PROSECUTING ATTORNEY: Cannot recover a refund of salary overpaid to him since January 1, 1931.

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Honorable Gordon Weir,
Prosecuting Attorney,
Dade County,
Greenfield, Missouri.

Dear Sir:

In your letter of October 5 addressed to General McKittrick you make the following inquiry and request an opinion regarding the same:

> "I have been advised that at the meeting of the county clerks, a few days ago, they were informed that in the matter of their salaries, they shouldn't go back of 1932, and as our county clerk understood this, it applied to all county officers. If this is the case, would it not also apply to the office of Prosecuting Attorney?
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> At the time when this was in question, and as soon as the opinion of Judge White was delivered, I paid back $900.00 of the 1931 salary and am the only one to pay back anything except for the county school superintendent, who made a settlement with the county court on a 50% basis. In equity and good conscience, if they don't recover from the others should I not have my $900.00 on the year 1931?"

In 1933 the Legislature passed laws fixing the salaries of circuit clerks and county clerks. Under Sec. 11811, p. 370, Laws of Mo. 1933, the following provision appears at the close of the section:

> "Provided, further, that until the expiration of their present term of office, the person holding the office of County Clerk shall be paid in the same manner and to the same extent as now provided by law, provided that this act shall not apply to counties in which such clerks now or may hereafter receive a fixed salary in lieu of all fees, commissions and emoluments."

We are enclosing an opinion rendered by this office on January 26, 1933 to Hon. Lewis B. Hoff, Prosecuting Attorney of Cedar County, wherein the question of the salary of county clerk is determined by Sec. 11811, R.S. Mo. 1929.

A portion of the amended section, quoted supra, permits the salary to remain unchanged until the present term of office of the county clerk expires, and Sec. 11811 has never been declared unconstitutional. The method of arriving at the population since 1930 differs from the method used in the case of a prosecuting attorney.

I.

Prosecuting Attorney cannot recover a refund of salary overpaid by him since January 1, 1931.

The salary of a prosecuting attorney is governed by Sec. 11314, R.S. Mo. 1929. This section was amended by the Legislature in 1933 (Session Acts, 1933, p. 178). However, it contains the following proviso:

> "Provided, that until the expiration of the present term of office, the persons holding the office of prosecuting attorney shall receive the same compensation now provided by law.***"

In view of this provision, we must rely upon the interpretation of the original section, 11314, R.S. Mo. 1929.

A leading case upon an interpretation of this section is the case of State ex rel. O'Connor v. Riedel, et al, 329 Mo. 616; l.c. 629, Judge Ragland, in passing upon the constitutionality of the law in fixing the salaries of prosecuting attorneys, said:

> "'The closing sentence of the section provides for but two things in express terms: the multiplying of the whole number of votes cast at the last preceding presidential election by five as a method of ascertaining population, and the termination of the use of that method upon the occurrence of a designated event. The event has occurred, the method just mentioned can no longer be employed. How are the populations of the counties to be now ascertained? 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 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. (2 Ed.) sec. 500, and cases cited). The contention of the amici curiae cannot be sustained.
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> In accordance with the foregoing we hold that said Section 11314, in its entirety is valid in all the respects as to which its constitutionality is challenged. Under its plain terms the prosecuting attorney of Marion County is entitled to a salary of $2,500 and no more.'"

It appears that after the above decision you made the refund of $900.00, the same being excess salary that you had drawn from January 1, 1931 until the rendering of the decision in February, 1932. You now desire that this amount be returned to you for the reason that the other county officers have not made any refund of their salaries.

In the case of O'Connor v. Riedel, supra, Judge Ragland, on p. 625 thereof, does not place the county clerks and circuit clerks in the same position as the prosecuting attorneys. The prosecuting attorneys receive their salaries according to actual census of the county, while the county clerks receive their salaries based on a population by multiplying the last presidential vote by 3½. The pertinent part of the opinion is as follows:

> "'The primary purpose of the section undoubtedly is to secure uniformity in the operation of laws fixing the compensation of county officers: the classifying of the counties by population is incidental--collateral. It is merely a method by which the required uniformity may be realized. If some other method (of classification or otherwise) will produce that result, the essential objection of the section will be just as surely attained. The form of the language employed clearly indicates that the classifying of counties by population was intended as a permissible but not as an exclusive method of securing the prescribed uniformity: 'and for this purpose may (not shall) classify the counties by population'. But it is argued that, if the clause does nothing more
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> Mandatory or Permissive

> than confer the power to classify the counties by population, it serves no purpose whatever, because the Legislature has always possessed, and now possesses, that power independently of the purported grant. It should be considered, however, that there has been in some of its aspects a very great development of constitutional law since the adoption of our present Constitution in 1875. Since that time tomes have been written on the subject of classification of persons and things for the purpose of legislation, in determining whether innumerable statutes and ordinances fell within the condemnation of the 14th Amendment of the Constitution of the United States or the due-process clauses and the provisions relating to the enactment of local or special laws of our own and other state constitutions. While there have been classifications for legislative purposes since the earliest times, the principles determining their validity under American constitutions are of comparatively recent development. Had they been as familiar in 1875 as they now are, it is probable that the last clause of said Section 12 would have been omitted. But be that as it may, if the words used be given their usual and ordinary meaning, the clause permits, but does not command, the classification of counties by population for the purpose of bringing about uniformity of operation. That was the construction put upon it by this Court en Banc in Greene County v. Lydy, 263 Mo. 77, 172 S.W. 376, and in State ex rel. v. Grinstead, 314 Mo. 55, 282 S.W. 705. We still think that construction sound.'"

Having established in the above quotations from Judge Ragland's opinion that since January 1, 1931, same being the last decennial census, the prosecuting attorneys have received their salaries according to the actual decennial census, and you, having paid back to the county the overpayment in your salary, can you now demand that the same be refunded to you? A leading case on the question is the case of State v. Dearing, 274 S.W. 477, wherein the Court said:

> "A mistake of law will not excuse a public officer from paying out public funds when he is dealing with other public officers. When a public official wrongfully receives funds, although paid to him under an honest mistake of law, he must restore such funds, and this has been the rule in Missouri especially since the case of Lamar Township v. City of Lamar, 261 Mo. 171."

The decision in the Lamar Case, 261 Mo., l.c. 186, relating to this question, is as follows:

> "The serious question and the one as to which appellant most earnestly and strenuously contends, is whether the rule that money paid without protest or duress, under a mistake of law, cannot be recovered, applies as between officers of municipal corporations dealing with the money and the property of the public. That individuals may not recover money so paid, absent fraud, protest or duress, is too well settled for argument. (Needles v. Burk, 81 Mo. 569; Savings Institution v. Enslin, 46 Mo. 200; Campbell v. Clark, 44 Mo. App. 249). Likewise, in other jurisdictions this rule so far as it applies to individuals, sui juris, dealing with their own property, is well nigh without exception. (30 Cyc. 1313, and cases cited). The reason for the rule as between individuals (which while sometimes provocative of great miscarriages of justice, and while largely predicated upon expediency) is yet bottomed upon some considerations which are logical and well settled. Among these (but when wrong is being done, clearly not chief among these) is the maxim ignorantia legis neminen excusat. Likewise the rule touches nearly upon the doctrines of accord and satisfaction, and of estoppel; as also upon the rule forbidding the unsettling of things settled and thereby disturbing repose by clamorous litigation. Other maxims, e.g. volenti non fit injuria, have likewise been invoked; but confessedly even among individuals, unless the peculiar facts of the case also warrants the application of the rule ex aequo et bona, there is little logic and less of honesty in putting it upon such an excuse. The best that may be said of the rule even as applied to individuals, is that it is a handy rule to apply in those rare cases where the application of it prevents gross injustice. (See, arguendo, Schell City v. Rumsey Mfg. Co., 39 Mo. App. 264)
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> Certainly in a case like this of dealings between public officers with the public's money, no excuse for invoking this rule can be found in logic, nor in our opinion can such excuse be found in the decided cases. The rule in such case is thus stated in 30 Cyc. 1315: 'Although there are cases holding the contrary, the better rule seems to be that payments by a public officer by mistake of law, especially when

made to another officer, may be recovered back.'"

CONCLUSION

Under the law, the county could have maintained an action against you for the recovery of the amount you were overpaid. Therefore, in view of the foregoing decisions and the distinction, as to salaries of the respective officers, it is the opinion of this department that you cannot recover the excess salary which was paid you and which you returned to the county; and the fact that other county officers failed to return any excess salaries which might have been paid them, would have no bearing or probative force involving the return of such payment to you as Prosecuting Attorney.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

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