

Montana State Industrial School,  
 Montana State Orphans' Homes,  
 Montana Training School for  
 Feeble-minded,  
 Montana State School for Deaf and  
 Dumb,  
 State Vocational School for Girls,  
 Habeas Corpus Proceedings.

Section 4933 has application to the amount of the fees payable to grand and trial jurors, and provides that those jurors shall receive \$4.00 per day for attendance before any court of record, and seven cents per mile each way for traveling from and to their residence and the county seat. No distinction is made between a criminal and a civil case.

Section 4936 has application to the fees allowed witnesses, and said section authorizes and provides the amount of per diem and mileage in any civil or criminal action or proceeding. In other words, three classes of actions are specified in said section wherein a fee shall be allowed; namely, civil, criminal, or other proceedings.

Section 4937 provides:

"Duties of clerk as to jurors. The clerk must give to each juror, at the time he is excused from further service, a certificate taken from a book containing a stub with a like designation, signed by himself under seal, in which must be stated the name of the juror, the number of days' attendance, the number of miles traveled, and the amount due, and on presentation of such certificate to the county treasurer, the amount specified in the certificate must be paid out of the general fund, and the clerk must make a detailed statement containing a list of the jurors, the amount of fees and mileage earned by each, and file the same with the clerk of the board of county commissioners on the first day of every regular meeting of the board, and no quarterly salary must be paid the clerk until such statement is filed. The board must examine such statement and see that it is correct. The clerk must keep a record of the attendance of jurors and compute the amount due for mileage, and the distance from any point to the county seat must be determined by the shortest traveled route."

**Opinion No. 179.**

**Fees—Jurors—Witnesses—Clerk of Court—Clerk and Recorder.**

HELD: Fees for jurors and witnesses in all actions, other than civil, must be paid by certificate drawn by the Clerk of Court on the Treasurer, paid out of the general fund, and charged to the budget of the Clerk of Court.

October 18, 1937.

Mr. L. D. French  
 County Attorney  
 Polson, Montana

My Dear Mr. French:

You have submitted to this office the question as to the manner and form of issuing warrants to pay jurors and witnesses their fees, and whether or not those fees should be charged to the budget of the clerk of the court or to the county clerk and recorder in the following matters:

Under Section 4937, whether the action be criminal, civil, or other proceedings, the clerk is required to give to each juror (no reference to witnesses) the proper certificate, and upon presentation of such certificate to the county treasurer the same shall be paid out of the general fund. The payment of this certificate is not predicated upon the consent, allowance, or approval of the Board of County Commissioners, and it need not be approved by the county clerk and recorder. Said section provides that thereafter the clerk of the court shall make a detailed statement and file the same with the clerk and recorder or clerk ex-officio of the board of county commissioners.

Section 4938, by express language, has application particularly to a situation where a jury has been impaneled for a term, and while it refers to that particular class of cases, it does not expressly or by implication exclude the class and character of cases such as you make inquiry about, and it does not by express or implied language prohibit payment of witnesses in such classes of cases. It is not necessary to determine whether habeas corpus cases, and similar cases to those you have inquired about, are criminal actions. Some courts classify them as quasi criminal. If necessary for the determination of this question, by reason of their quasi criminal character, it is possible that they could be classified as criminal actions and thus be brought squarely within the language of "criminal actions." At least they are special proceedings and the statute fairly embraces them in the same general class as criminal actions. In all actions, fees are required to be paid, by either the party involved or the county, as the case may be.

Section 4943 provides:

"In civil actions must be paid by party subpoenaing. The fees and compensation of a witness in all civil actions must be paid by the party who caused him to be subpoenaed."

Certainly these actions are not civil actions. Therefore, the implication must be, that if not paid by the party, they must be paid by the county. If said fees are paid by the county, the only provision to pay them is found in the statutes, supra, and that is that

they shall be paid upon the issuance of a certificate by the clerk, presented to the county treasurer, and paid out of the general funds. Nowhere do we find any express language, nor is it implied, that these fees shall be paid by the clerk and recorder. If the clerk and recorder paid the same, each certificate and claim could not be issued unless approved by the board.

The expenses, necessitating the payment of both juror and witness fees, arise in connection with the operation of the clerk of the court's office. Such expenses are mandatory; usually no discretion exists in his right to pay or not to pay the same, and his duties are usually ministerial in connection therewith. The clerk of the court is in a better position, due to his duties connected with court work, to formulate, or help formulate, a budget covering such expenditure, than is the county clerk and recorder.

Furthermore, the convenience of both the jurors and witnesses demands that the payment be prompt, and if the payments were to be subjected to the action of the board of county commissioners an interval might exist between the time the payments were due and the time they were made, because of the fact the board of county commissioners may not be in session at the time.

Therefore, it is my opinion that the clerk of the court shall issue certificates to the witnesses and to the jurors for their fees and mileage, in proceedings relating to the matters hereinbefore referred to, which certificates shall be presented to the county treasurer, payable out of the general funds of the county, and that the clerk of the court's budget shall be charged therefor.