

CRIMINAL COSTS:

Method of providing fee bill and payment of costs in misdemeanor cases.

May 11, 1939

Honorable Harold S. Hutchison
Prosecuting Attorney
Maries County
Vienna, Missouri

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Dear Sir:

We acknowledge your request for an opinion, dated May 4, 1939, which reads as follows:

"I would like to have your opinion in the matter in which the facts are substantiated as follows:

"In January of this year, there was an information filed before Robert C. Terrill, Justice of the Peace of Jefferson Township, in which State of Missouri was plaintiff and J. R. May was defendant charged with stealing chickens in the day time, the value of which was less than Thirty Dollars (\$30.00); that the same came on for trial January 7, 1939, before the above named Robert C. Terrill, Justice of the Peace, at which trial the defendant was acquitted. That sometime after the trial and before January 13th, the said Robert C. Terrill, Justice of the Peace submitted a cost bill to the County Clerk of Maries County in the amount of Seventy Eight Dollars and Ninety Five Cents (\$78.95), part of which was not itemized. That on January 13th, the said Justice of the Peace submitted some additional costs and in his letter stated he had not specified what some of the costs was for but would submit a regular transcript if the County Clerk thought it necessary.

That on February 10th, without ever submitting said cost bill to the Prosecuting Attorney for inspection and without his knowledge that the same had been filed, the County Court paid by warrant to Robert C. Terrill the amount of Eighty Dollars and Sixty Five Cents (\$80.65) "As fees in the May case." That the Justice of the Peace paid the sheriff of Maries County his fees and has converted the rest of the amount to his own use and has failed and refused to pay the jurors, witnesses and constable fees in the above cause.

"I would like your opinion first, whether or not the Justice of the Peace violated Section 4086 of the Revised Statutes of 1929. Second, if not, whether or not he violated any other criminal statute. Third, whether or not the County Court under that set of facts violated Section 3845. Fourth, whether or not the County Court would be individually liable to pay the jurors, witnesses and constable or whether the County would be liable.

"The Justice is absolutely insolvent."

Section 3828 R. S. Mo. 1929 provides:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Section 3851 R. S. Mo. 1929 provides that a Justice of the Peace upon issuing a fee bill shall certify same to the Circuit Clerk and reads:

"Whenever the state or county shall be liable under the provisions of this article, or any other law, for costs incurred in any examination of any felony, or in the trial of any misdemeanor before any justice of the peace, it shall be the duty of such justice to make out, certify and return to the clerk of the circuit or criminal court of the county a complete fee bill, specifying each item of service and the fee therefor, together with all the papers and docket entries in the case; and it shall thereupon be the duty of such clerk to make out a proper fee bill of such costs, which shall be properly and legally chargeable against the state or county, which shall be examined by the prosecuting attorney, and proceeded with in all respects as a fee bill made out for costs incurred in such court of record."

Section 3844 R. S. Mo. 1929 provides the procedure for the Circuit Clerk when certifying fee bills to the State Auditor in felony cases and reads:

"When a fee bill shall be certified to the state auditor for payment, the certificate of the judge and prosecuting attorney shall contain a statement of the following facts: That they have strictly examined the bill of costs; that the defendant was convicted or acquitted, and if convicted, the nature and extent of punishment assessed, or the cause continued generally, as the case may be; that the offense charged is a capital one, or punishable solely by imprisonment in the penitentiary, as the case may be, that the services were rendered for which charges are made, and that the fees charged are expressly authorized by law, and that they are properly taxed against the proper party, and that the fees of no more than three witnesses to prove any one fact are allowed. In cases in which the defendant is convicted, the judge and prosecuting attorney shall certify, in addition to the foregoing facts, that the defendant is insolvent, and that no

costs charged in the fee bill, fees for board excepted, were incurred on the part of the defendant."

Section 3845 R. S. Mo. 1929 provides the procedure for Circuit Clerks when certifying fee bills to the County Court in misdemeanor cases, that they be in the same form and substance as felony cases, and reads:

"Each and every bill of costs presented to any county court for allowance shall be examined and certified to by the judge and prosecuting attorney in the same manner, all necessary charges excepted, as provided for certifying bills of costs to the state auditor for payment; and any county judge who shall pay, or vote to pay, any cost incurred in any criminal case or proceeding, unless the same is so certified to, shall be adjudged guilty of a misdemeanor."

Section 3853 R. S. Mo. 1929 provides:

"All criminal cost fee bills shall be certified for payment as hereinbefore provided, and in addition thereto the circuit clerks of each county and clerks of all criminal courts shall make copies of all original fee bills certified to the state auditor for payment, and shall file the same with the treasurers of their respective counties, and the city of St. Louis, at the time of transmitting the original for payment, and when certified to the state auditor for payment, he shall draw his warrant on the state treasurer and transmit the same to the treasurer of the county from whence the bill originated, or the city of St. Louis, and when any criminal cost fee bill shall be certified to the county court, or the auditor of the city of St. Louis, for payment, the county clerk, or the auditor of the city of St. Louis, shall, when the same

is allowed, draw a warrant on the county treasurer, or the treasurer of the city of St. Louis, in payment thereof, and deliver the same to the county treasurer, or to the treasurer of the city of St. Louis, together with a list of the names of the various parties to whom the fees are due, stating the amount due each person. The treasurers, on receipt of any such warrants and fee bills, shall record the fee bills in a well-bound book, arranged with appropriate headings, so that the same shall correspond, as near as may be, with the accounts required to be kept by other officers in section 11822, R. S. 1929."

Section 3854 R. S. Mo. 1929 provides:

"The county treasurers shall pay out of all such fees to the proper owners as the same may be called for: Provided, that before any such fees shall be paid the party to whom the same is due shall furnish satisfactory evidence to the treasurer that he or she, as the case may be, is not at the time indebted to the state or county, on account of delinquent back taxes, or is indebted to the state or county on account of any fine, penalty, forfeitures or forfeited recognizances, or costs for a violation of any criminal statute of this state, or for contempt of any court, no matter if the same shall have been paid by oath of insolvency as provided by law; or is indebted to the state or any county on account of any funds coming to his hands by reason of any public office: Provided further, that after deducting the amount of the indebtedness of the claimant, if any, on account of any or all of the various causes hereinbefore enumerated, the treasurer shall pay him the balance, giving duplicate receipts for the separate amounts paid, one of which shall be filed with the county clerk, who shall charge the treasurer with the same, but if the indebtedness of the claimant equals or exceeds the amount of

his fees, the treasurer shall give him credit for the amount of his fees, stating on what account, and shall make duplicate receipts for the same, one of which he shall deliver to the claimant and the other he shall file with the county clerk, who shall charge the treasurer with all such receipts, and in his regular settlements with the county court the treasurer shall make a full and complete exhibit of all his acts and doings under section 3853 to 3858, inclusive."

In the case of State ex rel vs. Heege, 40 Mo. Appeals 650 l.c. 651 in a mandamus suit against county judges to allow fees in speaking of a cost bill coming up from a Justice Court's misdemeanor case, this court said:

"The cost bills were examined, approved and certified by the judge of the circuit court, and the prosecuting attorney of the county. * * * * *"

Thus we see that even in misdemeanor cases, the judges and the prosecuting attorney must certify the cost bills. We also see that county judges can be mandamus'd to pay statutory fees allowable in misdemeanor cases.

Section 3852 R. S. Mo. 1929 makes it a misdemeanor to knowingly violate the above statutes and reads:

Every judge, prosecuting attorney, clerk or justice of the peace who shall knowingly violate any provision of this article, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding one thousand dollars."

On the question of whether or not the justice violated Section 4086, which is the statute under the general criminal code on embezzlement by a public officer, in the case of State vs. Bolin 110 Mo. 210 l.c. 211, the Supreme Court said:

"No provision of the statute is pointed out, or found, which directs or authorizes the public school money of the state or county to be placed in the possession or under the supervision, care or control of a justice of the peace for safe keeping, disbursement, transfer, or other purpose, and we are unable to see how he, as a public officer, can be guilty of embezzling funds which never came into his possession, under any authority of law, by virtue of his office. If he had no right to the possession or control of this public money as an officer, he would have no greater right when acting merely under color or pretense of office.

"We do not think the language of the statute, 'under color or pretense' of an office, can be construed to apply to an officer, who, having in fact, no right to the custody of public money, obtains the possession of it by falsely representing that he is entitled to its custody by virtue of his office. The statute was only intended to make one, acting officially, under color of office only, equally liable for the misappropriation of the public money coming into his possession by virtue of his supposed official right to receive it, as he would have been had the title to his office been perfect."

The above case holds that there was no official embezzlement, because under the statute defendant Justice of the Peace was not authorized to collect the fines; hence, he did not receive the said fines by virtue of his office. In your case the fees likewise were not payable to or received by the justice under any statutory provision.

As to civil liability of officers for malfeasance, we quote from Knox County vs. Hunolt, 110 Mo. 67 l.c. 75:

" * * * * * The use of the fund for the payment of ordinary county debts was an act in direct violation of the constitution and laws

creating that fund, and was, therefore, nothing short of malfeasance. That the judges would be liable in a private suit to persons especially injured for such a violation of law is clear, and we can see no reason why they are not liable to the county."

CONCLUSION

Answering your first question, we are of the opinion under the facts submitted and the holding in the Bolin Case, supra, that the justice of the peace did not violate Section 4086 R. S. Mo. 1929.

Answering your second question, we are of the opinion under the facts submitted, that the justice of the peace may be prosecuted for violating the provisions of Section 3851, and 3852, supra, for not certifying a fee bill to the Circuit Clerk.

Answering your third question, we are of the opinion under the facts submitted that any judge of the county court who voted to pay this fee bill without requiring the certificate of the Circuit Judge and Prosecuting Attorney violated Section 3845, supra.

Answering your fourth question, we are of the opinion under the facts submitted and the holding in the Knox County Case, supra, that the members of the county court would be personally liable to the county for replacement of such portion of the money paid to the justice of the peace which did not actually reach the parties entitled thereto. We would not be prepared to say that upon the facts outlined in your letter the judges of the county court would be personally liable to the jurors, witnesses, and constables for payment of their respective fees. However, if the jurors, witnesses, and constables could show that they were especially injured by the improper payment to the justice of the peace, the judges might be personally liable to them. The question of whether these parties were especially injured is a question of fact which would involve more facts than are outlined in your letter. The Heege case holds that the county is liable for these fees when a proper fee bill is presented. We do not think that what has transpired in connection with these fees has discharged the county's liability, and therefore, we think the

Honorable Harold S. Hutchison

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the county is still liable to the jurors, witnesses, and constables.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General

APPROVED:

HARRY H. KAY
(Acting) Attorney-General

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