

SALARIES: Circuit Judge Sam C. Blair cannot collect  
CONTESTED ELECTION: a salary from the state unless he gives  
CIRCUIT JUDGE: bond and complies with Section 11423, R.  
S. Missouri 1929.

January 15, 1941

Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion,  
under date of January 13, 1941, which reads as follows:

"I am enclosing a copy of notice  
by the Attorney of Harry L. Buchanan  
who is contesting the election of  
Sam Blair for Circuit Judge, which  
notice is served on me under Sec-  
tion 11423, RS Mo. 1929 which pro-  
vides that no money shall be paid  
during the contest.

"I am enclosing a copy of a let-  
ter which I received from Sam  
Blair and which is self-explanatory.  
May I have your opinion as to whether  
I can legally pay money to Mr. Blair  
pending this contest decision."

Section 11765, R. S. Missouri 1929, provides a  
salary of Fifteen Hundred (\$1500.00) Dollars a year to  
the circuit judge in a circuit of the same bracket as  
the circuit of Judge Sam C. Blair for acting as juvenile  
judge.

Section 11766, R. S. Missouri 1929, provides a  
straight salary of Two Thousand (\$2,000.00) Dollars a  
year to a circuit judge of the same bracket as Judge  
Sam C. Blair.

Section 11771, R. S. Missouri 1929, provides a  
payment of Twelve Hundred (\$1200.00) Dollars a year to  
Sam C. Blair for expenses while trying cases in his cir-  
cuit.

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Section 11772, Laws of 1939, page 678, provides an additional salary of Thirteen Hundred (\$1300.00) Dollars a year to Judge Sam C. Blair as jury commissioner.

The total money which Judge Sam C. Blair is entitled to is Six Thousand (\$6,000.00) Dollars per year, payable monthly by the state.

Section 11423, R. S. Missouri 1929, reads as follows:

"Whenever any office, elective or appointive, the emoluments of which are required to be paid out of the state treasury, shall be contested or disputed by two or more persons claiming the right thereto, or by information in the nature of a quo warranto, then no warrant shall be drawn by the auditor, or paid by the treasurer, for the salary, by law attached to said office, until the right to the same shall be legally determined between the persons or parties claiming such right: Provided, however, and it is hereby further enacted, that in all cases when the person to whom the commission for such office shall have issued shall deliver to the party contesting his right to such office a good and sufficient bond, in double the amount of the annual salary of such office, conditioned that if, upon final determination of the rights of the contestants, it shall be decided that the obligor is not, and that the obligee therein is, entitled to the office in controversy, he shall pay over to the obligee the amount of salary therefor drawn by him as such officer, together with ten per centum interest thereon from the date of the receipt of each in-

stallment received by him, then, and in such case, notwithstanding the provisions of this law, a warrant may be drawn by the auditor, and paid by the treasurer to the person holding the Commission aforesaid, for the amount of his salary, as the same shall become due. It shall be the duty of any person contesting the election of any such officer to give notice of such contest to the state auditor, and no such contest shall be heard or determined until he shall satisfy the tribunal trying such contest that such notice has been given."

The constitutionality of this section was upheld in the case of State ex rel. v. Gordon, 245 Mo. 12, 149 S. W. 638. In this case William P. Evans, Superintendent of Public Schools, brought an original proceeding by mandamus to compel John P. Gordon, State Auditor, to issue a warrant for his salary as superintendent of public schools for thirteen (13) months ending January 31, 1912, in the sum of Three Thousand Two Hundred Fifty (\$3,250.00) Dollars. In his petition he related that he was a person of small means and was financially unable to comply with the provisions of Section 11830, R. S. Missouri 1909, which is now Section 11423, R. S. Missouri 1929. He related that he could not give the contestant a bond in the sum of Twenty Four Hundred (\$2400.00) Dollars or any part thereof in compliance with this section. The court, in its opinion, held that the compensation of a public officer is a matter of statute and not of contract and cited from Mechem on Public Offices and Officers as follows:

"Sec. 855. As has been seen, the relation between the officer and the public is not the creature of contract, nor is the office itself a contract. So his right to compensation is not the creature of con-

tract. It exists, if it exists at all, as the creation of the law, and when it so exists, it belongs to him "not by force of any contract, but because the law attaches it to the office." The most that can be said is that there is a contract to pay him such compensation as may from time to time be by law attached to the office."

The court, in its opinion, also held that this act in question did not violate the constitutional provision which forbids special or class legislation. The court also held that although the title to the act did not contain provisions as to the full subject matter of the act, yet it was not a violation of the state constitution. The court also held, in its opinion, that this act was not against public policy in that it deprived a man of just reward for his labor for the reason that the law set out the means of obtaining the salary and was a matter to be passed upon by the Legislature and was not a contract between the superintendent of schools and the state. This case is the only case in point upon this matter and has not been overruled in any respect. It was followed in the case of *Greene County v. Lydy*, 263 Mo. 92, 172 S. W. 382. The court, in its opinion, sustained the demurrer filed to the writ of mandamus. In its opinion the court also stated:

"We find one case only in our reports involving a consideration of this Act of 1873. In the case of *State ex rel. v. Clark*, 52 Mo. 508, the relator presented a petition to this court for a writ of mandamus to the State Auditor, alleging that he was commissioned as circuit judge on April 20, 1869, and was discharging the duties of that office, and that on April 1, 1873, he presented his account for the previous quarter's salary to the Auditor, who refused a warrant therefor. In his return the Auditor inter-

posed this same Act of 1873, and stated that a writ of quo warranto was pending to determine title to the office held by the relator. The answer to the return admitted the pendency of the writ, but said that it was issued at the relation of the Attorney-General, and did not involve a contest for the office. The answer further pleaded that the statute was unconstitutional. The court, without noticing the constitutional question, held that the act did not apply where there was no contest pending and where a quo warranto was filed by the Attorney-General at his own relation to determine only whether the respondent was a usurper in office. The validity of the Act of 1873 was apparently conceded by both court and counsel."

The above authorities have been set out for the purpose of showing the constitutionality of Section 11423, R. S. Missouri 1929, and also for the purpose of showing the procedure in case the Honorable Sam C. Blair, Judge, should desire to draw his full salary.

It will be noticed under Section 11423, supra, that it states, "Whenever any office, elective or appointive, the emoluments of which are required to be paid out of the state treasury, \* \* \* " It will also be noticed later in the section that it specifically states, "\* \* \* in double the amount of the annual salary of such office, \* \* \* " In reading the whole section, it seems to be the intention of the Legislature that the state treasurer is only prohibited from paying out a salary warrant and not other expenses payable by the state to the circuit judge.

Section 11771, R. S. Missouri 1929, which provided a payment of Twelve Hundred (\$1200.00) Dollars a year for expenses while trying cases in his circuit is not part of his salary. It was so held in State v. Gass,

296 S. W. 431, par. 1, where the court said:

"The trial court, in determining how much compensation the circuit judges received, added to the \$2,000 paid by the state the \$1,200 allowed for expenses, making a total of \$3,200, which, deducted from the \$4,500 referred to in section 6640, fixed the compensation of the jury commissioner at \$1,300. The exception of the \$1,200 allowed for expenses in the amendment to section 10991, R. S. 1919 (Laws of 1921, p. 599), does not apply to the probate judge of Jasper county, for it is an allowance to the circuit judges for expenses when holding court in counties other than in the county in which the judge resides. The circuit judges of said county do not hold court in other counties. However, the \$1,200 allowed for expenses is not an allowance for services of any kind. \* \* \* \* \*

Also, in the case of *Macon County v. Williams*, 224 S. W. 835, l. c. 836, par. 1,2, the court said:

"This question, whether allowances to officers for expenses come within the meaning of the word 'compensation,' has arisen in several cases. In Wisconsin, under a constitutional provision somewhat analogous to ours, in so far as the question presented was concerned, it was held that a statute providing for a payment to each circuit judge of \$400 per annum 'as and for his necessary expenses while in discharge of his duties' did not

constitute additional 'compensation' in the constitutional sense. Milwaukee County v. Halsey, 149 Wis. loc. cit. 87, 136 N. W. 139. In McCoy v. Handlin, 35 S. D. loc. cit. 514, et seq., 153 N. W. 361, L. R. A. 1915E, 858, Ann. Cas. 1917A, 1046, under a more comprehensive constitutional provision than ours, the Supreme Court of South Dakota held that an allowance of \$600 per annum to the Supreme Judges 'in consideration of expenses' was not in violation of the prohibition against increasing the compensation of judges. The court held that the salary provided could not be increased, but that the allowance of expenses, as such, did not have that effect. \* \*"

Also, in this case the court, at page 837, said:

"From these authorities, the reasoning quoted, and the principle last mentioned it follows that the provision for the payment of expenses of circuit judges did not provide additional 'compensation' in the constitutional sense or in the sense of section 10695, R. S. 1909, and the trial court was right in holding that appellant could not lawfully retain, in addition to an amount equaling the circuit judge's salary, an additional sum equal to the amount allowed the circuit judge for expenses.

"The allowance is made to the circuit judges expressly for expenses which the circuit judge must incur in the performance of duties for which there is no counterpart imposed upon probate judges."

There is no question but that the money allowed for expenses is not a salary.

The term "emolument" as used in Section 11423, R. S. Missouri 1929, does not include expenses such as allowed under Section 11771, R. S. Missouri 1929.

In the case of State v. Dishman, 68 S. W. (2d) 797, l. c. 799, par. 4, 5, the court said:

"\* \* \* But the undisputed evidence of the state was that the sum of \$25 of which the information made mention was a fine. Section 4093, R. S. 1929, as we construe it, relates alone to fees and emoluments and not to fines. Although the statute in one instance uses the word 'moneys,' that word, when viewed with its context, does not broaden the scope of the statute. The phrase is: 'Moneys, fees and emoluments so earned and received by him.' Only fees, but not fines, are earned. Therefore the trial court erred in overruling appellant's demurrers to the evidence."

The holding in the above case was to the effect that the word "emolument" did not include fines collected by the clerk of the Circuit Court of Christian County, Missouri, under a penal statute which assessed a punishment for the refusal to turn in certain specific moneys collected by him.

Expenses have been declared by the Federal Court of the United States in Federal Reporter 241, 747 as not being considered an emolument. In that case, at page 770, the court said:

"\* \* \* Further light has since been thrown upon the construction given

to the provision of the federal Constitution above referred to by the act of June 23, 1906 (34 Stat. at L. 454, c. 3523 (Comp. Stat. 1913, section 225)), which provides: "That hereafter there may be expended for or on account of the traveling expenses of the President of the United States such sums as Congress may from time to time appropriate, not exceeding \$25,000 per annum, such sum when appropriated to be expended in the discretion of the President and accounted for on his certificate solely." Under appropriations thereafter made by Congress, Presidents Roosevelt and Taft received, and to-day President Wilson is receiving, thousands of dollars each year. So far as we know, it has never been suggested that the money so allowed was an "emolument," and therefore unconstitutional. No one has ever seen fit to accuse these Presidents of being grafters. The judges of the federal courts, whose salaries are fixed by a law, declaring that such salaries shall be the "compensation for their official services," draw from the United States Treasury a sum not exceeding \$10 per day when absent from the places of their residence. Act March 3, 1911, c. 231, section 259, 36 Stat. at L. 1161 (Comp. Stat. 1913, Section 1236). This allowance is not given as an increase of salary but to cover the expenses incident to their being away from home in the discharge of their duties.'

"Paraphrasing, it may be said that the use of the house by Judge Jackson cannot be held to be an increase of salary, but was no more than the necessary inseparable incident to his compliance with

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his positive duty to reside within  
the Canal Zone during the term of his  
office. Section 8, supra, vol. 37,  
pt. 1, U. S. Stat. at L. 62d Cong.  
p. 565. \* \* \* \* \*

CONCLUSION

In view of the above authorities it is the  
opinion of this department that the state auditor can  
not legally pay a monthly salary to Judge Sam C. Blair  
unless he furnishes a bond to the contestant as set  
out in Section 11423, R. S. Missouri 1929.

It is further the opinion of this department  
that the state auditor should pay Judge Sam C. Blair  
One Hundred (\$100.00) Dollars a month for his expenses  
incident to the holding of the terms of court at places  
in his circuit other than the place of his residence  
as set out in Section 11771, R. S. Missouri 1929.

Respectfully submitted

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APPROVED:

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