

ST. LOUIS COUNTY--Salaries of County Judges, clerks and prosecuting
attorneys--how determined.

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Hon. William H. Bray,
County Counselor,
St. Louis County,
Clayton, Missouri.

Dear Sir:

We received your letter of June 14th, 1933 requesting an opinion from this Office upon the subject of salary to certain county officials in your county. Your request is as follows:

"A question has arisen in St. Louis County as to the population of this County. Owing to the fact that the various officers in the County are now contending that they are entitled to salaries which apply to Counties of 300,000 inhabitants.

The Section under which they are basing their claim is Section 11808 of the Revised Statutes of 1929, and Section 11786. In the 1928 Presidential Election there was a total vote cast of 76,732 in this County, and in accordance to the method provided in Section 11786 the population of St. Louis County for the purpose of fixing the classification of said County for salary purposes was 383,665."

In passing upon this matter it will be necessary to draw a distinction between the effect to be given to a general law, and a special law. In State v. Imhoff, 238 S. W. 1.c. 125, the Supreme Court in an opinion by Judge Walker, said:

"We have said, not once, but a number of times, that where there are two acts, and the provisions of one has special application to a particular subject and the other is general in its term, and its standing alone would include the same matter and thus conflict with the special act, then the latter must be construed as accepted out of the provisions of the general act, and hence not affected by the enactment of the latter."

At the outset, there is directly involved in this question, Section 12, Article 9 of the Constitution of Missouri which reads as follows:

"The General Assembly shall, by law uniform in its operation, provide for and regulate the fees of all county officers and for this purpose may classify the counties by population."

As what is meant by the term "fees" as contained in the above constitutional provision, the courts of this State do not seem to be in harmony. In *State ex rel. v. Patterson*, 152 App. 264, a mandamus suit was brought to recover for the services rendered by a special prosecuting attorney for Jackson County. The prosecuting attorney for Jackson County at that time was paid a salary. The statute provided that persons appointed as special prosecuting attorneys should possess the same power and receive the same fees as the prosecuting attorney received. The Court held that as the prosecuting attorney received a salary, and this statute referred to fees, and that such salary did not mean fees, that the special prosecuting attorney would not be entitled to any compensation. The Kansas City Court of Appeals in this case, l.c. 268 said:

"But relator argues that the term 'fees' in section 1014 should be defined to mean the salary of the prosecuting attorney in counties where the law gives him no other compensation than a salary. This section appears in the Article of the Statutes relating to 'Circuit and Prosecuting Attorneys' and we think it sufficiently discloses the legislative intent that its provisions should apply only to those counties mentioned in section 1005 and that, even where applicable, it does not authorize the payment of any salary to the special prosecutor."

However, in a more recent case, *State ex rel. O'Connor v. Riedel et al*, 46 S. W. (2d) 131, the Supreme Court said that this constitutional provision "fees" was broad enough to include the term "salary".

At the outset there appeared to be three separate statutes under which a circuit clerk may be paid in the State of Missouri, namely Section 11786, 11820 and 11833, R. S. 1929. We shall take them up in their order.

Section 11786 applies to counties having a population of less than

300,000. It provides:

"For the purpose of this section the population of any county shall be determined by multiplying by five the total number of votes cast in such county at the last presidential election prior to the time of such determination."

The vote cast in the presidential election in your County is given by you at over 76,000. This would make the population of your County over 300,000 and therefore Section 11786 would be inapplicable.

Section 11820 is a part of Article 2, Chapter 84, R. S. 1929. This Section applies only to counties having a population of 300,000 or more. The population under this Section is determined by the provision in Section 11811, which reads as follows:

"For the purpose of Articles 2 and 3 of this Chapter the population of any county shall be determined by multiplying by three and one-half the total number of votes cast in such county at the last presidential election prior to the time of such determination."

When the vote of your county is multiplied by three and one-half, the population of your county is less than 300,000 and the provisions of Section 11820 are therefore inapplicable. In this connection it may be urged that Section 11808 would apply so that the population of your county would be determined by multiplying by five the votes cast at the last general election in your county. However, Section 11808 is a general statute applicable to all officers, while Section 11811 is a special statute applicable only to clerks of courts. Under such circumstances, as heretofore pointed out, the special statute controls when its provisions are in conflict with the general statute.

Section 11833 R. S. 1929 applies to all counties in this State which now contain or may hereafter contain a population of 150,000 and less than 500,000 inhabitants. This Section is a part of Article 3, of Chapter 84. The population under this Section is determined by the special provisions contained in Section 11811, heretofore set out in full, namely, that the population is to be determined by multiplying the total number of votes cast in the last presidential election by three and one-half. Therefore the only provision made in either Article 2 or Article 3, Chapter 84, R. S. 1929, that fixes the salary of the county clerk and circuit clerk in your county is Section 11833 as amended by the Laws of 1931, p. 323.

It is therefore the opinion of this office that the county clerk and circuit clerk of your county are to be paid under the provisions of Section 11833, upon a population basis as determined by the provisions of Section 11811. It may be urged that the provisions of

Section 11811 R. S. 1929 refers and applies only to clerks that are paid upon a fee basis, and that such Section fixes the amount of fees that they may retain, and for this reason that the method of determining the population as set out in that Section, would not apply to and control the provision of Section 11833, as amended by the Laws of 1931, p. 323, for the reason that one Section refers to fees, and the other Section refers to salary.

However, it was said in *State ex rel. v. Riedel*, supra, that in the beginning an officer may be paid on the fee basis, but that when he receives the maximum amount of fees that is allowed him by law, that such ipso facto becomes a salary. We quote from that case, l.c. 133.

"Practically all county officers (with whom alone the constitutional provision was dealing) were compensated by fees, but, when a limit was placed on the amount of fees an officer might retain, that maximum was regarded as his salary, and therefore, in a generic sense, the word 'fees' implied compensation or salary, since it was the source of these."

Prior to the decision in *O'Connor v. Riedel*, supra, the term "fees" did not include salary, and the above provision of Section 11811 R. S. 1929 would have been inapplicable to determine the population for the purpose of paying the clerks, and the general provisions of Section 11808 R. S. 1929 would have governed and determined the method for arriving at the population. However, since the *O'Connor* case, supra, the provisions of Section 11811 R. S. 1929 govern for the purpose of determining the population because first, the term "fees" includes salary, and second, the provisions of a special statute such as Section 11811, govern over the provisions of a general statute such as 11808.

In the *O'Connor* case, supra, the Supreme Court said that the uniformity provision of the Constitution meant that the law applicable to one county office must be uniform throughout the State. But whatever construction may be placed upon the uniformity provision of the Constitution, we call your attention to the facts that under Section 11786, and Section 11833, and Section 11811, the Circuit Clerks of this State although they constitute one class of officers are paid upon a population basis determined by two methods, namely, five times the presidential vote in Section 11786 and by three and one-half times the presidential vote as set out in Section 11811. Whether or not these two statutes violate the uniformity provision of the Constitution, and just what the Supreme Court would say when this matter is properly presented, we venture no opinion.

Under the provisions of Section 11314 R. S. 1929, as amended by the Laws of 1931, p. 301, the salary of the prosecuting attorney is fixed upon a population determined by the last Federal census. Thus it appears that the population of your county for the purpose of paying the clerks will be fixed at one figure, and for the purpose of paying the prosecuting attorney will be fixed at another and different figure. This would appear to violate the uniformity provision of the Constitution, namely, Section 12, Article 9. Prior to the O'Connor case, supra, such a situation would have violated the uniformity provision of the Constitution. We quote from State ex rel Summers v. Hamilton, 279 S. W. 33, l.c. 36:

"At the threshold of this case relator challenges the constitutionality of the act approved April 1, 1921 (Laws of 1921, p. 606 and following), relied on as a defense by respondents in their return. Section 12 of Article 9 of our present Constitution provides that:

"The General Assembly shall, by a law uniform in its operation, provide for and regulate the fees of all county officers, and for this purpose may classify the counties by population."

Under the above requirement, it was the duty of the Legislature to pass a law that would regulate the fees of all county officers, including circuit clerks, county clerks, prosecuting attorneys, etc., and which should be uniform in its operation. The above provision of the Constitution is mandatory in its terms, and no law should pass muster which does not comply with its requirements."

The Court at p. 37 further said:

"Passing, but without deciding, the question as to whether the framers of the Constitution contemplated, that Section 12 of Article 9 supra, might be carried into effect, by the passage of separate and distinct acts relating to each county officer in respect to his salary, yet we have no hesitation in holding, that different laws, if enacted, must be uniform in their operation, in providing for and regulating the salaries of county officers."

However, the above opinion from the Summers case, does not seem to have been either overruled or criticized in the O'Connor case, and

since the O'Connor case is the last word of the Supreme Court we feel, until it is overruled, that it should be followed.

The salaries of county judges in 1929 and 1930 in your county were to be determined by Section 2588, R. S. 1919 and by either Section 10684 R. S. 1919 or 6515 R. S. 1919, depending upon which of the latter applied to your county. Section 10684, R. S. 1919 (now 7892 R. S. 1929) applies to counties of under 200,000 population, and Section 6515 R. S. 1919 (now 7897 R. S. 1929) applies to counties of over 200,000 population. Section 10684 provided a salary of \$1,200 per year, and Section 6515 provided for salary of \$3,500 per year, both statutes providing salaries for the county judges for acting as road overseers.

Under either of the above statutes, the population of the county, for the purpose of fixing the salaries, was to be determined, under the provisions of Section 11016 R. S. 1919 (now 11808 R. S. 1929), by multiplying by five the highest number of votes cast at the last previous general election and the product thereof shall be considered and held as the true population of such county.

If the county as a result of an intervening election passed from a classification of less than 200,000 population, to a classification of over 200,000 population so as to increase the pay of the county judges as road overseers from \$1,200 per year to \$3,500 per year would such an increase violate the provisions of Section 8, Article 14 of the Constitution which is as follows:

"The compensation of fees of no state, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

The answer to the above query is found in the opinion of that late learned and distinguished jurist, Graves, J., in State ex rel. Moss v. Hamilton, 260 S. W. 467, l.c. 469. Quoting from that opinion:

"The salary, in amount, was fixed by law as to relator's office in any event. If his county was not subjected to a change of class, his salary was not changed. If his county (by a decreased population) dropped to a lower class, his salary was fixed, and was fixed before his election, although the change of class might give him a different amount. So, too, if his county increased in population and thereby passed to a higher class, the existing law (that in force at the time of his election) fixed for him a salary. True it was higher,

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but it was definitely fixed at the date of his election."

Quoting further from that decision, l.c. 70:

"The salary of each class was fixed, and as said no subsequent law has changed the fixed salaries. The mere fact that a county passed from one class to the other does not deprive the holder of the office of the salary fixed by law, and fixed too, at a time long prior to relator's election. In our judgment Section 8, Article 14 of the Constitution does not preclude a recovery by relator."

The amendment by the 1929 Legislature of Section 2586, R. S. 1919, Laws 1929, p. 151 could not operate to fix the pay of county judges then in office. In the first place, this would be changing the law during the term of office of the county judges, as referred to in the opinion in the Moss case, and would be a violation of Article 14 Section 8 of the Constitution, for the reason that the amended statute increased the compensation of the county judges. Furthermore, the Constitution of Missouri, Article 6, Section 33 has specifically prohibited the increase or diminishing of the compensation paid to a judge of a court of record during his term of office.

It is therefore the opinion of this office that first, county clerks and circuit clerks are paid upon a population basis determined by Section 11811, under the compensation provided for in Section 11233 R. S. 1929; second, that the prosecuting attorney is paid upon the population as determined by the last Federal Census, under the compensation provided for in Section 11314 R. S. 1929 as amended by the Laws of 1931, p. 301; and third, the county judges for 1929 and 1930 were paid upon a population basis as provided for in Section 11016 R. S. 1919 and are entitled to the compensation provided for under Section 6515 R. S. 1919.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

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