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PROSECUTING ATTORNEY'S SALARY and Refund of sums paid in excess thereof --
Section 11314, R.S. Mo. 1929.

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January 26th, 1933

Hon. O. A. Kamp,
Prosecuting Attorney, Montgomery County,
Montgomery City,
Missouri.

Dear Sir:

Your letter of recent date requesting an opinion of this department relative to the salary of prosecuting attorneys has been handed to the undersigned for attention. You state:

" What I wish to have is the opinion of your department, on Section 11314, R. S. 1929, regarding the salaries of prosecuting attorneys. As I understand the section it provides for the payment of salary of prosecuting attorneys, at so much per annum, depending upon the population * * * to be paid in monthly payments, * * * population to be determined by multiplying the whole number of votes cast at the last presidential election by five, until AFTER THE POPULATION OF SUCH COUNTY SHALL HAVE BEEN ASCERTAINED BY THE NEXT DECENNIAL CENSUS OF THE UNITED STATES.

"Since the ruling of the Supreme Court that the population shall be determined by the census, the question is, when should the salary be paid according to the population by the census. The statute says it shall be paid at so much per annum, which was fixed at the beginning of 1930, according to the population by the vote, then would it not be a violation of the statute to say that it should be reduced in monthly payments at any time during that year of 1930. Again the statute says to continue payment according to the population by the vote, until AFTER THE POPULATION OF SUCH COUNTY SHALL HAVE BEEN ASCERTAINED BY THE CENSUS.

" What I wish to have is your opinion of the construction of that statute, and when should the salary begin to be based on the population by the census. In other words when was the population ascertained for the information of the courts, it would certainly not be until AFTER the census was taken and announced. I

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am seeking to know whether a refund of any salary paid during the year 1930 to prosecuting attorneys, in your opinion, could be compelled, and whether the County Courts should require it."

As you state in your inquiry, Section 11314 in substance provides that a prosecuting attorney shall receive for his services a salary per annum to be paid out of the county treasury in all counties having a certain population, said salary to be paid monthly upon the warrant of the County Court issued in favor of the prosecuting attorney to the county treasurer * * * *, the population to be arrived at by multiplying the whole number of the votes in the last presidential election by five until after the population shall have been determined by the next decennial census of the United States. Judge Ragland writing the opinion in the case of State ex rel O'Connor v. Reidel et al, 46 S.W. (2nd) 1066, says in referring to Section 11314:

" The section provides for two things in express terms; the multiplying of the whole number of votes cast in the last presidential election by five as a method of ascertaining the population, and termination of the use of that method upon the occurring of a designated event. When the event occurred by the census of 1930, further use of the first mentioned method could no longer be used."

Thus it will be seen that the census should be the guidance in paying the salary of a prosecuting attorney for his services after the ascertainment of the population by that method. Our next proposition is as to when the change in salary, if any, should be made effective by shifting from the multiple of the vote as in said section provided to the population of such county as and when ascertained by the next decennial census of the United States. It will be noted that said section provides that the prosecuting attorney shall receive a designated sum per annum, so placing a plain, ordinary construction upon the language used. It means annual salary for each year of his incumbency.

In the case of State ex rel Harvey v. Linville, 300 S. W. 366, the court uses this language:

" The increase of salary which a statute permits after an election showing an increase in population is not in violation of the Constitution in that the salary is increased during the term for which the officer was elected because the law in force at the time of his election fixed a salary to be ascertained at periods as changed by the increase in population."

The Constitutional provision referred to in said opinion, Sec. 8, Art. XIV, does not place an inhibition upon a decrease in salary or fees during term of office.

The Court further in considering a statutory provision in the Linville case, supra, pertaining to annual salary, says:

"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 that 'annual' as applied to salary means not the calendar years but the years of the incumbent's term, which in the case of relator begins on the first day of April each year."

The prosecuting attorney of your county was elected at the general election held in November, 1928, for a term of two years, beginning on the first day of January 1929, and ending on the 31st day of December, 1930. His salary at the beginning of his term would, therefore, have been ascertained by the method provided in Section 11314 and under the holding in the Linville case, supra would have so continued until the end of the first year of his term according to the time of year when his term should commence, which as hereinabove stated, was on January 1st, 1929 to December 31st, 1929, and again from January 1, 1930 until December 31st, 1930.

The above conclusions having been reached upon the opinions of the Supreme Court in the above cited cases, it will be unnecessary to determine at what period of the year, 1930 the decennial census of the United States became effective, and also unnecessary to determine your query with reference to a refund of any salary paid to the prosecuting attorney in that year.

As we construe Section 11314, it is applicable to prosecuting attorneys assuming the duties of office January 1, 1921. It provides as above stated that the prosecuting attorney shall be paid a salary of so much per annum, depending upon population, such population to be ascertained by multiplying the whole number of votes cast at the preceding presidential election by five. The language in that respect is clear. It appears also clear that such process of determination is to be continued with respect to prosecuting attorneys thereafter elected until after the population shall have been ascertained by the next decennial census in the United States. Upon the ascertainment of the true population as disclosed by the census of 1930, the further use of a speculative method would be unnecessary. There is nothing in the language of the section that would indicate an intention upon the part of the Legislature to resort again to the multiple method of ascertaining

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population when once the true population has been ascertained by the census. We are therefore of the opinion that the prosecuting attorney's salary from and after January 1st, 1931, should be ascertained from the census of 1930 and that such method of ascertaining the population of such county would thereafter continue until the next decennial census by the United States.

What has been above stated disposes of your inquiry relative to any duty involved upon the prosecuting attorney to make refund of any amounts paid in the year 1930. We may add however, that where a County Court erroneously but voluntarily pays a sum in excess of the amount a prosecuting attorney was entitled to receive, such action upon its part is not res adjudicata as against the county.

State ex rel v. Deimer , 255 Mo. 1. c. 351;
State ex rel v. Hill, 272 Mo. 1. c. 211.

It is the duty of the County Court to see that the County funds are protected and that the County obtains that to which it is entitled. If the Court paid to the prosecuting attorney a salary in excess of that to which he was entitled, after January 1st, 1931, then it is the opinion of this department that such excessive sum could be recovered by such County, and it should therefore make demand and recover such excessive amount for its general revenue fund.

Very truly yours,

CCA/N

CARL C. ABINGTON
Assistant Attorney-General

Approved:

ROY McKITTRICK
Attorney General