

Chapter 16, Laws of 1933, does not require the commissioners to allow a sheriff 7c per mile in lieu of actual expenses. This statute is a statute of limitation.

May 12, 1933.

You ask for an opinion in relation to the mileage of sheriffs. This matter is largely covered by Chapter 121 of the Session Laws of 1933, which amends Section 4916 R. C. M. 1921, and is in part as follows:

"In addition to the fees above specified, the sheriff shall receive for each mile actually traveled, in serving any writ, process, order or other paper including a warrant of arrest, or in conveying a person under arrest before a magistrate or to jail, only his actual expenses when such travel is made by railroad and eight and one-half cents ( $8\frac{1}{2}c$ ) when travel is made other than by railroad, both going and returning, and he shall also be allowed mileage based upon the above rates for each person transported under an order of court, for the actual distance conveyed or transported within the county, the same to be in full payment for transporting and dieting such persons during such transportation.

"Provided further, that this act shall not apply to the delivery of prisoners at the state prison or at the reform school, or insane persons to the state insane asylum, for which he shall receive the actual expense incurred as provided by Section 4885 of the Revised Codes of 1921. Nor shall this act apply to trips made for the return of fugitives apprehended and arrested outside of the county for which the sheriff shall receive the actual necessary expenses incurred in going for and returning with such fugitive."

Thus as to the items covered by this section, the mileage is fixed. The former act as amended, Chapter 121, Laws of 1929, contained (after the words "actually traveled" in lines 2 and 3 as quoted) the words "in the performance of any official duty." This omission must be construed to be for a definite purpose. There is omitted from this section any provision as to mileage or expenses of sheriffs in making investigations within or without their counties, in maintaining the peace and in

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##### Sheriffs—Mileage—Actual Expenses —County Commissioners.

HELD: As to the items covered in Chapter 121, Laws of 1933, the mileage of sheriffs is fixed. As to the items of travel not covered by said chapter or other express statutes, the conclusion must be that a sheriff can recover for his reasonable expenses and the power to determine what is reasonable is vested in the county commissioners and limited by the claim presented.

performing other duties which necessarily require travel upon the part of the sheriff.

In construing this matter I have very carefully checked this law with the section prior to amendment and examined the opinions of prior Attorneys General, and particularly opinions in Volume 5, pages 173 and 588, holding any additional expense and mileage to sheriffs invalid, and Volume 13, page 298, that in the execution of a duty to preserve public peace, the sheriff is entitled to be paid mileage. These opinions are in conflict.

Further, in Section 4885 R. C. M. 1921 is found this provision: "While in the discharge of his duties, both civil and criminal, except as hereinbefore provided, the sheriff shall receive 10c per mile for each and every mile actually and necessarily traveled."

It would appear fair that the sheriff should be paid his expenses or mileage in the performance of his official duties other than those described in Chapter 121, Laws of 1933. In the case of *Brannin v. Sweet Grass County*, 88 Mont. 412, that portion of Section 4885 quoted above was considered, and it was held that such section did not authorize the payment of mileage unless such mileage was elsewhere expressly provided by law. The decision suggested that under certain conditions contingent expenses might be allowed to sheriffs. There are certainly other duties which require extensive traveling upon the part of sheriffs and not covered by Chapter 121 of the Laws of 1933. In the *Brannin* case the bill of a sheriff was rejected but it was held that same was for an investigation outside of the state, which the sheriff was not required to make. As to investigations within his own county, a sheriff certainly must make them and if he is not entitled to mileage under this section, he is entitled to his expenses as contingent expenses.

The following are county charges: "2. One-half of the salary of the county attorney, and all expenses necessarily incurred by him in criminal cases arising within the county. 3. The salary and actual expenses for traveling when on official duty, and for the board of prisoners allowed by law to sheriffs, \* \* \*." Section 4952 R. C. M. 1921.

The question is, how are such expenses of the sheriff to be determined? From the decision in the *Brannin* case, we conclude that Section 4885 R. C. M. 1921 does not apply. If a sheriff, in performing such duties, travels by rail, clearly his carfare is an item of necessary expense and would not permit the recovery of mileage in addition to such expenses. As to items of travel not covered by Chapter 121, Laws of 1933, or other express statutes, the conclusion must be that a sheriff can recover for his reasonable expenses and the power to determine what is reasonable is vested in the county commissioners and limited by the claim presented. Attention has been called to subdivision 1 of Section 3 of Chapter 16, Laws of 1933, amending Chapter 80, Laws of 1923, which provides in part as follows: "Whenever it shall be necessary for any state or county officer to use his own automobile in the performance of any official duty where traveling expense is allowed by law, such officer shall receive not to exceed seven cents (7c) per mile for each mile necessarily traveled unless otherwise specifically provided by law."

This statute does not require the commissioners to allow a sheriff 7c per mile. He may be traveling by horse, as well as his automobile, or other vehicle, or on foot, in making investigations or preserving peace. This statute is a statute of limitation and as to items not elsewhere covered would forbid county commissioners from permitting a sheriff to recover an expense of more than 7c a mile for the use of his automobile. It cannot be used to compel county commissioners to allow a mileage computed on that basis in lieu of actual expenses. The rule is that when a sheriff travels for the purposes last discussed, he may recover his actual expenses, the reasonableness of which is to be determined by the county commissioners. If their determination appears unfair or arbitrary, a sheriff aggrieved has his remedy by appeal to the courts.