

OFFICERS:
PROBATE JUDGE OF
JASPER COUNTY:

Where duties are performed by several persons during a year each person is entitled to proportionate share of the annual compensation.

February 19, 1943



Mr. W. A. Holloway, Chief Clerk
State Auditor's Office
State Capitol Building
Jefferson City, Missouri

Dear Mr. Holloway:

Under date of February 12, 1943, you wrote this office requesting an opinion as follows:

"Judge Adolph McGee, Probate Judge of Jasper County, died March 18, 1942, and a special judge was appointed by the members of the bar, who served as Judge of the Probate Court until the vacancy was filled by the appointment of Judge W. W. Burden, who was appointed by the Governor.

"We request the opinion of your office as to whether or not the fees collected during the periods in which they were or will be in office, should be limited only to the fees which the probate judge is allowed to retain during any whole year in office, which would be \$4500.00 or should the amount of fees each is allowed to retain be figured on a ratio of the compensation he is allowed to retain is to the time he served, as \$4500.00 is to one year."

The compensation of the Judge of the Probate Court of Jasper County is fixed by Section 13404, Article 2, Chapter 99, R. S. Mo., 1939. This section fixes a

schedule of fees that may be charged by judges of probate courts and provides in part as follows:

" * * * * Provided further, that whenever, after deducting all reasonable and necessary expenses for clerk hire, the amount of fees collected in any one calendar year by or for any one probate judge in any county in this state, during his term of office, and irrespective of the date of accrual of such fees, shall exceed a sum equal to the annual compensation in the aggregate from all sources and for all duties by virtue of the office, except the \$1,200.00 allowed for expenses when holding circuit court in other counties, provided by law for a judge of the circuit court having jurisdiction in such county, then it shall be the duty of such probate judge to pay such excess less ten per cent thereof, within thirty days after the expiration of such year, into the treasury of the county in which such probate judge holds office, for the benefit of the school fund of such county; and whenever at any time after the expiration of the term of office of any probate judge the amount of fees collected by or for him, irrespective of the date of accrual, shall exceed the sum equal to the aforesaid annual compensation provided for a judge of the circuit court having jurisdiction in such county, it shall be the duty of such probate judge to pay such excess, and all fees thereafter collected by or for him on account of fees accrued to him as such probate judge less ten per cent thereof, within thirty days from the time of collection, into the county treasury for the benefit of the school fund. *

* * * * *

The Supreme Court en banc had occasion to construe this section and apply it to the Probate Judge of Jasper County in the case of State ex rel. Jasper County v. Gass, 317 Mo. 744, 296 S. W. 431. From this case at l.c. 750, 751, Missouri citation, the following quotation is taken:

"The lawmakers of 1921 knew the Supreme Court had, on the 13th of March, 1920, in the case of State ex rel. Buchanan County v. Imel, 280 Mo. 554, 219 S. W. 634, limited the compensation of the Probate Judge of Buchanan County to the \$2000 allowed to circuit judges as compensation for judicial services. They also knew, that on the 1st of October, 1920, the Supreme Court, in the case of Macon County v. Williams, 284 Mo. 447, 224 S. W. 748, held the \$1200 allowed to the circuit judges for expenses could not be considered by the Probate Judge of Macon County in determining the amount of his compensation during the year. They were not satisfied with the salary allowed probate judges, hence the amendment to said Section 10991. The circuit judges of Jasper County have only two sources of compensation: compensation for judicial services, and compensation for services as jury commissioner. The statute as amended provides that in determining the salary of the probate judges, the compensation of the circuit judges from all sources must be considered. If we follow the statute, we must hold that the words 'from all sources' include the compensation of circuit judges as jury commissioners. It follows, and we hold, that from the taking effect of Section 10981, Revised Statutes 1919, as amended by the Laws of 1921, page 604, the compensation of the circuit judges of Jasper County and the amount allowed

to them for expenses are as follows: Compensation for judicial services, \$2,000; compensation for services as jury commissioner, \$2500; for expenses, \$1200 making a total of \$5700 per annum. Of these items the Probate Judge of Jasper County was entitled to consider the \$2,000 for judicial services and the \$2500 for services as jury commissioner in determining the amount he was entitled to retain out of the fees collected by him during the year for his salary."

This definitely fixed the compensation of the Probate Judge of Jasper County at four thousand five hundred dollars (\$4500.00) per annum plus ten per cent (10%) of all excess above the amount turned in to the county treasury.

Whenever a special judge is elected by the members of the bar to transact the business of the probate court in accordance with Sections 2458-2459, Article 11, Chapter 10, R. S. Mo., 1939, compensation allowed such special judge is fixed by Section 2461 of the same article and chapter:

"The attorney thus elected shall, during the period he shall act, have power to solemnize marriages, to administer oaths and affirmations, to take acknowledgments to deeds and all of the other powers and be liable to all of the responsibilities of the judge of probate, and shall receive for his services the same fees as the judge of probate is entitled to receive for similar services."

A vacancy occurring in the office of probate

judge is filled by appointment by the Governor. Section 2439, Article 11, Chapter 10, R. S. Mo., 1939:

"When a vacancy shall occur in the office of judge of probate, it shall be the duty of the clerk of the circuit court to certify the fact to the governor, who shall fill such vacancy by appointing some eligible person to said office, who, when qualified, shall continue in office until the next general election, when a successor shall be elected for the unexpired term."

An appointment made to fill a vacancy fills the vacancy in the term. State ex rel. Rosenthal v. Smiley, 304 Mo. 549, loc. cit. 558:

"When the duration of the term is fixed, and also the beginning or ending, or both, a vacancy, if it occurs, is in the term of office as distinct from being in the office itself, and an appointment to fill such vacancy can only be for the unexpired portion. * * * *"

The Constitution of Missouri, Section 8, Article XIV, prohibits increasing the compensation of any officer during his term of office:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

In the case of State ex rel. Emmons v. Farmer, 271 Mo. 306, at l. c. 314, it was held that this section of the Constitution applied to the term of office.

By this section of the Constitution and Section 13404 R. S. Mo., 1939, supra, the compensation for the Probate Judge of Jasper County was fixed for the entire term for which Judge McGee was elected. Any special judge elected in accordance with Section 2458, supra, would be entitled to receive during the time he served the same compensation as the regular judge received. The special judge would be entitled to charge the same fees for services as would the regular judge and would be subject to the same limitations.

The appointee of the Governor, appointed to fill the vacancy in the term, would succeed to all the rights and liabilities and be subject to all the limitations which were on the person whose term he was filling out.

The compensation for the Probate Judge of Jasper County for the term of office under consideration being fixed at \$4500.00 per annum plus ten per cent of the excess fees turned in, the regularly elected judge, the special judge and the judge appointed to fill the vacancy could altogether receive only that amount of compensation as a maximum. If this were not true it might be possible that the total compensation for the year paid to the various persons who performed the duties of the office would exceed the amount fixed by statute for the year, which is prohibited by the Constitution. Section 8, Article XIV, supra.

In making this statement it is recognized the

language of the Constitution is "The compensation * * * * of no State, county * * * * officer shall be increased during his term of office; * * * * ", and from this language it might be argued as the original incumbent had died the limitation is personal and would not apply to the person or persons filling the vacancy in the term.

Under date of February 16, 1942, this office furnished you an opinion on the question of whether an appointee to fill a vacancy in the term of office of a county treasurer could receive increased compensation provided for by statute after the commencement of the term of office of the officer elected and whose term was being filled out by an appointee. A portion of what was said in that opinion relates to an appointee receiving an increase of compensation while filling out a vacancy in a term would apply equally as well to any other situation whether an attempt might be made to pay a greater sum as compensation for one year of the term as was authorized by statute and a portion of that opinion is here copied:

"In the California case of Larew v. Newman, 23 Pac. 227, when a similar question was presented to the Supreme Court of California, the court ruled against allowing the person filling the vacancy to receive the increase in compensation. The following quotation is from this case:

"* * * * * Afterwards, and before he had resigned, the general county government act (approved March 14, 1883) went into effect, by which the salary of said office was fixed at \$650 per annum. This act enacted that its provisions for salaries "shall not affect the present incumbents;" and also

that a vacancy in an office should be filled by appointment by the supervisors, "the appointee to hold office for the unexpired term." Section 9, art. 11, of the state constitution, provides that "the compensation of any county * * * officer shall not be increased after his election, or during his term of office." Section 1004 of the Political Code provides that "any person elected or appointed to fill a vacancy, after filing his official oath and bond, possesses all the rights and powers, and is subject to all the liabilities, duties, and obligations, of the officer whose vacancy he fills." We think that under these constitutional and statutory provisions, plaintiff merely stood in the shoes of Egenhoff, and gained no additional rights. The increased salary did not commence until after the expiration of the term for which Egenhoff had been elected, and that result could not be evaded either by Egenhoff resigning and procuring himself to be appointed, or by his resigning and allowing some other person to be appointed. The judgment is affirmed.'

"The case of Storke v. Goux, 62 Pac. 68, also a California case, in which it was sought to have the case of Larew v. Newman, supra, overruled, followed and cited with approval the Larew case. The case is also cited with approval in the case of Wilson v. Shaw, 188 N. W. 743, decided by the Supreme Court of Iowa

in 1922, and in the case of State ex. rel. Hovey v. Clausen, 251 Pac. 772, decided by the Supreme Court of Washington in 1922. In both of these cases the person filling the vacancy was denied the increased compensation. The Kentucky case of Bosworth v. Ellison, 147 S. W. 400, 148 Ky. 708, is also a case which is similar, and in which the case of Larew v. Newman, supra, is cited.

"The most recent case we find citing and following the Larew case, supra, is the case of Clark v. Frohmiller, 88 Pac. (2d) 542, decided by the Supreme Court of Arizona in March of 1939. In none of these cases was the constitutional provision identical with ours.

"The leading case allowing the person filling the vacancy to receive an increase in compensation which could not have been received by the person whose term was being filled, is the case of State v. Frear, 120 N. W. 216, 138 Wis. 536, 16 Ann. Cas. 1019. This case recognizes the rule announced in the case of Larew v. Newman, supra, as the general rule, but allowed the person filling the vacancy the increased compensation. The ruling was largely based on administrative interpretation acquiesced for over fifty years. This case is followed in the Oklahoma case of Carter v. State, 186 Pac. 464, 74 Okla. 31. The Montana case of State ex rel. Jackson v. Porter, 188 Pac. 375, allowed a person filling a vacancy in the office of district judge increased compensation which the person whose term was being filled could not have received. This case was decided upon the ground that constitutional provisions

prohibiting increase or decrease of compensation during a term of office, were placed in constitutions to prevent improper influence by the legislative branch of the government upon the executive and judicial branches of the government. The authority cited is 1 Kent's Commentaries, p. 393; The Federalist No. 79; 1 Scott's Federalist and Other Constitutional Papers, p. 431. After allowing the person filling the vacancy to receive the additional compensation, the court mentioned all of the above mentioned cases and a few others without comment and the decision was not based on any of them.

"In the early Tennessee case of *Gaines v. Horrigan*, 4 Lea Tenn. 608, a similar result was achieved. The constitutional provision there construed used the word 'time' instead of 'term', and the decision is based on the use of this word 'time.'

"The cases mentioned will serve to illustrate the lack of harmony in the decisions on similar questions. The cases allowing the person filling the vacancy to receive the increased compensation, while uniform in the result achieved, namely, permitting some person to have an increase in compensation, are not uniform in their reasoning or the authority upon which the decisions are based. The cases refusing the increase in compensation are more nearly uniform in the reasoning and all follow the case of *Larew v. Newman*, supra. As pointed out heretofore, the case of *State v. Frear*, 120 N. W. 216, 138 Wis. 536, recognizes it to be the general rule that the person filling the vacancy is not entitled to receive the increase in compensation, and indicates the general rule might have been followed, had it not been for the administrative interpretation in that state.

"The provision of the California constitution construed in the case of Larew v. Newman, supra, provided that the compensation of any county officer shall not be increased after his election, or during his term of office, and the statute relating to vacancies provided the person filling the vacancy should possess all the rights and powers, and be subject to all the liabilities, duties and obligations, of the officer whose vacancy he fills. The Missouri Constitution, Sec. 8, Art. 14, supra, provides that the compensation of no state, county or municipal officer shall be increased during his term of office."

The compensation of the probate judge is fixed on an annual basis. There is no provision for dividing it up into quarterly, monthly or weekly payments. Under this situation where several persons act in the office during one year and all are entitled to be paid on the same basis out of the amount that may be retained as compensation. The conclusion is obvious.

CONCLUSION

Each person performing the duties of the probate judge would be entitled to receive a proportionate share of the total compensation. The share of the compensation to be received would be on the ratio of the time he served to one year. By way of illustration, if one man served one month, another man three months and a third man eight months, the person serving

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one month would be entitled to one-twelfth of the total compensation. The person serving three months would be entitled to three-twelfths of the total compensation and the person serving eight months to eight-twelfths of the total compensation.

Respectfully submitted,

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APPROVED:

ROY McKITTRICK
Attorney-General

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