

**Witness Fees in Insanity Cases. Officers, Witness Fees.  
Fees, Witnesses in Insanity Cases.**

An insanity hearing is a civil proceeding. County officers receiving fixed salaries are not entitled to witness fees when testifying in such a case. County and township officers not receiving fixed salaries are entitled to witness fees.

Helena, Montana, Jan. 10, 1908.

Hon. John W. James,  
County Attorney,  
Anaconda, Montana.

Dear Sir:—

Your letter of the 6th inst. received, in which you submit the following question for an opinion thereon:

“Kindly advise whether or not deputy-sheriff, under-sheriff, sheriff, constables, coroners and township and county officers who receive a salary are entitled to witness fees when in attendance in or before the court or chairman of the board of county commissioners in insanity hearing?”

Section 4648 of the Political Code provides for the payment of witness fees in courts of record, and expressly provides that none of the officers mentioned in your question shall receive witness fees when testifying in criminal proceedings, and the last legislature refused to amend this section so as to permit officers not receiving a fixed salary to receive fees in criminal proceedings.

In our opinion, however, an examination as to the insanity of a person is not a criminal proceeding, and is not therefore covered by the proviso contained in said Section 4648. It is a civil proceeding before a court of record, and when the chairman of the board of county com-

missioners presides at such an examination he is acting merely as a statutory referee sitting for such court of record, for it is provided by Sec. 2312, Pol. Code, as amended by the Laws of 1897, page 164, that he must "have all the evidence reduced to writing" and the same with all papers, etc., must be filed with the clerk of the district court and entered upon the journal of the minutes of the probate proceedings, and thereafter such proceedings must be examined and approved or rejected by the judge of the district court.

The question then arises as to what county and township officers, if any, are entitled to witness fees in a civil proceeding, in which such fees must be paid, if at all, by the county.

Section 4648 is a part of Chapter 4, Title 2, part 4 of the Political Code, and Section 4591 and 4594 are a part of the same Chapter. Section 4591 provides that County Officers receiving a salary must receive no fees for their own use for any official service rendered by them, while Section 4592 provides that the county surveyor, coroner, public administrator, justice of the peace, and constable, may collect and receive for their own use fees for official services.

From the above sections it is apparent that the legislature intended that where an officer received a fixed salary that the same should be in full payment for his time and services, and that therefore he should not charge the county which was thus paying him for his time and services any fee for such time or services already paid for by a salary.

As was said by our Supreme Court in the case of Scharrenbroich vs. Lewis and Clark County, 83 Pac. 483 "the salary is to pay the officer for his time and services."

Of course, if an officer receiving a fixed salary testifies in a civil case of proceeding in which the county would not have to pay his per diem as a witness, then he could collect such witness fees, for in such a case he would be in the position of an ordinary witness.

On the other hand, county and township officers whose compensation is only in the way of fees or per diem for the performance of certain services, and whose time is not otherwise paid for, are entitled to per diem from the county for the time they are engaged as witnesses in civil cases and proceedings in which the county must pay the witness fees.

You are therefore advised that county officers and deputies who receive a salary, are not entitled to witness fees in insanity hearings, but that county and township officers who receive only fees or per diem for time actually employed in any service are entitled to per diem as witnesses in an insanity hearing; provided, of course, the per diem they receive as witnesses is the only per diem they receive from the county for the day or days that they serve as witnesses.

The policy of the law is that a public officer shall not receive double pay from the county for his time.

Very truly yours,

ALBERT J. GALEN,

Attorney General.