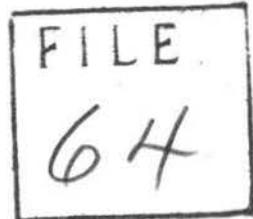


ROADS AND BRIDGES: Sec. 8668, R. S. Mo. 1939, is not applicable to counties having a population of 20,000 and not more than 50,000 inhabitants.

September 21, 1944



9/26

Mr. S. A. Morrison
County Surveyor and
Ex Officio Highway Engineer
Howell County
West Plains, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion, which reads:

"Section 8668 provides a way to dispense with the office of County Highway Engineer.

"A proviso in Section 8660 says that after the first of January 1941 in all counties in the state which contain or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio highway engineer, and his salary as county highway engineer not be less than \$1200.00 per annum nor more than \$2000.00 per annum to be determined by the County Court.

"In your opinion can the county surveyor under this proviso be deprived of the office of county engineer by the procedure set out in Section 8668? An opinion from your office will be greatly appreciated."

Article 9, Chapter 46, R. S. Missouri, 1939, is the Highway Engineer Law. It provides that the county court may appoint a county highway engineer in any county and further prescribes his qualifications, salary, duties, etc.

Section 8660, R. S. Missouri, 1939, authorizes the county court, in their discretion, to appoint the county surveyor as county highway engineer, and if he is appointed to such office his salary shall be governed by Section 8657, R. S. Missouri, 1939, which authorizes an additional amount of money in lieu of all fees except those which he receives as county surveyor.

Section 8660, supra, reads:

"The county court of the several counties in this state may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, as provided in section 8657, in lieu of all fees, except such fees as are allowed by law for his services as county surveyor: Provided, that in counties in which the provisions of this article with reference to the appointment of a county highway engineer have not been suspended as hereinafter provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court: Provided, however, that in all counties in this state which contain or which may hereafter contain more than fifty thousand inhabitants, and whose taxable wealth exceeds or may hereafter exceed the sum of forty-five million dollars, and which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than 100,000 inhabitants by the last decennial census, the county surveyor shall be ex officio county highway engineer, and his salary as surveyor

and ex officio county highway engineer shall be not less than three thousand dollars and not more than five thousand dollars, as may be fixed by the county court, and all fees collected in such counties by the surveyor, for his services as surveyor, shall be paid into the county treasury, to be placed to the credit of the county revenue fund: Provided, also, that in the counties last above mentioned the county surveyor, as surveyor and ex officio county highway engineer, may appoint, subject to the approval of the county court, such assistants as may be necessary, and no assistant shall receive more than twenty-one hundred dollars per annum: Provided further, that in all counties in this state which contain or may hereafter contain two hundred thousand and less than four hundred thousand inhabitants, and which county or counties contain one hundred and fifty miles or more of macadamized roads, outside of municipal corporations, and which county or counties pay to the county surveyor a salary of three thousand dollars or more annually, the county surveyor of such county or counties shall be ex officio county highway engineer: Provided further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

Section 8657, supra, reads:

"The county highway engineer shall receive such compensation as may be fixed by order of the county court of his respective county: Provided, his salary, shall not be less than

three hundred dollars nor more than two thousand dollars per annum: Provided further, that in all counties in this state which contain or may hereafter contain more than fifty thousand inhabitants, and whose taxable wealth exceeds, or may hereafter exceed, the sum of forty-five million dollars, and which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than one hundred thousand inhabitants by last decennial census, the county surveyor and ex officio highway engineer shall receive a salary of not less than three thousand dollars nor more than five thousand dollars, as may be fixed by the county court."

From a reading of Section 3660, supra, you will see that the 60th General Assembly amended that statute by adding thereto the last proviso effective January 1, 1941 (see Laws 1939, p. 674). This proviso is a command that in those counties between 20,000 and 50,000 inhabitants the county surveyor shall be ex officio county highway engineer, and for such services his salary shall not be less than \$1200.00 per annum or more than \$2000.00 per annum, to be determined by the county court.

In view of the foregoing, undoubtedly the Legislature intended that the county surveyor and ex officio county highway engineer in counties of that size shall receive, in addition to his fees as provided by law for services as county surveyor, a salary of not less than \$1200.00 or more than \$2000.00 per annum, as determined by the county court.

In *Parks v. State Social Security Commission*, 160 S. W. (2d) 823, l. c. 825, the court in holding that one of the fundamental rules of statutory construction is to determine the legislative intent from a general consideration of the whole act, and the intent as deduced from the whole will prevail over that of a particular part considered separately, said:

" * * * It is well established that 'in construing a statute, the legislative in-

tention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applied, and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately. * * *

It is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof. To this end it is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible.
* * * "

A careful research fails to find any case wherein the court has specifically passed upon your question.

In State v. Johnson, 173 S. W. (2d) 411, the county court, the respondent therein, held the last proviso hereinabove referred to in Section 8660, supra, was unconstitutional, and furthermore the county surveyor, as ex officio highway engineer, had neglected to perform the duties of county highway engineer, and they refused to permit him to perform said functions thereafter as ex officio county highway engineer, and also refused to pay him for any such services that he was willing to render. The ex officio county highway engineer filed a petition for a writ of mandamus in the Supreme Court to force the county court to reinstate him to such office and pay him a salary of \$125.00 per month from and after January 1, 1943. The Supreme Court, in making the writ permanent, held said proviso to be constitutional, and further held that the county court was without power to separate or abolish the two offices of county surveyor and ex officio county highway engineer. Regarding the removal of said officer for dereliction of duties, even though Section 8658, R. S. Mo. 1939, specifically provides for removal by the county court of the county highway engineer only, and not ex officio county highway engineer, for dereliction of duties, the Supreme Court held that such section has no application to counties wherein the county surveyor is made ex officio county highway engineer, and that if that could be done it could only be done under Article 3, Chapter 83, R. S. Mo. 1939, which is the general procedure for removal

of county officers. In so holding the court said, l. c. 414:

"We hold that the last proviso to Section 8660 is constitutional and valid, that in counties of the class to which St. Francois county belongs the county surveyor is ex officio county highway engineer and the county court is without power to separate the two offices or to abolish either of them. Under the proviso the county court does have discretion to fix the annual salary of the county highway engineer at from \$1,200 to \$2,000. As that discretion was not expressly exercised in this case, relator is entitled to the minimum salary. State ex rel. v. Bulger, 289 Mo. 441, 233 S. W. 486.

"Respondents argue that, under Section 8658, the county court had jurisdiction to remove relator for dereliction of duty. What we have already said disposes of that contention. Section 8658 has no application to counties wherein the county surveyor is made ex officio highway engineer. In such counties the county court has no jurisdiction to remove the highway engineer for any cause. The jurisdiction for that purpose is lodged in the Circuit Court by Article 3 of Chapter 83, Revised Statutes of Missouri 1939, Mo. R. S. A. Secs. 12828-12835, vol. 24, pp. 7 to 16. Even then the proceeding would be against the officer, not as 'county highway engineer,' but as 'county surveyor and ex officio county highway engineer.'"

Section 8668, R. S. Missouri, 1939, prescribes the procedure for suspending the provisions of said Article 9, Chapter 46, and reads:

"Whenever a petition, signed by at least ten per cent of the taxpaying citizens and voters representing at least two-thirds of

the townships of any county in this state, shall be presented to the county court thereof asking that a proposition be submitted to the qualified voters of the county, to determine whether or not the provisions of this article shall continue to apply to such county, the court, after due consideration, may order that a proposition for the approval or rejection of the provisions of this article be submitted to the qualified voters of the county at any general election held for the purpose of electing county officers, or upon a petition, signed by at least fifteen per cent of the taxpaying citizens and the voters representing at least two-thirds of the townships of any county in this state asking that such proposition be submitted, at a special election, the county court shall call the special election for the submission of such proposition within ninety days from the filing of such petition: Provided, such special election shall not be held within ninety days of any general election. The county court shall give notice of such election by publishing the same in some newspaper published in the county. Such notice shall be published for at least two consecutive weeks, the last insertion to be within ten days next before such election, and such other notice may be given as the court may deem proper. The proposition so submitted shall be printed on the ballots in the following form: 'For county highway engineer law,' 'Against county highway engineer law,' with the direction 'Mark out the clause you do not favor.' If a majority of those voting at such election upon the proposition vote for the county highway engineer law, then this article shall remain in full force and effect in such county, but if a majority of those voting at such election upon the proposition vote against the county highway engineer law, then this article and the provisions of the law relating to the appointment and duties of a county highway engineer shall not be enforced in such county."

Section 8669, R. S. Missouri, 1939, further provides that if a majority of the qualified voters at an election provided for in Section 8668, supra, vote against the county highway engineer law, the county surveyor shall be ex officio county highway engineer, and prescribes what his duties and salary shall be thereafter, which, to say the least, is indicative to the writer that under any circumstances the county surveyor will be ex officio highway engineer, even though the majority of the vote is against the county highway engineer law. About the only difference is that his salary as such ex officio county highway engineer is changed. However, in view of *State v. Johnson*, supra, we seriously doubt if the provisions of Sections 8668 and 8669, supra, are applicable to counties having 20,000 and not more than 50,000 inhabitants, for the reason the county highway engineer law did not apply when it came to removing him for dereliction of duty, but applied only to the appointment of a county highway engineer, and not as ex officio county highway engineer, and, further, the last proviso in Section 8660, supra, by the use of the word "shall" makes it mandatory that the county surveyor in counties having 20,000 and not more than 50,000 inhabitants shall also be ex officio county highway engineer, and for the further reason that said amendment to Section 8660, whereby the county surveyor shall be ex officio county highway engineer, is a later enactment than Sections 8668 and 8669, supra.

Usually the use of the word "shall" indicates a mandate. (See *State ex rel. Stevens v. Wurdeman*, 246 S. W. 189, 295 Mo. 566; *Ex parte Brown*, 297 S. W. 445.)

It has been frequently announced by the courts that in case of an irreconcilable conflict in statutes, the latter enactment will prevail. As stated in *State ex rel. v. Gideon*, 273 Mo. 79, l. c. 87:

"The law is well settled that where there is a irreconcilable conflict between two different parts of the same act, as a rule the last in order of position will control unless there is some special reason for holding to the contrary, which does not exist in this case. The authorities so holding are numerous. * * *"

In *Spurlock v. Wallace et al.*, 204 Mo. App. 674, the court in holding that the county court may order warrants drawn to road overseers without first having received the approval of the county surveyor or ex officio county highway engineer, where the county voted not to have a county highway engineer and abolish such office, said, l. c. 678:

"If the contention made by appellant should be upheld, then we must necessarily hold that to vote under section 10571, and to thereunder abolish the highway engineer act, meant simply a change of the manner and amount of compensation to be paid to the party acting as highway engineer, as the appellant is contending that he is duty bound to perform exactly the same service that the highway engineer would have performed even though the people have voted out this law. We cannot lend sanction to this narrow construction, as it would appear that the purpose of sections 10571 and 10572, Revised Statutes 1909, was to permit the people of a county to abolish the office of highway engineer yet to leave it possible for the surveyor to perform the duties that the highway engineer would have performed had the law not been voted out, provided he acted under the orders and direction of the county court. The general intent of section 10571 was to permit the people of a county to vote out a highway engineer and to abolish the duties of such engineer, and that more was intended by said section than to merely give them the right to change the form and amount of compensation."

This indicates that the court did not agree with the appellant that a vote under Section 10571 (which is practically the same as Section 8668, supra) to abolish the highway engineer meant simply a change in manner and amount of compensation to be paid the party acting as county highway engineer, but that Sections 10571 and 10572 (which are practically the same as Sections 8668 and 8669, supra) were enacted to permit a county to abolish the office of county

highway engineer and let the county surveyor perform said duties of said county highway engineer, and also to perform such service as ordered by the county court.

Apparently, Section 8660, as amended by the 60th General Assembly, and Sections 8668 and 8669, R. S. Missouri, 1939, are irreconcilable, but even if these statutory provisions could be harmoniously construed so as to give all parts thereof some reasonable construction, under Section 8669, supra, the county surveyor would become ex officio county highway engineer, with a salary as provided by Section 8669, supra, in addition to those fees he is entitled to receive as county surveyor. However, we are of the opinion that since these provisions cannot all be reconciled, and furthermore that the amendment to Section 8660, supra, apparently was intended to be an exception which should not be affected by Sections 8668 and 8669, supra, and also being the latest statutory enactment, it must prevail over all other provisions.

CONCLUSION

Therefore, we are of the opinion that Sections 8668 and 8669, R. S. Missouri, 1939, do not apply to the office of county surveyor and ex officio county highway engineer in counties having 20,000 inhabitants and not more than 50,000 inhabitants, as provided in the last proviso of Section 8660, R. S. Missouri, 1939; that the county surveyor in such counties shall also be ex officio county highway engineer and be entitled to the salary determined by the county court for his services as ex officio county highway engineer, as provided in Section 8660, supra.

Respectfully submitted

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Assistant Attorney General

APPROVED:

VANE C. THURLO
Acting Attorney General

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