

**Witnesses, Mileage and Per Diem Of.**

Under Section 4648, Political Code, a public officer, whether he be postmaster, constable, justice of the peace, sheriff or under sheriff, is not entitled to per diem when in attendance upon court in a criminal case, but he is entitled to mileage. This is one of the burdens imposed as an incident to holding public office.

Helena, Montana, May 2, 1905.

A. J. Walrath, Esq., County Attorney, Bozeman, Montana.

Dear Sir:—Your favor of April 27, requesting an opinion of this office as to the right of a postmaster, under sheriff or coroner residing out of the city in which court is held to collect fees and mileage in a criminal case, has been by me received and duly considered.

I am of the opinion that such public officers have the right to receive mileage when called to attend upon the court as a witness in a criminal case, but that they cannot, under the law, receive per diem. The language of Section 4648 of the Political Code is so very plain upon this subject that it is needless to attempt to construe it. However, I am of the opinion that this is a matter which should be remedied by the Legislative Assembly, for it is not right, on principle, that a coroner, justice of the peace, or other public officer, who does not receive a stipulated salary should be compelled to attend upon a court without per diem, as the emoluments incident to such offices cease when the officer is not on hand to collect the fees in lieu of salary and to perform the duties of such office. But this is one of the burdens imposed by law upon the holder of public office.

It is clearly within the right of the legislative assembly to pass such a law, and neither this office or a court can read into the law that which does not appear in it because we see the injustice of its operation. The law itself control and must guide the clerk of your court in the allowance and payment of witness fees, and he is without power to pay per diem to those who are barred from receiving same under the law.

This section is too sweeping in its terms but this defect cannot be remedied save and except by legislative action. The reason of the enactment of the section in the first instance is very plain, namely, to prevent a public officer from receiving double emolument for the performance of his sworn duty. And under this theory it is an excellent law, but it should have excepted such officers as do not receive a stipulated salary per month, quarter or year for the performance of their services.

Yours very truly,

ALBERT J. GALEN,

Attorney General.