

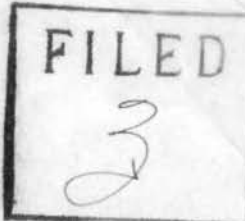
✓ JUSTICES OF THE PEACE: Appointment of additional justices in townships having between 75,000 and 150,000 inhabitants.

Decs' 2136-37-2366 R5 No 1/24

12-22

November the Twenty-seventh

1933



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Honorable C. Arthur Anderson,  
Prosecuting Attorney,  
St. Louis County,  
Clayton, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of September 21, 1933, such request being in the following terms:

"You are probably acquainted with our situation here in St. Louis County relative to the appointment of additional justices in Central Township. These appointments have been made by virtue of Section 2137 R. S. Missouri, 1929, and we believe Section 2366 supersedes Sec. 2137 or prohibits any additional justices above the four which are to receive a salary of \$2,000 per year.

We have taken the position that these four paid justices should receive the volume of criminal business and we are issuing informations in these courts only for traffic violations, for the simple reason that we feel that the appointment of these additional justices was invalid.

Under date of September 12th we wrote you inquiring how we could avoid the change of venue situation. Please refer to that letter and give us an opinion as soon as possible on both of these questions, as it is vexing us very much at this time."

There are three sections of the Revised Statutes of Missouri of 1929 providing for fixed numbers of Justices of the Peace in certain localities all of such sections being contained in Chapter 10 of such statutes. Article 8 of such chapter is applicable to townships containing between 75,000 and 150,000 inhabitants and was enacted in 1915 as Laws of 1915, page 324, and such article contains Section 2366 which provides as follows:

"In all townships which now contain or may hereafter contain seventy-five thousand inhabitants and not over one hundred and fifty thousand inhabitants according to the last decennial census there shall be four justices of the peace and each shall receive a salary of two thousand dollars per annum, payable monthly out of the treasury of the county in which he is elected."

The second of the three sections above mentioned is found in Article 10

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which applies to cities containing 300,000 inhabitants and over, such section being 2395 which provides as follows:

"For the first one hundred thousand of population in said cities there shall be five districts; and there shall be an additional district for every additional one hundred thousand, and for every fractional part of one hundred thousand exceeding fifty thousand of population. For the purpose of this article the last general census of the United States of America shall be taken as the basis of population."

The third and remaining section governing the numbers of justices of the peace is Section 2136, found in Article 1 which is entitled "Election, appointment, powers and duties of justices of the peace" which section provides as follows:

"Each municipal township, except as otherwise provided by law, shall be entitled to two justices of the peace, to be elected and commissioned in the manner hereinafter provided; but in case there shall be in any such township an incorporated town or city having a population of over two thousand inhabitants, and less than one hundred thousand inhabitants, said town or city shall be entitled to one additional justice of the peace, who shall be a resident of such town or city; and in all municipal townships that now contain or may hereafter contain a city of one hundred thousand inhabitants, and less than three hundred thousand inhabitants, the county court of the county in which said city is located shall, on or before the first day of March, 1890, divide the said township into districts, not to exceed eight, as nearly equal in population as may be possible; and at the general election in 1890, and every four years thereafter, there shall be elected in each of said districts, by the qualified voters thereof, one justice of the peace, who shall possess the qualifications required by law for other justices of the peace, shall take the same oath, possess the same jurisdiction, and shall hold his office for four years and until his successor is elected and qualified, and who shall be a resident of and keep and maintain his office in the district for which he is elected. The persons now holding the offices of justices of the peace in townships affected by this article shall continue to perform the duties of their respective offices until the general election of 1890, at which time one justice of the peace for each district, as herein provided, shall be elected, after which time there shall be no other justices of the peace in townships affected by this article, except as herein provided for."

An analysis of the statutes above quoted shows the following distribution as to numbers of justices of the peace throughout this state. Section 2136 shows that the general rule is two to each township with two special

provisions for justices of the peace in cities and towns within such townships, the first giving one justice beyond the usual two for every town or city having between 2,000 and 100,000 inhabitants, and the second requiring a division of cities in such townships of between 100,000 and 300,000 inhabitants into eight districts with one justice of the peace for each district. This second and latter statutory provision seems distinct and apart from the rest of Section 2136 and not in the nature of an additional provision for or exception to the main subject of 2136 because it eliminates entirely the chief subject matter of Section 2136 which is the general rule of two justices of the peace for each township, with additional justices for cities of from 2,000 to 100,000 inhabitants. Sections 2366 and 2395, above quoted, are self-explanatory so that the following is the regular statutory schedule for numbers of justices of the peace:

- (1) Section 2136 - (a) Two justices in every township with one additional for every city therein of 2,000 to 100,000 inhabitants.
- (b) Eight justices in townships with cities of 100,000 to 300,000 inhabitants.
- (2) Section 2366 - Four justices in townships of from 75,000 to 150,000 inhabitants.
- (3) Section 2395 - Five justices for first 100,000 inhabitants and one additional justice for each additional 100,000 inhabitants and one additional for any fraction of 100,000 over 50,000.

Section 2137 relates to the appointment of extra justices under certain circumstances as opposed to the regular number fixed by statute, all of the above quoted statutes dealing with regular numbers, Section 2137 providing as follows:

"Whenever a petition shall be presented to the county court of any county in this state, signed by twelve or more qualified voters of any township in said county, setting forth that they live more than five miles from the nearest justice of the peace in their township, the county court shall have power to appoint an additional justice of the peace for such township, and the justice so appointed shall live in the immediate neighborhood of the petitioners, and at least five miles from any other justice of the peace of such township: PROVIDED, that the county court shall not appoint more than two additional justices in any township, except if it be shown to the county court that there is no justice of the peace living in any incorporated or unincorporated town or village having a population of at least two hundred inhabitants, then the county court, at the request of any twelve resident householders, in said town or village, may appoint one justice in said town or village in addition to the number of justices hereinbefore specified. The term of office of a justice of the

peace appointed under this section shall expire on the general election day in the year when justices of the peace shall be elected for the townships, as provided by law: PROVIDED FURTHER, that this section shall not apply to townships which now have or may hereafter have a population of more than 300,000 inhabitants and less than 600,000 inhabitants, and all justices of the peace now holding under appointment in such townships shall continue to perform the duties of their respective offices until the next general election in the year when justices of the peace shall be elected in said townships, and no longer."

On its face Section 2137 applies to every county in this state because at the outset thereof it begins "whenever a petition shall be presented to the county court of any county in this state". Before 1929 the last proviso and sentence of 2137 was not a part of such section it having been added by Laws of 1929, page 147, such proviso excepting townships containing cities having between 300,000 and 600,000 inhabitants. Before such amendment in 1929 Article 10, including Section 2395, was in force and provided a separate scheme for the appointment of justices of the peace in cities having over 300,000 inhabitants. The General Assembly of 1929 apparently did not think that such special scheme for such cities prevented the application of 2137 to such cities or at least felt that the matter was ambiguous because otherwise the General Assembly would not have felt it necessary to add the amendment of 1929. If Section 2137 applies to cities falling within Article 10 which Article 10 has within it a special section dealing with the appointment of additional justices (Section 2407) then there would seem to be an even stronger case for Section 2137 applying to Article 8 which deals with townships having between 75,000 and 150,000 inhabitants, because Article 8 has no provision for the appointment of additional justices.

As has been seen above Section 2136 provides a special scheme for justices in townships containing cities of between 100,000 and 300,000 inhabitants. Not only does Section 2136 provide that there shall be eight justices in townships containing cities of between 100,000 and 300,000 inhabitants (i. e. a fixed number like the four fixed in Section 2366) but Section 2136 in dealing with townships given eight justices in 2136 says expressly that "there shall be no other justices of the peace in townships affected by this article, except as herein provided for." In spite of this special arrangement for eight justices and no more in such townships the Supreme Court of Missouri has held that 2137 applies to such townships and that additional justices may be appointed for such townships under 2137. *State ex inf. Gentry v. Toliver*, 315 Mo. 757, 287 S. W. 312 (1926); *State ex rel General Motors Acceptance Corp. v. Brown*, 330 Mo. 220, 48 S. W. 2d 857; see *Travalant v. Kelley-Reppert Motor Co.*, 16 S. W. 2d 709 (1929-Kansas City Court of Appeals). Just why the Missouri Supreme Court did not feel that Kaw township which territorially is Kansas City was not within Section 2395 dealing with cities of 300,000 inhabitants or more when Kansas City by the 1920 census had a population of 324,410 inhabitants is not clear, but the court clearly, although mentioning the population of Kansas City in its opinion, is of the above figure said in the case of *State ex inf. Barrett v. Joyce*, 307 Mo. 49, 269 S. W. 623 (1925) that what is now Section 2136

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was "the only statute which was designed to provide justices of the peace for Kaw township." (307 Mo. 56). However, the court in all of these four cases just cited did treat Kansas City as within Section 2136 with its special scheme for eight justices and no more. In these four cases every kind of attack was made on the validity of the appointment of additional justices in Kansas City but no mention in any of the cases was made of any contention that 2137 could not apply to Kansas City because Kansas City by 2136 was limited to eight justices and no more.

Section 2366 applicable to Central Township in St. Louis County is no more of a separate exclusive scheme for the appointment therein than is that part of 2136 held applicable to Kansas City, so that if 2137 applies to Kansas City the same arguments would seem to make it apply to St. Louis County and the only conclusion possible is that the fixed number of justices (eight in Kansas City and four in Central Township) refers to regular justices of the peace and does not purport to deal with additional justices who might be appointed under 2137 which by its terms applies to every county in the state. This analysis would explain Laws of 1933 page 214 which repeals Section 2366 and amends it so as to change the number of regular justices in the counties to which it applies from four to three, such enactment merely changing the regular number just as 2136 fixed the regular number for Kansas City at eight.

It might be observed that there is a direct contradiction in allowing 2137 to apply to that part of 2136 which applied to Kansas City because that part of 2136 expressly said that "there shall be no other justices of the peace in townships affected by this article" and yet the Supreme Court said that 2137 applied to Kansas City, but there is no such direct contradiction in allowing 2137 to apply to 2366 because 2366 merely says "there shall be four justices of the peace" in townships to which it is applicable, and says nothing about prohibiting more than such number. Nor is the argument possible that 2366 was intended as a special scheme for St. Louis County and should be respected as such because at the time of its enactment in 1915 St. Joseph was in the only township to which it applied. State ex rel Forgrave v. Hill, 272 Mo. 206, 198 S. W. 844 (1917) wherein the court said:

"It is agreed by the parties herein that said township is the one in which the city of St. Joseph is situate, and that it is the only township in the State having a population of seventy-five thousand and less than a hundred and fifty thousand." (272 Mo. 208).

To give any construction to the statute other than that given above would mean that there would be in every locality in this state a method for fixing the regular number of justices of the peace, and in every such locality there would be a flexible scheme for additional justices where the exigencies of legal business might require them except in townships of from 75,000 to 150,000 inhabitants, which would seem to be an unreasonable scheme of legislation.

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Admittedly the construction above given is in seeming conflict with a dictum in the case of Forgrave v. Buchanan County, 282 Mo. 599, 222 S. W. 755 (1920) wherein the court said:

"It is true, the old general law relating to justices of the peace no longer governs in townships now or hereafter having the specified population, but the act in question leaves the old general law in force in all other townships in the State, except in the townships provided for by this act, which, we hold, is a general law governing such townships." (282 Mo. 608).

The court in that case did not have before it the problem here presented and perhaps used language unduly broad which it is submitted should not be followed if an attempt were made to apply it to the problem here under consideration of additional justices of the peace.

Where Section 2137 applies the only ground of attacking the appointment of a justice of the peace by the county court is by alleging fraud, and a quo warranto proceeding against the justice so appointed alleging a lack of jurisdiction to make the appointment cannot be maintained where the record of the County court is fair on its face and no fraud is alleged. State ex rel Rice v. Simmons, 35 Mo. App. 374 (1889); State ex inf. Gentry v. Toliver, 315 Mo. 737, 287 S. W. 312 (1926); State ex rel General Motors Acceptance Corp. v. Brown, 330 Mo. 220, 48 S. W. 2d 857.

In the Toliver case just cited where the relators alleged that the power of the county court had been exhausted by the appointment of two justices, the court defined the issues involved as follows:

"It appears from the allegations of the reply that the county court had previously made orders appointing two additional justices of the peace under the authority of said Section 2689. It is contended that the record proof in support of such allegation demonstrates that said county court had no power to make the appointment of respondent at the time the purported order appointing him was made. On the other hand, it is the contention of respondent that the county court acted judicially indetermining the facts upon which its right and power to appoint respondent depended, including its necessary finding that two additional justices of the peace had not already been appointed, had qualified and were acting as such, and that its finding thereon constituted a judgment which cannot be attacked collaterally and that this proceeding is a collateral attack upon such judgment, and therefore that this court cannot inquire into the facts in respect to such alleged prior appointments of additional justices of the peace." (315 Mo. 740)

and the court held as follows:

"We hold that the act of making the appointment of respondent necessarily involved a finding by the county court that such a

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state of facts existed as to authorize it to appoint an additional justice of the peace, including the finding that two additional justices of the peace had not already been appointed, or, if they had previously been appointed, that both were not qualified and acting at the time. Such finding had the force and effect of a judgment and cannot be attacked in this proceeding, wherein fraud is neither alleged nor sought to be proven." (315 Mo. 746).

It is our opinion that the Revised Statutes of Missouri 1929, Section 2137 applies to townships containing between 75,000 and 150,000 inhabitants and that Section 2366 does not remove such townships from the operation of Section 2137.

Yours very truly,

EDWARD H. MILLER

APPROVED:

ASSISTANT ATTORNEY GENERAL.

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ATTORNEY GENERAL.