

Sheriff's Fees When Upon Extradition. Mileage of Sheriff When Acting as Agent for Governor. Extradition, Costs and Expenses.

A sheriff when upon extradition for a fugitive acts as an agent of the State, within Section 2862, Penal Code, and is not entitled to sheriff's mileage.

Helena, Montana, Nov. 6, 1907.

Hon. A. P. Heywood,
County Attorney,
Helena, Montana.

Dear Sir:—

I am in receipt of your favor of October 29th, in which you submit the proposition as to whether or not a sheriff, being designated as an agent for the extradition of a fugitive in another State, is entitled to receive mileage as in cases arising within the State, or is he entitled only to actual expenses for himself and prisoner?

Section 4604, Pol. Code of Montana, provides for the payment of the mileage of the sheriff. There is a limitation, however, upon the mileage in the section itself, it being allowable to the sheriff "while in the discharge of his duties" only. When a sheriff is taking a prisoner held without his own state he is not acting under the court's process or his own authority, for both of these are limited in their force to the territory within the boundaries of the state (State ex rel vs. Allen, 180 Mo. 27). He is acting under a power given in the Federal Constitution. (Par. 2. Art. 4, Fed. Const.)

The legislature in specifying how that power may be used, has provided in Section 2862 of the Penal Code that the Governor when exercising the power of extradition may appoint some person to go for the fugitive. Hence the sheriff when in another state with a requisition is simply the agent of the State (or its Governor) and acts under that authority in demanding the extradition. Thus he is within Section 2862 of the Penal Code, and this section specifically says, "the accounts of the persons employed by him to bring back the fugitive must be audited by the Board of Examiners and paid out of the State Treasury". Thus it follows that Section 4604 of the Political Code does not apply.

Kroutinger vs. Board of Examiners 8 Idaho, 463, 69 Pac. 279.

Chapter 86, Laws 1905, is an amendment of Section 4604 of the Political Code above referred to; it being amended to specify the fees for expenses to be received by the sheriff in delivering persons at the State Prison, or the State Reform School, or the State Insane Asylum, and providing that "while in the discharge of his duties, both civil and criminal, except as hereinbefore provided, the sheriff shall receive ten cents per mile for each and every mile actually and necessarily travelled, and for transporting any person by order of court." It might be argued that under this Act, extradition not being specified is excepted from the Act, that the Sheriff's mileage in extradition cases is to be

governed by the section of that act allowing him in all other cases ten cents per mile for each and every mile actually traveled. This cannot be true, for the amendment is bound by the same limitation which we have given with reference to Section 4604 of the Political Code, namely, that the sheriff must be in the discharge of his duties. Furthermore, the Act itself specifically provides in line 19 that the ten cents per mile each way is allowed to the sheriff "while in the discharge of his duties * * *." Hence it follows that this Act does not add any thing in this regard to the section which it purports to amend, in that both the Act and the Section referred to limit the sheriff's fees to such cases as may be in the discharge of his duties. Therefore, under the argument above stated, that the sheriff when on extradition is not acting as sheriff, but only as an agent of the Governor, Chap. 86 of the Laws of 1905, does not apply.

This cost bill is essentially a criminal cost bill, and it is indispensable for such claimant to be able to point to the statute which entitles him to receive what he claims. As Section 2862, Penal Code, is the only authority for such costs, I therefore advise that a county of the State cannot pay a mileage or expense bill in such cases, but the same must be presented to the State Board of Examiners to be paid out of the State Treasury. As said Section 2862 does not attempt to fix the fees, mileage or compensation that such agent of the Governor or State shall receive for the performance of such service, and as the law does not make it the duty of any officer of the State or county to perform such service under the salary allowed him by law, it necessarily follows that the State Board of Examiners must determine the compensation that will be allowed such agent for the performance of such service.

In the State of Missouri where the law made it the duty of the Governor to determine the amount of compensation for such a service, it was held by the Supreme Court in 180 Mo. 27, that the compensation allowed the sheriff by the legislature for the performance of similar services would be a reasonable basis of allowance in determining such compensations where the sheriff acted as the Governor's agent in going after the fugitive.

Very truly yours,

ALBERT J. GALLEN,

Attorney General.