

COUNTY CLERKS - I. The amount of compensation of county clerk and deputy hire;
II. Compensation of county clerk and pay of deputies must be derived annually from fees earned; III. Settlements with county courts; when made etc.; IV. Duty of the county clerk to appoint deputy or assistant; duty of county court to approve or disapprove such appointment.

February 14, 1935

2-20



Honorable Theo. McCracken
County Clerk
Dent County
Salem, Missouri

Dear Sir:

We have your request of January 15, 1935 for an opinion relative to the compensation of county clerks, compensation of deputies and settlement of fees with the county court. We also have numerous other requests pertaining to similar subjects connected with the county clerk's office and therefore, for brevity, we are combining all such requests in this opinion.

I.

The amount of compensation of county clerk
and deputy hire

Section 11811, Laws Mo. 1933, p. 370 fixes the maximum compensation for county clerks and deputies according to the size of the county, which compensation must be derived from fees of the office. Section 11811, supra, in part provides as follows:

"The aggregate amount of fees that any clerk of the County Court * shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. In counties having a popula-

#2 - Honorable Theo. McCracken

tion of * the clerks shall be allowed to retain * for themselves, and shall be allowed to pay for deputies and assistants * "

The above statute varies the amount of compensation of county clerks and the pay of deputies according to the population of the county.

County clerks are elected, under Section 11664, R. S. Mo. 1929, for a period of four years, and when commissioned by the Governor,

" * shall enter upon the discharge of their duties on the first Monday in January next ensuing their election, * "

It will be noted from the above quoted portion of Section 11811 that the compensation of a county clerk is for "one year's service". Construing the two statutes together, such one year's service begins annually on the first Monday in January. There is no difference between one year's service and an annual service. The compensation in either case is an annual compensation.

The Supreme Court, in State ex rel. Harvey v. Linville (1927), 300 S. W. 1066, l.c. 1067, in construing the salary provision said:

"From the context (of the statute) it must be presumed that annual salary was meant. 'Annual salary,' as used in said section 10938, means salary for each year of the incumbency. It cannot be split up into periods by elections which occur during the year, and must be calculated on a year as a whole. We conclude further than 'annual', as applied to salaries, means not the calendar years, but the years of the incumbent's term, which in the case of relator begins on the 1st day of April of each year."

#3 - Honorable Theo. McCracken

While the above quotation refers to a salary, there is now no distinction in this State between the term "salary" and "compensation". Both mean the same. State ex rel. O'Connor v. Riedel, 46 S. W. (2d) 131.

It is, therefore, the opinion of this office that the maximum amounts of compensation for the county clerk and the pay of deputies, payable exclusively from fees of the office, as set out in Section 11811, supra, are limited to the year of incumbency, beginning annually on the first Monday in January.

II.

Compensation of county clerk and pay of deputies must be derived annually from fees earned

In Harrington v. City of St. Louis (1891), 107 Mo. 327, the court, in construing the meaning of "fees", "commissions" and "emoluments" accruing to an officer by virtue of his office, l.c. 330, said:

"For illustration we will take the first year of the first term in this case. The receipts for that year will be composed of the fees and emoluments earned and collected during that year, and, also, of the fees and emoluments earned during the year, but collected during a subsequent year. In other words, the fees of a particular year are those earned during that year, no matter when collected. It often occurs that fees and commissions are earned in one year and collected in a succeeding year. All such fees and commissions must be carried into the account of the year in which they were earned. Allen v. Cowan, 96 Mo. 193."

#4 - Honorable Theo. McCracken

It is, therefore, the opinion of this office that the term "aggregate amount of fees" which a county clerk may retain annually under Section 11811 is the amount of fees earned in that year, whether collected or not.

III.

Settlements with county courts; when made,
and disposition of fees in excess
of annual compensation of county clerk and deputy
hire.

Section 13, Article IX, Constitution of Missouri relating to fees of county and other officers, provides:

"The fees of no executive or ministerial officer of any county or municipality, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of ten thousand dollars for any one year. Every such officer shall make return, quarterly, to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail, and verifying the same by his affidavit; and for any statement or omission in such return, contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

It will be noted that the above provision of the Constitution merely provides that the officer shall

#5 - Honorable Theo. McCracken

make return quarterly of all fees by him received.

By Section 11810, R. S. Mo. 1929, it is made the duty of

"Every clerk of a court of record in every county in this state shall make return quarterly to the county court of all fees by him received to date of return, * The county court shall at each regular session examine such statement, and may examine any person as to the truth of the same, and allow all necessary clerk or deputy hire, not exceeding the amount allowed in the next succeeding section of this chapter for deputies or assistants, and deduct the same from the aggregate amount received by the clerk, and if there be an amount still in the hands of the clerk exceeding the sums specified in the next section succeeding, the court shall ascertain the amount of such excess over and above the amounts allowed to be retained by the clerk and paid to deputies and assistants, and make an order directing such clerk to pay the amount so ascertained into the county treasury: *"

Section 11814, Laws Mo. 1933, p. 372, in part, also provides:

"It shall be the duty of the clerks of all courts of record to charge and collect, in all cases, every fee accruing to their offices * Such clerk shall, at the end of each quarter, file with the county clerk a report of all fees paid and accruing to his office during such quarter, * and which said report shall be verified by the affidavit of such clerk. And quarterly such clerk shall pay into the

#6 - Honorable Theo. McCracken

county treasury the amount of any fees collected in excess of the sums permitted to be retained for services and pay of deputies and assistants, and every clerk shall be liable on his official bond for all fees collected and not accounted for by him as provided by law. * "

The term "fees collected in excess of the sums permitted to be retained", as used in Section 11814, Laws Mo. 1933, supra, and the term "amount of such excess over and above the amounts allowed to be retained by the clerk", as used in Section 11810, R. S. Mo. 1929, refer to the maximum annual compensation as set out in Section 11811, Laws Mo. 1933, supra, fixing the amount that the clerk can annually retain for himself and pay of deputies. It does not mean that the clerk shall, at the end of three months, pay over all fees in excess of three months' compensation of himself and deputies. There may be quarters during the year in which he did not earn and collect sufficient fees for pay of himself and deputies, and we have heretofore pointed out that his compensation is not a quarterly stipend, but is an annual amount. Neither is the compensation and pay of deputies to be reckoned on a term basis.

It is the opinion of this office that the county clerk is elected for a term of four years, but he is not entitled to compute his compensation and pay of deputies upon a single unit basis of four years. In the Harrington case, supra, l.c. 330, the Supreme Court, in speaking of this matter, said:

"The excess of one year cannot be carried into another year for the purpose of bringing the fees of that year up to \$10,000, with deputy hire added. * His compensation for each year must come from the fees and emolu-

#7 - Honorable Theo. McCracken

ments of the office for that year, * "

IV.

Duty of the county clerk to appoint deputy or assistant; duty of county court to approve or disapprove such appointment.

The power of the county clerk to appoint a deputy, found in Section 11680, R. S. No. 1929, reads in part as follows:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, * "

The term "court", as used in Section 11680, refers to all courts of record, including the county court. It therefore appears, with reference to the appointment of deputy county clerks, that two acts are necessary:

- (1) The appointment of such deputy by the county clerk;
- (2) The approval of such appointment by the county court, or by two judges of the county court.

#8 - Honorable Theo. McCracken

The duty to appoint a deputy clerk is placed upon the county clerk, and the duty to approve or disapprove such appointment is made the duty of the county court. Such is the construction placed upon a similar term, "approved by the court", in *Butler v. Sullivan*, 108 Mo. 630, l.c. 638. In that case, the statute gave the county collector the power to employ attorneys "with the approval of the county court" to aid the prosecuting attorney in the handling of tax suits. The Supreme Court, in construing this term in that case, l.c. 638, said:

"The statute neither authorizes the county court to employ counsel nor to charge the county with liability for his compensation. The power to employ an attorney is granted solely to the collector; this compensation and the liability therefor is provided for by the law. The only power granted to the county court is to approve or disapprove of such employment, and thereby fix the status of the attorney employed by the collector as to his right to such compensation when his right to, and the amount thereof, comes to be ascertained by the court in which the tax suit is determined, and the liability therefor fixed by the final judgment of such court."

The meaning of a power or duty conferred upon an official which is subject to the approval of another official, is fully set out in *Makemson v. Dillen et al*, 171 Pac. 673, l.c. 676 in the following terse language:

" * The grant to New Mexico is to be effectuated by selection, not only of these lands granted in quantity, but also as indemnity, and they are to be selected under the direction and subject to the approval of the Secretary of the Interior. The words 'subject to the approval' we do not regard as

#9 - Honorable Theo. McCracken

giving the Secretary of the Interior discretion to arbitrarily refuse a selection for no reason at all. These words are to be understood to mean that the Secretary of the Interior shall investigate and pass upon and render judgment as to whether the lands selected are within the terms of the grant, and, if so, it is his duty to list them to the state."

It is the opinion of this office that the county court has the authority to approve or disapprove of the appointment of a deputy, but such authority does not include the power to fix the salary or compensation to be paid such deputy from the fees of the county clerk's office. The refusal of the county court to approve the appointment of any particular person as deputy county clerk must be a refusal based upon reasonable, not arbitrary, grounds.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE