

County, Stenographers' Fees Fees Necessarily Incurred by the County Attorney on Behalf of the County a Proper Charge Against. Stenographer's Fees, a Proper Charge Against County Where Necessarily Incurred on Behalf of the County by the County Attorney. Deputies, Salary of Governed by Chapter 85, Session Laws of 1909. Salary, Increase of to Deputies Under Chapter 85, Laws of 1909, Is Not in Conflict With Section 31, Article V., of the State Constitution. Mileage, Allowed Witnesses in Justices' Court. Witness, Mileage Fees of in Justices' Court. Constable, Mileage of. Mileage, Allowed Constables.

Witness, Policeman Appearing as Not Entitled to Per Diem. Policeman, Not Entitled to Per Diem as Witness in Criminal Cases. Constables, Witness Fees of in Criminal Cases. Witness Fees, What Entitled to by Policemen and Constables.

1. The county is liable for the payment of stenographers' fees where the expense is necessarily incurred by the county attorney on behalf of the county.

2. Under Chapter 85, Laws of 1909, the county is liable for the additional compensation allowed deputies from the date of the approval of said bill, and said bill is not in conflict with Section 31, Article V., of the State Constitution.

3. Justices of the peace are authorized to allow witnesses in criminal cases mileage on the basis of the distance actually traveled, and no more.

4. Constables are entitled to receive mileage when traveling in the performance of their official duty, even though such mileage would extend their compensation from the county beyond the sum of \$500.00 in any one year.

5. Policemen are entitled to per diem when appearing as witnesses in criminal cases in justice courts; constables, however, are entitled to per diem when appearing as witnesses in criminal cases in the district court, they not being excepted by the provisions of Section 3182, above referred to.

Helena, Montana, March 23, 1909.

Hon. W. H. Trippet, County Attorney, Anaconda, Montana.

Dear Sir:

I am in receipt of your letter of March 18, wherein you submit for my official opinion the following questions.

1. Is the county liable for stenographers' fees necessarily incurred by the County Attorney on behalf of the county?

2. Is the county liable for the additional compensation allowed deputies under House Bill 202 of the eleventh session, and is House Bill 202 in conflict with Section 31, Article V., of the state constitution?

3. Are justices of the peace authorized to allow witnesses in criminal cases mileage on a basis of two miles travel when they are residents of the city of Anaconda and appear before justices of the peace having their offices in the said city?

4. Are constables entitled to mileage when traveling in the performance of their official duty, when such mileage would bring their compensation from the county in excess of \$500.00 in any one year?

5. Are policemen entitled to per diem when appearing as

witnesses in criminal cases in justices of the peace courts; and, also, are constables entitled to per diem when appearing as witnesses in criminal cases in the district court?

1. I am of the opinion that where it is necessary for a county attorney to employ a stenographer for the purpose of preparing pleadings, instructions, etc., in cases wherein the state or county is a party, and in writing letters concerning the business of the county, that the expenses thereof is a proper charge against the county.

The Board of County Commissioners may, of course, provide for the employment by the County Attorney of a stenographer permanently, and at a fixed salary. While such stenographer is not properly a deputy, I believe the authority for this action by the board can be found in Section 3123, Revised Codes. If, in preference to following this procedure, the County Attorney should employ, from time to time as necessary, the services of a stenographer, then the county is under obligation to pay for the service thus rendered, under subdivision 2 and 8 of Section 3199, Revised Codes, which construction has been placed upon that section by this office in an opinion under date of December 15, 1906, addressed to George V. Davis, Bozeman, Montana, and also in an opinion under date of December 20, 1906, addressed to C. R. Stranahan, Esq., Boulder, Montana. Both of these opinions will be found in the report of Attorney General 1906-'08, at pages 5 and 11 respectively.

2. The provisions of House Bill 202, passed by the last legislative assembly, by the terms of the bill, become effective upon its passage and approval, which approval was given by the governor, after the passage of the bill, on March 6, 1909. You are, therefore, advised that the additional salary provided for in this bill would become due and payable to the deputies entitled thereto from that date. This act is not, in my opinion, in conflict with Section 31, Article V., or any other provisions of the state constitution.

We have discussed this question at considerable length in an opinion under date of March 29, 1907, addressed to Harry R. Cunningham, State Auditor, and reported in Opinions of Attorney General of 1906-'08, at page 61. These reports you have, and the opinion last above referred to covers fully the question of the constitutionality of an act similar to House Bill 202.

3. Justices of the peace have no authority to allow mileage for two miles travel to witnesses who travel a distance less than that. In the statement of your question, you say that some witnesses travel not more than a hundred yards and none as much as a mile when subpoenaed in the city of Anaconda to appear before a justice of the peace holding court therein.

Section 3111, Revised Codes, provides the mileage of all officers, and reads as follows:

"That members * * * witnesses and other persons who may be entitled to mileage shall be entitled to collect mileage at the rate of ten cents per mile for the distance actually traveled and no more."

4. Constables are entitled to mileage, under Section 3177, Revised Codes, "the same as Sheriff, and under the same conditions," and the fact that the same section provides that the total amount of fees allowed in criminal cases must not exceed \$500.00 in any one year, is not authority for withholding any part of the mileage earned by a constable in the service of process or other duty which entitled him to receive mileage.

The Supreme Court of this State has held that mileage is not a fee, in construing what is now Section 3137, Revised Codes, in the case of *Scharrenbroich v. L. & C. County*, 33 Mont. 250, 83 Pac. 432.

5. In my opinion policemen are entitled to per diem when appearing as witnesses in criminal cases in justices of the peace courts. This seems to be beyond question in view of Section 3187, Revised Codes, which is an act passed by the eighth legislative assembly, and therefore a later act than Section 3182, Revised Codes, which is a copy of Section 4648, Political Code, and would, therefore, supersede that section if there were conflict between the two. But I do not believe there is any conflict, as Section 3182 relates exclusively to courts of record, whereas Section 3187 relates to "courts not of record in criminal actions;" and, therefore, covers the case of policemen appearing as witnesses before justices of the peace.

I agree with you that a constable who is a witness in a criminal case in the district court is entitled to per diem and mileage. Section 3182, above referred to, provides that:

"No officer of the United States, the State of Montana, or of any county, incorporated city or town within the State of Montana, shall receive any per diem when testifying in a criminal proceeding."

The officers enumerated in this section are the only persons specifically denied witness fees when testifying in criminal actions, and this section must be strictly construed. I cannot extend its scope to township officers which are not specifically mentioned therein, and constables would, therefore, be governed by the statute providing fees for witnesses generally in courts of record, which is "For each day, three dollars. For mileage in traveling to the place of trial or hearing, each way, for each mile, ten cents."

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

Sheriffs, Deputies of. Deputy Sheriffs, Hours of Labor and Number. Jailors, Number and Hours of Labor. Board of County Commissioners, Authority to Appoint Extra Deputies.

1. The law does not limit the hours of labor of deputy sheriffs, except as to those who act as jailors, who are limited to eight hours per day.