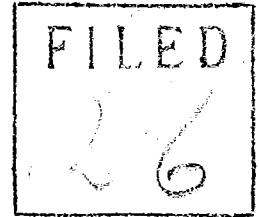


MAGISTRATE COURTS:  
PROBATE COURTS:

*in memo.*

In counties of less than 30,000 inhabitants special probate judge and ex officio magistrate appointed or elected under Sections 2458 through 2462, R.S.Mo. 1939. Same compensation as regular judge to be paid from magistrate fund. Special probate judge in counties of more than 30,000 inhabitants entitled to same compensation as regular judge, to be paid by county.

October 1, 1947



Honorable Walter A. Eggers  
Judge of the Probate Court  
Perry County  
Perryville, Missouri

*10-8*  
*Amended Copy*  
*available*  
*7-23-54*

Dear Judge Eggers:

This is in reply to your letter of September 23, 1947, requesting an opinion from this department, which reads as follows:

"S.B. 207 Section 10a Laws of Missouri 1945 reads in part as follows:

"If the judge of the magistrate court in any county which has only one magistrate ..... or is absent from the county for a period of five days or more, the Judge of the Circuit Court of such county, may make an order to be entered in the records of such magistrate court, appointing and designating either some magistrate of another county within the circuit or some qualified attorney of the county to act as judge of the magistrate court of such county ..... Any magistrate so appointed shall be entitled to such travel and subsistence expense as may be fixed by the circuit judge,' etc.

"Section 6 of Senate Bill 207 reads in part: 'In counties of 30,000 inhabitants or less, the probate judge shall qualify as judge of the magistrate court,' etc.

"Sections 2458-2461 RS Missouri 1939 provide for the appointment of a qualified attorney to act as probate judge and specifies that for such services he is to receive the same fees that the regular

judge of probate is entitled to receive for similar services.

"SCS for SB 198, Page 1514 Laws of 1945, provides for salaries of Probate Judges in counties of over 30,000 inhabitants.

"The Missouri Constitution abolishes the fee system entirely as applied to Magistrates and Probate Judges.

"Now our association has the following questions for your consideration:

"1. If a temporary magistrate is appointed by the circuit judge in accordance with the provisions of Section 10A of SB 207, will this temporary magistrate also have jurisdiction in probate matters during the period that he serves as temporary magistrate?

"2. If the temporary magistrate does not have probate jurisdiction then how will a temporary judge be appointed to handle probate matters during such an absence of the regular magistrate. Would Sections 2458-2461 RS 1939 prescribe the manner of appointment? If so, what would be the compensation of such temporary probate judge in view of the fact that fees are contrary to the Constitution?

"3. If a probate judge is temporary appointed in counties over 30,000 in accordance with sections 2458-2461 RS 1939, how would such temporary judge be compensated?"

Section 18 of Article V of the 1945 Constitution of Missouri provides, in part, as follows:

"There shall be a magistrate court in each county. In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court.

\* \* \* \*"

Section 6, Laws of 1945, page 770, implementing the above section, provides:

"In counties of 30,000 inhabitants or less, the probate judge shall qualify as judge of the magistrate court and his failure or refusal to do so shall constitute a vacancy in both the office of probate judge and the office of judge of the magistrate court."

The effect of the above provisions is to combine the offices of probate judge and magistrate in counties of 30,000 inhabitants or less and to invest one person with the duty and authority to perform the functions of both offices. The wording of the Constitution and the statutes is clear and unambiguous in providing that the probate judge shall perform the functions of both offices. Said probate judge is an ex officio magistrate, i.e., by virtue of his office. In other words, his authority as magistrate is derived from his official capacity as probate judge and is appurtenant thereto. Therefore, since the office of probate judge is the fundamental office we must look to the statutes relating to that office. Section 10a, Laws of 1945, page 771, relating to the appointment of temporary magistrates, reads as follows:

"If the judge of the magistrate court in any county which has only one magistrate court is incapacitated and unable to act or to dispose of the business pending before him for any reason, or is absent from the county, for a period of five days or more, the judge of the circuit court of such county, may make an order to be entered in the records of such magistrate court, appointing and designating either some magistrate of another county within the circuit or some qualified attorney of the county to act as judge of the magistrate court of such county until such magistrate resumes his duties, and such magistrate or special judge, when so appointed shall possess all the powers and shall be subject to all the responsibilities of the regular judge of the magistrate court during the time of his appointment. Any

person so appointed shall, before acting as judge of the magistrate court, take the oath required of magistrates. Any magistrate so appointed shall be entitled to such travel and subsistence expense as may be fixed by the circuit judge which shall be paid by the state and charged against the salary of the regular judge of the magistrate court of such county. Any attorney appointed to act as magistrate shall be entitled to one-thirtieth of the monthly salary of the regular judge of the magistrate court of the county for each day he shall act as magistrate to be paid by the state and charged against the salary of the regular magistrate. Such payments shall be made upon the certification of the circuit judge and the clerk of such magistrate court that the person or magistrate was duly appointed and acted as magistrate of such court."

We believe that said section applies only to counties having more than 30,000 inhabitants and less than 70,000 inhabitants where there is one magistrate court, and has no application to counties having 30,000 inhabitants or less where the probate judge is ex officio magistrate.

The election or appointment of special probate judges, in the absence of the regular judge, is governed by Sections 2458 through 2472, R.S.Mo. 1939. When so elected or appointed in counties of 30,000 inhabitants or less, as the case may be, said special judge must, of course, qualify as magistrate.

It is also quite evident that when the Governor, under the authority given him in Section 4 of Article IV of the 1945 Constitution, fills a vacancy in the office of probate judge and ex officio magistrate in counties of 30,000 inhabitants or less he appoints a probate judge who qualifies as magistrate. The office of probate judge and ex officio magistrate in said counties is a constitutional office.

Sections 2461 and 2462, R.S.Mo. 1939, further provide that a special probate judge is allowed the same fees and compensation for his services as the regular judge is entitled to receive. It will be noted that probate judges and ex officio

magistrates in counties of 30,000 inhabitants or less are compensated in their capacity as ex officio magistrates. Section 13404, Mo.R.S.A., relating to the fees charged and collected in probate proceedings, is, in part, as follows:

"In counties now or hereafter having 30,000 inhabitants or less, the judge shall, at the end of each month, pay over to the director of revenue, to be deposited by him with the state treasurer in the 'magistrate fund', all moneys collected by him or his clerk as fees, taking two receipts therefor, one of which he shall immediately file with the state treasurer. \* \* \* \*"

All such fees charged and collected in counties of 30,000 inhabitants or less must be paid into the magistrate fund from which the salaries of magistrates are paid. Further, Senate Bill No. 198 of the 63rd General Assembly, Laws of 1945, page 1514, relating to salaries of probate judges, makes provision only for probate judges in counties of more than 30,000 inhabitants. In Section 17, Laws of 1945, page 773, providing for the salaries of magistrates in the various counties, we find this provision:

" \* \* \* \* In all counties now or hereafter containing a population of 30,000 inhabitants or less, the salary of the magistrate as above provided shall include his compensation as probate judge of said county."

However, in 1943 the General Assembly enacted Section 13404a, Mo.R.S.A., which provided certain salaries for probate judges in counties of 19,000 inhabitants or less. We believe said section is clearly inconsistent with the general compensation system adopted by the 64th General Assembly for judges of the probate court in counties of 30,000 inhabitants or less, and particularly with the foregoing statutory provisions, and must necessarily be considered as repealed by implication. In *Re Naturalization of Berlin*, 45 Fed. Supp. 774; *State ex rel. Wells v. Walker*, 326 Mo. 1233, 34 S.W. (2d) 124; *Vining v. Probst*, Mo. App., 186 S.W. (2d) 611; *State v. Malone*, Mo. App., 192 S.W. (2d) 68.

The question now arises as to the proper source of said compensation. By way of comparison, it will be noted that the compensation of a special or temporary magistrate is, under the provisions of Section 10a, Laws of 1945, page 771, charged against the salary of the regular magistrate. However, it is a familiar rule of law that the person rightfully holding a public office is entitled to the compensation attached thereto, and this right does not rest upon contract. The right to the compensation attached to a public office is an incident to the title to the office and not to the exercise of the functions of the office. The fact that officers have not performed the duties of their office does not deprive them the right to compensation. 46 C. J., Section 233, page 1014; Luth v. Kansas City, 203 Mo. App. 110, l.c. 113; Stratton v. City of Warrensburg, 167 S.W. (2d) 392, l.c. 396; Coleman v. Kansas City, Mo., 173 S.W. (2d) 572, l.c. 577; State ex rel. Nicolai v. Nolte, 180 S.W. (2d) 740, l.c. 741. Therefore, in the absence of a statutory provision such as found in Section 10a, requiring the compensation of a special probate judge and ex officio magistrate to be charged against the salary of the regular probate judge and ex officio magistrate, we believe said regular probate judge and ex officio magistrate is entitled to his full compensation as provided in Section 17, supra, even though at times his duties are performed by a special probate judge and ex officio magistrate. Said compensation is paid by the state from the magistrate fund. It necessarily follows that compensation of a special probate judge and ex officio magistrate should be paid by the state from the magistrate fund.

It will be noted that under the provisions of Section 13404, supra, every judge of the probate court in counties of 30,000 inhabitants or less shall give a good and sufficient bond in a penal sum of \$2,000.00. Said provision certainly applies with equal force to a special probate judge. The reason for the requirement is present in either case.

The foregoing will serve to answer the first two questions presented. With respect to your further question, the foregoing discussion of compensation of regular judges is also controlling except that in counties of more than 30,000 inhabitants probate judges are paid by the county according to Senate Bill No. 198 of the 63rd General Assembly, Laws of 1945, page 1514. Thus, the county must pay the compensation of special probate judges.

Honorable Walter A. Eggers -7-

Conclusion.

Therefore, it is the opinion of this department that in counties of 30,000 inhabitants or less a special probate judge and ex officio magistrate is appointed or elected under the provisions of Sections 2458 through 2462, R.S.Mo.1939, and is entitled to the same compensation allowed the regular probate judge and ex officio magistrate, said compensation to be paid by the state from the magistrate fund. It is further the opinion of this department that a special probate judge in counties of more than 30,000 inhabitants is entitled to the same compensation allowed the regular probate judge, said compensation to be paid by the county.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

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