

CONSTITUTIONAL LAW: 1. A final declaration that a statute is un-
COMPENSATION: constitutional renders the statute void from the
COUNTY COLLECTORS: date of its enactment.
COUNTY OFFICERS: 2. The result of the decision declaring Section
48.030-2 unconstitutional is that all counties
which except for the subdivision would have become
third class counties on Jan. 1, 1961, shall be deemed to have become
third class counties on that date.
3. Any change in the salary or fees of county
officials of Christian, McDonald and Wright counties resulting from
the transition shall become effective in 1961 on the date corre-
sponding to the beginning of the term of such officials. Excess
fees retained since the first Monday in March, 1961, may be recovered
from the county collectors of these counties.

November 2, 1962

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri



OPINION NO. 382

Dear Mr. Holman:

This is in answer to your request for an opinion of this office on the following matters:

"Pursuant to a conversation with members of this office we would appreciate a reply to the following questions, as the result of the Supreme Court Ruling in Case No. 49073 (Joe N. Chaffin vs. The County of Christian, et al.), in connection with the change of classification of counties from fourth to third class.

"The assessed valuation of Christian county was over \$10,000,000.00 for the years 1954 through 1961 and McDonald and Wright Counties assessed valuations were each over \$10,000,000.00 for the years 1955 through 1961.

1. Having met the requirements of Section 48.030, RSMo 1949 and subsection 1, Section 48.030, RSMo 1959, are these counties deemed to be counties of the third class as of January 1, 1961?

2. Are all existing statutes governing counties of the third class applicable to these counties as of January 1, 1961?

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" 3. Shall all salaries and fees as provided by existing statutes for officers of a third class county, even though the officers salaries may be increased or decreased due to change of county classification, be in effect as of January 1, 1961?

4. Shall these counties as well as other counties that have met the requirements to become third class counties on January 1, 1963 be renotified of their change in classification?"

Section 48.020, RSMo 1959, divides the counties of Missouri into four classes, based upon their assessed valuation at the time of enactment. Section 48.030, subdivision 1, provides:

" * * * no county shall be deemed as moving from a lower class to a higher class or from a higher class to a lower class until the assessed valuation of the county is such as to place it in the other class for five successive years. * * *"

Section 48.030, subdivision 2, purports to impose an additional requirement for the change of fourth class counties to third class counties, in that:

" * * * no county of the fourth class shall become a county of the third class until the question is submitted to a vote of the people at a general election, and a majority of the electors voting on the question shall vote in favor thereof. * * *"

In the case of Chaffin v. Christian County, No. 49,073, decided September 10, 1962, not yet reported, the Supreme Court of Missouri, en Banc, declared Subdivision 2 of Section 48.030 unconstitutional. The Court further declared: " * * * under the valid statutes presently existing Christian County

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is a county of the third class and that plaintiff is entitled to be paid his salary as treasurer of a third class county."

The effect of a final decision that a statute is unconstitutional is to render the statute null and void, not only from and after the date of such judicial pronouncement, but from the date of its enactment. Such a statute shall be regarded as void ab initio and as though it had never been in existence. Norton v. Shelby County, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178; Lieber v. Heil, (1930) Mo.App., 32 S.W.2d 792; State v. O'Malley, (1938) Mo., 117 S.W.2d 319; State v. Koon, (1947) Mo., 201 S.W.2d 446, 451, 11 Am.Jur., Constitutional Law, §148; 16 C.J.S., Constitutional Law, §101.

As a result of this decision, all counties having met the requirements of Section 48.030 RSMo 1949, and Section 48.030, Subdivision 1, RSMo 1959, and which would have become counties of the third class January 1, 1961, except for the provisions of Section 48.030, Subdivision 2, shall be deemed to have become third class counties on that date. According to your letter three counties, Christian, McDonald and Wright, so qualify, and therefore must be considered as having become third class counties on January 1, 1961. We assume the notification prescribed by Section 48.040 was given each of these counties. In answer to your fourth question, while we do not believe a renotification to be required, it is our opinion it would be wise to do so to avoid any question being raised. It should be emphasized that it is a renotification and that, as a result of the decision in Chaffin v. Christian County, supra, the county so notified became a county of the third class on January 1, 1961.

Statutes providing for salaries and fees of all officers of third class counties became applicable to Christian, McDonald and Wright Counties on January 1, 1961. Any change in the compensation of officers of these counties whose statutory term of office begins on the first day of the year following their election would become effective on the date of the change of classification, January 1, 1961. This is the gist of an opinion of this office issued on February 16, 1955, to the Honorable Stephen R. Pratt, Prosecuting Attorney of Clay County, Liberty, Missouri, a copy of which is enclosed herewith. In an earlier opinion to Mr. Pratt issued on January 27, 1955, a copy of which is enclosed, we concluded that a change in the salary of officials whose term of office does not begin on the first day of the year, such as the county assessor, whose term begins on September 1st (Section 53.010), shall not take place on January 1st, but on the date

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corresponding to the beginning of his term of office.

It is our understanding the salaries and fees of all county officers except the county collector are increased upon the transition of a fourth class county to a third class county. Thus, other than county collectors, all officers whose term of office begins on the first day of January following their election are entitled to the amount of such increase from the date of change, January 1, 1961. All such officers whose term of office begins on a date other than January 1st are entitled to an increase beginning in 1961 on the date corresponding to the date of the beginning of their term of office. The amount of such increase should be paid as soon as possible as such amounts were, as a matter of law, included in the county budget, *Gill v. Buchanan County*, (1940) Mo., 142 S.W.2d 665, and, if necessary, the discretionary amounts listed in the county budget should be reduced in order to pay these statutorily included budget figures.

Regarding county collectors, their basic compensation is prescribed by Sections 52.260 and 52.280. It is not affected by a change in the classification of a county. However, collectors in fourth class counties may retain one per cent of all current taxes collected as compensation for mailing tax statements and receipts. Collectors in third class counties receive only one-half of one per cent of all current taxes for these services, Section 52.250. The county collectors holding office in 1961 were elected in 1958, and their term expired the first Monday in March, 1962. Therefore, the county collectors of Christian, McDonald and Wright Counties are entitled to retain not more than one-half of one per cent of all current taxes collected since the first Monday in March, 1961. In *State v. Ludwig*, (1959) Mo., 322 S.W.2d 841, our Supreme Court, en banc, held that excess commissions voluntarily paid to or retained by a public officer out of public funds, in good faith, under a mistake of law, may be recovered by the State. The fact that the money was retained by virtue of the provisions of a statute later declared unconstitutional does not relieve the official of the liability for the funds wrongfully withheld. He will have withheld a portion of the taxes to which not only the county but also the State of Missouri is entitled, and it is our opinion both county and State have the right to recover such portion of the taxes so retained by the collector, irrespective of his good faith. However, only the excess commissions retained by the collector after the first Monday in March, 1961, may be recovered.

Possible methods of recovery of funds wrongfully withheld were enumerated by the Court in *State v. Ludwig*, supra, which said, l. c. 850:

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"If an official retains fees or commissions which he is not entitled to receive they may be recovered in an action for money had and received (Nodaway County v. Kidder, 344 Mo. 795, 129 S.W.2d 857), they may be allowed by way of recoupment in a mandamus proceeding (State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532), or, in the absence of a valid defense to the claim, in a summary proceeding such as this. 84 C.J.S., Taxation, §670, p. 1348; 67 C.J.S., Officers, §§101, 123(b), pp. 364, 416."

The summary method referred to is that prescribed by Section 139.250.

Recovery of the excess commissions retained by the county collectors may be made at this time under any of the theories set out in State v. Ludwig, supra. The cause of action did not arise prior to the date of the first report of the county collector following the first Monday in March, 1961, and is not barred by any statute of limitations.

We do not herein decide that all existing statutes governing counties of the third class are applicable to the three counties in question as of January 1, 1961. If you have any questions pertaining to specific statutes or factual situations, we will be glad to try to answer them.

CONCLUSION.

The declaration by the Supreme Court that Subdivision 2 of Section 48.030 RSMo 1959 is unconstitutional renders such statute void from the date of its enactment. All counties which would have changed from counties of the fourth class to counties of the third class on January 1, 1961, except for the requirements contained in this subdivision, shall be deemed to have become third class counties on that date. All statutes prescribing the salaries and fees of county officials shall become applicable to such counties on that date. The salaries and fees of such county officials whose term of office begins on the first day of the year following the date of their election shall be changed beginning January 1, 1961. The change of the salaries and fees of all county officials whose term of office begins on a date other than on the first day of the year following their election shall begin

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in 1961 on the date corresponding to the date of the beginning of their term of office. This rule is applicable to both increases and decreases in the compensation of such county officials.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John H. Denman.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JHD:sr

Enclosures