

SHERIFFS FEES - County Court,- Duty of county court to audit
and correct before paying.

6-8
June 8, 1935

Honorable Joseph M. Bone
Prosecuting Attorney
Audrain County
Mexico, Missouri



Dear Sir:

Your letter is received which makes the following inquiry:

"Assuming the facts to be that neither the sheriff nor his deputy was present, in person, in the county court room nor probate court room of Audrain County during the sessions of said courts for the last term thereof, and that neither the sheriff nor his deputy waited upon or served either of said courts during said quarter, and that the sheriff thereafter presented a bill to the County Court of Audrain County for per diem for services for twenty-five days' attending and waiting upon the county court of said county at \$3.00 per day, and for thirteen days' attending and waiting upon the probate court of said county at \$3.00 per day, is the County Court of Audrain County required, under the law, to order warrants and pay said bill?"

We construe your inquiry to be: Is the sheriff entitled to per diem compensation for each day said courts

#2 - Honorable Joseph W. Bone

were in session, regardless of whether he attended such court, and should the County Court audit and pay the same regardless of facts outside of the statute?

Considering first the question as to the liability and duty of the County Court to pay the sheriff for the days the County Court was in session, we note that Section 1870 of the Revised Statutes of Missouri for 1929 is as follows:

"The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

Section 1871 thereof is as follows:

"The court shall audit and adjust the accounts of the officer attending it, made pursuant to this chapter, and certify the same for payment."

It is a basic rule of law as to official fees that statutes providing therefor must be strictly construed. Likewise, that officers are not entitled to any fees unless the statute authorizes payment thereof.

In the case of State ex rel. Troll v. Brown, 146 Mo. 401, l.c. 406, the Supreme Court of this State said:

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co.

#3- Honorable Joseph M. Bone

76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

With these rules in mind, the answer to your inquiry turns on the meaning of the above two quoted statutes.

The word "shall", not "may", is used in the statute requiring the sheriff to attend the court.

The word "shall" has been construed by courts of various States, and, in such decisions, it has been given the meaning that it does not leave the way open for the substitution of a discretion.

Baer v. Gore, 90 S. E. 530, 79 W. Va. 50, L.R.A. 1917B 723.

In the Indiana case of State v. Meeker, 108 N. E. 906, 907, 182 Ind. 240, and in the Iowa case of Vale v. Messenger, 168 N. W. 281, 283, 184 Iowa 553, it is stated that the word "shall" in a statute is presumed to be used in a mandatory sense. Likewise, the word "attend" has been defined and construed.

In the case of Robson v. Dickinson County, 8 Kan. App. 374, 55 P. 520, it is held that a sheriff was not entitled to a per diem for attending on the probate court when not expressly requested by the probate judge so to do, and when it is not necessary for him to attend, although the statute provides that the sheriff shall attend upon the several courts of record held in his county, and that he shall receive for attending any court of record a certain per diem.

#4 - Honorable Joseph M. Bone

In the case of *People ex rel. Gray v. Livingston County* (1903), 89 App. Div. 152, 85 N.Y.S. 234, the sheriff was held not entitled to a per diem for attending the County Court on Saturdays, on which the Judge designated the Court to be held in his Chamber, for days when the Judge was not present where no adjournment of these Courts was made by the sheriff, and he performed no service in regard thereto.

In the case of *Mason v. Culbert*, 41 P. 464, 108 Cal. 247, in construing the meaning of the word "attendance" of a juror on court, it is said that a juror may be in attendance on court without being impaneled to try any cause; after he has been drawn he may be excused until some future day. In such cases they are not in "attendance" upon the court during any period that they are excused therefrom with the opportunity to be engaged in ordinary vocations.

From the above expressions of the courts, we think the fair meaning of the words "shall attend" court is that the sheriff is actually at court ready to carry out the orders or requirements of the court by the judge thereof with the speaking voice directing him, and that he does not have the right to be about and engaged in other usual vocations.

In the California case last above cited, the court makes the distinction between attendance and non-attendance turn on whether the party is about the business of the court as a juror or is free to go elsewhere. On reason, it seems to us that if the sheriff absents himself, without leave of court, from attendance and performance of his duties at the court, that he can certainly not have greater rights to compensation than if he were excused by the court.

The apparent intent and reason of the Legislature in enacting Section 1871, supra, providing that the "court shall audit and adjust the accounts of the officer attending it", was that the court in which the services were charged or claimed would know whether it was a just and true statement of fact. The County Court would know whether the sheriff attended that court, and the probate court would know whether the sheriff attended that court and on what days he did so attend.

#5 - Honorable Joseph W. Bone

Each respective court is required to audit and adjust the accounts of the officers of that particular court. After being so corrected by the court which actually knew of the facts, that court certifies the corrected bill for payment.

In the case of State ex rel. Bensick v. Smith, Auditor, 5 Mo. App. 427, the court construed the right of an auditor to pass on a bill as being a valid charge against the county, the bill being on account of board furnished juries under a court order of the St. Louis Criminal Court. The Court of Appeals said:

"The General law directs that all accounts for expenditure accruing in courts shall be paid out of the treasury of the county in which the court is held in the same manner as other demands, and shall be audited and adjusted by the court in which the services were rendered. That tribunal has the means of determining the correctness of the account as to which the auditor can know nothing, and to that tribunal alone have the people delegated the power of determining what expenditures are necessary to carry on with efficiency and decorum the public business of the court."

In the case of State ex rel. McNeil v. The St. Louis County Court, 42 Mo. 498, l.c. 499, the court said:

"On the contrary all warrants upon the treasury must be ordered by the court itself. Thus giving to that body power to allow and pay the amount of a claim notwithstanding the objections of the auditor."

And l.c. 500:

"The general law directs all such accounts to be audited, adjusted and certified for payment by the court in which the service

is rendered and the articles furnished; such tribunal is presumed to have the means of determining almost with positive certainty as to the correctness of the items of such an account."

In the case of Crouch v. Plummer, 17 Mo. 421, the Supreme Court passed on the duty of the County Court to pay a bill that had been certified by the circuit judge and circuit attorney to the County Court as being correct. It included a bill by the sheriff for per diem for attendance on court and also of a deputy thereon. The county court took the position that there was no law justifying payment of the deputy, and struck that part out of the bill and paid the remainder. Thereupon the sheriff sued out a writ of mandamus against the county court, seeking to require the payment of the part stricken out. On Appeal, the Supreme Court held the writ to be improper and that the county court was justified, saying, l.c. 423:

"It was the right of the county court to examine the account produced for allowance and if that court found that in such account charges had been made for services not by law permitted to be charged against the county, it was the duty of the court to reject and refuse to allow for such."

The only difference between the bill for services for attendance on the county court and on the probate court is that, as to the latter, the probate judge should first pass on and audit and certify it to the county court for payment.

CONCLUSION.

We think that the statute not only gives the right to the sheriff to attend each court, in this instance the county court and the probate court, but also places that duty on him,

#7 - Honorable Joseph M. Bone

and, if he performs that duty, he is entitled to the statutory fees therefor; however, if he does not perform that duty, the county court should not pay him for such days as he fails to perform such duties.

The county court has the right, and the duty is placed upon said court by Section 1871 of Revised Statutes of Missouri for 1929 of auditing the sheriff's bills, and, if they find the fact to be that the sheriff did not attend said court, or either of them, on some or all of the days for which he has charged the county such per diem, then it is the duty of the county court to decline to pay the sheriff for such days.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

DR:PA