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11316 R.S. 1929

PROSECUTING ATTORNEY - Allowance of expenses in the county; allowance of expenses in change of venue cases in the county.

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Hon. George F. Addison
Prosecuting Attorney
Salem, Missouri

My dear Sir:

This acknowledges receipt of your request of October 5th 1933 for an opinion. Your request is as follows:

"On February 23, 1932, an opinion was issued by the then Attorney General relative to Sec. 11316 of the R. S. M. 1929, to the effect that Prosecuting Attorneys are entitled to reimbursement for expenses incurred in attending to duties in other places than in the county seat. Please send me an opinion as to whether this is the true law on the subject and also as to whether the term expenses includes all reasonable expense incurred or mileage to and from the point, only."

Your request involves a construction of Section 11316 R. S. Mo. 1929, which is as follows:

"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; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall re-

ceive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said court, and make out and cause to be printed, at the expense of the county, and in cities of over 300,000 inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city".

This opinion involves three propositions of law:

1st. The distinctions between "Payment for services" and "Expenses", as made by the Missouri courts.

2nd. Whether the prosecuting attorney is entitled to expenses in the performance of his duties in the county outside of the county seat; and

3rd. Whether the prosecuting attorney is entitled to reasonable expenses in change of venue cases from one township to another.

We shall treat the three in order.

I.

THE COURTS APPLY A STRICT RULE IN DETERMINING COMPENSATION FOR AN OFFICE AND A LIBERAL RULE AS TO THE ALLOWANCE OF EXPENSES.

We have in Missouri a strict rule as to payment for services, fees, salary or compensation of an officer which requires the officer claiming such compensation to place his finger upon statutory authority for same. An officer can only recover such compensation as is specifically authorized by statute. *Williams v. Chariton county*,

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85 Mo. 645 (1885); State ex rel. v. Adams, 172 Mo. 1 (1903); Hill v. Butler County, 195 Mo. 511 (1906)); 22 Mo. Dig. - officers -94.

Furthermore, an officer in Missouri is presumed to render his services gratuitously unless some specific statutory authorization is found for the payment of such services. King v. Riverland Levee District, 279 S. W. 195, 1. c. 196 (1926).

The courts have taken a different attitude with reference to the allowance of "expenses" necessarily incurred in the performance of official duties. The general rule as to such matters is found in 46 C. J. p. 1018, Section 246 in the following language:

"But where the law requires an officer to do that which necessitates an expenditure of money for which no provision is made to supply him with cash in hand, he may make the expenditure out of his own funds and have reimbursement therefor, and where public duty is demandant of an officer without provision for any compensation, the expense must be borne by the public for whose benefit it is done".

This rule has been accepted and consistently followed in Missouri. County of Boone v. Todd, 3 Mo. 140 (1833); Harkreader v. Vernon county, 216 Mo. 696 (1909); Buchanan v. Ralls county, 283 Mo. 10; 222 S. W. 1002 (1920).

In Ewing v. Vernon County, 216 Mo. 681 1. c. 694, the court said,

"Conceding there are no fees allowed for the delivery of a deed after recording or for transmitting a deed from one county to another, yet the statute does not contemplate that he should pay money out of his pocket in the performance of his official duty. Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore, those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo".

It is, therefore, the opinion of this office that the question of "compensation", and its allowance by law, does not furnish the basis

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for the adjudication of "expense" accounts.

II.

A PROSECUTING ATTORNEY IS ENTITLED TO REASONABLE TRAVELING EXPENSES IN THE COUNTY, OUTSIDE OF THE COUNTY SEAT WHILE IN THE DISCHARGE OF OFFICIAL DUTIES.

Under the provisions of Sec. 11316, supra, it is made the duty of the prosecuting attorney to "commence and prosecute all civil and criminal actions" in his county, "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".

Thus we have the duties of the prosecuting attorney specifically defined and limited by law. We must, therefore, determine what is reasonably necessary for the prosecuting attorney to do in order to fully discharge these duties. Whatever is necessary, and reasonable expenses incurred therein, go together. In this connection we must turn to the decisions of the Supreme Court to learn the reasons for the allowance of expenses.

In *Ewing v. Vernon County*, supra, l. c. 693, the Supreme Court said,

"Finally, we shall assume that among civilized people approved advances and results in scientific research make janitor services in public offices (i.e., the prevention of the propagation and spread of disease from filth), a necessity, and that the Legislature knew and gave effect to that fact.* * * * Is the general public not interested in and benefited by clean windows, clean floors, clean furniture, clean spittons, heat in winter and wholesome, healthy air at all times in public offices? It is useless to argue that question. It answers itself".

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Reasoning by analogy, it may be said that the protection of life and property from the criminal element and the maintenance of law and order is equally essential to the general welfare as the prevention and control of disease. It is indispensable to successful prosecution of criminal cases pending that sufficient evidence be gathered upon which to successfully conclude said prosecution, and the gathering of such evidence in criminal cases pending often involves expense. In examining such expense accounts, the county court, before allowing any such items of expense, should ascertain whether or not the items and charges are reasonable and whether or not they were necessarily incurred by the prosecuting attorney in the official discharge of his duties.

In the foregoing cases from Ralls, Vernon, and Boone counties, supra, the only statutes involved provided for the payment to the county officer for his services. Yet, in all the above cases, without statutory authority, the court held that expenses cannot be imposed upon an official without reimbursement.

It is, therefore, the opinion of this office that the prosecuting attorney is entitled to his reasonable expenses which are necessarily incurred in the performance of his official duties within his county, away from the county seat.

III.

THE PROSECUTING ATTORNEY IS ENTITLED TO REASONABLE EXPENSES IN THE FOLLOWING CHANGE OF VENUE CASES FROM ONE TOWNSHIP TO ANOTHER.

This question involves a construction of that part of section 11316 R. S. 1929, supra, which is as follows:

"In all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses."

The term "Cases", as used above, includes both misdemeanor and felony cases because the laws of change of venue apply to each. The jurisdiction of justice courts in misdemeanor cases is in the township where it is claimed the offense was committed. Section 3414 R. S. 1929, states:-

"Provided, that all prosecutions before the justices of the peace for misdemeanor shall

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be commenced and prosecuted in the township wherein the offense is alleged to have been committed."

This statute has heretofore been construed and followed by the courts in State v. Alford, 142 Mo. App. 412; and in State v. Taylor, 167 Mo. App. 104.

In misdemeanor cases, a change of venue is authorized and a case may be sent to another township in the county:

"The defendant shall be entitled to a change of venue if he shall, before the trial of the case is commenced before the justice, or before the jury is sworn, file an affidavit, stating that the justice is prejudiced against him, or is a near relation to the injured party or prosecuting witness, stating in what degree, or interested in the subject of the offense, or is a material witness in the case, or that the defendant cannot have a fair trial in the township, on account of the bias or prejudice of the inhabitants thereof, as the defendant verily believes."

- Section 3429 R. S. 1929.

"If such affidavit be filed, the change of venue must be allowed, and the justice must immediately transmit all the original papers and a transcript of all his docket entries in the case to the next nearest justice in the township, if there be one, unless the party asking for a change of venue shall, in his affidavit, state that the other justice in the township is a material witness for him, without whose testimony he cannot safely proceed to trial, or that he is near of kin to the injured party or prosecuting witness, stating in what degree, or that he cannot have a fair and impartial trial before such justice in the township, in which case, then to a justice in some other township in the county, or, if the change be allowed on

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account of the bias or prejudice of the inhabitants of the township, then to a justice in some other township in the county; and the justice to whom such case shall be sent shall forthwith proceed with the same in like manner as if said cause had been originally brought before him. No more than one change of venue in the same case shall be allowed."

- Section 3430 R. S. 1929

Further, the granting of a change of venue is mandatory. State ex rel. v. Watkins, 212 Mo. App. 501. When a case is transferred on a change of venue from one township to another, under the above statutory law, it is necessary for the prosecuting attorney "to follow" the case and prosecute the same. We think this duty is specifically covered by the provisions of Section 11316 R. S. 1929, supra, and that the expenses of the prosecuting attorney for such are specifically authorized by that statute which makes it his duty "to follow and prosecute or defend, as the case may be, all said causes, for which, * * by law he shall receive his actual expenses.

The above provisions, (Sections 3429-3430 R. S. 1929) are made applicable to preliminary hearing under the terms of Sec. 3432 R. S. 1929:

"Sec. 3432. THREE PRECEDING SECTIONS APPLICABLE IN OTHER CASES.--The provisions of the next three preceding sections shall be extended to cases brought before justices or other magistrates for examination and bail, as provided in articles 3 and 5 of this chapter, so far as applicable. R.S. 1919 Sec. 3777.)".

It is therefore the opinion of this office that the prosecuting attorney, in either felony or misdemeanor cases, when a change of venue is taken in the justice court from one township to another, must follow the same and perform the duties imposed upon him by law, and in the discharge of such duties, he is entitled to reimbursement from the county for the reasonable and neces-

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sary expenses incurred in discharging such duties.

Respectfully submitted,

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APPROVED:

ROY McKITTRICK
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