

**Opinion No. 51.****Courts—Justice and District Courts—  
Jurors, Compensation of.**

HELD: In courts not of record, such as Justice Courts, only those jurors who actually serve are entitled to per diem of \$1.50.

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April 21, 1939.

Mr. Harold K. Anderson  
County Attorney  
Helena, Montana

Dear Mr. Anderson:

Your letter of April 8, submits two questions, as follows:

“1. Would those who are excused and are disqualified be entitled to the per diem fee of \$1.50?”

“2. Also, would those who are never reached in the examination, but who have appeared under the subpoena and excused after a jury is selected, be entitled to the \$1.50 fee?”

These questions, of course, refer to jurors subpoenaed for service in the justice courts or the courts not of record.

Since the right of jurors to compensation is purely statutory (35 C. J. 310), we must look to our statutes for an answer to the questions, and since the two questions are so closely related, I think that a general discussion will answer both interrogatories.

Section 4395, R. C. M., 1935 refers exclusively to jurors in courts not of record, while Section 4933 is a general statute and refers to matters pertaining to courts of record. I might say that Section 4933 is not as clear as we would like to have it, but reading it together with the general practice in courts not of record, and comparing the practice with that of courts of record, I feel that we can get a proper interpretation of the law and convince ourselves as to the intention of the

Legislature in the enactment of the respective sections.

Section 4933 reads as follows:

"Grand and trial jurors shall receive four dollars per day for attendance before any court of record, and seven cents per mile each way for traveling \* \* \*. Any juror who is excused from attendance upon his own motion on the first day of his appearance in obedience to notice, or who has been summoned as a special juror and not sworn in the trial of the case, in the discretion of the court, may receive per diem and mileage."

Section 4935 reads:

"Jurors in courts not of record, in both civil and criminal actions, shall receive one dollar and fifty cents per day, but in civil actions the jury must be paid by the party demanding the jury, and must be taxed as costs against the losing party. Jurors in coroner's inquest shall receive for their services the sum of one dollar and fifty cents per day."

In comparing these two sections of our Codes it is apparent that there is a distinction to be drawn between attendance upon a court of record and service in a court not of record.

Section 4933 has reference to courts of record, and provides for compensation for all who attend in answer to a subpoena. They may never serve on a jury, and, of course, the procedure is generally by the drawing of such a number of jurors as may be necessary to sit in the trial of causes during a term of the court, which comprises, as a rule, several days. It is clear from a reading of this section, together with reading Section 4815, as to the duties of the clerk of the district court, that it was the intention of the Legislature in the enactment of the said section that all jurors summoned or subpoenaed to comprise a venire for a term of the district court, should be paid.

Section 4815, sub-section 13, requires that the clerk of court keep a book called a "book of jurors' certificates," in which must be contained blank certificates and stubs to be filled out. Sub-section 15 requires that the clerk keep a record of the attendance of all jurors and all witnesses in criminal

actions and compute the mileage of each. There are no such provisions made as to the practice in a court not of record. It seems quite obvious from reading Section 4935 that the only jurors entitled to compensation are those who serve and that the right does not extend to veniremen who are not chosen on the panel of jurors to try the issues of a cause.

Section 8888, R. C. M., 1935 defines a jury in the justice court, as follows:

"A jury in a justice's court, both in civil and misdemeanors, consists of six persons, but the parties may agree to a less number than six."

This is practically verbatim of Section 23, Article III of the Constitution of the State of Montana, in so far as it is pertinent to this question. Then, reading this section together with the requirements of the justice of peace in the keeping of a docket (Section 9703, sub-section 6) to the effect that the docket of the justice of the peace must show a demand for a trial by jury, and sub-section 7, it must show the names of the jurors who appear and are sworn, would indicate that it was the intent of the Legislature under Section 4935 to compensate only such jurors who serve in the trial of the cause and that such compensation should be \$1.50, since no provision is made for mileage nor is any provision specifically set out for compensation to others who may have been subpoenaed but did not serve.

While the case of *Wade v. Lewis and Clark County*, 24 Mont. 335, is not wholly in point as to jurors, it does shed light on the question of the intention of the Legislature in that only such as serve are entitled to compensation. If the Legislature had intended that the entire venire drawn in justice court be compensated, they could well have manifested such intention by repeating Section 4933, and simply changing the per diem rate. This, they did not see fit to do.

It is my conclusion that in courts not of record persons drawn but who are excused or disqualified are not entitled to per diem, also that the persons who are never reached in the examination, even though they have appeared under subpoena and have been excused after a jury is selected, are not entitled to the per diem fee.