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CRIMINAL LAW: Setting out officers subject to prosecution for the purchase of fees and warrants at less than par under Section 4349, R. S. Missouri 1939.

October 2, 1941

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

We have your request for an opinion from this department under date of September 23, 1941, which reads as follows:

"In our auditing of criminal cost cases we find in some of the counties of the state, that all of the county officials are engaged in the business of buying witness fees. Sections 4349 and 4486 Revised Statutes of Missouri 1939, seem to prohibit county officials from purchasing witness fees or other claims against the county at less than par.

"We would like an opinion from your office as to whether this prohibits the speculation by county officials in the buying of witness fees where the cost is paid by the State, and if so, what officials are prohibited from buying witness fees where the cost is paid by the State. If certain county officials are prohibited from buying witness fees, who is charged with the responsibility of filing charges against the guilty county officers."

In your request you mention Sections 4349 and 4486, R. S. Missouri 1939. Section 4349, R. S. Missouri 1939, provides as follows:

"It shall be unlawful for the clerk of any court, or his deputy, or any person in his employ, or any person

for him, or any other officer of any court, to buy or purchase, or trade for, directly or indirectly, any fee taxed or to be taxed as costs in the court of which he is clerk or officer, or of any other court in this state, or any county warrant, at less than par value, which may be by law due or become due to any person by or through any such court; and it shall be unlawful for any county clerk, circuit clerk, recorder, or any other officer of any court, or his deputy, or any person in his employ, to charge, collect or receive less fee for his services than is provided by law."

Under this section the crime described refers to fees and county warrants becoming due to any person by or through some court. The crime described in this section is a misdemeanor.

Section 4350, R. S. Missouri 1939, provides as follows:

"Any such clerk or officer violating the preceding section shall, upon conviction, be punished by fine of not less than one hundred dollars, and in addition shall forfeit his office, and it shall be the duty of the judge having criminal jurisdiction to give this and the preceding section in special charge to the grand jury."

Section 4486, R. S. Missouri 1939, provides as follows:

"Every clerk of a court of record, sheriff, marshal, constable, collector of public revenue, or deputy of any such officer, or a judge of a county court, prosecuting attorney or county treasurer, who shall traffic for or purchase at less than the par value or speculate in any county war-

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rant issued by order of the county court of his county, or in any claim or demand held against such county, shall be adjudged guilty of a misdemeanor, and shall, upon conviction, be punished by fine not less than twenty nor more than fifty dollars."

Under this section the crime described refers to the traffic in county warrants on claims and demands held against the county. This section is not applicable in any way to your request for the reason you are interested in the disbursement of criminal costs paid by the state.

Under Section 4248, R. S. Missouri 1939, the state auditor pays to the county treasurer in a lump sum cost bills due and payable by the state. The county treasurer, in turn, disburses the money to the individual claimant of fees and it is not a claim or a warrant against the county as described in Section 4486, supra.

In your request you also ask what officials are prohibited from buying witness fees at less than par where the cost is paid by the state. Section 4349, supra, specifically sets out and prohibits the buying of a fee taxed or a county warrant at less than par value which becomes due through any court. The officers specifically named are the clerk of any court, or his deputy, or any person in or not in his employ who should purchase for him fees or warrants at less than par, or any other officer of any court. Since it specifically states the clerk of the court, there is no question but that he would be liable to prosecution under Section 4349, supra. Since it mentions "any other officer of any court," we are compelled to give our opinion as to who should be construed as "any other officer of any court." It goes without saying that the judge of a court is an officer of his own court. Under Section 13138, R. S. Missouri 1939, the duties of the sheriff are specifically set out, one of them being "and he shall attend upon all courts of record at every term." Under this section there is no question but that the sheriff is the officer of any court of record. State v. Yager, 250 Mo. 388.

Section 13339, R. S. Missouri 1939, specifically states, "such court reporter shall be a sworn officer of the court, * * "

It is, therefore, our opinion that a court reporter is an officer of the court although some states hold that a court reporter is not an officer of the court. It was so held in *State ex rel. v. Hitchcock*, 171 Mo. App. 109.

Under Section 12951, R. S. Missouri 1939, it is the duty of the prosecuting attorney to attend any term of the court having criminal jurisdiction in his county, and by reason of this section it is our opinion that a prosecuting attorney is an officer of the court.

The county treasurer, the recorder of deeds, the assessor and the coroner are not officers of any court. The coroner, under certain circumstances, may be considered an officer of the court when he is acting as sheriff where the sheriff has been disqualified or a vacancy has been declared in the office of sheriff.

In your request you ask who is charged with the responsibility of filing charges against the guilty officer who can be prosecuted under Section 4349, *supra*. Under Section 12948, *supra*, if the prosecuting attorney and assistant prosecuting attorneys be interested in any certain case, the court having criminal jurisdiction may appoint some other attorney to prosecute the case. In such a case where the prosecuting attorney is guilty of the crime charged under Section 4349, *supra*, then the court having criminal jurisdiction may appoint some other attorney to prosecute the prosecuting attorney.

Under Section 3891, R. S. Missouri 1939, the circuit court, and under Section 3804, R. S. Missouri 1939, a justice court has concurrent jurisdiction to try misdemeanors such as set out under Section 4349, *supra*.

Section 3895, R. S. Missouri 1939, provides as follows:

"When any person has knowledge of the commission of a crime, he may make his affidavit before any person authorized to administer oaths, setting forth the offense and the person or persons charged therewith, and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney, or

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deposit it with the prosecuting attorney, furnishing also the names of the witnesses for the prosecution; and it shall be the duty of the prosecuting attorney to file an information, as soon as practicable, upon said affidavit, as directed in the next preceding section."

Under the above section any person may make the affidavit and file the same with the clerk of the court having jurisdiction of the crime and it shall be the duty of the prosecuting attorney to file an information as soon as practicable upon said affidavits.

Section 3805, R. S. Missouri 1939, provides the prosecuting attorney may file an information upon a misdemeanor in a justice court upon his own information and belief, and any individual may file a complaint before a justice of the peace upon a felony or upon a misdemeanor, and in a misdemeanor when the complaint is filed the prosecuting attorney shall file an information founded upon the complaint.

Under Section 3837, R. S. Missouri 1939, it is the duty of the prosecuting attorney to appear and prosecute all misdemeanors tried before any justice of the peace of his county.

An attorney has been commonly known as an officer of the court by the appeal courts of this state. In the case of *In Re Fenn*, 128 S. W. (2d) 657, the court said:

"* * 'while a lawyer is not a public officer in the constitutional sense of the term, he is an officer of the court, * * * * *

It was so held in the case of *In Re Sizer*, 134 S. W. (2d) 1085.

CONCLUSION

In view of the above authorities it is the opinion of this department that under Section 4349, *supra*, the judge of any court, the clerk of any court, any deputy clerk of

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any court, the prosecuting attorney, the court reporter, the sheriff, and in some cases the coroner, are prohibited from directly or indirectly buying, purchasing or trading for any fee taxed or to be taxed as costs in the court of which he is an officer or of any other court in this state, or any county warrant, at less than par value, which may be by law due or become due to any person by or through any such court.

It is further the opinion of this department that any individual having knowledge of such an offense may file a complaint in the proper justice court and it then becomes the duty of the prosecuting attorney to file an information under this section which is a misdemeanor.

It is further the opinion of this department that the prosecuting attorney may file an information on his own knowledge and belief under Section 4349, supra, either directly in the criminal court or in a justice court.

It is further the opinion of this department that if the prosecuting attorney is guilty of a charge set out in Section 4349, supra, and a complaint is filed by an individual before a justice of the peace, then the judge of the criminal court may appoint another lawyer to prosecute the prosecuting attorney.

It is further the opinion of this department that the county treasurer, recorder of deeds, county collector, assessor, and in most instances the coroner and an attorney at law are not officers of the court and would not be subject to prosecution as officers of any court under Section 4349, supra.

Respectfully submitted

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APPROVED:

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