Insane Cases, Necessity of Reduction of Testimony to Writing—Sheriff, Payment Expenses Of.

Where examination and commitment of an insane person is had before the Chairman of the Board of County Commissioners, under the provisions of Section 2312, Political Code, as amended by the laws of 1897, p. 164, all the evidence must be reduced to

writing and filed with the other papers in the office of the Clerk of the District Court. There is nothing in the law requiring that such testimony shall be reduced to writing when the hearing is had before the District Judge.

A sheriff is entitled only to his actual expenses incurred in hunting up criminals or looking up evidence in any criminal case.

Helena, Montana, Sept. 12, 1905.

Hon. John H. Tolan, County Attorney, Anaconda, Montana.

Dear Sir:—Your letter of the 11th instant, requesting, an opinion upon the following propositions received.

1. Is it necessary to have the testimony in insane cases reduced to writing when heard before the district judge, and if so is the district court stenographer entitled to compensation from the county in which the hearing is held for his services in so taking the testimony?

2. Is the sheriff entitled to his necessary expenses for traveling when hunting for a criminal where no warrant has been issued or no service of warrant is made?

I.

Section 2312, Political Code, as amended by the laws of 1897, p. 164, provides that where the examination and commitment of an insane person is had before the chairman of the board of county commissioners that all the evidence must be reduced to writing and filed with the other papers in the office of the clerk of the district court. This provision is made in order that the district judge may review all the testimony before approving or rejecting the proceedings of the chairman of the board of county commissioners. There is nothing whatever in said section that requires such testimony to be taken and reduced to writing when the hearing is before the judge of the district court. However, Section 2313, as amended by act, provides that the testimony regarding the financial worth of the insane person shall be reduced to writing and filed with the clerk of the district court, whether the hearing is before the judge or the chairman. When the hearing is before the chairman of the board of county commissioners it is for him to provide a stenographer, or other person, to take the testimony, and the expense of taking such testimony is a proper county charge. When the hearing is before the district judge he must, under Section 2313, have the testimony regarding the financial worth of the insane person reduced to writing. This would be one of the duties of the court stenographer, and he would be entitled to five cents per folio for the copy written out at length and seven and a-half cents per folio for the copy written out in narrative form.

As to whether all the testimony must be taken down and reduced to writing when the hearing is before the district judge, I find no provisions of the statute requiring it. Said Section 2313 simply provides that the testimony regarding the financial worth of the person must be reduced to writing when the hearing is before the district judge. However, Section 371, Political Code, provides that the court stenographer must,

under the direction of the judge, attend all sittings of the court and take full stenographic notes of the testimony, and that these original stenographic notes must be filed with the clerk of the district court. Under this section if the court directs the stenographer to take all the testimony at a hearing before the district judge, and if the judge orders a copy of it transcribed or reduced to writing and filed with the papers in the case, then the stenographer would be entitled to five cents per folio or seven and a-half cents as the case might be, which would be a proper charge against the county in which the hearing was had. If, on the other hand, the judge simply directed the stenographer to take the stenographic notes and file them with the clerk of the district court, and did not order a copy transcribed, then the stenographer would be entitled to no fees. In other words, when a hearing is had before a judge of the district court it is the same as any other proceeding in court and the stenographer's fees are governed my Sections 371 and 373, Political Code, but when the hearing is before the chairman of the board of county commissioners he has no authority to call upon the court stenographer to take such testimony, and in case he does take the testimony the fees for taking same are to be agreed upon between him and the board of county commissioners.

II.

In an opinion of this office, given to J. P. Regan, Deputy County Attorney of Cascade County, on August 30, 1905, it was held that the sheriff was not entitled to mileage for distance traveled in hunting for criminals unless he served the warrant; that where he traveled with a warrant but did not serve it, or traveled in search of a person without a warrant and therefore made no service, that he was not entitled to mileage. However, it is the general theory of our law that where an officers salary is fixed by statute that he is entitled to receive such salary net and that all expenses necessarily incurred when traveling in the performance of official duty shall be paid to him by the county or state, as the case may be.

Subdivision 3, of Section 4681, Political Code, provides that the following is a county charge, to-wit: the salary and actual expenses of the sheriff for traveling when on official duty. This section is modified by Section 4634 to the extent that for service of order of arrest or for each mile actually traveled in serving every writ, process, order, etc., the sheriff shall receive mileage which is fixed by Section 4590, Political Code, and Section 4604, as amended by Chapter 86, laws 1905, at ten cents a mile. But when traveling on official duty other than that for which he is allowed mileage there can be no question but what Subdivision 3, of said Section 4681, would govern and he would be entitled to his actual expenses for the distance traveled in the performance of such duty.

The supreme court of California in Overall v. Tulare Co. 100 Cal. 65, 34 Pac. (Cal.) 520, while not deciding this particular question strongly intimated that the sheriff would be entitled to his actual expenses in cases where he was not allowed mileage, by using the following language:

"It follows that the plaintiff was not entitled to recover for the

miles traveled in his unsuccessful hunt, though possibly he might have rightly claimed pay for his necessary expenses.

That question, however, does not arise here, as no such claim was presented for allowance."

We therefore hold that where the sheriff travels in search of a person with a warrant in his possession but does not serve the warrant, or where a crime has been committed and he, in good faith, travels in search of the guilty party before he has had time to have a warrant issued for his arrest, that he is entitled to his actual traveling expenses in the performance of such official duty, even though he does not find the party he is hunting for.

Respectfully submitted.

ALBERT J. GALEN,
Attorney General.