

INQUEST COSTS - To be paid by county.
WITNESS FEES - No witness fees payable to witness detained in jail for refusal to give recognizance.

December 8th, 1933.

FILED

29

63

Hon. Elbert L. Ford
Prosecuting Attorney
Kennett, Missouri

Dear Sir:

We have your request of November 14th, 1933 for an opinion upon the following state of facts:

"I would appreciate it if you would render me an opinion in the above case relative to costs. This County and State Auditor is having some controversy relative to payment of inquest fees. It is the contention of the County Court that under Section 3855 Revised Statutes Missouri, 1929, that the State is liable for cost and expenses of inquest when such inquest shows that the deceased came to his or her death by a felony.

Second - The Court under an order held three material witnesses in jail for several months in the above matter and according to the supplemental cost bill filed in this case there is due said witnesses the sum of \$450.00 for witness fees for each day they were held in jail pending this trial.

The question is where witnesses are held in jail as material witnesses by the Court and for the State whether they are entitled to witness fees for the time they were held in jail or "for attending any Court of Record?"

I would appreciate it if would give me an opinion concerning this and I am doing this at the request of the State Auditor who asked me to get this opinion."

#2 - Elbert L. Ford

I.

WITNESS FEES IN INQUEST CASES ARE TO BE PAID BY THE COUNTY.

Section 3855 R. S. Mo. 1929 cited in your letter merely classifies fees accruing in any inquest as criminal costs, but does not fix the responsibility for paying same. Section 3855 is as follows:

"CERTAIN FEES DEEMED CRIMINAL COSTS. --All fees due witnesses before the grand jury, and all fees due jurors in any criminal case, and all fees accruing in any inquest case where the verdict of the jury is that the deceased came to death by other than unavoidable accident or natural causes, shall be deemed criminal costs, and shall be paid in like manner and shall be subject to all the offsets herein provided for."

The responsibility for paying fees of an inquest is definitely fixed by the terms of Section 11802 R. S. Mo. 1929. Pertinent parts of this section are as follows:

"The above fees, together with the fees allowed jurors, constables and witnesses, in all inquests, shall be paid out of the county treasury as other demands."

It is, therefore, the opinion of this office that the costs of an inquest are properly chargeable to the county and are to be paid out of the county treasury.

II.

A WITNESS DETAINED IN CUSTODY FOR REFUSAL TO GIVE A RECOGNIZANCE FOR HIS APPEARANCE IS NOT ENTITLED TO WITNESS FEES WHILE SO DETAINED IN CUSTODY.

#3 - Elbert L. Ford

We began with the premise that witness fees are for services rendered, as is fully justified by the following excerpt from Section 11776, R. S. Mo. 1929:

"The several officers hereinafter named, and jurors and witnesses, shall be allowed such fees for their services rendered in discharging the duties imposed upon them by law as are hereinafter provided,*"

Preceding the right of an officer to receive compensation from the public treasury is the indispensability of finding statutory authorization for such payment. This principle is undoubtedly now well established in Missouri. State ex rel. v. Patterson, 152 Mo. App. 264 l.c. 268. The same is true with reference to witness fees which are only allowed when expressly authorized by statute. In State v. Oliver, 116 Mo. 188, l.c. 195, the Supreme Court said; (1893):

"No witness has a right, independent of the statute, to enforce a claim against the state for fees for attendance upon the trial of a criminal case. The question of justice or injustice to the witness is not a matter for consideration."

In the absence of such statutory authority to pay compensation, a presumption arises that public services are rendered gratuitously, since the right to receive pay is a matter, not of contract, but of statute. King v. Riverland Levy District, 279 S. W. 195 l.c. 196 (1926). In the Riverland Levy District case, supra, the St. Louis Court of Appeals, l.c. 196, said:

"It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract,

#4 - Elbert L. Ford

and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. State ex rel. Evans v. Gordon, 245 Mo. 12 loc. cit. 27, 149 S.W. 658; Sanderson v. Pike County, 195 Mo. 598, 93 S.W. 942; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S. W. 504. Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. loc. cit, 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same. State ex rel. Evans v. Gordon, supra.

The amount of witness fees are fixed in Section 11798, R.S. Mo. 1929:

"Witnesses shall be allowed fees for their services as follows: For attending any court of record,* within the county where the witness resides, each day, \$1.50. For like attendance out of the county where witness resides, each day, \$2.00. For traveling each mile in going to and returning from the place of trial, .05."

We must now examine the statutes directly involved as to whether or not witnesses detained in jail because of their refusal to give a recognizance for their appearance, are entitled to witness fees for each day of their detention. Section 3483 R. S. Mo. 1929 provides as follows:

#5 - Elbert L. Ford

"RECOGNIZANCE, WHEN REQUIRED.--If it appear that a felony has been committed, and that there is probable cause to believe the prisoner guilty thereof, the magistrate shall bind, by recognizance, the prosecutor, and all material witnesses against such prisoner, to appear and testify before the court having cognizance of the offense, on such day as the prosecuting attorney shall designate in writing duly filed with the magistrate at the time, and not to depart such court without leave."

Section 3485 provides as follows:

"WITNESSES, WHEN COMMITTED.--If any witness so required to enter into a recognizance refuse to comply with such order, the magistrate may commit him or her to prison until he or she comply with such order or be otherwise discharged according to law."

A New York statute (Sec. 618b. of the Criminal Code) providing that upon the neglect or refusal of the witness to comply with the court order requiring a recognizance for their appearance to be given, that the judge must commit such witness to jail, was said by the Kings County Supreme Court (1921) in *People ex rel. v. Sheriff of Kings County*, 192 N. Y. Supplement, 553, to be unconstitutional as "an unwarrantable interference with the liberty of the individual". However, this part of the decision may be regarded as obiter dictum since the constitutionality of the statute did not need to be passed upon by the court to reach the decision made. The New York statute is broader than the Missouri statute in that it provided that upon the "neglect or refusal" of the witness to give recognizance for his appearance he should be committed to jail, while the Missouri statute provides that the witness may be committed to jail upon his refusal to give a recognizance.

#6 - Elbert L. Ford

Furthermore, the New York statute required the witness to furnish recognizance with sureties, while the Missouri statute (Sec. 3435) is silent as to any sureties being required, and when strictly construed, the Missouri statute would require no sureties. In *Comfort v. Kettle*, 81 Ia. 179, 46 N. W. 988, it was held that sureties could not be required on such recognizance, because the statute did not expressly so declare. It therefore appears that the witness in Missouri could sign and give his own bond without sureties.

While the authorities in this country are not uniform in their holdings upon the right of a witness to collect fees while detained as a witness, yet the general rule is well stated in 24 Annotated Cases, 1912, C, p. 807 as follows:

"As stated in the reported case the authorities are not agreed as to whether a witness who is detained in custody for future appearance may recover fees for the period of detention. In the majority of jurisdictions where the question has arisen it has been held that there can be no recovery even though the failure to furnish bail results from no fault of the witness, the courts holding that statutes authorizing payment of a witness while attending court do not extend to the time while the witness is forcibly detained waiting for the trial to take place."

Further, it would appear that in Missouri the commitment of a witness for the purpose of procuring his attendance in a trial later to be held, is in the nature of a contempt proceeding, because prior to any right of a court to commit a witness, the witness must refuse to give a recognizance, and such refusal places the witness in the same category as any other person who refuses to obey an order of the court. The duration of the commitment is the same as for contempt proceedings, namely, "until he or she comply with such order or be otherwise discharged according to law". It would therefore

#7 - Elbert L. Ford

appear that the refusal of the witness to give such a recognition is, in the eyes of the law, a wrongful act, and to allow him compensation for each day he was detained because of such wrongful act would be to allow a person to profit by his wrong, a principle which no court in Missouri would recognize. We quote further from 24 Annotated Cases, 1912 C, p. 809:

"In a few jurisdictions, the rule adopted is that if a witness can, but will not, give security for his appearance and is committed for his refusal, he will not be entitled to a per diem fee during any part of the time he may be detained to secure his attendance, and likewise if his inability to find security results from his own misconduct or bad character he will equally not be entitled to a per diem fee."

In some jurisdictions, if the inability of the witness to give a bond for his appearance arises from his misfortune and not from his fault, he is considered in attendance at court and will be entitled to fees for the term of his detention. - 24 Annotated Cases 1912 C. l.c. 809.

The Federal Government has specifically provided in 28 U.S.C.A. 601:

"When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to compensation of \$1. a day."

We have no such statute in Missouri, and in the absence of such statutory authorization, no compensation can be paid a witness detained in custody. It is, therefore, the opinion of this office that the two witnesses who were committed to

#8 - Elbert L. Ford

jail for their refusal to give a recognizance for their appearance are not entitled to witness fees for each day they were detained in jail.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

FER:FE