

SALARY:
FIRST DEPUTY:
CIRCUIT CLERK AND RECORDER:
FOURTH CLASS COUNTY:

An employee who has been classified as a first deputy to the circuit clerk and recorder under Section 483.380, RSMo, C. S. 1957, in a fourth class county whose population brings it within the purview of subsection 2, Section 483.382, cannot by agreement or otherwise be paid less than the amount set forth in subsection 2, supra.

May 23, 1960

Honorable J. Allen Gibson
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Mr. Gibson:

Your opinion request of May 2, 1960, reads:

"In accordance with Section 483.380 the Circuit Court has appointed a first deputy to the Circuit Clerk and Recorder. It has been agreed between the judge, clerk and deputy that she is to work on a part time basis at a specified sum per hour, which amount is not to exceed the amount stated in Section 483.382, sub-section two.

"Is this arrangement permissible under above Sections or could the county be held liable to pay the full salary for such deputy as specified in the Statutes?

"This deputy is now working under above arrangement and the earliest possible reply will be greatly appreciated."

Section 483.380, RSMo, C. S. 1957, to which you refer reads:

"1. The circuit clerk and recorder in counties of the fourth class may appoint and classify at least one and not more than three deputies and assistants except that the number of such deputies and assistants, in excess of one, shall be determined by the judge of the circuit court, as the judge shall deem necessary for the prompt and proper discharge of the duties of his office. The judge of the circuit court, in his order designating the number of deputies and assistants to be appointed by the circuit clerk and recorder, shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered on record and a certified copy thereof shall be filed in the office of the county clerk. The circuit

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clerk and recorder may, at any time, discharge any deputy or assistant and may regulate the time of his employment and the circuit court, for good cause, may at any time modify or rescind its order permitting an appointment to be made.

"2. The classification of deputies and assistants provided for in this section is as follows: Chief deputy, first deputy and second deputy; except that there shall not be more than one deputy or assistant in any one classification at any one time."

Section 483.382, numbered paragraph 2 reads:

"In counties having a population of seven thousand five hundred and less than ten thousand, the chief deputy shall receive the sum of one thousand nine hundred twenty dollars; the first deputy shall receive the sum of one thousand seven hundred forty dollars; the second deputy shall receive the sum of one thousand five hundred sixty dollars." (Underscoring ours.)

We note from the 1950 census that Stone County falls within the population bracket set forth in subsection 2 quoted above.

It will be noted that Section 483.380, supra, empowers the circuit clerk and recorder to appoint and classify at least one and not more than three deputies, but that the number of such deputies in excess of one shall be determined by the judge of the circuit court, and that the judge of the circuit court shall designate the period of time of employment of deputies and assistants. Also that the circuit clerk and recorder may at any time discharge any deputy or assistant. It will be noted that nowhere in this section is there any grant of power to the circuit judge or the circuit clerk and recorder with regard to the compensation of deputies and assistants. We believe this to be of some significance, especially in view of the history of Section 483.380, supra. This section, when adopted in 1945, provided that the judge of the circuit court, in his order permitting the circuit clerk and recorder to appoint deputies or assistants, "shall fix the compensation of such deputies or assistants." This section was amended in 1957, and as amended, omits that portion of the old section which gives the circuit judge power to fix the compensation of deputies or assistants. We cannot conclude that this omission was unintentional or without meaning or purpose.

The issue in this case would appear to be whether a county officer, specifically a circuit clerk and recorder in a fourth class county having a population of 7,500 and less than 10,000,

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may pay an employee classified by him as a "first deputy," less than the sum of \$1,740, the amount of pay for such first deputy set forth in the statute quoted above.

In regard to this matter we first direct attention to the case of Powell v. Buchanan County, 155 SW2d 172. In that case an action was filed to recover from Buchanan County a balance claimed to be due plaintiff as salary as chief deputy to the county highway engineer. The defense made to this claim was that the county court had not authorized the appointment of the plaintiff and that no record of such appointment had ever been entered on record. Plaintiff prevailed in the lower court and defendant appealed.

The court found the facts to be that the plaintiff had been regularly appointed; that the amount paid to him was less than the amount fixed by statute, and that plaintiff was entitled to be paid the amount fixed by statute. The judgment was affirmed. The court set forth the statute upon which the claim of the plaintiff was based, which was Section 13488, RSMo 1939, which section reads:

"The recorder of deeds, collector or revenue, clerk of the circuit and criminal courts, clerk of the county court, county highway engineer and county assessor in any such county shall each be entitled to one chief deputy, which chief deputy shall be appointed by said official and be paid a salary of nineteen hundred and twenty dollars per year, to be paid in the same manner as the officers."

At l.c. 175 [1, 2] the court held:

"* * *In the Whalen case, this court construed these statutes together to avoid repugnancy, holding that sections 'referring to deputies and assistants' should be construed as meaning those other than 'Chief Deputy'; and that the officers designated in Section 13488, were each authorized 'to appoint a "chief deputy" at salary of \$1,920 per year, leaving * * * nothing for the county court to do but pay the salary fixed by statute.'"

It is true that the main issue in this case was whether or not the plaintiff had been regularly appointed, but we do believe that the holding of the court set forth by us above is persuasive in the instant situation.

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We next direct attention to the case of Coleman v. Jackson County, 160 SW2d 691. The facts in that case are set forth in the opinion of the court as follows (l.c. 693):

"The respondent brought the present action against the appellant Jackson County, Missouri, upon claims which had been assigned to him by 30 different individuals, hereinafter referred to as the assignors. Each of the assignors had acted in the capacity of a deputy or assistant to the Clerk of the Circuit Court of Jackson County at some time during the period from March 1, 1935, to December 31, 1939. The assigned claims are for salaries alleged to be due to the assignors for such services in excess of the amounts actually paid them by the county. The petition originally included claims for amounts falling due from 1931 to 1935, but the jury below found against the plaintiff on such items and the claims for our consideration may therefore be limited to the period from 1935 to 1939. On 13 of the 30 counts in the petition the court directed a verdict for the plaintiff (on one of the 13 the directed verdict was as to a portion of the claim only). The remaining 17 counts were submitted to the jury under instructions which required them to return a verdict for the plaintiff if they should find from the evidence that the assignors named therein were duly appointed and acting deputy clerks within the period under consideration. Upon these counts the verdict was for the plaintiff. Other facts necessary to a decision will be stated in the course of the opinion."

The court stated the law to be (l.c. 693 [3]):

"It is the contention of the respondent that the undisputed documentary evidence in this case entitled him to a directed verdict on the counts mentioned. The claims of the various assignors are based upon the alleged fact that they were duly appointed deputy clerks and that they were paid a salary less than that provided for in Section 13466, RSMo 1939, Mo. St. Ann. §11834, p. 7040, which section, they contend, governs the amount of their compensation. Each of the assignors involved in the counts we are now considering was shown to have been duly appointed as a deputy by the elected circuit clerk. The written appointments of these assignors were introduced in evidence taken from the files of the court. Plaintiff also introduced the records of the Circuit Court of Jackson County, en banc,

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showing that that court duly approved the above mentioned appointments. Plaintiff then introduced in evidence the county pay rolls, which are records approved by the county court and kept in the proper county offices, showing the names of these various assignors on such approved pay rolls and showing the actual amounts paid to them, which in each instance was less than the statutory rate. If this documentary evidence as a matter of law showed the due appointment of the assignors and if as a matter of law the assignors were entitled to pay in accordance with the statute schedule, then the plaintiff was properly granted peremptory instructions on the counts in question."

The court found that the statute setting salaries which was invoked did not apply, and for other reasons set aside the judgment. In this case, as in the preceeding one, the issue with which we are here directly concerned was only indirectly involved. But this case, as we believe to be true of the preceeding case, is persuasive of a decision of the issue in the instant case, inasmuch as the court held that the salary fixed by statute was determinative.

We would next call attention to the case of Reed v. Jackson County, 142 SW2d 862. In this case one Reed was appointed a deputy assessor of Jackson County. The pay received by Reed and other of his fellow deputies of whom he was assignee was fixed by statute (Section 11.834, RSMo 1949) at \$2,100 per year. Through a contrivance of shuffling employee classifications, Reed actually was paid less than the aforesaid statute fixed the pay of a person occupying the position which Reed did occupy. A jury was waived, the court found for the defendant, the case was appealed and reversed with directions to enter judgment for plaintiff. In that case the Missouri Supreme Court stated (l.c. 864):

"The authorities on the questions involved in the present cause were reviewed at length in Rothrum v. Barby et al., Mo.Sup., 137 SW2d 532, not yet reported [in State Reports], and there is no occasion to go over the field again. That case was in mandamus to compel the necessary action to pay Rothrum an alleged balance due on his salary as a motor driver of the fire fighting division of the fire department of Kansas City. The trial court found against him and he appealed. The plan followed in the Rothrum case was to deduct from the monthly salary, as fixed by ordinance, for leaves of absence that Rothrum did not take.

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Each month, that the deduction was made, Rothrum signed a printed application for a leave of absence without pay, and the deduction corresponded in amount with the purported absent period. The reason for the deductions was the same as in the present case. In that case the question for decision is stated thus: 'The real question is validity of an agreement, for deductions from pay fixed by ordinance (without any change by ordinance), made between executive officers (the City Manager and department directors) and the other appointed city officers or employees; considering such an agreement either to be implied from the terms of the leave of absence agreements or from acceptance of pay as shown in the payrolls or as an oral contract. Appellant [Rothrum] contends that such an agreement was void; that to withhold and refuse to pay part of his salary fixed by ordinance was unlawful and arbitrary; and that he was thereby deprived of his property without due process of law, in violation of Sec. 30, Art. II of the Constitution of Missouri, Mo.St. Ann., and the Fourteenth Amendment of the Constitution of the United States.'

There seems to be a difference of opinion among the courts of the land on the question in the Rothrum case and in the present case, and of this we said in the Rothrum case: 'The majority rule is that such an agreement is void, on grounds of public policy. For cases see 70 A.L.R. 975 note; 118 A.L.R. 1458 note; see also Orthwein v. St. Louis, 265 Mo. 556, 178 SW 87 and cases cited; 46 C.J. 1027, sec. 275; 43 C.J. 702, sec. 1173; 19 R.C.L. 920, sec. 200; 22 R.C.L. 537-541; Sec. 234-239; 2 McQuillin, Municipal Corporations [2d Ed.] 330, sec. 542; Throop's Public Officers, secs. 52 and 456; Mechem on Public Officers, sec. 377. Cases showing the minority view, upon which respondents rely, will also be found in these A.L.R. notes.'

It is further said in the Rothrum case that 'an even more vital ground is that public office, and compensation therefor, is not and must not become a matter of contract. Mechem on Public Officers, secs. 463 and 855. Public offices and positions belong to the people and not to officers upon whom they confer appointive

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power. 22 R.C.L. 377-379, secs. 9-11. The qualifications, tenure, and compensation thereof must be determined by the people or the people will lose control of their government. This must be done by the representatives the people have authorized to act for them, unless the people themselves have determined these matters by writing them into the Constitution. If the people have not thus themselves determined them, then under our Constitution and theory of government, these are legislative powers. Merchants' Exchange of St. Louis v. Knott, 212 Mo. 616, 111 SW 565; Throop's Public Officers, secs. 19 and 443-444.'

The office of deputy county assessor is a recognized public office and the legislature has fixed the compensation to be received by the holder of such office, and the legislature, Sec. 3939, R.S. 1929, Mo.St. Ann. §3939, p. 2759, has made it a crime for anyone seeking election to any 'office of honor, trust or profit' to 'offer or promise to discharge the duties of such office for a less sum than the salary, fees or emoluments of said office, as fixed by the laws of the state.'

[1] The public policy of a state is determined by 'its statutes and when they have not * * * spoken, then in the decisions of the courts.' In re Rahn's Estate, 316 Mo. 492, 291 SW 120, 123, 51 A.L.R. 877. The very highest evidence of the public policy of any state is its statutory law.' In re Rahn's Estate, supra, 291 SW 1.c. 123, and cases there cited."

In view of the fact situation and finding of law set forth above in what is referred to as the "Rothman case," it becomes unnecessary for us to further analyze this case, which is State v. Darby, 137 SW2d 532.

In an opinion, a copy of which is enclosed, rendered September 20, 1955, to Richard K. Phelps, Prosecuting Attorney of Jackson County, this department held that the county court of Jackson County could be compelled to pay the increased salary of employees of the prosecuting attorney's office, which salaries were fixed by statute.

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In an opinion rendered November 29, 1957, a copy of which is enclosed, to Garner L. Moody, Prosecuting Attorney of Wright County, Missouri, this department held that deputy county clerks in fourth class counties were entitled to the \$500 per year additional compensation set forth by statute, and that the chief deputy circuit clerk, also the first and second deputies in fourth class counties, should be paid the amount of salary fixed by statute.

These two opinions are not primarily written upon the issue involved in the instant case, but, like the first two cases cited and analyzed above, are, we believe, persuasive of the issue here involved.

CONCLUSION

It is the opinion of the department that an employee who has been classified as a first deputy of the circuit clerk and recorder, under Section 384.380, RSMo, C. S. 1957, in a fourth class county whose population brings it within the purview of subsection 2, Section 483.382, cannot by agreement or otherwise be paid less than the amount set forth in subsection 2, supra.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

Enclosures
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