SPECIAL JUDGE, compensation of under R. S. Mo. 1929, Section 1944.

June 21, 1935.

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Hon. Richard Chamier,
Prosecuting Attorney,
The County of Randolph,
Moberly, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of March 6, 1935, such request being in the following terms;

> "The Bar of this county may appoint a special judge in a case tried some years ago before a Referee. It will be necessary for the special judge to review the evidence and findings made by the Referee. Will he be entitled to the fee of $10.00 a day for the time spent in reviewing the case or will compensation be allowed only for that period actually spent in trying the case."

The information contained in such request was supplemented by letter from you of June 12, 1935, in the following terms:

> "In answer to your letter of May 28, 1935, in reply to my letter of March 6, 1935, to General McKittrick, will say that in the case referred to, the finding of the Referee was not merged in a judgment, but the Referee simply made his report, and Judge A. W. Walker, who appointed the Referee, was defeated by Judge Hammett, who is now Circuit Judge, and Judge Hammett disqualified, and the matter is now before the Special Judge on the question of approving the Referee's Report and the Exceptions filed thereto.
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> The Referee was more than a week in hearing the evidence and there is a voluminous transcript containing many hundred pages of evidence. The report of the Referee was filed shortly before Judge Walker went off the bench. No evidence is to be heard by the Special Judge, but the case is to be tried on the evidence taken before the Referee.

> There is no agreement between the parties as to a fee, and the Special Judge was elected by the Bar under Section 1944."

R. S. Missouri, 1929, Section 1944, provides as follows:

> "The person elected as special judge, as provided by the preceding section, shall receive the sum of ten dollars per day for each day actually engaged in transacting the business of such term or part of term of court, to be paid out of the state treasury upon the certificate of the clerk of said court."

This statute has never been construed by an Appellate Court of this State and, therefore, the answer to your question must be based on a reasonable construction of its terms.

The question is, what the phrase "actually engaged in transacting the business of such term or part of term of court", means. A first impression might be that this phrase would be confined to time actually on the bench hearing evidence and arguments of counsel. However, it seems more likely that the phrase is broader in meaning and includes the time spent by the judge in actually working on the case, as opposed to the tenure of office of such special judge, from the time of his appointment until its termination.

In a situation such as that presented by your letters, where the special judge is elected only for one case, and this case has been referred to a referee who has made a report prior to the election of such special judge, the special judge would probably sit on the bench only during the argument of counsel on the exceptions to the report of the referee, which would probably consume a part of one day. However, in order to take proper action on the report, many days of work would be necessary where the report and the evidence are voluminous and exceptions are filed to such report. It would be the duty of the special judge to study carefully the report and evidence for it is his function to take such action as is indicated to him by the whole record. In the case of Fine Art Pictures Corp. v. Karzin et al., 29 S.W. (2d) 170 (1930), the court said:

> "The trial court was not bound by the findings of the referee, whose power was limited to re-

commending a judgment, and it was entitled in arriving at the terms of its judgment to disregard the report entirely, or to adopt such parts as seemed to it to be right, or to modify it and adopt it with corrections. Lack v. Brecht, 166 Mo. 242, 65 S.W. 976; Utley v. Hill, 155 Mo. 232, 55 S.W. 1091, 49 L.R.A. 323, 78 Am. St. Rep. 569; State ex rel. v. People's Ice, Storage & Fuel Co., 246 Mo. 168, 151 S. W. 101; City of St. Louis v. Parker-Washington Co., supra; Crowell v. Metts, 213 Mo. App. 683, 253 S.W. 205; Valleroy v. Enright, supra; West v. Bank of Caruthersville, 110 Mo. App. 490, 85 S.W. 601; W. T. Rawleigh Medical Co. v. Woodward (Mo. App.) 230 S.W. 647; Springfield Gas & Electric Co. v. Southern Surety Co. (Mo. App.) 250 S.W. 78." 29 S.W. (2d) 174.

There remains then the narrow issue of whether a special judge, under the circumstances detailed in your letter, is actually engaged in transacting the business of the court only when he is sitting on the bench hearing the arguments of counsel, and if he is to be paid only for his time so spent, which will probably entitle him to $10 as his total compensation for acting in the case, when he may be obliged to spend his entire time for several weeks working on the case. We believe the answer to this question must be no, if the statute as applied to these facts is to operate reasonably and fairly. A lawyer is transacting the business of his client while preparing in his office a case for trial, or a brief to be argued, as well as when he is in the courtroom trying or arguing his case. Both are essential to a proper serving of the interests of his client. It would seem to us likewise that a judge is transacting the business of the court when he is investigating and working on a case in his chambers alone, equally as when he is sitting on the bench hearing evidence or arguments.

In conclusion, it is our opinion that a special judge elected under the provisions of R. S. Missouri, 1929, Section 1943, is entitled, under Section 1944, to the sum of $10 per day for the time spent by him working on and reviewing the report of a referee, the evidence adduced before such referee, and the exceptions filed to such report, when it is his duty to enter judgment based on such report, as well as for the time when he is sitting on the bench hearing the arguments of counsel in connection with such report, when no evidence is to be adduced be-

fore him, and his judgment is to be entered solely on the basis of the evidence adduced before the referee, the report of the referee, the exceptions thereto, and the arguments of counsel thereon.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

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