

SALARY: ROAD OVERSEER: Recovery of back salary as road overseer.

3-30

March 10, 1936.



Hon. Chas. M. Hardin,
Judge, Jefferson County Court,
Hillsboro, Missouri.

Dear Sir:

This department is in receipt of your letter of March 4th wherein you state as follows:

"Section 7892, Rev. Statutes, Missouri 1929: Provided a salary for Judges of County Courts in all counties in this state, with a population of not less than fifty thousand nor more than two hundred thousand.

Sec. 2092 Rev. Statutes Mo. 1929, provided a salary for County Judges of a county with more than sixty thousand population for the years 1931 and 1932.

For the 1931 term, Jefferson County's population was more than fifty thousand inhabitants, as determined by Sec. 11808, Rev. Statutes 1929. All other county officers were receiving a salary based on Sec. 11808.

This section provides for counties which now have or may have hereafter, more than two hundred miles of macadamized or rock public roads:

For the 1931 term, Jefferson County had a total mileage of 998 miles of roads, and 616 miles of macadam and gravel or rock roads, measured by the State Highway Department, and 232 miles of macadam and rock roads, measured by P. M. Reilly, Jefferson County Highway Engineer.

County may now have or may hereafter have a total taxable wealth of more than twenty-five million dollars:

During the 1931 term, Jefferson County had more than twenty-five million dollars of taxable wealth, and did not contain a city of the first class.

Section 9874 provided for the apportionment of the County funds:

First: A sum to care for paupers,
Second: A sum for the building of bridges and repairing of roads, and
Third: Compensation of road overseers.

Section 7892 states: And for the purpose of seeing that the roads contemplated by said subdivision two of Sec. 9874, are each and every one kept in repair and for the purpose of personally viewing new road and bridge sites which are the subject of petition, and through personal supervision of seeing that all road work is done in a proper and workmanlike manner.

The matter of personally seeing to the construction and completion of the road and bridge work was done by the County Court, together with the Engineer. The requirements of said Sec. 9874 was complied with as the record will show. However, being unaware of the provisions of Sec. 7892, there was no record of performance as a board of road overseers, except the record of having ordered road and bridge work done.

It appears, had the Court been familiar with the provisions of Section 7892, at the beginning of the 1931 term, it would have been entitled to the salary provided by said section.

Therefore, I would like to have an opinion on the following questions:

First: What material constitutes a macadam or rock road?

Second: Would all the mileage of the macadamized or rock roads in all road

districts in the county be included in the meaning of said Section 7892, Rev. Statutes Missouri 1929, and
Third: In view of the above mentioned conditions is there any reason why the Court should not collect a back salary for the 1931 term as a Board of Road Overseers?"

I.

In answer to your first question as to what material constitutes a macadam or rock road, we feel that same could be better answered by your own County Engineer or the State Highway Department. Some suggestion is found, however, in the case of Partridge v. Lucas, 99 Calif. 519, 33 Pac. 1082, wherein the court in defining the term "macadamize", indicates that the material for a macadam road would consist of small stones, thus:

"The word 'macadamize' has a fixed and definite meaning, and refers, not only to the kind of material to be used in covering a street or road, but also the manner in which it is to be laid. It means to cover a street or road 'by the process introduced by Macadam, which consists of the use of small stones of a uniform size consolidated and leveled by heavy rollers.' 13 Amer. & Eng. Enc. Law, p. 1194."

As to what material constitutes a rock road, the answer appears to be obviously "rock". Such term is defined in the case of Okey v. Moyers, 91 N. W. 771, thus:

"In geology every layer which forms a portion of the solid crust of the earth is called rock, but in its popular acceptation the term embraces only the solid portions of the earth. Webster defines it as 'a large concrete mass of stony material.' The Standard Dictionary: 'Technically, a rock is a mixture of mineral substances, except when it is one species, in a bed or mass. The constituents of rock are mineral,

although they may be organic in origin.' The Encyclopedia Brittanica, Vol. X: 'A rock may be defined as a mass of material matter composed of one or more, usually of several, kinds of minerals, having as a rule no definite external form, and liable to vary considerably in chemical composition.'"

II.

Section 7892, R. S. Mo. 1929, provides as follows:

"The judges of the county courts in all counties in this state which now have, or may hereafter have, a population of not less than 50,000 nor more than 200,000 inhabitants, and which now have, or may hereafter have, more than two hundred miles of macadamized or rock public roads, and which now have, or may hereafter have, a total taxable wealth of over twenty-five million dollars and not containing a city of the first class shall be and constitute a board of road overseers for such counties for the purpose of seeing that the fund provided for by subdivision two of section 9874 shall be expended as provided in said second subdivision of said section 9874, and for the purpose of seeing that the roads contemplated by said subdivision of said section are each and every one kept in good repair, and for the purpose of personally viewing new road and bridge sites which are the subject of petitions for improvement, and for the purpose, through personal supervision, of seeing that all road improvements are completed in a good and workmanlike manner, and that all work of every kind done on the county roads is done in a proper workmanlike manner. Each member of said board shall, as compensation, solely for his services as such road overseer, receive a salary of twelve hundred dollars per annum to

be paid by the county, monthly, in equal monthly installments out of the fund mentioned in said subdivision two of section 9874. The time, place and manner of holding meetings of said board and the rules and regulations for the performance of the duties shall be fixed by said board."

The above section does not say that the two hundred miles of macadamized or rock public roads is exclusive of the mileage of the macadamized or rock roads in all road districts in the county, and hence we are of the opinion that all the mileage in the road districts is to be included within the meaning of section 7892, supra.

III.

In asking whether there is any reason why the Court should not collect a back salary for the 1931 term, we assume you are referring to the salary of county judges elected at the general election in 1930 and who took office on January 1, 1931--Section 2073, R. S. Mo. 1929.

You state that during the 1931 term, or from January 1, 1931, to January 1, 1933, the population of Jefferson County was more than 50,000 inhabitants as determined by Section 11808, R. S. Mo. 1929, which provides that:

"For the purpose of determining the population of any county in this state, as a basis for ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants, the highest number of votes cast at the last previous general election, whether heretofore or hereafter held in such county, for any office, shall be multiplied by five, and the result shall be considered and held for the purpose aforesaid as the true population of such county."

Section 11808, supra, was repealed by the Laws of Missouri, 1933, page 369, and a new section passed. However, same would have no bearing since the question would have to be determined by the law that was in effect during the 1931 term.

You further state that during the 1931 term the county had more than two hundred miles of macadamized or rock public roads, taxable wealth of more than \$25,000,000, and that it did not have a city of the first class. This would clearly bring the court within the provisions of Section 7892, supra, as constituting the county court a board of road overseers, and each member of the court entitled to a salary of \$1200 per year.

Section 2092, R. S. Mo. 1929, provides in part that:

"In all counties of this state now or hereafter having less than sixty thousand inhabitants, the judges of the county court shall receive for their services the sum of five dollars per day for each day necessarily engaged in holding court. In addition to the salaries herein authorized to be paid to judges of the county court in counties having sixty thousand inhabitants or more, and in addition to the per diem herein authorized to be paid to the judges of the county court in counties having less than sixty thousand inhabitants, said judges shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court, provided that such mileage shall be charged only once for each regular term."

The above section was amended by the Laws of Missouri, 1931, page 191, to "all counties of this state now or hereafter having less than seventy-five thousand inhabitants," and the entire Section 2092 read thus:

"In all counties of this state now or hereafter having seventy-five thousand inhabitants and less than ninety thousand inhabitants, the judges of the county court shall receive an annual salary of twenty-five hundred dollars. Said salary to be in lieu of the per diem heretofore

allowed by law to said judges as judges of the county court, and in lieu of the salary heretofore allowed by law to said judges as members of the board of road overseers, under the provisions of section 7892, R. S. 1929. In all counties of this state now or hereafter having ninety thousand inhabitants and less than one hundred fifty thousand inhabitants, the judges of the county court shall receive an annual salary of three thousand dollars. Said salary to be in lieu of the per diem heretofore allowed by law to said judges as judges of the county court, and in lieu of the salary heretofore allowed by law to said judges as members of the board of road overseers, as provided by section 7894. In all counties of this state now or hereafter having one hundred fifty thousand inhabitants and less than three hundred thousand inhabitants, the judges of the county court shall receive an annual salary of forty-five hundred dollars. Said salary to be in lieu of the per diem heretofore allowed by law to said judges as judges of the county court, and in lieu of the salary heretofore allowed by law to said judges as members of the board of road overseers, under the provisions of section 7892, R. S. 1929, and in lieu of all other fees, compensation, or salaries, heretofore allowed by law to said judges, except the per diem as allowed to said judges as members of the board of equalization and board of appeals. In all counties of this state now or hereafter having more than three hundred thousand inhabitants, the judges of the county court shall receive an annual salary of six thousand dollars. Said salary of six thousand dollars to be in lieu of the per diem heretofore allowed by law to such judges of the county court, and in lieu of the salary as road overseers heretofore allowed by law to said judges, as provided in section 7897, R. S. 1929, and in lieu of all other fees, or salaries, heretofore allowed by law to said judges, except the per diem allowed to said judges as members

of the board of equalization and the board of appeals. The salaries herein fixed for the judges of the county court in all counties of this state having more than seventy-five thousand inhabitants shall be paid in equal monthly installments as the salaries of other county officers are paid. In all counties of this state now or hereafter having less than seventy-five thousand inhabitants, the judges of the county court shall receive for their services the sum of five dollars per day for each day necessarily engaged in holding court. In addition to the salaries herein authorized to be paid to judges of the county court in counties having seventy-five thousand inhabitants or more, and in addition to the per diem herein authorized to be paid to the judges of the county court in counties having less than seventy-five thousand inhabitants, said judges shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court, provided that such mileage shall be charged only once for each regular term."

We assume that although Jefferson County had more than fifty thousand inhabitants during the 1931 term of the county court, yet at no time did it have as many as sixty thousand inhabitants. If such be the facts, the amendment of Section 2092, supra, making it applicable to counties of less than seventy-five thousand inhabitants would not have affected the court's salary for the 1931 term. Thus we see that during the 1931 term, or from January 1, 1931, to January 1, 1933, Jefferson County came within the provisions of Sections 7892 and 2092, supra.

It is to be noted that in counties having certain populations it is specifically stated that the salary is in lieu of Section 7892, R. S. Mo. 1929. However, such language is not used for counties under seventy-five thousand inhabitants, and we are of the opinion that the judges of Jefferson County Court would have been entitled during the 1931 term to a salary of \$1200 per year as members of the board of road overseers.

46 C. J., Sec. 275, page 1027, makes the following statement (citing many cases):

"The acceptance of less compensation than that established by law for the office does not estop an officer from subsequently claiming the legal compensation."

Section 862, R. S. Mo. 1929, provides that the five-year statute of limitation runs on:

"Second, an action upon a liability created by a statute other than a penalty or forfeiture."

In the case of State ex rel. Wingfield v. Kansas City, 236 S. W. (Mo.) 516, an employee who was wrongfully discharged as a civil service employee sued for his salary. The court, in holding that his recovery for compensation due him was subject to the five-year statute of limitation, said:

"Moreover, we hold that section 1317, R. S. 1919, does apply; this being 'an action upon a liability created by a statute other than a penalty or forfeiture,' and that this case is governed by the five-year period of limitations."

From the foregoing, we are of the opinion that the judges of the county court may collect a back salary for the 1931 term, or from January 1, 1931, to January 1, 1933, subject to the five-year statutory period of limitation which started running January 1, 1931. We are further of the opinion that, since the members of the court were entitled to be paid monthly as members of the board of road overseers, only two months' salary, to-wit, January and February of the year 1931, has been barred by the statute of limitations.

Respectfully submitted,

J. E. TAYLOR,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

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