

in this case
FEES:--Sheriff, not entitled to \$1.25 a day fee for keeping prisoner while undergoing examination preparatory to commitment.

May 15, 1933 *52*

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Honorable Walker Pierce
Prosecuting Attorney
Howard County
Fayette, Missouri

Dear Sir:

This is to acknowledge your letter of May 5, 1933, which is as follows:

"This request is for an interpretation of Section 11791 of the Revised Statutes of Missouri, 1929, and two cases cited thereunder; State ex rel. Million vs. Allen, 187 No. 560; and, State ex rel. Dickmann vs. Clark, 170 No. 67.

The sheriff of this County recently demanded that the County Court pay him the sum of \$1.25 a day for keeping prisoners until their preliminary regardless of whether they were in jail one day or 15. This practice has not been followed before in this County and the result is that the sheriff's bills have run into large sums for the reason that it is not possible, at all times, for me to immediately give the prisoners a hearing and the situation has proved embarrassing to me for that reason.

Will you please state your opinion as to whether or not the sheriff is entitled to \$1.25 a day for the safe keeping of prisoners under these circumstances.

Personally, I can see no reason why it is any more expensive to keep them before a preliminary than it is after, and I don't think that the Legislature intended that this amount be paid for each day of safe keeping.

Trusting that I may hear from you soon and thanking you for the consideration that you have shown me already, I am, "

You desire an opinion as to the interpretation of that part of Section 11791 R. S. Mo. 1929, regarding the \$1.25 a day fee due the Sheriff for the safe keeping of prisoners preparatory to committing them to jail. You state that the Sheriff is of the opinion that he is entitled to \$1.25 a day fee for keeping prisoners until preliminaries are held on such prisoners.

Section 11791 R. S. Mo. 1929, in part pertinent to the inquiry herein considered reads as follows:

"The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, or who may remove a prisoner from one county to another for any cause authorized by law, or who shall have in custody or under his charge any person undergoing an examination preparatory to his commitment more than one day for transporting, safe keeping and maintaining any such person, shall be allowed by the court, having cognizance of the offense, one dollar and twenty-five cents per day for every day he may have such person under his charge. * * * "

In the case of State v. Wofford, 116 Mo. 223, the court had under consideration the above quoted part of the statute. The facts in that case being: a man was arrested upon a warrant, charged with a felony; he was brought before the justice who issued the warrant, and on motion of the prosecuting attorney, the defendant was committed to jail to await trial; the case was continued for quite a while when it was subsequently dismissed; the marshal applied for the fee of \$1.25 per day for the seventy days in which he had the custody of the defendant as he claimed while undergoing examination preparatory to commitment. The Court held in this case that the marshal was not entitled to the fee, holding that under the other sections of the statutes the defendant was committed by the magistrate. These statutes will be hereinafter set out. The Court in its opinion said the following: (l.c. 223)

* * * "It is a well settled law that no officer is entitled to fees of any kind unless provided for by statute, and that

the law conferring such right must be strictly construed because of statutory origin and right." * * *

And further at page 226:

"* * * If the facts showed that there was no jail provided by Jackson county for the safe keeping of prisoners, or that there had been no order of commitment or entry to that effect by the justice on his docket and that for either one of such causes it was compulsory on the part of the marshal to keep the person under his guard, an entirely different rule would prevail, but the pleadings show that the county is well provided with regard to jails and also that the prisoner was committed to jail by the justice to await examination. The statute, giving it the most liberal construction, does not, in our opinion, entitle the relator to the fee claimed."

In the case of State ex rel. Dieckmann, Sheriff, v. Clark et al. 170 Mo. 67, the Supreme Court in Banc, held that the Sheriff was entitled to the \$1.25 per day for the keeping of a prisoner while undergoing examination preparatory to commitment. The facts showed that the defendant was arrested and the court had adjourned for the day so the prisoner could not have been brought before the court on that day, and it was the duty of the sheriff to safely keep him until the next day at which time he was produced in court and then committed by the court to jail to await trial. In this case the court discussed the Wofford Case, supra, and distinguished between that case and the instant one, and also the Thomas v. County of St. Louis, 61 Mo. 547.

The case of State ex rel. Millien v. Allen, Auditor, 187 Mo. 560, the Supreme Court in Banc, held that the sheriff was not entitled to the \$1.25 fee for the keeping a prisoner while undergoing an examination preparatory to commitment because such was not the fact. In this case the prosecuting attorney filed an information in the Circuit Court and the sheriff arrested the prisoner and kept him in custody under the *capias* issued by the Circuit Clerk until trial time. The court held that a commitment means a judicial

order, and until such an order is made the person arrested is the sheriff's prisoner, by virtue of the *capias*. (Thomas v. County of St. Louis 61 Mo. 547). After an order of commitment has been made by the court, the sheriff or jailor is entitled to a sum not exceeding the amount per day for the board of a prisoner. This case also distinguishes the Dieckmann case, *supra*. The Court had the following to say: (l.c. 564).

"It may be true that a sheriff runs as much risk and incurs as much expense in keeping a prisoner in such a case as this, as he does in such a case as the Dieckmann case. But these are considerations with which the courts have no concern. Costs and fees are purely the creatures of the statutes, and one who claims them must be able to put his finger upon the express provision of the statutes which allow them or the courts cannot award them. The statute allows a sheriff one dollar and a quarter a day for having a prisoner in his charge 'while undergoing an examination preparatory to his commitment,' and only allows fifty cents a day for keeping and boarding a prisoner after he is committed to prison or while he is in prison awaiting a trial on the merits of the charge against him.

The reason for or injustice in the difference is a matter for the Legislature solely, and not for the courts. The courts can only enforce the statutory law as it is written."

Section 3467 R. S. Mo. 1929, provides that when a complaint is made to a magistrate in writing and under oath, setting forth that a felony has been committed and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant commanding the officer to whom it is directed forthwith to take the accused and bring him before such magistrate.

Section 3468 R. S. Mo. 1929, pertains to bail when such prisoner is brought before the magistrate.

Section 3473 R. S. Mo. 1929, makes it the duty of the magistrate to proceed as soon as may be to examine the complainant and witnesses in support of the prosecution, on oath, in the presence of the prisoner in regard to the offense charged.

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Section 3474 R. S. No. 1929, provides that a magistrate may adjourn an examination of a prisoner pending before him, and if the party is charged with a bailable offense, he shall be entitled to bail, otherwise he shall be committed.

The provisions supra, and other provisions in the statutes under Article 5, Chapter 29, makes it the plain duty of the arresting officer, when he has a warrant issued from a court in a felony case to bring the prisoner forthwith before that court and then it is the duty of the magistrate to permit the prisoner to bail pending an examination, or commit him pending hearing.

In your case, if the sheriff after serving the warrants, took the prisoners before the court, the court would have committed them either by a docket entry or commitment papers to the custody of the sheriff pending an examination, and when same was done the sheriff would be entitled to only the fee for boarding prisoners as provided by section 11794 R. S. No. 1929, and not the \$1.25 a day.

From the above and foregoing it is our opinion that the sheriff is not entitled to the \$1.25 a day for keeping prisoners until their preliminary examinations, if said prisoners were in jail awaiting examination after they had been brought before a magistrate and said magistrate continued or set the cause for hearing at a future date.

Trusting this answers your inquiry, we are,

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED _____
Attorney General.

JLH:MM