

Juror, Collecting Fees as Witness. Justice of the Peace, Fees Of at Preliminary Examination. Stenographer's Fees. Sheriff, Serving Subpoenas Outside His County. Sheriff, Mileage where Service Is Not Had.

A juror on a regular panel cannot collect witness fees in criminal cases for the same days.

A justice of the peace is only entitled to five dollars for all services rendered as committing magistrate.

If testimony is taken down the county attorney may employ a stenographer and agree upon a reasonable compensation.

A sheriff has no authority as sheriff to serve subpoenas beyond the limits of his county except upon persons confined in the state prison.

A sheriff is not entitled to mileage for distance traveled in pursuit of a prisoner whom he fails to arrest, but may collect his actual and necessary traveling expenses.

Helena, Montana, March 13, 1908.

Hon. S. P. Wilson,
County Attorney,
Deer Lodge, Montana.

Dear Sir:—

Your letter of the 7th inst., received, in which you request an opinion upon the following propositions:

1. "May a person who is serving as a trial juror in the district court, collect a juror's fee and a witness fee in a criminal action for the same day?"

2. "What pay is a justice of the peace entitled to, per folio, or otherwise, for taking testimony in writing at a preliminary hearing in his court, upon a criminal charge wherein the defendant is bound over to the district court for trial? Is there any specific amount allowed by law, or is this matter within the discretion of the board of county commissioners?"

3. "Is the county sheriff allowed mileage at the rate of 10c per mile for each mile traveled for subpoenaing witnesses outside of his county, in a criminal action, when there is an order endorsed upon the subpoena by the district court, authorizing satisfactory service to be made upon that witness outside of the county?"

4. "Is the sheriff entitled to mileage when he is in pursuit of a person who is wanted, but fails to make an arrest?"

These questions will be answered in the order in which they are above stated:

In answer to question 1 you are advised that a juror is not entitled to receive double per diem from the state or county. When the state has paid him \$3.00 for his services as a juror it has paid for his time for that day, and if he also, on the same day, testifies in a criminal case in which the state or county is liable for witness fees, he would not be entitled to additional per diem, for his time for that day has already been paid for. It is not the policy of our law to pay jurors, witnesses, or officers, more than one per diem for the same period of time. (See: Section 4648, Political Code.)

In answer to question 2, you are advised that under Section 4642, Political Code, a justice of the peace is only entitled to five dollars "for all services rendered as committing magistrate where a hearing takes place and witnesses are examined." If the justice of the peace, himself, takes down the testimony he is prohibited from charging anything more than the five dollars. However, where it is necessary to take down the testimony at a preliminary hearing, it cannot be satisfactorily taken except by a stenographer, and thereafter transcribed. Therefore, in our opinion, it is within the authority of the county attorney, under Division 2, Section 4681, Political Code to employ a stenographer to take the testimony of witnesses at a preliminary examination. And any reasonable amount that the county attorney may agree to pay such stenographer for taking such testimony is "an expense necessarily incurred by him in a criminal case arising within the county," and therefore a proper county charge.

The price per folio allowed the clerk of the court, or allowed a justice of the peace, for making copies of papers on file, namely, twenty cents per folio, would seem to be a reasonable amount, at least it is the price fixed by the legislature for somewhat similar services. However, such matter not being expressly fixed by statute, should be fixed by the county attorney at the time of employing a stenographer.

In answer to question 3, you are advised that the sheriff has no authority, as sheriff, to serve subpoenas beyond the limit of his own county, except in the case provided for in Section 2467, Penal Code,

where a witness is confined in the state prison. That section is the only provision in the code that we are able to find which authorizes a sheriff to serve subpoenas outside of his own county. The sheriff is a county officer, and, in the absence of express authority conferred upon him, has no jurisdiction outside the boundaries of his county.

In the case of *Jones vs. State*, 9 S. W. (Tex. 53) the supreme court of that state in discussing the right of a sheriff to serve a warrant of arrest beyond the confines of his county, said:

"At common law, a sheriff has no jurisdiction beyond the borders of his county. The constitution of this state provides for this officer, giving to the legislature the right to prescribe his duties. We have searched the statutes carefully, but find no act giving jurisdiction to the sheriff to serve *capias* beyond the limits of his county; and hence the attempted arrest in this case was unlawful."

also:

York vs. Commonwealth, 82 Ky. 360.

Murfree on Sheriffs, Secs. 114-1163.

From the above it will be noticed that the laws of Texas in no instance authorize a sheriff to serve papers outside of his county. The laws of this state, however, by Section 1603-1604, Penal Code, expressly provide that the sheriff or other peace officer may serve a warrant of arrest delivered to him in any part of the state, and, as stated above, Section 2467 expressly provides that the sheriff of a county to whom a subpoena has been delivered for a person confined in the state prison must personally serve such subpoena. The mere fact that the legislature has seen fit in the above cases to expressly confer authority upon the sheriff to serve subpoenas outside of his county shows that it was not the intention of the legislature for the sheriff to serve subpoenas outside of his county in any other cases.

Section 2464 of the Penal Code, which provides that the district judge may endorse an order upon a subpoena that is to be served upon a witness outside of the county, does not give authority to the sheriff of the county in which the subpoena is issued to serve such subpoena, and, as stated above, in the absence of express authority so to do, the sheriff has no right to make such service as sheriff. Therefore, if the sheriff has no authority of law to serve a subpoena as sheriff, except in the case of persons in state prison, it necessarily follows that he is not entitled to ten cents per mile, or any other mileage, if he goes outside of his county to make service of a subpoena, for under such circumstances he would not be serving it as sheriff, but simply as a private person.

Section 4385, Political Code, reads as follows:

"Sec. 4385. When process or notices are returnable to another county, the sheriff may enclose such process or notice in an envelope, addressed to the officer who sent them, and deposit it in the postoffice, prepaying postage."

From the language of this section it is apparent that the legislature intended that process should be sent to the sheriff of the county in

which it is to be served, for it expressly provides the method by which the sheriff of such county may return such process to the county in which it is issued, after he has served it.

In answer to question 4, you are advised that this office has heretofore held that a sheriff is not entitled to mileage for distance traveled in pursuit of a person whom he fails to arrest, but that in such cases he is entitled to his actual and necessary traveling expenses only.

(See opinion to J. P. Regan, Opinions of Attorney General, 1905-06, page 179, and opinion to C. R. Stranahan, Opinions of Attorney General, 1905-06, page 195).

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