

Sheriff's Fees—Boarding Prisoners—Fee for.

The Sheriff of a County is limited by law to the sum of fifty cents per day for the board of a county prisoner notwithstanding the fact that it costs more than that sum per day to feed said prisoner.

Nov. 19th, 1917.

Mr. W. E. Keeley,
County Attorney,
Deer Lodge, Montana.

Dear Sir:

I am in receipt of your letter of the 10th inst., submitting the following:

"Is the sheriff of a county limited by law to the sum of fifty cents per day for the board of a county prisoner, notwithstanding the fact that it costs more than that sum per day to feed said prisoner?"

You state in your letter that, in view of Sec. 9773 you have come to the conclusion that Sec. 3138 is merely directory, and that the sheriff is entitled to the actual cost of boarding a prisoner and to nothing more or nothing less.

Sec. 3138, Revised Codes 1907, being a part of the Political Code, is as follows:

"The fees allowed sheriffs of the several counties of the state for the board of prisoners confined in Jail under their charge, shall be fifty cents per day for each of said prisoners, and for each person committed to the county jail as a witness the said sheriff shall receive the sum of seventy-five cents per day."

Sec. 9773, Revised Codes 1907, being a part of the Penal Code, is as follows:

"The sheriff must receive all prisoners committed to jail by competent authority, and provide them with necessary food, clothing and bedding, for which he shall be allowed a reasonable compensation to be determined by the board of county commissioners, and, except as provided in the next section, to be paid out of the County treasury."

Tracing back the history of these two sections we find the following:

The first territorial legislative assembly, held at Bannock in 1864, adopted two acts. The first was an act entitled, "An Act concerning jails and prisoners," which was as follows:

"The sheriff shall have the custody of the jail in his county, and of the prisoners therein, and shall keep the same personally or by his deputy, for whose debts he shall be responsible, and shall furnish at the expense of the proper county all necessary sustenance, bedding, clothing, fuel, and medical attendance for the prisoners committed to his custody, and the

county commissioners shall allow him a reasonable compensation out of the county treasury, not exceeding \$3.00 per day for the support of all prisoners confined on criminal process. (1864 Laws pg. 402).

The other of said acts was an act entitled "An Act regulating fees," in which fees of sheriffs for boarding prisoners were fixed as follows:

"For dieting prisoners per day \$4.00." (1864 Laws, pg. 471).

The act of the Bannock legislature concerning jails and prisoners was carried forward, without change, as Sec. 3 of Chapter 35, General Laws Codified Statutes of 1871-1872, and was again carried forward as Sec. 748 of the 5th Division Revised Statutes of 1879, without change, except that the words "not exceeding \$3.00 per day for the support of all prisoners confined on criminal process," appearing in the 1864 laws and in Sec. 3 of Chapter 35, General Laws Codified Statutes of 1871-1872, were omitted. Section 748 of 5th Division Revised Statutes 1879, was then carried forward, without change as Sec. 1270 General Laws 1887 Compiled Statutes, and remained in full force and effect until the adoption of the 1895 codes.

In the meantime the act of the Bannock legislature concerning fees of sheriffs for board of prisoners, was carried forward, without change, as a part of Chapter 19 General Laws Codified Statutes of 1871-1872. The 7th extraordinary Session of the territorial legislative assembly amended Chapter 19, General Laws Codified Statutes 1871-1872, so as to provide that the cost of dieting prisoners should not be less than \$1.50, nor more than \$2.50 per day, to be regulated by the county commissioners. (7th Extra Session Laws, pg. 51). The 8th Territorial legislative assembly amended the act of the 7th Extra. Session by providing that the dieting of prisoners should not exceed \$2.00 per day, and not in any sum exceed the actual value thereof. (8th Session, pg.65). The act of the 8th Session was carried forward, without change, as Sec. 585—5th Division Revised Statutes 1879. The 12th Territorial legislative assembly amended Sec. 585 of the 5th Division Revised Statutes 1879, so as to provide that the fees for boarding prisoners should be such as the county commissioners might deem reasonable, not exceeding \$1.25 per day. (12th Session, pg. 2). The 13th Territorial legislative assembly amended the act of the 12th Session by providing that such fees should not be more than \$1.25 per day for each prisoner. The 14th Territorial legislative assembly amended the act of the 13th Session, by providing that such fees should be such as the county commissioners should deem reasonable, but not exceeding seventy-five cents per day for each prisoner when a less number than 5, and where 5 or over, sixty cents per day. (14th Session, 107). The 15th Territorial legislative assembly amended the act of the 14th Session by providing that such fees should be for 5 or under, one dollar per day for each prisoner, and for over five, eighty cents per day each, this act being inserted in the 1887 Compiled Statutes as Sec. 1075 General Laws. The 2nd state legislative assembly amended Sec. 1075 General Laws

1887 Compiled statutes by providing that such fees should not exceed sixty cents per day for each prisoner. (2nd Session, p. 234) and Sec. 1075 General Laws 1887 Compiled Statutes remained in full force and effect until the adoption of the 1895 codes.

When the 1895 Codes were adopted Sec. 1270 Gen. Laws 1887 compiled Statutes, was re-enacted as Sec. 3036 of the Penal Code as follows:

"The sheriff must receive all prisoners committed to jail by competent authority, and provide them with necessary food, clothing, and bedding, for which he shall be allowed a reasonable compensation to be determined by the board of county commissioners, and, except as provided in the next section, to paid out of the county treasury."

While Section 1075 Gen. Laws Compiled Statutes 1887, as amended by the 15th territorial assembly, was re-enacted as Sec. 4605 of the Political Code, as follows:

"The fees allowed sheriffs of the several counties of the state for the board of prisoners confined in jail under their charge, shall be fifty cents per day for each of said prisoners, and for each person committed to the county jail as a witness the said sheriff shall receive the sum of seventy-five cents per day."

And on the revision of the codes in 1907, Sec. 3036 Penal Code of 1895, and Sec. 4605 Political Code of 1895, were carried forward, without change, as Sections 9773 and 3138, respectively, Revised Codes, 1907.

It will, therefore, be seen that any conflict between the provisions of Sections 3138 and 9773 Revised Codes 1907, first appeared in the acts of the first territorial assembly, and has continued clear through the numerous amendments, revisions, and codifications of our laws down to the present time.

The 1895 codes were not revisions and compilations of the laws then in force, but were new enactments taking effect at 12:00 o'clock noon of July 1, 1895, all laws in force prior thereto, save and except certain laws enumerated in such codes, being repealed. (Sec. 5132 Pol. Code, 1895, being now Sec. 3562 Rev. Codes 1907.)

The 1907 Codes, on the contrary, were not new enactments, but were revisions and compilations of the laws then in force.

By the provisions of the Political Code of 1895, Sec. 4605 Pol. Code and Sec. 3036 Penal Code must be, for the purposes of construction, treated as parts of the same Statute. (Sec. 5161 Pol. Code 1895, now Sec. 3554; 45 Pac. 1089. State ex rel. vs. Donlan 32 Mont. 264; 80 Pac. 246.)

When there are conflicting provisions in two acts, or conflicting provisions in different parts of the same act, the rules of construction as laid down by Sutherland on Statutory Construction, (2nd Ed.) are as follows:

"Where there is in one act, or in several contemporaneously passed specific provisions relating to a particular subject, they will govern in respect to that subject as against general provis-

ions contained in the same act. This interpretation harmonizes with the rules that when a general intention is expressed, and also a particular intention, which is incompatible with the general intention, the particular intention shall be considered as an exception to the general one. The special act is in the nature of an exception to the general law and suspends its operation in the field governed by the special act." (Secs. 275, 345, 346, 348, 387.)

Section 9773 is in the nature of a general act, providing generally for the support of prisoners confined in a county jail by the sheriff and for compensation to the sheriff for such support, while Section 3138 makes specific provision with reference to the compensation for one of the items constituting such support, and, under the rules of statutory construction laid down by Sutherland's Statutory Construction, above referred to, the provisions of Section 3138 must govern the fees to be paid sheriffs for board of prisoners.

Again the rule of contemporaneous construction of statutes as given in Sutherland's Statutory Construction is as follows:

"Contemporaneous construction is that which it received soon after its enactment. This, after the lapse of time, without change of that construction by legislative or judicial decision, has been declared to be generally the best construction. It gives the sense of the community as to the terms made use of by the legislature. If there is any ambiguity in the language, the understanding of the application of it, when the statute comes into operation, sanctioned by an acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law."

(Sec. 472.)

It is a well known fact that immediately after the 1895 codes went into effect the sheriffs of the several counties construed Sec. 4605 Pol. Code to mean that they were entitled to receive for the board of prisoners fifty cents per day for each prisoner, regardless of whether the actual cost of such board was more or less than such amount, and that the boards of county commissioners of the several counties adopted such construction, and from that time up to the present time the sheriffs of these several counties have claimed, and the board of county commissioners have allowed such fees at such rate, no consideration whatever being given to the actual cost of such board.

That this construction of this statute was sanctioned by our courts clearly appears from the decision of the supreme court in the case of Lloyd, Sheriff, vs. Board of Co. Com. Silver Bow county, 7 Mont. 562, 19 Pac. 217. In that case the court construed the provisions of Sec. 1075 5th Div. Compiled Stats. 1887, which provided that for boarding prisoners the sheriff should receive, "for five or under, one dollar per day for each prisoner, and for over five eighty cents per day each," holding that the sheriff was entitled to receive a dollar a day for each of the first five and eighty cents per day for each in excess of five.

Under the rule of contemporaneous construction as given in Sutherland on Stat. Con., herein referred to, the construction given to Sec. 3138 by the sheriffs and board of county commissioners, and sanctioned by our supreme court in the case of Lloyd, Sheriff, vs. Co. Com. Silver Bow County, Supra, must be held to have established the construction of this section.

I am, therefore, of the opinion that the provisions of Sec. 9773 have no application to the compensation of sheriffs for boarding prisoners, but that the provisions of Section 3138 must govern the same, and that under the provisions of Section 3138, boards of county commissioners must allow sheriffs for boarding prisoners fifty cents per day for each prisoner, and that such boards have no power or authority to either increase or diminish such amount. Your question is therefore answered in the affirmative.

Very truly yours,

S. C. FORD,

Attorney General.