

PROSECUTING ATTORNEY'S SALARY:) Salary and judgment for salary
SALARIES:) not binding where no notice
DECLARATORY JUDGMENT ACT) given to adverse party.
CONSIDERED:)

December 16, 1936.

12-21

FILED
76

Judge J. S. Robertson
Presiding Judge
Moniteau County
California, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of December 10, 1936, relative to the claim of the Prosecuting Attorney of Moniteau County for back salary, in which you request the opinion of this Department on the question therein submitted. Your letter is as follows:

"The County Court of Moniteau County, by order of record, must call upon you for advice on the above subject. This due to the fact the Prosecuting Attorney, Mr. Roy L. Kay, has filed a claim for \$2750.00 against the County of Moniteau for back salary alleged by him to be due from the county.

"The facts are as follows:

"Auditors from the office of the State Auditor recently filed a report of an audit of Moniteau County for the years 1934 and 1935 wherein it is alleged that the Prosecuting Attorney owes the county between \$90 and \$100.

"Thereafter the Prosecuting Attorney filed an ex parte proceeding in the Circuit Court for the September Term, 1936, asking the Court to declare that the 1930 census did not take effect until three (3) years thereafter and that he was entitled to

determine the population of the county and collect a salary under the old law (Sec. 11314 R. S. 1929) 'by multiplying the whole number of votes cast at the last preceding presidential election by five' etc. for the years 1931, 1932 and 1933. This proceeding was instituted under the declaratory judgment statute-Laws of 1935, page 218, but no notice was given as required by Sec. 11 of the act. On December 1, 1936, the Circuit Court sustained the action in favor of the Prosecuting Attorney and a judgment has been written.

"In view of Sec. 11 of the Laws of 1935, page 219, the County Court does not deem it is bound by the ex parte proceeding in the Circuit Court of the Prosecuting Attorney but the Prosecuting Attorney insists that the County Court is bound by the same and should pay his demand for the \$2750.00 alleged to be due him.

"Enclosed you will find certified copy of the proceedings in the Circuit Court above referred to.

"The records further show that the Prosecuting Attorney drew about \$2150.00 for salary in the year 1931, \$1100.00 for 1932, and \$1100.00 for 1933. \$1100.00 appeared the annual salary of Prosecuting Attorney according to the census of 1930 of this Moniteau county.

"Will you therefore kindly advise the Moniteau County Court at your earliest convenience as to the above question."

We find attached to your letter a certified copy of the application of the Prosecuting Attorney of your county for a declaratory judgment and also the opinion of the Circuit Judge on said application under the provisions of the declaratory judgment act, Laws of Missouri, 1935, page 218. We have carefully examined the application and copy of the opinion of the Circuit Judge submitted by you.

We note in your letter that no notice, as required by Section 11 of the declaratory judgment act, was given the county court, and assume also from your letter that the county court did not enter its appearance in this proceeding.

We have examined the declaratory judgment act, but do not think that it contemplates such a situation as was undertaken in the ex parte proceeding mentioned in your letter, in the absence of notice to the adverse party; in this case—Moniteau County. In Section 1 of this act we note that "the Circuit Courts and Courts of Common Pleas of this State, within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." We think that this language was intended to indicate that jurisdiction over parties and subject matter was not intended to be altered and that unless the court had jurisdiction of the subject matter and the parties that any judgment that might be obtained would be ineffective. We do not think that this act departs so far from the fundamental principles that notice need not be given to the adverse party in a proceeding of this kind.

Section 11 of said act says,

"When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. * * *" (Underscoring ours)

In the above we are not unmindful of what is said in Section 5 of said act, which is as follows:

"The enumeration in Sections 2, 3 and 4 does not limit or restrict the

exercise of the general powers conferred in Section 1, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty."

We do not say that the court could not ascertain the salary of the Prosecuting Attorney under this act but we do say that it cannot be done without notice to the county court of your county. It is fundamental that everyone is entitled to his day in court and this applies equally as well to the county or other political subdivision as it does to persons. And by a "day in court" we mean the time appointed for one whose rights are called judicially in question, or liable to be affected by judicial action, to appear in court and be heard in his own behalf. This phrase, as generally used, means not so much the time appointed for a hearing as the opportunity to present one's claims or rights in a proper forensic hearing before a competent tribunal."

We are not passing on the merits of the Prosecuting Attorney's claim in this matter, but only as to the procedure; for instance, in a suit for back salary certain facts might be brought to the attention of the court and certain conclusions of law might be presented in court that perhaps were not available in an ex parte proceeding like this.

It is, therefore, our opinion that the county court of your county would be justified in refusing to pay, and are not bound to pay, the \$2750.00 as set forth in the opinion of the court, on the facts as stated in your letter, where there has been no notice to the county court of the proceeding.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

CRH:EG