

Fees, of Sheriff. Sheriff, Entitled to Actual Expenses When. Actual Expenses of Sheriff, When to Be Allowed. Mileage, Sheriff Entitled to When. Team and Horse Hire, Charges for Unlawful When. Claims, This Office Will Not Audit.

Sheriffs in Montana are entitled to actual expenses when transporting prisoners to State institutions, but in the service of process, both civil and criminal, they are entitled to mileage only, as provided in Sec. 3137, Revised Codes.

Sec. 3137, Revised Codes, expressly provides that the mileage named in the section is in full for all such traveling expenses and it makes unlawful any charges for team or horse hire. **Held**, That the phrase "team or horse hire" includes motor vehicles.

This office will not undertake to audit claims filed by county officers as charges against the county; it being the duty of the county officials to audit all claims presented as charges against the county.

June 2nd, 1913.

Hon. Gus J. Stromme,
Chairman Board of County Commissioners,
Butte, Montana.

Dear Sir:

You recently wrote to this office as follows::

"Enclosed find opinion of County Attorney McCaffery, rendered to this board upon request, relative to charges of sheriffs for automobiles and rigs, and also a bill of Sheriff Driscoll for mileage and expenses for the month of March, 1913, which includes several charges for the above mentioned purposes.

"The opinion of Mr. McCaffery appears to the board to be not sufficiently plain and in addition thereto, the board has been deluged with arguments and citations, tending to show that under certain circumstances these items constitute a legal charge against the county. The board is most desirous of ascertaining just what their powers and duties in this matter are, and most respectfully request that you render the said board of county commissioners an opinion as to the legality of the several charges enumerated in the enclosed bill against the county. The charges enumerated speak for themselves, and the monthly claims of the sheriff appear in substantially the same form and for the same purposes as set forth in this claim.

The board will greatly appreciate a full and comprehensive opinion as to the legal charges which the sheriff may make for expenses, and what steps the commissioners should take in passing upon these claims, in order that they may know that they are acting within the statutes."

With your communication there was an itemized bill of Hon. Tim Driscoll, sheriff of Silver Bow County, and a copy of an opinion upon the legality of this bill, rendered by Hon. Joseph J. McCaffery of Silver Bow County, as follows:

"Your request for opinion as to the legality of claims presented against the county for horse and automobile hire has received consideration with the following findings:

"There is absolutely no warrant or authority of law under the statutes of Montana for the payment by the county of these claims under consideration. The only authority where such claims might be paid is the delivery of prisoners to the state prison, state reform school, or insane person to the insane asylum. These, however, go to the state board of examiners or the board of county commissioners according to the circumstances. But in the discharge of the civil and criminal duties the sheriff is to receive ten cents per mile for the distance actually traveled and ten cents per mile for any person whom the sheriff may have in custody. The strict prohibition of the statute is that the county shall not be liable, and the county commissioners shall not pay, for any claim of the sheriff or other officer for team or horse hire, or any other expense incurred in travel or for sustenance in cases where mileage is allowed. The section governing instances of this kind is Numbered 3137, Revised Codes. It is therefore the opinion of the county attorney that the claims in the account accompanying your request are each and all, which pertain to the hire of means of transportation, illegal and void, and that you are under the strict prohibition not to pay the same. It might be suggested that this section applied with equal force to every officer in the county, where provision is made to compensate him by the mile for any distance necessarily traveled."

I have carefully examined into the matter submitted by you and now beg leave to advise you as follows:

The office of sheriff of Silver Bow County was taken by Mr. Driscoll *cum* onere; that is to say, when he assumed the duties of his office, he did so object to its burdens.

Turpin v. Board, 7 Ind. 172.

The compensation for official acts being regulated by statute, he is entitled to charge for those services to which compensation by law attaches, for the rule appears to be that a county official can only demand such fees and compensation as the law has fixed and authorized for the performance of his official duties. The general rule respecting such charges is stated thus:

"Where the salary or compensation of a county official is definitely fixed by law, it is generally held that such sum is intended to include his entire official remuneration, and to preclude extra charges for any services whatsoever, unless .

it is clear that the statute contemplated and intended additional compensation for certain extra services."

11 Cyc. 429.

As bearing upon the right of compensation generally, in the absence of a specific statutory declaration, it was held in an early day by our supreme court that an attorney who was appointed by the district court to defend an indigent person charged with the commission of a felony was required to perform this duty, but that he could not recover compensation for his services from the county in which the trial occurred, and it was expressly held as a general proposition of law that money can only be drawn from the treasury of a county in pursuance of the statute. It is said in the opinion that it is not the law that when a duty is enjoined by statute, the means for enforcing it are necessarily implied, for this is too broad a construction to be given a statute. If such were the law, the opinion states, why legislate at all upon the subject of fees or compensation of any of the officers of the court, and the answer is given that in this respect the legislative branches of the government has undertaken to regulate the creation of such liabilities, and it has regarded the courts and the commissioners in this respect the mere creatures of their statutory powers. Further, when courts order processes and papers to be served, their ministerial officers must obey, and for this certain compensation is fixed by statutory law, though in some instances no compensation is fixed by law, yet they must perform their duties without charge, unless provided by statute, and if the statute has not conferred the right to compensation, the court has it not by implication, and cannot enforce it, for that would be but to violate the law instead of enforcing it.

Johnson v. Lewis and Clark County, 2 Mont. 159.

It would appear that where extra expense is incurred or extra duties performed and no direct provision for remuneration is fixed by statute, that this would be a forceable proposition to urge upon a legislature, whose province is to make laws, but whatever it may be the law must be taken as it is and not as it ought to be (*idem*), and to this general doctrine I believe that our supreme court has since consistently adhered. Later our supreme court in passing upon an act in relation to the fees of county clerks, held that county clerks are not entitled to any extra compensation for any services required to be performed by them for the county. The salary fixed by the act was intended to be full compensation for all service rendered by them to the county, in any manner whatsoever, and the county was prohibited from paying any other compensation.

Raymond v. Commissioners, 5 Mont. 103.

Some time later an attempt was made by a person, while acting as a member of the sheriff's posse comitatus, to recover from the County of Gallatin for money actually expended by him in the performance of his duties. Since no provision for such compensation was made by statute, his claim was denied, and this denial affirmed upon appeal to our supreme court, and in that case it was expressly

held that one cannot recover upon the theory of an implied promise by the county to reimburse and compensate one, for the making of such a contract is beyond the power of a county.

"One who renders services to the state for which there is no compensation provided by statute, cannot, as in the case of services rendered a private person, raise an implied assumpsit against the state, and for such services he has no legal claim, no claim which can be enforced by process of law."

Sears v. Gallatin County, 20 Mont. 462.

The theory of law underlying cases of this kind appears to be embodied in the following excerpt:

"The actual expenses of transporting a violently insane person may often exceed ten cents per mile, while ordinarily such an allowance would be a liberal one. Doubtless consideration of such varying charges prompted the Legislature to establish a uniform rate as equitable and just in all cases. But as uniformity seems clearly to have been intended by the subsequent general statute, and the object was to prescribe but one rule in respect to the subject of transportation of any persons transported by order of court, the general statute must control."

Proctor v. Cascade County, 20 Mont. 315.

This case, while not precisely in point, yet contains a general principle which is to the effect that the Legislature, in fixing the fees for mileage allowed to the sheriff, doubtless had under consideration the fact that upon extraordinary occasions the sheriff might be obliged to incur extra expenses in serving civil or criminal process, yet its loss in one instance would be doubtless recouped in another instance, wherein he would receive the statutory rate, when in fact his actual expenses might be much less. In the case of Wood v. Lewis and Clark County, 24 Mont. 335, it was held that a county surveyor is not entitled to mileage under the general provisions of Sec. 3199, Revised Codes, and it was held that this section had not for its purpose the creation of a right to mileage, but simply to fix a uniform rate, and that the phrase "who may be entitled to mileage," does not limit the phrase "other persons," but refers back and qualifies "county officers" as well. In the course of the opinion the maxim is laid down: What is not by law imposed, as expenses upon a county, is not a charge against it,—and the Sears case, supra, is cited with approval.

The case of Scharrenbroich v. Lewis and Clark County, 33 Mont. 250, whilst not decisive of this case, contains some general and well defined principles, among which may be quoted:

"The object of the Legislature was to have certain services performed for the people, and not to make money for a sheriff or set him up in business. The old idea of paying an officer was to feed him and clothe him and take care of his family, while he was giving his services to the people. There

never was any idea that holding public office was a private business.

"We think that the Legislature probably understood that the expenses averaged about ten cents a mile, including guards, dieting, transportation, etc., and that in some cases sheriffs saved something honestly, and in other cases they lost. But whether loss or gain, it was for the Legislature to say how much they should have to meet expenses. Now all sheriffs are treated alike, and there is not any opportunity for one to gain unjustly and another to lose unjustly in the performance of his duty."

I think it manifest that the authority reposed in your board to allow expense accounts filed by your sheriff as charges against the county is confined to the express provisions of Sec. 3137, Revised Codes of Montana of 1907, and since it is therein expressly provided that while in the discharge of his duties, both civil and criminal, except as otherwise provided therein, the sheriff shall receive ten cents per mile for each and every mile actually and necessarily traveled, and that the county shall not be liable nor shall the board of county commissioners pay for any claim of the sheriff or other officer for team and horse hire or any other expense incurred in travel or for expenses in case where mileage is allowed under the statute,—the fees for mileage named in the section being in full for all such traveling expenses, in both civil and criminal work. I have no doubt that the phrase, "team or horse hire," as used in this section includes motor vehicles.

The itemized bill of the sheriff, as filed, contains many items, and I will not undertake an examination of them separately, since I believe the duty to audit his claim is not one of the duties incident to this office, and the same is herewith returned.

As bearing further upon the discussion under consideration, you are referred to an opinion rendered by this office to Hon. Joseph J. McCaffery, county attorney of Silver Bow County, Butte, Montana, January 31, 1913.

Concluding, you are advised that any charges of your sheriff filed as claims against your county for automobiles and rigs, unless the same to be for delivering persons at state institutions, are not legal charges against your county, and you have no authority to allow them, and as to the latter class of service, whether the charges be against the county or against the state, is a matter which you are in a position easily to determine from the nature of the services rendered.

Yours very truly,

D. M. KELLY,

Attorney General.