

SALARIES:
CENSUS:
OFFICERS:

1940 census will not cause change in the salaries of county officers during the year 1940.

November 20, 1940 ^{11/25}



Honorable Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Mr. Williams:

This will acknowledge receipt of your letter of July 1st, 1940, which is as follows:

"A question has arisen as to when the salary of the various county officers will be changed, and become effective should the latest census show an increase or decrease in population over the previous census. The statutes provide in a number of cases how the salaries of these officers should be determined. Sec. 11811. Salaries of county clerks, deputies and assistants- fees to county treasury (Laws of 1937) and Sec. 11786. Salaries of circuit clerks in certain counties. (Laws 1937). Sec. 11314 Prosecuting Attorney Salary of. (Laws of 1933).

"I understand the census is effective as of April 1st, 1940. Should any of the county officers be entitled to an increase due to an increase in population over the last census, would they be entitled to back pay to April 1st, 1940? If not, what will be the effective day for the increase or decrease in salaries, due to the change in population?"

I.

Your question requires a consideration of the

Federal Acts providing for the taking of the census, the publishing of bulletins and reports and the effective date of the census. The Sections of the Act which are pertinent to your question are found in Title 13, U.S.C.A., and are the following:

"Sec. 202. Decennial census period; reports of inquiries when completed. The period of three years beginning the 1st day of January in the year 1930 and every tenth year thereafter shall be known as the decennial census period, and the reports upon the inquiries provided for in said section shall be completed within such period: Provided, That the tabulation of total population by States as required for the apportionment of Representatives shall be completed within eight months from the beginning of the enumeration and reported by the Director of the Census to the Secretary of Commerce and by him to the President of the United States.

"Sec. 213. Printing; requisitions upon Public Printer; publication of bulletins and reports. The Director of the Census is hereby authorized to make requisition upon the Public Printer for such printing as may be necessary to carry out the provisions of this chapter, to-wit: Blanks, schedules, circulars, pamphlets, envelopes, work sheets, and other items of miscellaneous printing; that he is further authorized to have printed by the Public Printer, in such editions as the director may deem necessary, preliminary and other census bulletins, and final reports of the results of the several investigations authorized by this chapter or by chapters 1 and 3 of this title and to publish and distribute said bulletins and reports."

Under Section 218, U.S.C.A., Title 13 at page

13 (Annual Pocket Part) provides that upon the payment of One Dollar population returns may be obtained from the Director of Census. In the case of *Ervin v. State*, (1931) 44 S. W. (2d) 380, 119 Tex. Cr. 204, the court held that preliminary bulletins issued under Section 213 U.S.C.A., supra, are official and should be judicially noticed by state courts as determining matters of population.

"Sec. 218. Certified copies of population and agricultural returns; authorization; restriction on use; disposition of fees received. The Director of the Census is authorized at his discretion, upon the written request of the governor of any State or Territory or of a court of record, to furnish such governor or court of record with certified copies of so much of the population or agricultural returns as may be requested, upon the payment of the actual cost of making such copies and \$1 additional for certification; * * * *"

These sections authorize the Director to publish bulletins and reports from time to time, and, upon request of any Governor or court of record to furnish certified copies of reports. The State courts have not been uniform in their holdings as to what is the effective date of the census for the purpose of paying salaries. The recent case of *Kay v. Moniteau County*, 134 S. W. (2d) 81, l. c. 83, decided by the Supreme Court of Missouri, is a case in which the County Court paid the salary of a Prosecuting Attorney on the 1930 census, and, although it was admitted in the trial of the case that the County did not have the official report of population until 1936, plaintiff Kay sought to recover salary upon the former population basis as determined by multiplying the vote by five. The Supreme Court, in ruling against plaintiff's contention, said:

"* * * * * Since the county court paid plaintiff the salary authorized under the census method, it is immaterial to plaintiff as to how the

court acquired knowledge of the census. The census method was available and the court was bound under the law to be guided thereby."

A similar case is Carter County v. Huett, 259 S. W. 1057. In this case defendant Huett was Prosecuting Attorney of Carter County and was paid during the entire year of 1920 on the population as determined by the 1920 census which gave the County a higher classification than it had under the method of determining the population by multiplying the vote by five. In this case it was admitted that the official publication of the census was not made until March 28th, 1921. The Supreme Court, upholding the payment of salary on the census figure, said, l. c. 1059:

"As to the fact that Carter county, as of the 1st day of January, 1920, had such a population as put it in the class whose prosecuting attorneys were entitled to receive a salary of \$1,000 per annum, there is and can be no dispute. The substance of plaintiff's contention is that this fact was not and legally could not have been ascertained, within the meaning of the statute, so as to make it applicable to the salary of the prosecuting attorney for the year of 1920. There is nothing here showing an express or specific finding by the county court of the population of the county, but the making of orders for the issuance of warrants for the payment of the increased salary, involved an ascertainment of the existence of a population within a given minimum and maximum limit. The defendants, judges of the county court, in auditing and paying the salary of the prosecuting attorney, were in the exercise of their statutory authority, and it cannot be said as a matter of law, under the terms of the Census Act, or under the statute, that

the population of the county was not ascertained, or that as a matter of law it could not have been ascertained by the decennial census of 1920 for the purpose of determining the salary paid. This is said as applicable to the case against all of the defendants herein. * * * * *

The case of Carter County v. Huett is quoted and cited with approval in the Kay case, supra, which was decided December 14, 1939.

The County Clerk's salary was fixed by Section 11811, R. S. Mo. 1929, and provided that the counties should be classified for the purpose of paying fees, upon the population and the population was to be determined by multiplying the vote. This section was repealed by the General Assembly of 1937 and a new section 11811 was enacted. This new section 11811, found at page 441, Laws of Missouri 1937, is as follows:

"The clerks of the county courts of this State and their deputies and assistants shall receive for their services annually, to be paid out of the county treasury in monthly installments at the end of each month by warrant drawn by the county court upon the county treasury, the following sums: (Here follows the classification of counties and the salary brackets.) Provided, that the county court in all counties in this State having a population of 15,000 and less than 40,000 persons may allow the county clerks, in addition to the amount herein specified for deputies' or assistants' hire, a further sum not to exceed \$500.00 per annum, to be determined by the county court of such county. Provided, further, that the county court shall determine that the work required to be done by such clerk

or clerks demands or requires such extra remuneration. It shall be the duty of the clerks of county courts to charge and collect in all cases every fee accruing to their offices by law, except such fees as are chargeable to the county, and such clerk shall, at the end of each month, file with the county court a report of all fees charged and collected during said month stating on what account such fees were charged and collected, together with the names of the persons paying or who are liable for same, which said report shall be verified by the affidavit of such clerk. It shall be the duty of such clerks upon the filing of said report to forthwith pay over to the county treasury all moneys collected by them during the month and required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and every such clerk shall be liable on his official bond for all fees collected and not accounted for by him and paid into the county treasury as herein provided."

The salary of the Circuit Clerks of the various counties was provided for in Section 11786, R. S. Mo. 1929. This section was repealed by the General Assembly in 1933 and a new section 11786 enacted. This new section is found at page 369, Laws of Missouri 1933. In 1937 the General Assembly repealed Section 11786 as enacted by the Legislature of 1933 and enacted a new section 11786, which is found at page 445, Laws of Missouri 1937. This section is as follows:

"The Clerks of the Circuit Courts of this State shall receive for their services annually the following sum:
(Here follows the classification of

counties and the salary bracket.)
Provided, that in any county wherein the Clerk of the Circuit Court is ex-officio Recorder of Deeds, said offices shall be considered as one for the purpose of this Section; Provided, it shall be the duty of the Circuit Clerk, who is ex-officio Recorder of Deeds, to charge and collect for the county in all cases every fee accruing to his office as such Recorder of Deeds and to which he may be entitled under the provisions of Section 11804 or any other statute, such Clerk and ex-officio Recorder shall, at the end of each month, file with the County Clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of such Circuit Clerk and ex-officio Recorder of Deeds, upon the filing of said report, to forthwith pay over to the County Treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the County Clerk, and every such Circuit Clerk and ex-officio Recorder of Deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the County treasury as herein provided; Provided, further, that the Clerks of the Circuit Courts shall be allowed to retain in addition to the sums allowed in this Section, all fees earned by him in cases of change of venue from other counties; Provided, further, that until the expiration of their present term of office, the persons holding the office of Circuit Clerk shall be paid the maximum amount as now provided by law, in the manner provided by this Act."

There is also the question involved as to whether or not the salary should take effect beginning at the first of any year of their term of office or whether

the year can be divided and salaries increased or decreased that year of the years of their term of office. It has always been the attitude of the Supreme Court that statutes in regard to salaries should not retrospectively increase a salary unless the statute specifically states that the salary should be dated or increased retrospectively. The first case cited on that subject was State ex rel. Attorney General v. State Auditor, 36 Mo. 67, l. c. 70, where the court said:

"* * * It is contended that by virtue of the words 'annual salary,' therein used, the increased salary should commence on the first of January preceding, being the beginning of the quarter of that year.

"There is no just or reasonable rule of interpretation which will warrant such a conclusion. By our general law, acts take effect ninety days after their approval, unless a different time be designated in the act itself. The Legislature in this instance fixed the time at which the law should go into force, and it will not be presumed that they meant any other or different time. There is no room left here for construction; there is neither ambiguity nor obscurity in the act. It will always be intended that the law-making power use words in their usual and proper signification; hence courts will not deviate from the common usage of the words, unless it is made clearly to appear that they were intended in a different sense, or there be good and substantial reasons for affixing a different meaning to them. The language employed in the act is clear and explicit, and to make it relate back and cover the previous period, before it took effect, would be to

violate and torture the ordinary meaning of words. Had the Legislature intended that the increased salary should commence from the beginning of the year, they would have said so when fixing the period at which time the act should go into operation. As they did not see fit and proper to do so, there is no warrant for giving it a different meaning than that expressed therein.

"The relator is entitled to salary at the rate of fifteen hundred dollars annually, till the 15th day of February, 1865, and at the rate of three thousand dollars thereafter."

Following the reasoning in the above case, it cannot be said that since the census was taken on April 1, 1940, that an increase of the salary of the prosecuting attorney or circuit clerk should be allowed to act retroactively to April 1, 1940, when at that time the correct amount of the population had not been ascertained or obtained by the Census Department.

In the case of *State v. Linville*, 300 S. W. 1066, par. 4, the court said:

"Section 10938, R. S. 1909, provides for ascertaining the 'annual' salary. Section 11352, R. S. 1919, says that the superintendent shall receive so much money, dependent upon the population of the county, without saying whether it was per annum. From the context it must be presumed that annual salary was meant. '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 salaries, means

not the calendar years, but the years of the incumbent's term, which in the case of relator begins on the 1st day of April each year."

Under the above holding, Judge White, in writing the opinion, declared that the "annual salary" meant the salary for each year of the incumbency and further stated it could not be divided or split up into periods by elections which occur during that year. In other words, when and if an increase is allowed or a decrease is shown the prosecuting attorney, circuit clerk and other officers of the county relying upon the population for their salaries, could not divide the salary as to the decrease or increase into monthly payments of the "annual salary" and could only commence at the first month of his following year in his term of office. The above case does not say that the increase or decrease should go into effect at the first month of the following year as to being affected by the federal census but only applies as to salaries being affected by elections. Also in the above case of State v. Linville, supra, Judge White, in paragraphs 2 and 3 of his opinion, said:

"The increase of salary which a statute permits after an election showing an increase of 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 fixes his salary, to be ascertained at periods as changed by the increase in population. State ex rel. v. Hamilton, 303 Mo. 302, 260 S. W. 466. The salary of an officer, dependent upon the population as ascertained from time to time, would be determined by the law in force at the time of his election, and a law which went into effect later would not affect the matter. Therefore, if the act of 1919 was not in effect when relator was elected, it would not apply to his salary at any period of his term."

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Hon. Bryan A. Williams

(11)

November 20, 1940

In the case of Overstreet v. Boyle County Fiscal Court, 95 S. W. (2d) 584, 264 Ky. 761, the court said:

"The text in 46 C. J. 1019, Section 250, relating to the governing rule in the construction of statutes fixing compensation of officers, says in part: 'Statutes relating to the fees and compensation of public officers must be strictly construed in favor of the government, and such officers are entitled only to what is clearly given by law.' In a different subdivision of that section and on the same page, under the heading 'Compensation Based on Population' of the taxing authority, the text says: 'An "annual salary" based on population as shown by election, must be calculated for the year as a whole.' In note 98 cited to that text is the case of State v. Linville, 318 Mo. 698, 300 S. W. 1066, 1067, in which it was held that under such a measuring statute the year 'cannot be split up into periods by elections (revealing fluctuations in population) which occur during the year, and (the compensation) must be calculated on a year as a whole.' While the exact question we have was not presented or determined in that case the same principle as here involved was determined in accord with the trial court's opinion, and which, for the reasons stated, we approve."

In this case the Supreme Court of Kentucky approved the holding of the Missouri Supreme Court in the case of State v. Linville, 318 Mo. 698, 300 S. W. 1066, the holding in both cases being to the effect that since the prosecuting attorney or any elective officer was paid annually by an annual salary, an increase or decrease could not be made during the year but must only be increased or decreased at the beginning of any year which does not mean

the first of the incumbent's year. In the case of State v. Hamilton, 260 S. W. 466, par. 2, the court said:

"Relator's term began on January 1, 1919, and ended on December 31, 1922. No law was passed between those dates which increased his salary. The whole difficulty, if there be difficulty in the case, arises out of the fact that clerks of circuit courts are not elected at presidential elections, but at what we call the off-year elections, whilst the act of 1915 fixed the method of determining the salary by presidential election dates and data. Were our circuit clerks elected in presidential years, there would not be before us the peculiar and rather difficult question we have in the instant case. This act of 1915 was in effect when relator was elected. Under it, relator's salary was fixed for his whole term, but was not in named dollars and cents for the whole term. The effect of this act of 1915 was to say to relator, 'Your salary shall be determined upon the presidential vote of 1916, until there is another presidential election, at which time your county may be in a lower or a higher class, according to the population indicated by the presidential vote.' 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 elec-

tion) fixed for him a salary. True it was higher, but it was definitely fixed at the date of his election. If the act of 1915 had said that the circuit clerk of Crawford County, elected in 1916, shall receive \$1,600 per year for the first two years, and \$1,950 per year for the last two years of the term there would be no question. Section 8 of article 14 of the Constitution could not be invoked, because the salary would not be either increased or decreased during the term. To my mind the act of 1915 as it now stands is no nearer a violation of section 8 of article 14 of the Constitution, than the supposed law. The lawmakers knew the presidential election years, and with this knowledge classified the counties as to salaries, and provided that such salaries should be determined by the last previous presidential vote. 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 of article 14 of the Constitution does not preclude a recovery by relator. This because his salary was fixed by law before his election, and no law since enacted has changed it, except as we may hereafter note. The cases cited have no application to this state of facts. The exact question has never been ruled before. There is some language in *King v. Texas County*, supra, which might be construed to be in support of this ruling, but the question was not squarely at issue in that case."

In that opinion the court held that where the

salary of an officer was increased or decreased during his term of office by reason of being placed in a different bracket on account of an increase or decrease in the population of the county it was not a violation of Section 8, Article XIV of the Constitution which prohibits the increase of the salary of an elected officer during his term. It also held that 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. In the above case it was very noticeable that the court, in allowing the circuit clerk to take advantage of the raise in population, held that he was entitled to the raise or increase in salary for the last two years and did not apply the increase to any divided parts of his previous term year.

It will be noted that both of these sections classify the various counties for the purpose of payment of salaries on a population basis. This power is given by the Constitution of Missouri, Section 12, Article 9. Neither section contains any direction for ascertaining or computing the population. Formerly in this State there were many special laws concerning the determination of the population for the payment of salaries and fees of these two officials, and a general section, 11808. The Legislature of 1933 repealed all these special laws and the general section 11808 and enacted a new section 11808, which is now in effect and found in Laws of Missouri 1933, page 370, and is as follows:

"The last previous decennial census of the United States shall be the basis for determining the population of any county in this state, for the purpose of 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."

This section definitely fixes which census shall be used in determining the population of the counties for the purpose of paying salaries of the County officers -- the last previous decennial census for the payment of any

salary for any officer for any year. This would fix the salaries of these officers by the 1930 census for the year 1940, as it was the last previous decennial census.

Section 11314 R. S. Mo. 1929 provides for the payment of salary to Prosecuting Attorneys. This section, along with others in Article 2, Chapter 70, was repealed by the Legislature in 1933 and a new section 11314 enacted. This new section is found at page 178, Laws of Missouri 1933, and is as follows:

"The prosecuting attorney shall receive for his services per annum, to be paid out of the County treasury * * the sum of: (Here follows the classification of counties and the salary bracket.) Provided, that until the expiration of the present term of office, the persons holding the office of prosecuting attorney shall receive the same compensation now provided by law. The number of inhabitants of any county, for the purpose of this section, shall be determined by the last decennial census of the United States."

This is a special section applicable to Prosecuting Attorneys and was enacted at the same Session of the Legislature which enacted Section 11808. It is not in conflict with that clause of Section 12, Article 9 of the Constitution which requires that "by a law uniform in its operation" the General Assembly shall provide for and regulate the fees of all county officers, as it applies uniformly to the Prosecuting Attorneys of the various counties. It will be noted that the last sentence of this section says: "The number of inhabitants of any county, for the purpose of this section, shall be determined by the last decennial census of the United States." It is necessary to determine what the Legislature meant when the words "per annum" in the first sentence and "last decennial census" in the last sentence were used.

Section 655 R. S. Mo. 1929 on the subject of

construction of statutes says, in part, as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import; * * * *"

The word "annum" means year, and Webster's New International Dictionary defines "per" as "Through; by means of; through the agency of; by; for; for each". Applying this definition it seems obvious that it was the intention of the Legislature to fix the salaries of Prosecuting Attorneys by or through each year to be paid upon population classification determined by the last decennial census. The word "last" has a number of meanings; included in these are: "one before the present; final; following all the rest". In using the word "last" it must have been the intention of the Legislature to use the census which was final, or following all the rest. Since the census following all the rest at the beginning of the year 1940 was the 1930 census, it is the opinion of the writer that the salary of the Prosecuting Attorney should be based for the entire year of 1940 on the 1930 census.

This position is given strength by the fact that the Census Acts as now in force were in force when the present Section 11314 was passed, and the Legislature was charged with knowledge of its provisions and that its effective date was as of April 1st, 1940, and no provision or direction was made for changing of the classification for paying the salary during the year or upon the announcement or publication of the census reports. Also at the same Session was enacted the County Budget Law, which would have no effect in determining the salaries of officers, but, by Section 3 of this Act, found at page 342,

Laws of Missouri 1933, it is made the express duty of every officer claiming any payment for salary to furnish to the clerk of the county court, on or before the 15th day of January of each year an itemized statement of the estimated amount required for the payment of salaries. In making this estimate an officer could only use the census in effect on that date and this estimate could not be made upon the census which had not yet been taken and the results of which would be a matter of conjecture.

In the recent case of Gile vs. Buchanan County, 142 S. W. (2d) 665, 1. c. 668, is found the following:

"However, our conclusion is that a county's liability for a county officer's salary is incurred not just when each monthly installment thereof is payable, but, insofar as the constitutional provision herein invoked is concerned, the whole amount, due and payable during each year, must be considered from the beginning of the year. This must be true because the annual amount of such salary is fixed by the Legislature and no other officer or officers have authority to change it, either before or after it is due and payable. Nodaway County v. Kidder, 344 Mo. 795, 129 S. W. 2d 857; State ex rel. Rothrum v. Darby, Mo. Sup., 137 S. W. 2d 532. Certainly such annual obligations imposed upon the county by the Legislature would be valid from the first of the year, if within the limits of the constitutional provisions fixing the county's authority to raise revenue during each year to pay them; and no part of any such obligation could become invalid merely because the county court decided to incur other obligations for different purposes during the year. To so hold would amount to recognition of authority in the county court to ignore statutes,

and to say that it could make its own choice as to whether it would follow valid acts of the Legislature or use all of its revenue for different purposes. Therefore, while a part of the obligations incurred during the month of December may have been invalid, under the showing made, we hold that the county had imposed upon it a valid obligation to pay plaintiff the full salary which the Legislature provided should be paid to him for the year 1934; and that its showing is insufficient to prove that such obligation was void because of the constitutional provision invoked."

(The section of the Constitution referred to is Section 12, Article 10.)

While this case is not directly upon the point involved in your question the use of the above language, in a salary case, would add strength to the position that salaries of county officers are determined for the whole year at the beginning of the year and not subject to change by things occurring during the year.

CONCLUSION

The above opinion is in regard to whether or not the fiscal years of an officer's term could be divided and his salary be increased or be decreased before the beginning of his next fiscal year.

It is the opinion of this department that the circuit clerk, prosecuting attorney and other county officers affected by the decrease or increase of the population could only be paid in accordance with said increase or decrease at the beginning of the next fiscal year of his term after the population has been determined by the federal government, and that no increase be allowed or decrease be ordered before the first day of the fiscal year following the year of 1940.

II.

Another question that will arise in the case of decrease or increase of the population of any county is whether or not the office of circuit clerk and recorder of deeds should be combined when the population of the county is shown by the official census to be lower than twenty thousand (20,000).

Section 11534, Laws of 1933, page 361, reads as follows:

"That in the event any person has been elected or may hereafter be elected to the office of recorder of deeds in a county in which the office is a separate office at the time of such election, such office shall remain a separate office for the entire term for which such person has been or may be elected."

The above section is unambiguous and for that reason the Supreme Court has not been called upon to construe that section. Under the section the office of recorder of deeds shall remain a separate office for that entire term for which such person has been or may be elected.

CONCLUSION

In view of this section it is the opinion of this department that since the office of recorder of deeds shall remain a separate office for the entire term for which such person has been or may be elected, then it is not affected by the decennial census of 1940 and by reason of this section the office of the circuit clerk shall remain separate and apart from the office of the recorder of deeds.

Respectfully submitted

APPROVED:

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