

FEES--COMPENSATION--CIRCUIT JUDGES: Per diem compensation
of Circuit Judges when
trying cases in another
Circuit.

January 6, 1936.

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

Your request for an opinion dated December 17, 1935,
is as follows:

"I am enclosing some correspondence
which I have had with Judge Walter
A. Higbee, Circuit Judge of the
Thirty-Seventh Circuit at Lancaster,
Missouri relative to fees which he
claims is due him as Special Judge
at Trenton, Grundy County.

"The certificate which we received
from the County Clerk shows that the
Judge only served one day; however,
he disposed of three cases that day.
My contention is that the Judge is
entitled to \$5.00 per day and ex-
penses, while the Judges contention
is that he is entitled to \$5.00 for
each case tried.

"We would like an opinion from your
department as to the amount of money
I should pay Judge Higbee as Special
Judge in this matter.

"Please return the correspondence to
my office for my files."

As per your request we are returning herewith your
correspondence with Judge Higbee.

Section 3651 R. S. Mo. 1929, provides:

"If, in any case, the judge shall be
incompetent to sit, for any of the

causes mentioned in section 3648, and no person to try the case will serve when elected as such special judge, the judge of said court shall in either case set the case down for trial on some day of the term, or on some day as early as practicable in vacation, and ~~may~~ notify and request another circuit or criminal judge to try the case; and it shall be the duty of the judge so requested to appear and hold the court at the time appointed for the trial of said case; and he shall, during the trial of said case, possess all the powers and perform all the duties of the judge at a regular term of said court, and may adjourn the case from day to day, or to some other time, as the exigencies of the case may require, and may grant a change of venue in said case to the circuit court of another county in the same circuit, or to another circuit or criminal court; and when said cause shall be removed to the circuit court of another county in the same circuit, it shall be the duty of the judge so requested to appear and hold the court at the time set for the trial of said case in the circuit court of the county to which said case shall be removed: Provided, that if the person elected as such special judge shall refuse to serve, or if the judge so requested shall fail to appear and hold the court at the time appointed for the trial of said case, the judge of said court shall reset said case for trial to suit the convenience of the judge so requested to try said case, or may notify and request the judge of some other circuit to appear and try said cause as heretofore provided. Should said judge so requested fail to appear and hold the court at the time appointed for the trial of said

case, the judge of the court shall order a change of venue in said case to some other circuit. Said order may be made in term time, or by the judge of the court in vacation, by an order in writing, which the judge shall file with the clerk of the court in which such cause is pending. Whenever the judge so requested shall appear and hold the court for the trial of said case, he shall, in addition to the salary now allotted by law, receive his actual expenses and five dollars per diem for the time necessarily engaged in the trial of said cause, and in going to and returning from the place of trial, which shall be paid out of the state treasury upon the certificate of the clerk of the court in which such cause is pending. Whenever the special judge elected to try a cause shall appear and hold the court for the trial thereof, he shall receive ten dollars per day for the time necessarily engaged in such trial, and five dollars per day while going to and returning from the place of trial if he reside outside of the county where said cause is tried, to be paid out of the state treasury upon the certificate of the clerk of the court where said cause is tried."

CONCLUSION.

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Section 3651 provides for calling in another Circuit Judge to try a case where the regular judge is deemed legally incompetent to try said case. All through the section it speaks of each case in the singular number. When providing for the compensation due the visiting judge, it speaks of each case singularly, and all through this section the words "case" and "cause" appear interchangeably.

January 6, 1936.

We are of the opinion that when the Legislature provided compensation for the "actual expenses and five dollars per diem for the time necessarily engaged in the trial of the cause," the Legislature here thinks of each case as singular, and as one cause of action. In the matter of Judge Higbee, he was called in on four distinct cases. There were four cases separately responded to after four distinct and separate invitations, hence four causes were disposed of by him. His appearance was a separate appearance in each cause. By the terms of the Statute he could have appeared in one case and declined appearance in all the rest. In that case he would have been entitled to Five Dollars for that day's service, because he was necessarily engaged in the trial of that cause.

Since he was separately called, and appeared in four distinct cases, we believe that it was the intention of the Legislature to compensate him at the rate of Five Dollars per day per case, and such is our opinion.

The facts show that Judge Higbee was not called in to preside over a part or a term of Court, in which circumstance his compensation would be on a per diem basis, no matter how many cases were disposed of each day.

Respectfully submitted

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APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

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