as clerk of the county court, because she was not re-appointed and there was no approval of the appointment nor salary fixed by the county board after the new act took effect. We think this position is untenable. The law in force in 1919 authorized the appointment of an assistant to act as clerk of the county court, and further provided that such appointment should be approved and salary fixed by the county board. While the law of 1919 was repealed, yet these

> provisions, in effect, were carried forward and re-enacted into the law of 1921. The provisions of section 2395, relative to the appointment of a clerk of the county court and the fixing of salary, was but a continuation of the law previously in force. Under the circumstances, no new appointment was necessary. Gage County v. Wright, 86 Neb. 347, 125 N.W. 626, 36 Cyc. 1223."
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> (Emphasis ours.)

The General Assembly itself recognized the desirability of continuing the terms of the various county counselors as they then existed by incorporating in the act Section 12993, reading as follows:

> "Law does not affect present incumbents.--Any county counselor heretofore appointed and commissioned and now acting under the provisions of Article 4 of Chapter 85 of the Revised Statutes of Missouri, 1939, or under the provisions of said Article and Chapter as amended, Laws of Missouri, 1941, page 317, shall continue in office until the expiration of his commission and until a successor is duly appointed and commissioned under the provisions of this Act."

It, therefore, becomes necessary to re-examine the situation as it existed in Jackson County following the passage of the legislative act referred to.

There then existed in Jackson County the office of county counselor having a term expiring on December 31, 1948, determined in accordance with the rule declared in State ex rel. Jones v. Smiley et al., Judges, 300 S.W. 459. That term of office was specifically preserved by Section 12993, cited supra. It must also be kept in mind that, as we have pointed out heretofore, Section 2 of the act found Laws of 1887, pages 129 to 131, was still in full force and effect, definitely fixing the end of each ensuing term as being the 31st day of December in the even numbered years.

It is our opinion that this precise condition continued to exist, and that the last term prior to the date of this opinion of the county counselor of Jackson County expired on the 31st day of December, 1952. It is our further opinion that at any time thereafter the county court of Jackson County was empowered to appoint a county counselor for the ensuing term to end on the 31st day of December, 1954.

That the conclusion we have reached is in accord with common law principles and with the public policy of the State of Missouri appears from what was said in State ex rel. Rosenthal v. Smiley et al., Judges, 263 S.W. 825, l.c. 828, from which we quote:

> "* * * It is a rule of the common law, founded in sound public policy, that 'the appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to office expiring after their power to appoint has itself expired.' * * *"

This same public policy was reiterated in State ex rel. Jones v. Smiley et al., Judges, 300 S.W. 459, l.c. 464, wherein the court again said:

> "It was apparently the policy of the General Assembly in enacting Laws of 1887, pp. 129 to 131, to enable a county court, entitled to the benefits of said act, to be advised by a county counselor of its own choosing, and not by one foisted upon it by an outgoing and possibly unfriendly county court. * * *"

The conclusion we have reached attains this desired result.

We have given due regard to the copies of various orders made by the county court of Jackson County, but for the reasons mentioned in State ex rel. Jones v. Smiley, et al., Judges, 300 S.W. 459, we do not consider them pertinent. We have also given consideration to the amendatory act found as House Bill No. 475, and incorporated in the Missouri Revised Statutes Cumulative Supplement, 1951, page 50. How-

ever, following Ford v. Boyd County, cited supra, and the rule as declared in 67 C.J.S., "Officers," Section 9, we do not think the act has any relevancy to this opinion.

The second question you have proposed is:

> "(2) Is there any method by which the court would be prohibited from paying other county officers in the event the answer to question one is in the affirmative."

We are not aware of any legal proceeding that might be brought to interfere with the Jackson County court making its regular disbursements even though litigation might ensue with respect to the office of county counselor. At most such litigation could only affect the payment of the salary of that office.

The third question which you have proposed is:

> "(3) Aside from the statutory provisions for such other officers, what is the particular method by which officers of the county are commissioned."

There appears to be no particular mode by which county officers are commissioned. The officer elected or appointed derives his title to the office from his election or appointment, and the commission at most is merely evidentiary of such election or appointment. However, we direct your attention to Section 5, Article IV, Constitution of Missouri, 1945, reading as follows:

> "Commissions of State Officers.--The governor shall commission all officers unless otherwise provided by law. All commissions shall be issued in the name of the state, signed by the governor, sealed with the Great Seal of the state and attested by the secretary of state."

In view of the fact that no specific provision has been enacted by the General Assembly relating to the commissioning of persons appointed to the office of county counselor, it is our thought that the above constitutional provision should be followed.

Honorable Henry H. Fox, Jr.

CONCLUSION

In the premises we are of the opinion:

(1) That at any time subsequent to January 1, 1953, the county court of Jackson County is empowered to appoint a county counselor for a term ending on the 31st day of December, 1954;

(2) That no litigation based upon such appointment can have the effect of interfering with the payment of the lawful salaries of other county officials and employees with the exception of the claimant to the office of county counselor and such persons as have been appointed by such official under statutory authority to do so; and,

(3) That the Governor of the State of Missouri should commission persons appointed to the office of county counselor in counties of the first class.

This opinion, which I hereby approve, was prepared by my assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

WFB/fh