

DEPOSITIONS: State not compelled to pay cost of depositions taken at a preliminary hearing when defendant is discharged;

Depositions taken outside state by defendant for use at trial are legal costs to be paid by State if defendant is discharged.

3-14
March 5, 1934.



Honorable Orin J. Adams,
Prosecuting Attorney,
Caldwell County,
Kingston, Missouri.

Dear Sir:

Your letter of January 12 addressed to Attorney General McKittrick relating to criminal costs, has been handed to me for answer, the contents being as follows:

"One Deems Payne was arrested upon complaint filed before a Justice of the Peace charged with the commission of a felony, to-wit, robbery with a dangerous and deadly weapon. The defendant's defense was an alibi, a preliminary examination was demanded, and the Justice of the Peace ordered the defendant discharged. Prior to the preliminary the prosecuting attorney was served with notice that the defendant intended to take depositions in the State of Nebraska. Some twenty-three witnesses were examined on the part of the defendant, all of them testifying that the defendant was seen in Nebraska on dates prior to, and on the date of the alleged commission of the crime. The depositions were not properly certified to by the officer taking the same, and in the form in which they were presented were not admissible in evidence, but were read by the Justice.

Thereafter, the Caldwell County Grand Jury considered the case, and returned an indictment charging the defendant with the commission of the crime, and again the defendant gave notice to take depositions in the manner provided by law. Approximately the same number of witnesses were examined, all testifying solely as alibi witnesses, and as having seen the defendant in Nebraska, on certain days just prior to, and just following the alleged commission of the crime. These depositions were in proper form and were read and considered in evidence at the trial of the cause in

which the defendant was acquitted.

The question for determination is, as to whether the witnesses who testified in Nebraska are entitled to witness fees and mileage or not. The witnesses are not only undertaking to claim attendance for one day consumed in taking the depositions, but are also claiming for an extra day, when they came before the officer and signed their depositions. There appears to be no statutory authority whatever for the payment by the State of witness fees of witnesses outside of the state. Sections 11776, 11798 and 11799, R.S. 1929, make no mention of such cases and apply to witnesses within the State of Missouri.

Also, in view of the provisions of Section 3850, making it the duty of the prosecuting attorney and trial judge not to tax the state or county with more than the costs of three witnesses, to establish any one fact, this statute evidently limits the officers in their allowance of fees to a limited number of witnesses in any case."

I.

The State is not compelled to pay the cost of depositions taken at a preliminary hearing when the defendant is discharged.

The facts stated in your letter present a difficult question and for the purpose of this opinion we will divide same into (1) costs of depositions taken for the preliminary examination of defendant; and (2) costs of depositions used in the trial of defendant. It is mandatory on the part of the State to accord a defendant when charged with a felony a preliminary hearing before some justice of the peace of the county.

Section 3621, R.S. Mo. 1929 refers to the defendant taking depositions and provides:

"When any issue of fact is joined in any criminal case, and any material witness for the defendant resides out of the state, or residing within the state, is eniente, sick or infirm, or is bound on a voyage or is about to leave this state, or is confined in prison under sentence for a felony, such defendant may apply to the court, or judge thereof, in which the cause is pending, for a

commission to examine such witness upon interrogatories thereto annexed, and such court may grant the same upon the like proof and on the like terms as provided by law in civil cases. The court, or judge thereof, granting such commission, may permit the officer prosecuting for the state to join in such commission. The deposition of any witness confined in prison under sentence for a felony shall be taken where such witness is confined."

Section 3623, R.S. Mo. 1929, also pertaining to this matter provides:

"The defendant in any criminal cause may also have witnesses examined on his behalf, conditionally, upon a commission issued by the clerk of the court in which the cause is pending, in the same cases and upon the like notice to the prosecuting attorney, with the like effect and in all respects as is provided by law in civil suits: Provided, that the notice in such case to the prosecuting attorney shall state the name or names of the witness or witnesses whose depositions are desired or will be taken."

You will note under Sec. 3621, supra, the phrase "when any issue of fact is joined in any criminal case" is used.

We infer your question to be whether or not the costs of depositions are to be paid by the State when the witnesses reside out of the state, rather than the fees of the witnesses individually. When depositions of witnesses are taken, the person before whom they are taken attaches a statement of the costs, properly computed, and then the witnesses lose their identity; it then becomes a question of whether or not the costs as computed by the Notary are proper or improper.

Referring again to Secs. 3621 and 3623, supra, and to the fact that Payne, the defendant, took the depositions of the witnesses outside of the State, we are of the opinion that the statutes do not authorize the taking of depositions for preliminary hearing on the part of the defendant outside of the state, in as much as the statutes use the expression "when any issue of fact is joined", and as long as the defendant is not in Circuit Court under information, when the charge is a felony, the issues are not joined. You further state that the depositions were not properly certified to by the officer and were therefore subject to being quashed.

CONCLUSION (I)

In view of the foregoing, it is the opinion of this department that the costs of depositions of witnesses outside of the State for a preliminary examination on the part of the defendant, when the defendant is bound over or discharged, are not costs which can be legally charged to the State for the reason that there is no statutory provision for the taking of depositions for a preliminary hearing.

II.

The costs of depositions of witnesses outside of the State taken by a defendant for use in his defense at the trial are legal costs to be paid by the State if the defendant is discharged.

We next consider the question of depositions taken and used by defendant at his trial wherein he was acquitted. Referring to Secs. 3621 and 3623, quoted in part I of this opinion, it must be conceded that the defendant had the legal right to take the depositions. When a defendant is charged with felony, punishable solely by imprisonment in the penitentiary under Sec. 3828, R.S. Mo. 1929, it is mandatory on the State to pay the costs, said section being as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictment or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Reiterating the statement made in Part I hereof, i.e., that the question resolves itself into the situation of the State being liable or not liable for the costs of depositions used in the trial of the case instead of the mileage and fees of the witnesses individually, Secs. 11776, 11798 and 11799 have no bearing on the issues for the reason that they deal solely with the witnesses outside of the State attending the trial in person. We must, therefore, look to the regularity or irregularity of the depositions or the cost of the same. In the instant case the testimony of the witnesses appears to have been material, as it bore on the question of an alibi and therefore we would say that defendant did not abuse his right to take the same.

It is well settled law that had the witnesses attended the trial in person and then claimed fees for mileage for their residence in the foreign state, said costs would not be properly chargeable to the State. In the case of *Buckman v. Railroad*, 121 Mo. App. 299 the Court said (l.c. 304):

"Henry and John Cline attended the second trial as witnesses, in December, 1900. They lived in Oklahoma and each claimed and was allowed eight hundred and ninety miles mileage in coming from and returning to his home in Oklahoma. A subpoena was served on one of these witnesses by a constable in the State of Illinois. The other one had been subpoenaed in this State to attend a prior term of the Monroe Circuit Court as a witness in the case, but he was not re-subpoenaed to attend the October term, 1900. The service of the subpoena in Illinois, being beyond the jurisdiction of the court, was absolutely null and void. Neither of these witnesses were therefore served with a subpoena to attend the October term, 1901, of the Monroe Circuit Court to testify as witnesses in said cause and neither are entitled to mileage (*State ex rel. v. Seibert*, 130 Mo. 202, 32 S.W. 670), and the mileage of these witnesses should have been disallowed."

In the case of *State ex rel. v. Wilder*, 196 Mo. 418, the Court said (l.c. 430):

"It will not be seriously contended that the subpoenas in this cause which are alleged to have been served upon the witnesses at their places of residence in a foreign State were of any force or vitality. A subpoena issued from the courts of this State cannot have any extraterritorial operation, hence the service of the subpoenas of the witnesses whose claims for mileage are involved in this proceeding in another State were mere nullities and of no obligatory force upon the witnesses to obey the command contained in the subpoena. The rules of law applicable to this subject were fully discussed and announced in *State ex rel. v. Seibert*, 130 Mo. 202, by the Court in Banc. There were two opinions in that case, but upon the proposition that process served beyond the limits of this State were of no force and effect, there was no division of opinion. Sherwood, J.

in that case, in treating of process, thus announced the law: 'When the Legislature treats of process and its service and recognizances, it will be intended that such process can only be served within this State and that such recognizances only possess obligatory force within its borders. Neither process nor recognizances can have any extraterritorial operation. (State v. Pagels, 92 Mo., loc. cit. 308; State v. Butler, 67 Mo. loc cit. 62; Board, etc. v. Chase, 24 Kan. 774). And it would be beyond the power of the Legislature to authorize process to be effectual outside of this State. (Wilson v. Railroad, 108 Mo. 588)'"

We cite these decisions in order to clarify our differentiation between costs of taking depositions and the fees of witnesses individually when they appear in court from a foreign State.

Sec. 1806, R.S. Mo. 1929 relating to the costs of taking depositions provides as follows:

"The costs and expenses of taking the depositions shall be audited and allowed by the officer taking the same; and such costs and expenses, together with the fees of recording and copying the same, shall be taxed in favor of the party or parties praying the same, and collected as other costs in the suit or suits in which such depositions, or any part thereof, may be used."

We interpret this section to apply in the instant case, as the depositions were taken and used in the manner prescribed by civil procedure.

The outstanding decision on which we finally base our conclusion is the case of State v. Krueger, 69 Mo. App. 31, l.c. 32-33:

"This is an appeal from a judgment taxing certain costs against the defendant, though the state dismissed the indictments after the cost had been incurred. In January, 1895 three indictments were found against the defendant for violation of the election laws. The cause was continued to the April term, and during that time the defendant gave notice and took the depositions of certain witnesses. On the application of the prosecuting attorney the court appointed a special commissioner to take the depositions. The parties procured and

took the testimony of a number of witnesses, the majority, if not all, of whom were the same as those named on the indictments as witnesses for the state. Following the taking of these depositions the state dismissed the case; and the court, at the suggestion of the prosecuting attorney, adjudged the costs of taking these depositions against defendant, and he appealed.

I know of no law that will sustain the court's action. The defendant had the legal right to take depositions to be used conditionally at the trial against him. Secs. 4147, 4149, R.S. 1889. If, however, the state should thereafter abandon the prosecution and dismiss the case, then the defendant was entitled, not only to a judgment of discharge, but as well a judgment for his costs lawfully incurred in preparing for his defense. This matter of costs is one of statutory regulation, and I know of no statute provision for taxing the costs against the defendant in a criminal prosecution except where he is convicted. Sec. 4395, R.S. 1889. If the defendant should manifestly abuse this provision for his benefit, and should take depositions foreign to the issues involved, and which could not in any event be used, then the court might well deny his right to recover the same. But there is nothing in this record to show any such abuse. The mere fact that defendant took the depositions of witnesses named on the state's indictment; or that such witnesses then resided and were found within the reach of subpoenas from the court, do not establish such abuse. It may be that the testimony of such witnesses was material for the defense, though relied on by the state; and that though they were at the time within reach of the court's process, yet they might have been beyond it when the cause was called for trial. In view of this contingency, the defendant would be justified in taking the depositions of such witnesses to be used conditionally as the statute before cited has provided.

There was a final judgment discharging the defendant; and hence the objection that an appeal will not lie from a mere order taxing costs, as suggested in the brief of the state's attorney, is not well taken. The judgment of the criminal court, in so far as it taxes the costs attending the taking of the depositions in question, will be reversed."

Section 3850 R.S. Mo. 1929 provides as follows:

"The judge and prosecuting attorney shall in no case tax the state or county with more than the costs of three witnesses to establish any one fact, nor with the costs of witnesses unnecessarily summoned and not examined, but the costs of such surplus or unnecessary witnesses shall, in the discretion of the court, be taxed against the party or attorney causing them to be summoned."

This section limits the judge and prosecuting attorney to the testimony and costs of not more than three witnesses to establish any one fact. Trial judges have been more or less inclined to disregard this section during the trial of a case; however, it is possible that a motion to retax the costs, insofar as the question of the costs of depositions are concerned, wherein the mileage and number of witnesses as shown by the Notary before whom the depositions were taken, might be attacked and the costs of the depositions reduced.

CONCLUSION (II)

In view of the statutes and the decisions above quoted, it is the opinion of this department that the State, under the facts as outlined in your letter, is liable for the costs of the depositions used in the trial of the case of State v. Payne.

Respectfully submitted,

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APPROVED:

ROY MCKITTRICK,
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