FEES: A sheriff, constable or any other officer is not entitled to a statutory fee for serving notice on insufficient check.

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October 3, 1941

Honorable Wilson D. Hill
Prosecuting Attorney
Ray County
Richmond, Missouri

FILE

Dear Sir:

We are in receipt of your request for an opinion from this department under date of September 26, 1941, which is as follows:

> "May I have an opinion on your interpretation of the law applicable to the following facts:
>
> "Under Section 4696, Missouri Revised Statutes, 1939, the maker of an 'insufficient fund check' is deemed to have the intention to cheat and defraud if within five days after receiving notice that such check has not been paid by the drawee, he fails to pay the amount of the check together with all costs and protest fees.
>
> "Is the serving of the notice under this section restricted to an officer?
>
> "Is a Sheriff or Constable who served such a notice entitled to a fee of fifty (50¢) cents, together with a mileage fee of ten (10¢) cents per mile for the miles actually traveled in serving the notice? If the foregoing are true, then should the maker of the check be taxed the Sheriff's fee and mileage as part of the costs mentioned in said check?
>
> "If the check is not paid after a no-

> tice has been served by the Sheriff, and an affidavit is filed and a warrant issued and the defendant is adjudged guilty can the Sheriff recover both mileage on the warrant and on the notice which he served?"

Section 4696, R. S. Missouri 1939, provides as follows:

> "As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depositary, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, (together with the drawee thereof the amount due thereon), together with all costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee."

The above section specifically states, "* together with all costs and protest fees, * * " This section is not a part of the criminal prosecution for the reason the drawer of the instrument may pay the same to the drawee before the five days have expired and in that way would have no connection with the criminal prosecution of the case. That part of Section 4696, supra, is merely a civil matter and a matter of evidence. That it bears no connection with a criminal charge and is only a civil procedure to aid in the collection of an insufficient check was indirectly held in the case of State v. Taylor, 73 S. W. (2d) 378, l. c. 381, where the court cited the following:

> "In the case of City of St. Louis v. Sternberg, 69 Mo. 289, the defendant appealed from a judgment imposing a fine for violation of an ordinance requiring persons practicing law to obtain a license

> and to pay the city collector $25 annually therefor. The judgment was attacked here on constitutional grounds. But this court upheld the judgment of the trial court. In its opinion it made a distinction which seems to be in point here (69 Mo. 289, loc. cit. 303): 'This is not a proceeding on the part of the city to collect the amount of license required by the ordinance, but is instituted to recover a fine for a breach of it committed by defendant in practicing law without such license, and although he may be subjected to the payment of the fine he would not thereby be entitled to the license. The mere fact that defendant did not procure the license does not create the liability, but the fact of his practicing as a lawyer without such license. It was his privilege to decline to pay the $25, the required sum for the license, and it was only when he continued or entered upon such practice without such license that he became liable to a fine. It is, therefore, the collection of the fine, and not the license tax, which is sought to be enforced in this proceeding.'"

In this case the question of imprisonment for a debt was before the court and it held that the $25.00 to practice law was a civil matter, but when the attorney continued to practice law without the payment of the $25.00 license fee, then it became a criminal matter.

Under the facts in your request if the drawer paid the drawee the check within five days there could be no criminal prosecution.

You also ask in your request if the notice set out in Section 4696, supra, restricted the serving of the same to a sheriff or constable. In reading this section we see no such restriction as it merely says, "within five days after receiving notice that such check, draft or order has not been paid by the drawee." Under this clause said notice could be served by an individual or in any other man-

ner and becomes a question of fact in the prosecution as to the prima facie evidence of the intent and should be proven as any other ordinary fact.

The fees allowed a sheriff are set out in Section 13413, R. S. Missouri 1939. Section 13415, R. S. Missouri 1939, provides as follows:

> "No sheriff or ministerial officer in any criminal proceeding shall be allowed any fee or fees for any other services than those in the two preceding sections enumerated, or for guards not actually employed."

In an examination of Sections 13413 and 13414, supra, we find no fees allowed for the serving of a notice such as described under Section 4696, supra. Since under Sections 13413 and 13399, R. S. Missouri 1939, it does not specifically state that a sheriff is entitled to fees under Section 4696, supra, then he cannot collect either a fee or mileage. In the case of State ex rel. v. Brown, 146 Mo. 401, l. c. 406, the court said:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

Also, in the case of Nodaway County v. Kidder, 129

S. W. (2d) 857, l. c. 860, paragraph 8, the court said:

> "It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

CONCLUSION

In view of the above authorities it is the opinion of this department that the serving of the notice as set out in Section 4696, R. S. Missouri 1939, does not restrict the service to a sheriff, constable or any other officer, and does not set out the procedure of such service, and for that reason it may be served in any manner and becomes a question of fact to be proven in the trial of the criminal case as to the intent to defraud on the part of the drawer of the instrument.

It is further the opinion of this department that if a sheriff or constable or any other officer serves such notice, the fee for his services is not a statutory fee, and he serves the same under a private contract for the one who employs him. Of course, if a complaint is issued under Section 4695, R. S. Missouri 1939, and a notice has been served as under Section 4696, supra, the sheriff, if he serves the warrant, is entitled to his fee and mileage upon the warrant but not upon the notice.

Respectfully submitted

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APPROVED:

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