Opinion No. 1.

Offices and Officers—Sheriff—Fees—Prisoners, Board of—Jails, Occupation of part of by Sheriff for living quarters—Counties—County Commissioners.

Held: 1. The practice indulged in by sheriffs of the several counties over a period of years of charging for the number of prisoners confined in jail each day in claims for board of prisoners, which practice has sanction by the board of county commissioners over a like period, is a reasonable interpretation of the meaning of Section 4886, Revised Codes of Montana, 1935. 2. The county is not liable for the expense of fuel used by the sheriff in preparation of meals for prisoners. 3. The board of county comissioners is a quasi judicial body in passing upon claims against the county, and when once allowed, the amount cannot in the absence of fraud, be recovered by the county. 4. No statute governing the question of furnishing living quarters for the sheriff and his family existing, the custom of so doing indulged in by the several counties over a period of years may be held to have ripened into legal authority, and such question should be presented to the Supreme Court for decision.

December 8, 1942.

Mr. J. Miller Smith
County Attorney
Lewis and Clark County
Helena, Montana

Dear Mr. Smith:

I am in receipt of a copy of request for opinion submitted to you by the county auditor of Lewis and Clark County, together with copy of your opinion rendered thereon.

The questions submitted for determination are as follows:

1. Is the sheriff entitled to charge the full statutory allowance for board of prisoners in cases where a prisoner or prisoners are confined for only a fraction of day and receive less than the usual meals provided per day?

(a) If a sheriff, in such cases, has made claim for and received the full amount per day, may the county recover for any excess charge?

2. Is it the responsibility of the board of county commissioners to furnish either directly or indirectly the fuel used in the preparation of the food or meals to be served prisoners?

3. Can the county recover amounts paid for personal telephone calls made by county officials?

4. May the county commissioners legally furnish living quarters, light, heat and phone service for the sheriff and his family?

I have carefully read and considered your opinion on the above questions and am inclined to agree with your reasoning and conclusions.

Inasmuch as these questions affect each county in the state, I deem it advisable to render an official opinion of this office on the questions.

Section 4886, Revised Codes of Montana, 1935, provides the fees allowed sheriffs for board of prisoners confined in jail under their charge at specified rates "per day for each of said prisoners;" the rate is based upon the "number of prisoners" confined "each day." The quoted words are important in interpreting the statute and determining the intention of the legislature.

Statutes should be construed so as to ascertain and give effect to the legislative intent expressed therein. (U. S. v. One Automobile, 237 F. 891.) Courts construe statutes and ascertain the intention of the legislative assembly by considering every part of the act, its subject matter, object and intent. (Daniels v. Andes Ins. Co., 2 Mont. 78.) The fundamental rule of construction is to ascertain and give effect to the intention of the legislature as expressed in the statute. (State v. Stewart, 53 Mont. 18, 161 Pac. 309.)

The question as to the board of prisoners was the subject of an opinion by former Attorney General Poindexter, reported in Volume 6 of the Report and Official Opinions of the Attorney General at page 331, and dated February 14, 1916. In this opinion, the Attorney General held the sheriff was only entitled to the proportionate share of the rate per day that the prisoner was actually confined. The opinion is based

upon language used by the Supreme Court in the case of Scharrenbroich v. Lewis and Clark County, 33 Mont. 250, and upon the holding of the Indiana Supreme Court in the case of Pressly v. Board of Commissioners, 80 Indiana 45, from which latter case the Attorney General quoted. However, upon a reading of the Scharrenbroich case, it will be found the question before the Court was as to the applicability of a statute allowing the sheriff ten cents per mile in force when the sheriff was elected, or, a later act enacted after the sheriff took office allowing actual expenses. While the Court, in the course of its opinion, touched upon the question of the fee allowed for board of prisoners,, and used language which might indicate the Court's view on this question were it directly before it, yet, as to this question, the opinion is obiter dicta. The question here, therefore, has never been directly before the Supreme Court. It therefore becomes necessary to determine the meaning of the language used in the statute and the intention of the legislature. Section 8771, Revised Codes of Montana, 1935, provides, "Interpretation must be reasonable." Our Supreme Court has held that a reasonable construction of a statute should be adopted if possible. (State v. Mills, 81 Mont. 86, 261 Pac. 885.)

As you point out, it will be noted the legislature does not say "how many meals the sheriff shall prepare per day per prisoner nor how much he may use in preparation thereof for fuel, whether he has to cook the meals himself, or may hire a cook or buy the meals already prepared at a restaurant. . . ." Neither does it state that "if he has purchased or prepared meals for prisoners who the county attorney releases before the meal is served that the county commissioners shall reimburse the sheriff for his loss in meals not consumed, nor does it allow for the rise in costs of food." In this connection, I think, the language used by the Courts in the Scharrenbroich case, and which you quote in your opinion, is enlightening, as follows:

> "In this case we do not consider that the legislature ever intended that the sheriff should make a cent either in travelling on business or feeding of prisoners, whether the law allows ten cents a mile or 'actual expenses.' We think that the legislature probably understood that the expenses avereraged about ten cents a mile, including guards, dieting, transportation, etc., and that in some cases sheriffs saved something honestly, and in other cases they lost. But whether loss or gain, it was for the legislature to say how much they should have to meet expenses."

It is also worthy of note that the custom followed by the sheriff in your county, that is, charging for the number of prisoners in jail at any time during the day, has been followed in most of the counties of the state over a period of years, even after the opinion of the Attorney General hereinabove referred to. The legislature has met every two years since and has adopted many changes relative to fees of sheriffs, but has not seen fit to change the language of Section 4886, supra. If the legislature intended the sheriff should be paid only for the actual meals served each prisoner, it could well have provided a rate per meal served. Having failed to do so over such a long period of time, it may reasonably be concluded the custom so widely in use has had the tacit approval of the legislature. Our Supreme Court has held on several occasions that a practical interpretation of an ambiguous statute by an executive department, if acted upon for a number of years, will not be disturbed except for very cogent resans. (Murray Hospital v. Angrove, 92 Mont. 101, 10 Pac. (2nd) 577; Miller Ins. Agency v. Porter, 93 Mont. 567, 20 Pac. (2nd) 643.)

It is therefore my opinion that the custom followed is within a reasonable construction of the language used in Section 4886, Revised Codes of Montana, 1935.

With reference to the second question, as to the responsibility of the county commissioners to furnish fuel used in the preparation of the food or meals to be served the prisoners, I agree with your opinion that this question has been settled by the Supreme Court in the case of Pacific Coal Co. v. Silver Bow County, 79 Mont. 323, 256 Pac. 386, wherein it was held the county was not liable for such expense.

With reference to the third question, as to whether the county may recover amounts paid for personal telephone calls made by the county officials, as pointed out in your opinion, the allowance or rejection of claims against the county is within the legal discretion of

the board acting as a quasi judicial body, and their action is conclusive in the absence of fraud. The case of Carbon County v. Draper, 84 Mont. 413, 276 Pac. 667, as pointed out by you, held that:

> "The board of county commissioners is a quasi-judicial body and its action in examining, settling and allowing claims against the county in the absence of fraud is conclusive, even though it is erroneous . . ."

In passing upon the claim of the sheriff for the board of prisoners, or of any county official for fees or expenses, the board has an opportunity to investigate the items and determine whether it represents the true facts, or whether there is fraud. Once having passed favorably upon and allowed the claim, it is my opinion no recovery can thereafter be had unless fraud, which could not be discovered at the time of the allowance of the claim by the board, existed.

With reference to the fourth question, as to the liability of the county to furnish living quarters, light, fuel, telephone service for the sheriff and his family, I am referred to two opinions of this office rendered by former Attorneys General. Attorney General Rankin, in a well-reasoned opinion found in Volume 10 at page 97, Report and Official Opinions of the Attorney General, held the county has no authority to permit the sheriff to occupy a part of the county jail as his residence rent free. On the other hand, Attorney General Foot, in a like well-reasoned opinion found in Volume 12 at page 50, report and Official Opinions of the Attorney General, held there may be conditions under which a county would be justified in permitting the sheriff to occupy rooms adjoining the county jail free of charge or for a reasonable rental. However, Attorney General Foot refers to the opinion of Attorney General Rankin, supra, and says:

> "While, as a general proposition of law, I am disposed to concur with the opinion of former Attorney General Rankin in Volume 10, Opinions of the Attorney General, page 97, still after a careful consideration of this question, it seems to me that there might be conditions under which the county would be justified in permitting the sheriff to occupy rooms adjoining the county jail, free of charge, or for a reasonable rental. . . .
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> "It is entirely possible that the supreme court might hold that in view of the above duty imposed on the sheriff, it is compatible with the performance of such duty (to keep safely in the county jail prisoners committed to his charge) that he should occupy rooms adjoining the county jail, and that his family should not be separated from him while he is engaged in the discharge of said duty. . . .
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> "I do not feel justified in announcing a hard and fast rule that would be applicable under all circumstances. . . ."

In view of these two opinions rendered in 1924 and 1927 respectively, and in view of the well-known fact that this custom has been followed in many counties of the state over a long period of time, even after the above referred opinions of the Attorney General, without interference by legislative action, under the well-established rule of construction referred to above, it would be my opinion that the Supreme Court would not disturb such practice "except for cogent reasons."

Therefore, because of these considerations, and the importance of the question, I am inclined to agree with you and with Attorney General Foot, that such questions should be brought directly before the Supreme Court for decision.

Sincerely yours,
R. V. BOTTOMLY
Attorney General