

**Justices of the Peace—Counties—Witnesses—Mileage—
Witness Fees.**

A justice of the peace has the right to demand a showing by the defendant that persons he wishes subpoenaed are in fact witnesses who can give testimony material to his defense.

A person who has been subpoenaed as a witness for the defendant in justice court in a criminal case, but who knew nothing concerning the case and who was not called to testify, is entitled to be paid mileage and fees if he was free from fraud himself in having the subpoena issued for him.

Mr. H. O. Vralsted,
County Attorney,
Stanford, Montana.

August 17, 1931.

My dear Mr. Vralsted:

You request my opinion whether witness fees and mileage for defense witnesses in a criminal case in justice court are a proper charge against the county and if the defendant has the right to subpoena an

unlimited number of persons as witnesses for him in a trial before a justice of the peace.

In answer to your first question will say that section 4952 R. C. M. 1921 provides that the sums required by law to be paid to grand and trial jurors and witnesses in criminal cases are charges against the county. As other statutes provide for the payment of per diem and mileage to witnesses for both the state and defendant in criminal cases it is apparent that under the section above mentioned the per diem and mileage of defendant's witnesses are proper charges against the county.

In answer to your second question will say I do not find any express limitation upon the number of witnesses that a defendant can have subpoenas issued for in criminal cases pending before a justice of the peace. The only limitation is found with reference to subpoenas for witnesses in courts of record. It would seem outlandish that a defendant could procure without control by the justice or anybody else subpoenas for as many persons as he saw fit to have issued regardless of whether they had any knowledge bearing upon the issues in the case.

The constitution and statute authorize the issuance of subpoenas for witnesses. This right, however, in my opinion, presupposes that the persons subpoenaed on behalf of the defendant are in fact subpoenaed as witnesses whose testimony would be material to the defense of the defendant. It certainly was not intended that a defendant could subpoena persons to attend the trial at public expense who had no testimony to offer at the trial. Such persons would not be considered witnesses in any sense but merely spectators at the trial.

However, no direct provision is made by the law for the justice, at the time he issues the subpoena, to require the defendant to disclose that the persons desired to be subpoenaed are in fact witnesses, that is, persons who have some knowledge bearing upon the case in which they are subpoenaed and whose testimony disclosing that knowledge could reasonably be said to be required by the defendant. It would seem, however, that inasmuch as the right to have subpoenaes issued is for persons who are really witnesses instead of mere spectators, the justice could require the defendant to show that the persons he wishes subpoenaed come within the purview of the constitution and the laws which give him the right to have subpoenaes issued, namely, those persons who because of their knowledge of facts and circumstances bearing upon the case would have testimony to offer in behalf of the defendant which is reasonably necessary for his defense. (State vs. Graves, 43 Pac. 357.)

You state that your questions arise by reason of the fact that in a criminal case in your county pending before the justice of the peace a large number of subpoenas were issued by the justice for persons who had no testimony whatever that could be offered in the trial of the case, and that for that reason you have advised the county commissioners not to pay their per diem and mileage. A subpoena once issued and served upon a person requires him to obey it or suffer the penalty for contempt and I think that a person obeying a subpoena as a witness, which he is required to do, is entitled to be paid mileage and per diem unless it can be shown that he was not subpoenaed in fact as a witness but merely

as a spectator and that he himself was instrumental in having the subpoena issued for him which would taint his claim with fraud and vitiate it.

Where, however, he is free from fraud himself it is my opinion he is entitled to receive his mileage and per diem where a subpoena has been issued and served upon him and he has appeared at court in response thereto.

The cases on this question are few but in *Peay vs. Searcy County*, 163 S. W. 1147 the lower court refused to tax costs in a criminal case for the reason that the witnesses were character witnesses and none of them lived within 150 miles from where the defendant lived and were not competent character witnesses. The court said:

“Appellants were compelled to attend the trial of the case in which they were subpoenaed as witnesses. It was not a question for them to determine, whether they were to be used or not. They were still witnesses and entitled to their fees for attendance although the court held that their testimony was incompetent.”

In the case of *State vs. Graves*, supra, the court reserved the question of whether the persons subpoenaed were entitled to their mileage and per diem as it was not necessary to decide that question in that case although, in my opinion, the court indicates they were entitled to payment.

In *State vs. Grimes*, 35 Pac. 361 (Wash.) the court stated that the accused is not at liberty to sow the country broadcast with subpoenas but this statement has reference to the right to procure the subpoenas in the first place rather than to the right of the persons subpoenaed to receive their mileage and per diem.

The last two mentioned cases which are cited by you are authority to the effect that a justice may exercise restrictive powers at the time of the issuance of subpoenas but cannot be said to hold or indicate that a person, who in good faith has obeyed a subpoena issued and served upon him even though he knows nothing about the case, may not collect his mileage and per diem.

Adverting to your second question I will say that the reason the law places a limitation upon the number of witnesses for whom subpoenas may be issued by the clerk of the district court is to prevent an abuse by the defendant of the privilege of having witnesses subpoenaed at the expense of the county. Subpoenas on behalf of the defendant in cases tried in the district court are issued by the clerk. He is a ministerial officer and cannot pass upon the question of materiality of testimony which the defendant seeks to procure through the issuance of subpoenas. Therefore, the law has placed a limitation upon the number of witnesses that he may issue subpoenas for without a showing made to and finding by the judge of the fact that the persons whom the defendant seeks to have subpoenaed can give testimony that is material to the defendant's defense.

Subpoenas in a justice court are issued by the justice himself and he being a judicial officer can determine before their issuance the question of whether the persons sought to be subpoenaed as witnesses are in fact

such and their testimony material to his defense. There was no reason, therefore, for the statute to specifically limit the number of subpoenas which he could issue on behalf of the defendant as he, having direct control of the process of his court, has the power to prevent its abuse and to see that it is not used for a fraudulent purpose. The clerk of the district court not having this power the statute limiting his power to the issuance of six subpoenas unless he is ordered by the court to issue more was no doubt designed to prevent a defendant from abusing the privilege of having the subpoenas issued for witnesses, but no such statute was necessary where the subpoenas are issued by a justice of the peace because it lies within his own power to prevent the abuse of the process of his court the same as the judge of the district court has like powers concerning the processes of his court.

Very truly yours,

L. A. FOOT,

Attorney General.