COUNTY COURT: SALARIES: LIMITATIONS: HIGHWAYS: Suit by ex-office holder governed by five year statute of limitations.

Ex-office holders are not estopped to claim back salary.

Rock public roads include gravel roads.

Section 11808 Revised Statutes Missouri 1929 to be used in estimating population until effective date of Laws 1933, page 369.

September 20, 1934

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Honorable Henry C. Salveter
Prosecuting Attorney
Sedalia
Missouri

Dear Mr. Salveter:

This Department acknowledges receipt of your letter dated September 14, 1934 as follows:

"Two suits against the County of Pettis have recently been filed on behalf of two Ex-County Judges, who were members of our County Court from January 1,1929, to January 1,1931. Since January 1,1931, Judges of the County Court in Pettis County have drawn a salary of $2500 per year under Section 2092 R. S. Mo. 1929. The claims on behalf of these ex-judges are for $1200 a year, as road overseers for the years 1929 and 1930, under Section 7892 R. S. Mo. 1929. This same Section had been the law for several years prior to 1929. Section 7892 aforesaid, interpreted with Section 11808 R. S. Mo. 1929, gave Pettis County a population of between seventy and eighty thousand,during the years in question. In these years the County also had more than two hundred miles of paved, macadamized and graveled public roads. Pettis County also had a total taxable wealth of over $25,000,000 and did not contain a city of the first class. The above named suits were filed in our Circuit Court the latter part of June,1934.

In preparing the defense of these cases on behalf of the County, and considering whether a settlement should be made of the claims, I respectfully petition your

department for an opinion with reference to the following questions, concerning said cases.

(1) Does an ex-office holder, of a county, have the benefit of a five year period within which to file his claim against the county for back salary?

Section 862 R. S. Mo. 1929 allows a five year period within which to sue, in cases of, 'an action upon a liability created by a statute other than a penalty or a forfeiture.' I am unable to find any other statute which limits claims against a county for a less period. Section 11416 R. S. Mo. 1929 limits claims against the State to a period of two years, but in my opinion this does not apply to claims against a county. You will observe from the above statement of facts that the suit was filed four and half years after December, 1929. Counsel for claimants agree that the salary for the first six months of the year 1929 is barred under the five year statute. Hence, whether or not claimants could recover for the first six months of the year 1929 is not an issue in this inquiry.

(2) The second question is: Are claimants now estopped to assert their claim for back salary? Claimants, as judges of the County Court and as members of the board of road overseers, were the officers who wrote their own pay checks. They had absolute opportunity to pay themselves what was due them under the law. The fact that they did not take their money at the time it was due is entirely their own fault. As a moral proposition, it seems unjust that they should now be permitted, after these long years, to come in and ask for their pay. However, as a legal proposition, which of course governs, it appears

to me that the following cases lay down the rule that if the law gives a county officer a salary, that he is entitled to collect the full salary, and even though he accepts a smaller sum than the law allows, that he may later demand and collect the full amount to which he was originally entitled:

State ex rel. -v- Hamilton, 312 Mo. 157, 279 S. W. 33
State ex rel. -v- Hamilton, 260 S. W. 466
State ex rel. -v- Ludder, 285 S. W. 421
State ex rel. -v- Grinstead, 282 S. W. 715.
State ex rel. -v- Fisher, 282 S. W. 724
State ex rel. -v- Bockleman, 240 S. W. 209
State ex rel. -v-- Bailey, 272 S. W. 921
State ex rel. -v- McCurdy, 282 S. W. 722

(3) The third issue is whether or not a public graveled road, and being an all weather road at all seasons of the year, comes within the qualifications prescribed in Section 7892, aforesaid. Said Section provides, 'and which now have or may hereafter have more than two hundred miles of macadamized or rock public roads.' The phrase 'rock public roads' would, in the opinion of this office, mean and refer to a road which had sufficient hard surface, to be available and open to public traffic at any and all seasons of the year, under all weather conditions. In my opinion a gravel road which was an all weather road for all seasons comes within the meaning, 'rock public roads.' However, I will appreciate your interpretation as to that question.

(4) The fourth question is whether or not Pettis County during the years in question had a population of more than 50,000. The actual or census population of Pettis County during the years concerned was less than 50,000. However, Section 11808 R. S. Mo. 1929 expressly provided that the population of all counties for the purposes of determining the fees or salary due an officer, should

be determined and ascertained by multiplying the highest number of votes cast at the last previous general election by five. It is the opinion of this office that the population of Pettis County for the purpose of determining the salary of the board of road overseers during the years in question is determined by the multiplication method and is not to be determined by the actual census. As above stated Pettis County had a population,under the terms of Section 11808, of over 50,000. It is the opinion of this office that the right of the claimants to prevail is determined upon the provisions of the law as it was written and existed during the years in question. The fact that Section 11808 R. S. 1929 was repealed and a new section re-enacted bearing the same number in the laws of 1933, page 369, whereby the population of a county is determined solely by the last decennial census of the United States, cannot have a retroactive force and effect against the claimants in the opinion of this office.

While this office, and the great majority of the county tax payers would be personally gratified to be in a position to defeat the above claimants, yet it appears that the law and the facts are in favor or the claimants. Since the claims involve a matter of public importance to the tax payers of the county, I desire to know the opinion of your department and to learn whether or not it concurs with my own, before advising the present Judges of our County Court with reference to a disposition of the claims."

We address ourselves to your inquiries in the order in which you number them.

1.

Section 862 Revised Statutes Missouri 1929 provides:

> "What within five years. Within five years: First, all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 861, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract, and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."

There is not any special statute of limitations in the State of Missouri applying to actions brought by an ex-office holder of a county against such county. We do not find that the question of whether or not Section 862, above set out, applies to actions brought by an ex-office holder of the county against such county to have been ruled in this State. But in a number of such suits the fact that such section would apply to such action does not seem to have been questioned; for instance, in the case of State ex rel. Sperry v. Beaty 282 S.W. 725, the action was one to recover unpaid salaries for the years 1921, 1922, 1923 and 1924, and there was no contention that Section 862 did not apply.

We are of the opinion that in an action brought against a county, by an ex-county office holder, for unpaid salary that so far as the question of limitation is concerned Section 862 Revised Statutes Missouri 1929 controls.

2.

By Section 7892 Revised Statutes Missouri 1929, in counties where certain precedent conditions of fact exist, members of the county court are entitled to,

> "* * * * receive a salary of $1200 per annum to be paid, by the county, monthly, in equal monthly installments out of a fund mentioned in said subdivision (2) of Section 9874."

The legal obligation of a proper county to pay the members of the county court is thus and thereby fixed. The question of whether or not by accepting a portion of what the law provided the members of a county court were entitled works an estoppel against such members thereafter claiming the proper amount due them under the law, was discussed in principle in State ex rel Summers v. Hamilton 312 Mo. 157, being an action by a clerk of the circuit court to compel issuance to him of warrants for a certain portion of his salary theretofore uncollected by him. It was contended that, having theretofore accepted a portion of the salary due him, the circuit clerk was estopped to thereafter make claim for the unpaid portion of the salary. The Supreme Court of Missouri, at page 172 of the opinion said:

> "Having reached the conclusion that relator was entitled under our Constitution and Statutes to $1950 per annum as his salary, what has transpired to cut off his right to recover the difference between the above amount and the salary of $1600 paid by respondents?
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> The County Court of Crawford County was not vested by law with the power to compromise relator's rights and compel him to accept as his salary less than the law allowed him. The county court was simply required, in the performance of a purely ministerial act, to issue warrants to relator for his monthly salary, based on the population of said county, as determined under the foregoing law. In so doing, it was not acting judicially. (Marion County v. Phillips, 45 Mo. 75; State to use Carroll Co. v. Roberts, 60 Mo. 402, 62 Mo. 388; Cole County v. Dallmeyer, 101 Mo.57; Spears v. Stone County, 105 Mo. 236; State ex rel. Christian County v. Gideon, 158 Mo. 1. c. 338; State ex rel. v. Diemer,

> 255 Mo. 336; State ex rel. Moss v. Hamilton, 260 S. W. 466.)
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> We are of the opinion that, on the undisputed facts, the doctrine of estoppel has no place in the case. the conclusion reached by Court in Banc, speaking through Graves, J.,in State ex rel. Moss v. Hamilton, 303 Mo. 302, 260 S. W. l. c. 471, is applicable to the facts in this case, and we hereby adopt the same, as follows:
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> 'If there was the legal obligation upon Crawford County to pay relator at the rate of $1950 per year, as we have ruled, then there is nothing in the conduct and acts of relator which occasioned said county through respondents to act to their detriment, or to change its position to its detriment. At most the county only partially discharged a legal obligation. The partial payment of a legal obligation is not payment in full, and does not discharge the debt. (Zinke v. Maccabees,275 Mo. l. c. 666, 205 S. W. l.)
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> Upon the facts no act of relator caused Crawford County, or respondents, its agents, to do anything to the detriment of the county or to themselves, as its agents. There was simply a part payment of a debt which the county owed under the law.' "

A debt is not paid until it is paid in full, compromised or settled. From your letter I take it there is no question of compromise or settlement involved in your controversy. The members of the county court simply failed to collect what the county owed them under the law,and in that situation we are of the opinion that estoppel does not lie against such members of a county court to collect the unpaid portions of their salaries, unless some portion of same may be barred by the statute of limitations.

3.

In Fellows v. Dorsey 171 Mo. App. 289, the Kansas City Court of Appeals defined "gravel" as,

> "Small stones, or fragments of stone, very small pebbles, often intermixed

with particles of sand."

We know, of course, that the words 'stones' and 'rocks' are often used interchangeably.

The statutes of the State of Indiana authorized the building by a railroad of a branch line extending to lands containing building stone. In the case of Cottrell, et al. v. Railway Co. 138 N. E. 504, a railroad company in the State of Indiana undertook to extend its lines, under the statute above referred to, to gravel beds. Its right to do so was upheld by the court. The court at page 505 of the opinion said:

> "Gravel consists of stone,more or less broken up and disintegrated,and is used extensively for building purposes. Building a branch line extending to mineral lands containing gravel, less than 50 miles from the main line of the railroad, is therefore authorized by the statute. Burns' 1914,Sec.5425; Acts 1889,c.63,p.100."

In the case of Dione v. West Paris Building Association 126 Me. 454, the court had under consideration the construction of a building contract. Referring to the meaning of the word 'stone' the court said that,

> " The word 'stone' as ordinarily used refers to small pieces or moderately sized pieces of <u>rock</u>."

It is our opinion that the term 'rock public roads' as used in Section 7892 Revised Statutes Missouri 1929, was and is sufficient to cover and include what is known as graveled roads.

4.

It is too elementary for discussion that a law has no efficacy before its effective date, so that the amendment to Section 11808 Revised Statutes Missouri 1929, by laws Missouri

1933, at page 369, did not affect in any way the provisions of the above section prior to the effective date of the 1933 law.

On the facts submitted by you the population of Pettis County, so far as your question is concerned, should be ascertained under and by virtue of the provisions of Section 11808 Revised Statutes Missouri 1929.

Yours very truly,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

(Acting)
Attorney General.

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