

Opinion No. 640**Courts — Fees — Witnesses — Jurors
—Budget—County Commissioners
—Emergency Expenditures.**

HELD: Witnesses' fees in criminal cases and jurors' fees are mandatory expenditures required by law.

Where there is a shortage in the budget as regards the amount allotted for jurors and witnesses the Board of County Commissioners should proceed under section 6, Chapter 148, Laws of 1929.

November 8, 1934.

Your letter to us of the 18th ult., is as follows:

"Mr. Will Whalen, Clerk of the District Court of Lewis and Clark County has requested an opinion of this office as regards a construction of the budget law, Chapter 148 of the 1929 Session Laws.

"Paragraph III of sub-section 5 of said law reads as follows: 'Expendi-

tures made, liabilities incurred, or warrants issued, in excess of any of the budgets detailed appropriations as originally determined, or as thereafter revised by transfer, as herein provided shall not be a liability of the county, but the official making or incurring of such expenditure or issuing such warrant shall be liable therefor personally and upon his official bond.'

'Section 4937 and Section 4938 of the Revised Codes of Montana, 1921, provide that the Clerk of Court must give to each juror at the time he is excused from further service a certificate of his per diem and mileage, which certificate upon presentation to the County Treasurer must be paid out of the General Fund of the county, and this likewise is true of all witnesses in criminal cases. The Supreme Court in the case entitled *In re Farrell*, 36 Mont. 254 construed this section as being mandatory upon the clerk, and the county treasurer, and that when a juror or a witness is excused in a criminal case the duty of the clerk is imperative to pay the juror or the witness.

'Mr. Whalen is anticipating a shortage in his budget as regards the amount allotted for jurors and witnesses, and the situation may arise wherein he may not have sufficient money in his budget for these items with which to pay the jurors and witnesses in the coming calendar, which is expected to be called on or about the 26th day of October, 1934.

'Referring again to Chapter 148 of the 1929 Session Laws, and to Paragraph III of sub-section 5 thereof, there is a provision to the effect that an official may not make an expenditure in excess of his budget 'except upon an order of a court of competent jurisdiction'.

'It appears to the writer that the legislature in incorporating the provisions to the effect that a court of competent jurisdiction can order the payment of money that is in excess of the budget anticipated a situation such as is presented here. And that should such a contingency as above outlined occur that the district court judge could order the payment of all moneys in excess of the budget that are due jurors and criminal witnesses.

Is this office correct in advising Mr. Whalen that in the event the budget allotted for jurors and criminal witnesses fees is exhausted that the judge of the district court may by order pay the jurors and witnesses who have earned money and for which here is no money in the budget to pay them.

Chapter 148, Laws of 1929, is known as the "County Budget Act." Sections 5 and 6 thereof provide: (The text is omitted.)

Sections 4933, 4936, 4937, 4938 and 4939, Revised Codes 1921, provide: (The text is omitted.)

It is evident, then, that jurors' fees and witnesses' fees are not such claims against the county as require the approval of the board of county commissioners (*Flynn v. Beaverhead County*, 54 Mont. 309; *School District v. Pondera County*, 89 Mont. 342; *Case v. City of Tulsa*, 212 Pac. 998) and that the county clerk does not issue warrants for such expenditures. Therefore, the provision of section 5 commencing with the words "the board of county commissioners shall not approve any claim" has no application.

Are witnesses' fees in criminal cases and jurors' fees mandatory expenditures required by law? We think it is clear that they are. It is made the duty of the clerk of the district court to issue certificates therefor and of the county treasurer to pay them upon presentation. (*In re Farrell*, 36 Mont. 254; *County of Silver Bow v. Davies*, 40 Mont. 418.) The certificate issued by the clerk of the court is the equivalent of, and serves the same purpose as, the warrant issued by the county clerk. (*In re Farrell*, supra.) The wheels of justice must be kept moving.

It is a matter of more than passing interest that the county commissioners of Silver Bow County, under conditions similar to those which may later arise in Lewis and Clark County, felt they were governed by the quoted provisions of section 6 and acted accordingly.

It is our conclusion, therefore, that upon the happening of the emergency herein anticipated, the board of county commissioners of Lewis and Clark County should follow the provisions of section 6 rather than the provisions of section 5 of Chapter 148.