

PROSECUTING: Special Prosecuting Attorney appointed under Sections  
ATTORNEY : 12948 and 12949 R. S. Mo. 1939 is not entitled to  
salaries or fees.

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January 14, 1942.

Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

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Dear Mr. Smith:

We are in receipt of a request for an opinion, dated January 7, 1942, which reads as follows:

"We are in receipt of a letter from Mr. Earnest A. Long, Circuit Clerk of Pemisnot County, wherein certain questions are asked in regard to the fee of a special prosecutor in a criminal case. We hand you herewith a copy of the letter written by Mr. Long and request your official opinion in regard to the questions raised.

"We presume that the sections particularly applicable are 12948, 12949, 12950, 12939 and 13505 R. S. Mo. 1939. Section 12948 provides for the appointment of some other attorney to prosecute in a criminal case where the prosecutor has been employed as Council or is related to the defendant. Section 12949 provides for the appointment of some person to discharge the duties of office when the proper official is sick or absent. Section 12950 relates to the 'power of the appointee'. Section 12939 provides for the salary of prosecuting attorney in counties up to 200,000 population.

"In addition to the questions asked by Mr. Long, we desire to know if a person appointed under the provisions of either section 12948 or 12949 R. S. Mo. 1939 is entitled to remuneration for services rendered either by the collection of fees or salary. If the person so appointed is entitled to compensation, is such compensation in addition to the salary provided for the prosecuting attorney in section 12939, or is the salary provided by said section the maximum amount allowable? What procedure should be followed in the payment of this compensation?"

According to the last decennial census of 1940 the population of Pemiscot County was 46,857 and by reason of that population the prosecuting attorney of Pemiscot County is on a salary which is set out in Section 12939 R. S. Mo. 1939, which partially reads as follows:

"The prosecuting attorney shall receive for his services per annum, to be paid out of the County treasury, in all counties now or hereafter having a population of \* \* \* 30,000 and less than 50,000 inhabitants, the sum of \$3,000.00; \* \* \*"

Section 12941 R. S. Mo. 1939 partially reads as follows:

"It shall be 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 treasury all moneys collected by him as fees, \* \* \*"

Under the above two sections the prosecuting attorney is on a salary basis and not a fee basis.

Section 12948 R. S. Mo. 1939 reads as follows:

"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."

Section 12950 R. S. Mo. 1939 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."

The word "fees" as used in Section 12950, supra, should not be considered as a salary and it was so held in the case of State ex rel. v. Patterson et al., 152 Mo. App. 264, l. c. 268, where the court said:

"The prosecuting attorney receives no fees as compensation for his services and it is clear a special prosecutor can receive none since there 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.

"But relator argues that the term 'fees' in section 1014 should be defined to mean the salary of the prosecuting attorney in counties where the law gives him no other compensation than a salary. This section appears in the article of the statutes relating to 'Circuit and Prosecuting Attorneys' and we think it sufficiently discloses the legislative intent that its provisions should apply only to those counties mentioned in section 1005 and that, even where applicable, it does not authorize the payment of any salary to the special prosecutor. 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. (Shed v. Railway, 67 Mo. 687; Gammon v. LaFayette Co., 76 Mo. 675; State v. Wofford, 116 Mo. 220; State ex rel. v. Walbridge, 153 Mo. 194; Sanderson v. Pike Co., 195 Mo. 598.)"

Under Section 12948, supra, the court was authorized to appoint a special prosecutor under the facts set out in your letter

from Mr. Earnest A. Long, referred to in your request, and it was so held in the case of State v. Jones, 268 S. W. 83, para. 1-2, where the court said:

"The information charged the defendant with operating a motor vehicle while in a state of intoxication. Mr. Massengill, the prosecuting attorney of New Madrid county, filed the information and was the principal witness for the state. The evidence discloses that he is an interested party; his car and the car of the defendant were in collision. 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. Section 742 R. S. 1919. The trial court had inherent power, independent of the statute, to appoint a special prosecuting attorney for the state when the prosecuting attorney, for any reason, was disqualified. 32 Cyc. 719."

It was also affirmed in the case of State v. Wilson, 200 Mo. 23, l. c. 28, where the court said:

"\* \* \*That the special prosecuting attorney was duly appointed appears from the record of the court on the twenty-first of February, 1905, wherein it is recited that Mr. Moss, the regular prosecuting attorney of the county, had been employed as counsel by the defendant and for that reason the court appointed Mr. Scott as special prosecuting attorney for this case. Section 4955, Revised Statutes 1899, provides: 'If the 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 . . . either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to

prosecute or defend the cause.' And section 4957, Revised Statutes 1899, provides: 'The person thus appointed shall possess the same power and receive the same fees as the proper officer would if he were present.' That a special prosecutor appointed by virtue of these sections has all the power for the purposes of the case in which he is appointed as the regular prosecuting attorney, there can be no doubt. (State v. Griffin, 87 Mo. l. c. 615, 616; State v. Moxley, 102 Mo. l. c. 383, 384.) \* \* \*"

Under the holding in the case of State ex rel. v. Patterson et al, 152 Mo. App. l. c. 268, the court specifically held that where the prosecuting attorney receives no fees as compensation for his services but is on a salary basis as set out in Section 12939, supra, it is very clear a special prosecutor can receive none, and that there is a positive mandate of the statute that all fees must be paid into the county treasury, and in the absence of an express statutory warrant they cannot be diverted to any other use or purpose. The court also, in that case, held that a public officer, even though he is specially appointed cannot demand any compensation for his services not specifically allowed by statute, and that statutes providing such compensation as salaries and fees must be strictly construed. Evidently Section 12950, supra, was enacted when the prosecuting attorneys were on a fee basis and not on a salary basis which was re-enacted by the Laws of 1933, page 178.

We find no statutory authority allowing the county court to pay a special prosecuting attorney who has been appointed temporarily for the trial of one or more specific cases. The courts have placed the appointment of a special prosecuting attorney in the same bracket as that of an attorney appointed by the court to defend in a criminal action. In neither position, either that of special prosecutor or an attorney appointed to defend in a criminal case, does the statute set out any payment of a salary, either by statute or by a written agreement of the county court. This was so held in the case of State ex rel. v. Patterson, supra.

CONCLUSION

In view of the above authorities, it is the opinion of this department that a special prosecuting attorney cannot be allowed a fee or salary for the reason that the statutes do not provide for such a salary or fee and that the county court cannot by written contract allow such a salary or fee. In view of this holding, it is further the opinion of this department that since the special prosecuting attorney cannot be allowed a fee or salary, it would be impossible to deduct any amount from the salaries of the regular elected, qualified and acting prosecutor to pay the special prosecuting attorney appointed under Section 12948 or Section 12949 R. S. Mo. 1939.

It is further the opinion of this department that the fee bill which included a fee due the regular prosecuting attorney should not be corrected to allow the fee to be paid the special prosecuting attorney, and a fee allowed the regular prosecuting attorney should be paid into the county treasury.

Respectfully submitted.

W. J. BURKE  
Assistant Attorney General

APPROVED:

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VANE C. THURLO  
(Acting) Attorney-General

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