COUNTY COURT: Upon appointment of county superintendent of public welfare the appointment of a probate parole and truant officer is automatically suspended.

January 21, 1943

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Honorable Sears Jayne
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of January 18, 1943, which reads as follows:

> "Acting under the authority of Chap. 56, Art. 11, Sections 9719 to 9732, inclusive, R. S. Missouri, 1939, I have recently petitioned the County Court of Clark County Missouri to appoint me as Superintendent of Public Welfare so that the duties of that office can be combined with the duties of Prosecuting Attorney at a saving to the county.
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> "In considering the matter, the County Court has discovered that on June 26, 1939 (by the act of a prior court) an order was entered appointing an individual in this county as "Probate Parole and Truant Officer" for a term of four years starting July 1, 1939. It appears that the order originally read "three" years but has been changed to "four" years. The original order is not in the files.
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> "Will you please advise us as to the effect of this old order in the following particulars:

> "(1) Can a County Court make an appointment extending beyond the expiration of the term of office of the members of the court.
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> "(2) Would not an appointment under Chap. 56, Art. 11, and particularly under Sec. 9719 thereof automatically suspend the duties and salary of a "Probate Parole and Truant Officer."

I

Your first question is whether or not a county court can make an appointment extending beyond the expiration of the term of office of the members of the court.

Section 36, Article VI of the Constitution of the State of Missouri, reads as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

By reason of this section of the Constitution, the legislature enacted Section 2480 R. S. Missouri, 1939, which reads as follows:

> "The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

In your request you stated that the county court had discovered that on June 26, 1939, a prior county court had entered an order appointing an individual in this county as "Probate Parole and Truant Officer", for a term of four years, starting July 1, 1939.

In a recent case handed down by the Supreme Court of this State, it was held that the county court could appoint janitors, and set their salary, for a term that might hold over under the next new county court.

It was so held in the case of Aslin v. Stoddard County, 106 S. W. (2d) 472, l. c. 475, where the court said:

> "By section 2078, R. S. 1929, Mo. St. Ann. Sec. 2078, p. 2658, it is provided that the county court 'shall have control and management of the property, real and personal, belonging to the county.' This express authority and duty carries with it the necessarily implied authority to employ such labor and

> service as may reasonably be requisite in order to effectuate the express power granted. Of such character is the work of a janitor, such as plaintiff herein. By the order of court and the contract pursuant thereto employing him he did not become an officer of the county, but only an employee, to whom no attempt was made to delegate governmental or other such functions of the court which from time to time might involve matters of discretion to be exercised by that body. See, on this question, Manley v. Scott, 108 Minn. 142, 121 N. W. 628, 630, 29 L. R. A. (N. S.) 652, and notes in latter volume.
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> "No case from this state is cited nor have we found any directly adjudicating the precise question now under consideration, viz., whether the county court may lawfully make a contract, binding upon the county (assuming good faith in the making thereof and reasonableness as to time of performance), the performance of which will extend beyond the terms of office of part or all of the members of the court as then constituted. * * * "

The court further said, on page 477, of the same case:

> "In our opinion, a county court has power to make a contract such as that here in question, for a

reasonable time, the performance of which will extend beyond the term of office of some member or members of the court. We so hold.

"We take next the contention that the contract was for an unreasonable time and was made in bad faith and collusively. As to the time factor we think it clear that one year cannot be considered an unreasonable term of employment, the circumstances considered. The county court needed the services of a competent janitor (a continuing need), and, being agent of the county and trustee of its funds (Kansas City Disinfecting & Mfg. Co. v. Bates County, 273 Mo. 300, 201 S. W. 92), owed the county the duty to conserve its funds and to procure necessary labor and service at the best available price. It may well be that, in the judgment of the court, a competent janitor, who might, perhaps. have found employment elsewhere, could be hired at the time in question for the definite term of one year, to the advantage of the county. The result in the instant case emphasizes that thought. There is no contention that plaintiff was not competent and suitable for the work for which he was employed. Prior to his employment Parks had been receiving $60 per month for doing the same work which plaintiff contracted and was willing to do for one year at $50 per month. The 'new' county court (so called in appellant's brief) continued to pay Parks $60 per

month. The contract with plaintiff, if carried out, would have saved the county $10 a month for a year — a substantial saving on an item of the size involved.

"Neither do we think the agreed facts would justify us in holding, as a matter of law, that the court acted fraudulently or in bad faith in employing plaintiff. Fraud is not presumed. Contra, right rather than wrong action is presumed, if presumption may be indulged. So far as concerns the employment of plaintiff alone, that contract certainly cannot be said to indicate bad faith or wrongful purpose on the part of the court. As we have pointed out, it was calculated to conserve the county's funds — to save money for the county, and would have so resulted had it been adhered to. But it is said that, at the same time, when two members of the court were about to bid farewell to their official positions, the court made three other 'appointments,' each for a term of one year, when the statute did not fix any definite term for such appointments or employments. One of those 'appointments,' that of Mooney, seems to have been considered by the so-called 'new court' as all right, since he was retained (though for an indefinite term). As to none of them is there any showing concerning salaries, or the reasons why the county court made the alleged 'appointments'

> on December 31, 1932. We have but the bare fact that the appointments were made. From this it is argued that said appointments were made collusively and in bad faith, for the purpose of forestalling the court, after the two newly elected members took office, from appointing other persons to such positions, and that, inferentially, it must follow that plaintiff's employment was actuated by the same purpose. We cannot say, as matter of law, that it conclusively so appears. The trial court found the issues for the plaintiff. We would not be justified in setting aside that finding."

Under the holding in the above case the old county court could appoint a probate parole and truant officer for a term that may not be terminated until some time during the term of the new county court, providing the term and salary are reasonable.

CONCLUSION

It is, therefore, the opinion of this department that the members of the prior county court of Clark County, whose terms have expired, could have appointed an individual as "Probate Parole and Truant Officer", for a term of four years starting July 1, 1939, and could fix his salary, even though the term of employment was carried over into the term of the new county court, if such employment, salary and term of office were reasonable.

II

Your second question is whether or not an appointment under Chapter 56, Article 2 of the Revised Statutes of Missouri, 1939, and particularly under Section 9719 thereof, automatically suspends the duties and salaries of a Probate Parole and Truant Officer.

You have informed this office, since writing your request, that the appointment of Probate Parole and Truant Officer was made by the previous county court and not by the circuit judge.

Section 9719 R. S. Missouri, 1939, reads as follows:

> "The county court in each county may in its discretion appoint a county superintendent of public welfare, and such assistants as it may deem necessary. Whenever the county court of any county has appointed a superintendent of public welfare such officer shall assume all the powers and duties now conferred by law upon the probation or parole officer of such county and shall assume all the powers and duties of the attendance officer in said county and all the powers and the duties of the attendance officer in any incorporated town or village having a population of more than 1,000 inhabitants, and no other or different probation or parole officer or attendance officer or officers shall be appointed by the judge of the juvenile court, by the county superintendent of public schools, or by the school board or any incorporated city, town or village school district or consolidated school district: Providing, however, that the provision

> of this section shall not apply to counties which now have or which shall hereafter have a population of more than 50,000 inhabitants."

Under the above section the county court appoints the superintendent of public welfare and his assistants. This section was originally enacted and appears in the Laws of 1921, page 586, Section 1. In construing this section the Supreme Court of this State en banc, in the case of Poindexter v. Pettis County, 246 S. W. 38, l. c. 40, said:

> "So as justly contended for by counsel for the appellant, the legal effect of the appointment of White was to automatically suspend the term of office of Poindexter, who was appointed under section 1144 of the Revised Statutes of Missouri 1919, as probation officer. All the duties devolving upon Poindexter as probation officer, by the act of 1921, supra, were transferred to White. State of Washington ex rel. Voris v. City of Seattle, 74 Wash. 199, 133 Pac. 11, 4 A. L. R. 198; Donaghy v. Macy, 167 Mass. 178, 45 N. E. 87. * * *
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> "Under the rulings announced in these cases, unquestionably it was the intention of the Legislature by the act of 1921 to repeal section 1144, R. S. 1919.

> "It necessarily follows from what has been said that the respondent was not an office holder under the laws of this state at the time for which he claims to have rendered the services sued for. He was therefore not entitled to the salary for which he sued."

Under the opinion in the above case, it was held that unquestionably it was the intention of the legislature, by the Act of 1921, to repeal Section 1144 R. S. Missouri, 1919. Section 1144 R. S. Missouri, 1919, is now Section 9708 R. S. Missouri, 1939, and reads as follows:

> "The circuit judge shall designate or appoint an officer of the county or some other person to serve as probation officer under the direction of the court in cases arising under this article. The court may also designate or appoint one or more persons to act as deputy probation officers."

Under the opinion in the above case, it is specifically stated that the appointment by the county court automatically suspended the term of office of the probation officer who was appointed by the circuit judge, under Section 9708, supra.

We are aware of the holding in the case of Cunio v. Franklin County, 285 S. W. 1007, where the court, at page 1008, said:

> "The circuit judge of Franklin county, speaking by and through the records of the circuit court only, could legally appoint plaintiff to the office of probation officer, and the said copy of said order of the county court was inadmissible and incompetent as proof of his appointment to said office. Reversible error was committed in the admission in evidence of said record.
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> "The plaintiff not having been duly appointed, and as he was not a de jure officer of defendant county, this suit for salary cannot be maintained."

Under the holding in the above case the Supreme Court, in a division opinion (that is, division number one), held that the circuit judge of Franklin County was the only one who could legally appoint a person to the office of probation officer. This case, although a later case, is in conflict with the case of Poindexter v. Pettis County, supra. We are compelled, however, to follow the ruling of the Supreme Court en banc, although an earlier case, in preference to following a conflicting division opinion, of division number one, which is a later case.

It is a rule of this State, that banc opinions are controlling where a conflicting opinion is even later rendered by a division opinion. It was so held in the case of Benner v. Terminal R. R. Ass'n of St. Louis, 156 S. W. (2d) 657, l. c. 660, where the court said:

> " * * * It is to be noted, however, that all of the cases cited by defendant were divisional opinions.

> As such they cannot stand if they are in conflict with the principles laid down in the Price case, which was a decision of the court en banc."

Under Section 9719, supra, it appears that the legislature intended that it was not mandatory upon the county court to appoint a county superintendent of public welfare and if a county superintendent of public welfare was not appointed, then the appointment by the circuit judge of a probation officer would remain in effect. It is also very noticeable, under Section 9719, supra, that upon the appointment of county superintendent of public welfare that no other or different probation or parole officer could be appointed by the judge of the juvenile court, who is also a circuit judge.

Since the previous county court appointed a Probate Parole and Truant Officer and not a county superintendent of public welfare, the appointment of a county superintendent of public welfare would automatically suspend the appointment of a Probate Parole and Truant Officer, as was made by the prior county court. We know of no office described as a Probate Parole and Truant Office.

CONCLUSION

It is, therefore, the opinion of this department, that an appointment of a person under the provisions of Section 9719 R. S. Missouri, 1939, to the office of county superintendent of public welfare, would automatically suspend the appointment of a so-called Probate Parole and Truant Officer by the previous county court.

Respectfully submitted

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APPROVED:

ROY McKITTRICK
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