

October 19, 1939.

Mr. George S. Smith
County Attorney
Billings, Montana

My dear Mr. Smith:

You have directed attention to Section 4932, R. C. M., 1935, and ask if the provision therein limiting the total amount of fees allowed in criminal cases by the board of county commissioners to \$500 in any one year applies to mileage allowances for constables. Billings township has a population of more than twenty thousand people and therefore the constables receive a salary of \$1500 per annum as provided by Section 4932, R. C. M., 1935. Then the question is, whether the expenses and mileage of a constable are considered fees and subject to the \$500 limitation.

In 3 O. A. G., 67 and 188, it was held that mileage and expenses were not fees. The case of Scharrenbroich v. Lewis and Clark County, 33 Mont. 350, was cited as authority. That case arose from the passage of Chapter 86, Laws, 1905, changing the sheriff's mileage from ten cents per mile to allowance of actual expenses. The Court distinguished between fees which are compensation for services performed and such items as mileage which are reimbursement for outlays made in the performance of official duty. Making this distinction, Justice Milburn held that mileage is not a fee.

In Volume 53 of the Montana Reports is a series of cases that might cast doubt upon the holding of the Scharrenbroich case. These are State ex rel Paynes v. District Court, 53 Mont. 350; State v. Story, 53 Mont. 573; State v. Callighan, 53 Mont. 584; State v. Overstreet, 53 Mont. 585. On page 578 of the Story case the Court said that the term "fees" in what is now Section 4932, R. C. M., 1935, included mileage of the constable. I think, however, that statement is clarified by a careful study of the cases in 53 Mont. These cases were all brought to remove officers for the collection of "illegal fees" by the procedure prescribed in Section 9006, R. C. M., 1907, now Section 11702, R. C. M., 1935. In the Paynes case the Court said, "The term 'fees' used in the Codes is somewhat elastic * * * We think the term 'fees' used in Sec-

Opinion No. 156.

Counties—County Commissioners—
Constables' Fees, Mileage and
Expenses Not Part of.

HELD: A constable's mileage and expenses are not a part of the maximum of \$500 for constable fees which may be allowed in criminal cases in any one year.

tion 9006 is sufficiently broad to comprehend both per diem and expenses." This statement is cited with approval in the Story case and the Court continues on page 576, "The result has been to confirm our view that the term 'illegal fees' is used in Section 9006 in its broadest sense, as meaning any moneys collected or attempted to be collected, by a public officer from any source whatever, whether in the guise of mileage, per diem or specific charge for service rendered or to be rendered, in his office without authority of law for such collection."

The Court then recognized that the term "fees" has different meanings in different parts of the Code. The Story and Paynes cases defined the term as it was used in Section 9006, R. C. M., 1907 (11702, R. C. M., 1935), and the Scharrenbroich case defined the term as it is used in Section 4932, R. C. M., 1935. We are here concerned with the definition of fees as used in the latter section and therefore the definition in the Scharrenbroich case is the controlling one. Then, I concur with Attorney General Galen in his holding that "mileage and expenses paid to a constable are not a part of the \$500" mentioned in Section 4932.