

August 30, 1943.

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Honorable John M. Gallatin
President
Missouri Probate Judges' Association
Chillicothe, Missouri

Dear Judge Gallatin:

We are in receipt of your letter of August 25, 1943, requesting an opinion of this Department, which letter is as follows:

"As President of the Missouri Probate Judge's Association I have had several inquiries concerning the House Committee Substitute for Senate Bill No. 4, which was passed by the Sixty-second General Assembly. This Act places the Probate Judges in counties having a population of less than 19,000 on a salary basis.

"It was agreed by the officers of our Association meeting at Sedalia yesterday that an early ruling from your Department in regard to some of these questions would be of great service to the Probate Judges of the State. I therefore, respectfully ask for an opinion of your Department on the following:

- "1. On what date does the act take effect?
- "2. Does it apply to the Probate Judges now in office?
- "3. Does the 1940 decennial census regulate the population of the county?

- "4. If the yearly fees exceed the amount to which each Judge is entitled by reason of the population of his County is it mandatory on the County Court to pay such excess fees over to the Probate Judges?
- "5. Must the accrued fees due each Judge at the time this Act takes effect be reported to the County Court and when such accrued fees are collected must they be paid into the County Treasury the same as current monthly fees?

"I understand the Governor signed this bill August 4th and as our Annual Association meets in October we will greatly appreciate an early opinion on this matter."

We enclose herewith copy of an opinion rendered by this office, dated August 25, 1943, written by Honorable Lawrence L. Bradley, Assistant Attorney-General, which opinion, we believe answers some of the questions contained in your letter. The first question is answered by a statement on page five of said opinion, holding that the effective date is fixed by Section 659, Revised Statutes of Missouri, 1939. The fourth question contained in your letter is answered on page three of said opinion. We assume by this question that you refer to fees in excess of the salary provided by House Committee Substitute for Senate Bill No. 4 (hereinafter referred to as Senate Bill No. 4).

Said Senate Bill No. 4 applies to probate judges now in office. The bill commences with the statement, "the judges of the probate courts in the counties which now have * * *," and the entire text of the act indicates that it is not intended to apply to a future date but is intended to apply as soon as the act becomes law. Said opinion herein referred to points out that Section 8, Article XIV, of the Constitution, is not applicable because the provisions of this act do not amount to an increase in salary during a term of office.

Said Senate Bill No. 4 refers to population of the counties without indicating how this population should be determined.

In the absence of any statutory provision on this question, the last decennial census would be controlling. This question was determined in the case of *State ex rel. O'Connor v. Riedel et al.*, by the Supreme Court, en banc, 46 S. W. (2d) 131, 1. c. 135. The court held:

"* * *There is no express language requiring a resort to the 'next' or any other decennial census of the United States. But the implication is clear that after the occurrence of the event which puts an end to the further use of the presidential vote method the populations shall be ascertained from the official census of the United States. But which census? One which is obsolete for all except historical or statistical purposes? Manifestly the one at the time in current use for every other practical purpose--the last one. That which is implied in a statute is as much a part of it as what is expressed. 2 Sutherland on Stat. Const. (2d Ed.) Sec. 500, and cases cited. * * *"

The fifth question contained in your letter is answered by the following quotation from said Senate Bill No. 4, beginning with the second sentence in said act, which is as follows:

"It is further provided that all Probate Judges in such counties shall at the end of each and every month after this act shall take effect, make and file with the County Clerk a report of all fees actually collected by him or his clerk during the month, except fees earned and collected for the solemnization of marriages and the hearing and determining of inheritance tax matters, together with a report of all such fees earned during the month but not yet collected, and that he shall at the end of each month pay over to the County Treasurer all monies collected by him or his clerk during the month which are required to be shown in the monthly report as above provided,
* * *"

It will be noted that the act requires that a probate judge shall "report all fees actually collected by him or his clerk during the month." And further on the act provides that there shall also be made "a report of all such fees earned during the month but not yet collected." And then again the act provides that "he shall at the end of each month pay over to the county treasurer all monies collected."

Conclusion.

It is, therefore, the opinion of this Department that:

- (1) Senate Bill No. 4 will take effect as law ninety days after the adjournment of the Sixty-second General Assembly. The General Assembly adjourned on August 23d. Ninety days thereafter would be November 21st. However, that day falling on Sunday, the act will become effective on the following Monday, or November 22d;
- (2) Said act applies to probate judges now in office;
- (3) The 1940 Decennial Census is the census upon which the population of the county is to be determined;
- (4) If the fees collected by a probate judge during any one year exceed the salary provided by said act for a county that comes within the population class specified in the act, at the end of the year when the yearly report is filed the county court must pay such excess fees over to the probate judge, subject to the limitations set out in Section 13404, Revised Statutes of Missouri, 1939;
- (5) After the effective date of Senate Bill No. 4, the probate judge, subject to said act, must pay over to the county each month all of the accountable fees collected by him during such month, whether or not such fees were earned prior to the effective date of said Senate Bill No. 4.

Respectfully submitted,

LEO A. POLITTE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

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