

PROSECUTING ATTORNEY - Special prosecutor not entitled to compensation.

11-21

November 17th, 1933

11323-24-15 RS Mo 1933

1004-1005 RS Mo 1933

FILED  
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Hon. Robert W. Hawkins  
Attorney at Law  
Caruthersville, Mo.

Dear Sir:

Your request of November 10, 1933, for an opinion is as follows:

"Sec. 11323 R. S. No. 1929 provides that in the event the regular prosecuting attorney is sick or absent the court may appoint some person to discharge the duties of the office, and the next section provides that the person so appointed shall receive the same fees as the proper officers would if he were present.

Please advise if a person is appointed to serve as prosecuting attorney during the sickness or absence of the regular prosecuting attorney should be paid out of the salary of the regular prosecuting attorney or if he should receive the fee provided by the statute over and above the salary of the regular prosecuting attorney?"

Your request for an opinion involves the construction of Section 11323 R. S. No. 1929, and in particular the meaning of the term "fees" used therein.

I.

A SPECIAL PROSECUTING ATTORNEY IS ENTITLED TO "FEES"  
BUT NOT TO THE SALARY OF THE REGULAR PROSECUTING ATTORNEY.

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Section 11323 R. S. Mo. 1929 provides:

"If he be sick or absent, such court shall appoint some person to discharge the duties of the office until the proper officer resume the discharge of his duties."

Section 11324 R. S. Mo. 1929 provides:

"The person thus appointed shall possess the same power and receive the same fees as the proper officer would if he were present."

The above statutes originated at a time when the prosecuting attorney received as compensation certain "fees" for his services. Since that time, recent legislation has placed the prosecuting attorney upon a salary basis. At the present time, it is made the duty of the prosecuting attorney, under Section 11315 R. S. Mo. 1929

"to charge upon behalf of the county every fee that accrues in his office and to receive the same, and at the end of each month, pay over to the county treasury all moneys collected by him as fees,".

Section 11317 provides that any prosecuting attorney who fails to pay over such fees to the county "shall forfeit his salary for that quarter of the year and shall be deemed guilty of a misdemeanor,".

The prosecuting attorneys at the present time are therefore not allowed to retain any fees collected.

This matter has been directly passed upon by the Kansas City Court of Appeals in 1910. In State ex rel. vs. Patterson et al, 152 Mo. App. 264, the question was raised by virtue of an appoint-

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ment by the circuit court of a special prosecuting attorney, after the legally elected prosecuting attorney refused to recognize a grand jury summoned to investigate violations of particular laws. At that time the prosecuting attorney of Jackson county was paid a salary and was required, by Article 3, Chapter 104, R. S. No. 1909, to turn over all fees collected by him to the county treasurer upon completion of the duties for which the special prosecuting attorney was appointed, and upon being denied compensation, he instituted an action to compel payment under the provisions of Section 1014 R. S. No. 1909 which reads as follows:

"The person thus appointed shall possess the same power and receive the same fees as the proper officer would if he were present."

This case was defended on the theory that the prosecuting attorney of Jackson county did not receive any fees, and since there was no provision in the statute for the special prosecuting attorney to draw a salary, he was not entitled by law to any compensation. In sustaining this defense in an opinion by Judge Johnson, the Kansas City Court of Appeals said, l.c. 267:

"The thing that embarrasses relator in maintaining his demand is that he performed his services in a county where the prosecuting attorney receives no other compensation than a fixed salary of five thousand dollars per annum and is compelled by law to account for and pay to the county treasurer all the fees collected by his office.

The statutes grade the compensation of prosecuting attorneys according to the population of the respective counties. In nearly all counties, a salary ranging from three hundred to one thousand dollars per annum is paid, and in addition thereto, the attorney is allowed to "receive for his services in the circuit

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court such fees as are allowed by law." (Section 1005, R. S. 1909.) Had relator rendered his services in one of such counties he would have been entitled to receive all the fees his services brought to the office but there is no warrant in the provisions of section 1014, for saying that he would have been entitled in such case to receive any part of the prosecuting attorney's fixed salary."

The prosecuting attorney receives no fees as compensation for his services, and it is clear that a special prosecuting attorney can receive none, since it is a positive mandate of the statute that all fees must be paid into the public treasury and in the absence of express statutory warrant, they cannot be diverted to any other use or purpose.

It may be urged that the term "fees" includes the term "salary". Such a construction was placed upon the term "fees" used in Article 9, Section 12 of the Missouri Constitution in *State v. Reidel*, 46 S. W. 131. In this connection it must be borne in mind that constitutional terms are to be liberally construed, gathering the intent of the framers thereof from the four corners of the instrument, while statutory terms with reference to compensation are to be strictly construed, as was found in the *Patterson* case, supra, l.c. 268:

"The rule is well settled that a public officer cannot demand any compensation for his services not specifically allowed by statute, and that statutes providing such compensation must be liberally construed."

Furthermore, an officer in Missouri is presumed to render his services gratuitously unless some specific statutory authorization is found for the payment of such services. *King vs. Riverland Levy District*, 279 S.W. 195, l.c. 196 (1926).

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It is, therefore, the opinion of this office that the special prosecuting attorney cannot, by law, collect compensation for services rendered as such.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney-General

APPROVED:

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ROY McKITTRICK  
Attorney-General

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