Witness, Liability of County for Payment of Fees of When Confined in County Jail. County, Liability of for Payment of Witness Fees. Fees, of Witness Confined in County Jail.

Where a witness is confined in the county jail in default of giving security for his appearance in court, after a period of three days has elapsed such confinement should be by agreement with such witness. Such witness should file his claim for fees against the county, and if found correct the same should be allowed.

December 12th, 1912.

Hon. Wm. Dingwall, Chairman,
Board of County Commissioners,
Philipsburg, Montana.

Dear Sir:

I am in receipt of your letter of the 6th inst., submitting the question:

> "Is the county liable for witness fees where a witness has been confined in the county jail in default of giving security for his appearance at court?"

Under the provisions of Sec. 102, Third Division, Compiled Statutes of 1887, it is expressly provided in a separate paragraph to that section, that witnesses so detained shall receive compensation from the county. This provision does not appear to ever have been expressly repealed, except by being omitted from the Codes of 1895, where a part of the section is found in Sec. 1691, Penal Code of 1895. It is also carried forward in the Revised Codes of 1907 as Sec. 9098. The provisions of the State Constitution relating to the detention of witnesses is found in Sec. 17, Art. 3, wherein it is provided:

> "No person shall be imprisoned for the purpose of securing his testimony in any criminal proceeding longer than is necessary to take his deposition."

In 1907 the Legislature enacted a law relating to the examination of witnesses in criminal cases and provided that the method of procedure therein specified should be exclusive. (Sec. 9494 et seq.) This act provides among other things that the defendant in the criminal action has the right to have the deposition of the witnesses taken and it further provides that the State has the same right, but no provision is contained therein relative to the rights of the witness detained. While the law makes specific provision for preserving the

rights of the defendant and the rights of the State there is no statement in the act relative to the rights of the witness who is held in custody, as was the case in the legislation of 1891, Session Laws of 1891, at page 246, wherein it is provided that the person so detained who is unable to furnish bail may demand that his deposition be taken. However, it is provided in the 1907 law that three days notice must be given where it is sought to take the deposition of the imprisoned witness.

Sec. 9497, Revised Codes.

The provisions of the State Constitution supra prohibits the holding of a witness longer than is actually necessary to take his deposition. Where, therefore, a witness has been detained for weeks or months when his deposition might have been taken in three days it is very apparent that his rights as guaranteed him in this provision of the State Constitution have been invaded and somebody is liable to reimburse him. If it is a case of false imprisonment, it is probable the officers and not the county would be primarily liable, but the person however is detained as a witness in a case then pending.. If he were subpoenaed to appear in court on a certain day and did appear at that time, there would be no question that he was entitled to his witness fees, although the case might not be called for trial for weeks afterwards. He would in that case he held in custody by virtue of the order of the court, to-wit: the subpoena. In this case he is held in custody by order of the court, to-wit: the command that he give bail, which he cannot procure, and if the witness were required to attend at a certain time and place in obedience to an order of the court for the purpose of having his deposition taken he would certainly be entitled to his witness fees for such attendance. It is not the act of the witness that he is detained but the act of the county authorities and the statute prescribes a method of procedure by which these authorities may take the deposition of the witness and save the county any further expense, but there is no way provided in the statute by which the witness can demand that his deposition be taken. His only remedy would be a habeas corpus proceeding and neither the county nor its official holding him in charge can take advantage of the fact that the witness does not choose to resort to such a proceeding. The statute itself ignores the provision of the Constitution and where the county official has obeyed the letter of the statute it would be manifestly unfair to say that he is liable for damages when the statute itself is at fault, rather than the official. From the practical standpoint it is a well known fact that a deposition in a criminal case does not ordinarily have the weight of testimony given in open court, hence it is sometimes very desirable that the witness be held in order that his testimony may be taken at the trial rather than by deposition, but when held beyond the three days time it should be, of course, by agreement with the witness. It might also happen that a witness is sometimes held rather as a result of his own stubbornness in refusing to enter into a personal recognizance, or by refusing to submit to having his deposition taken, but these would be questions

of fact rather than of law. I am inclined to the belief that the witness should file his verified claim against the county and that if the same is found correct as to time and computation, it should be allowed. This, at least, would have the effect of preventing any action by the witness against the county or its official for unlawful detention in prison.

Very truly yours,
ALBERT J. GALEN,
Attorney General.