

✓
PROSECUTING ATTORNEYS)
BONDS OR RECOGNIZANCES)
FORFEITURE)

Special prosecuting attorneys may be appointed by court.

11-23
November 21, 1933



Hon. Warren L. White,
Judge Division Two,
Circuit Court,
Springfield, Missouri.

Dear Judge White:

This is to acknowledge your letter of November 14th, 1933, requesting an opinion on the following facts:

"Ed Alexander was convicted of murder in this court in 1932, sentenced to ten years in the penitentiary, appealed, and gave bond. After the lapse of one year his appeal was dismissed in the Supreme Court on your motion, for his failure to perfect and prosecute his appeal with dilligence.

Alexander has never been apprehended, but is a fugitive from justice, and so far as I know, nothing has been done toward collecting the bond. The present prosecuting attorney of this County, Nat Benton, was an attorney for the defendant, and has asked to be relieved of any duty he may have in reference to the forfeiture proceedings.

I would like to ask your opinion on these questions?

Whose duty is it to prosecute the forfeiture?
The prosecuting attorney's or the attorney general's?

What steps should first be taken and in what court?

If the duty devolves upon the prosecuting attorney, can I appoint a special prosecutor under the circumstances above detailed, and if so, can he receive any compensation and how?"

I.

FORFEITURE - WHERE TAKEN.

Section 3747, R. S. Mo. 1929, provides:

"CONDITION OF RECOGNIZANCE.--The recognizance shall, in case of felonies not excepted in the last preceding section, be conditioned that the defendant shall appear in the supreme court at the next term thereof, to receive judgment on the appeal or writ of error, and in the court in which the trial or indictment shall have been had, if the supreme court shall so order, and at such time and place as such court shall direct, and that he will render himself in execution, and obey every order and judgment which shall be made in the premises."

Section 3749, R. S. 1929, provides:

"WHEN SUPREME COURT SHALL ORDER SENTENCE EXECUTED.--In all cases where the appeal or writ of error shall be prosecuted by the party indicted in the supreme court, and where the punishment assessed shall be imprisonment in the penitentiary, and where the judgment wherein the appeal or writ of error is prosecuted shall be affirmed, such court shall direct the sentence pronounced to be executed, and for this purpose the supreme court shall order the marshal of such court to arrest the convict, and deliver him to the proper officer of the penitentiary."

Section 3759, R. S. 1929, provides:

"FORFEITURE, WHERE CERTIFIED.--If the forfeiture of the recognizance is taken in the supreme court, the same shall be certified back to the court in which the judgment was rendered; and the supreme court, in such case, and in case the defendant breaks jail, shall proceed to determine the cause, and issue a *capias* if necessary."

See also Section 3763, R. S. 1929.

We assume that the recognizance complies with the requirements of the statute. As stated in your letter the party convicted never perfected his appeal, same being dismissed by the Supreme Court on motion of the Attorney-General. Thus, the Supreme Court did not affirm or reverse the judgment of the Circuit Court. Consequently, it was not its (Supreme Court's) duty to direct the sentence pronounced to be executed. The forfeiture then in this case should be taken in the Circuit Court of Greene County.

Section 3584 R. S. 1929, provides:

"RECOGNIZANCE, WHEN AND HOW FORFEITED.--If, without sufficient cause or excuse, the defendant fails to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the fact to be entered upon its minutes, and thereupon the recognizance is forfeited, and the same shall be proceeded upon by scire facias to final judgment and execution thereon, although the defendant may be afterward arrested on the original charge, unless remitted by the court for cause shown."

See Section 3585 R. S. 1929.

"The writ of scire facias is not an original writ by which litigation can be initiated; it only marks a stage in litigation already commenced. It is founded on the record of the court that issues it, and must rely on the record of that court for its support."--

State v. Kelly, 2 S. W. (2d) 750, l. c. 752.

Thus, the matter is in the nature of a civil action and not criminal.

Section 11316 R. S. 1929, provides in part the following:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in

their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county."

It is our opinion that the forfeiture should be taken in the circuit court of Greene County, Missouri; and that a scire facias issue; and it is the duty of the prosecuting attorney to prosecute such unless he be ineligible.

II.

INELIGIBILITY OF PROSECUTING ATTORNEY.

Section 11322 R. S. 1929, reads as follows:

"INTERESTED IN CASE, COURT TO APPOINT.--If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause."

The disqualification of the prosecuting attorney goes to him personally and does not attach to any of his assistants. Note wording of the above statute, "If the prosecuting attorney and the assistant prosecuting attorney etc." Under this section the court has power to appoint a special prosecuting attorney. We quote from *State v. Jones*, 306 Mo. 437, 1. c. 445:

"On account of his personal interest in the matter he was disqualified to act as prosecuting attorney or to prefer a charge based on the alleged criminal conduct of the defendant. (Sec. 11322) The trial court had inherent power, independent of the statute, to appoint a special prosecuting attorney for the State when the prosecu-

ting attorney, for any reason, was disqualified."

For limitations on inherent power of court, see State ex rel. Jones v. Wierdeman, Judge, 274 S. W. 407.

It is our opinion that the court has the power to appoint a special prosecuting attorney if Mr. Benton or his assistants are ineligible to act in this matter.

III.

COMPENSATION OF SPECIAL PROSECUTING ATTORNEY.

Section 11324 R. S. 1929, provides:

"POWER OF APPOINTEE.--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 statute originated at a time when the prosecuting attorney received as compensation certain "fees" for his services. Since that time legislation has placed the prosecuting attorney upon a salary basis. Now, it is the duty of the prosecuting attorney 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 treasurer all moneys collected by him as fees. Section 11315 R. S. 1929.

Section 11783 R. S. 1929, provides in part:

"Prosecuting attorneys shall be allowed fees as follows, unless in cases where it is otherwise directed by law: for collections or recognizances given to the state in criminal cases and which are or may become forfeited, ten per cent. on all sums collected, if not more than five hundred dollars, and five per cent. on all sums over five hundred dollars, to be paid out of the amount collected."

Section 11317 R. S. 1929, provides:

"PENALTY.--Any prosecuting attorney of any county who shall fail or neglect to comply with any provision of section 11315 shall forfeit his salary for that quarter of the year and shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined in the sum of not less than fifty dollars (\$50.00), nor more than five hundred dollars (\$500.00), for each offense, and if he shall continue in default for three months, his office shall be deemed vacant and shall be filled as provided by law for filling vacancies therein."

Thus the prosecuting attorneys must charge "upon behalf of the county every fee that accrues in his office and to receive the same", but are not allowed to retain them.

In State ex rel. v. Patterson et al, 152 Mo. App. 264, 1. c. 267, 268, the court said:

"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 court such fees as are allowed by law.' * * * 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 facts in the above case were that a grand jury was summoned to investigate violations of particular laws in Jackson County and the prosecuting attorney refused to recognize it, whereupon the Circuit Court appointed a special prosecuting attorney. The Prosecuting Attorney of Jackson County was paid a salary and all fees collected by him were turned over to the county treasurer. The special prosecuting attorney, being denied compensation upon completion of his duties, instituted an action to compel payment under the provisions of Section 1014 R. S. Mo. 1909, which provided:

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

The 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, he was not entitled to any compensation. The court sustained this defense.

We, therefore, hold that 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. In this connection, however, it may be urged that the term "fees" includes the term "salary". We quote from *State v. Riedel*, 46 S. W. (2d) 131, 1. c. 133:

"The word 'fees,' if used in its narrow distinctive sense, signifies the compensation for particular acts or services rendered by county officers in the line of their duties, to be paid by the individuals obtaining the benefit of the acts, or receiving the services, or at whose instance they were performed. But a glance at the statutes in force at the time (*Wagner's Statutes 1872*), will show that in the main only state officers then received salaries within the strict meaning of that term. Practically all county officers (with whom alone the constitutional provision was dealing) were compensated by fees, but, when a limit was placed on the amount of fees an officer might retain, that maximum

was regarded as his salary, and therefore, in a generic sense, the word 'fees' implied compensation or salary since it was the source of these."

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 strictly construed."

Observe the language of the court in King v. Riverland Levee District (Mo. App.), 279 S. W. 195, l. c. 196:

"It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office (Cases cited.) Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

Therefore, the court has the right to appoint a special prosecuting attorney and when such is appointed he becomes an officer of the court, and no provision in the statute existing for compensation he would be deemed to have performed same gratuitously. It is analogous to the same case when the court appoints

an attorney to represent a defendant. The attorney thus appointed receives no compensation.

IV.

ATTORNEY-GENERAL.

The procedure for obtaining the assistance of this office is found in Section 11273, R. S. 1929:

"When directed by the governor, the attorney general, or one of his assistants, shall aid any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts and in examinations before grand juries, and when so directed by the trial court, he may sign indictments in lieu of the prosecuting attorney."

V.

In conclusion we inquire why the matter may not be handled by an assistant prosecuting attorney, or as the money goes into the county school fund (Article 11, Sec. 8, Constitution of Missouri) why the county court could not employ counsel, who then could be appointed special prosecuting attorney, in order to protect that fund? However, we are not called upon for an opinion as to these questions and we express none.

Respectfully submitted,

James L. HornBostel
Assistant Attorney-General.

Approved: _____
ROY McKITTRICK
Attorney-General.