

SUPPLEMENTAL COST BILLS: Cannot include claims for Sheriffs fees where the sheriff failed to claim same during the term of the trial.

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May 9, 1935.

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Hon. Percy W. Gullic  
Prosecuting Attorney  
Oregon County  
Alton, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion of this office on the following matter:

"Is it lawful to make a supplemental cost bill where witnesses fail to claim their witness fee at the term of court they were subpoenaed for and then put in their claim afterwards."

In reply to the above inquiry, we have examined the pertinent statutes, the condition existing prior to the enactment thereof, the apparent reason for the enactment by the Legislature of the statutes, with the object of determining the legislative intent.

We assume that your inquiry pertains to claims for witness fees for witnesses who were legally subpoenaed in a criminal case, attended the trial, testified therein and failed to claim their attendance fees and mileage during the term of court at which the trial was had, then after the term had ended presented themselves before the clerk and claimed their attendance and thereupon made the statutory affidavit.

Section 11799 R. S. Mo. 1929, provides:

"The clerk of each court of record shall, on the application of any witness to have his fees allowed, enter on his book, under the title of the cause in which the witness was summoned or recognized, or if before the grand jury, the name of the witness, the number of days he has attended and the number of miles he has necessarily to travel in consequence of the summons or recognizance, and shall swear the witness to the truth of the facts contained in said entry.\* \* \* \* \*"

Section 3830 R. S. Mo. 1929, provides in what instance the county shall pay the costs.

Sections 3831, 3832 and 3833 provide that in certain contingencies the prosecutor or person on whose oath the prosecution was instituted shall pay the costs.

Section 3834 R. S. Mo. 1929, provides the formality necessary for issuance of subpoenas and this Section has been construed by the Courts to be a safeguard as to the question of payment of costs. State vs. Rosco, 289 Mo. 535, 144 S. W. 449.

Section 3835 R. S. Mo. 1929, requires the clerk to attach to each fee bill a certified copy of the names of all the witnesses and all orders of the prosecuting attorney and affidavits of the prosecutor and provides that no costs shall be paid any state witness not therein.

Section 3838 R. S. Mo. 1929 provides that all costs unnecessarily incurred by violation of Sections 3834 and 3836 shall be taxed against the clerk or justice causing the same.

Section 3840 specifies that the County Court may, when satisfied of the necessity, make certain allowances and pay them from county funds.

Section 3841 R. S. Mo. 1929, provides:

"The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

Section 3842 R. S. Mo. 1929, makes it the duty of the Prosecuting Attorney and Judge to carefully scrutinize and correct the fee bills.

Sections 3843 to 3848 R. S. Mo. 1929, further throw safeguards around the State and County against improper payment of costs.

Section 3849 R. S. Mo. 1929, states:

"When the clerk shall send a bill of costs to the state auditor or county court as provided in the next preceding section, he shall expressly state in his certificate that he has not at any previous time certified or sent a copy of the same bill, or part thereof, for payment: Provided, that if the clerk shall, by oversight or mistake, fail to include any costs properly chargeable against the state or county in any fee bill, he may make out and present, as hereinbefore provided for making out bills of costs, a supplemental bill for the costs so omitted: Provided, that the clerk shall in no case charge or receive any fee or fees whatsoever for the issuance of such supplemental fee bill."

At common law witnesses were not entitled to any fees whatever, and the statutes passed allowing fees are strictly construed.

In the case of Veidt vs. Missouri, Kansas & Texas Railway Company, 109 Mo. App. 102, the Court having under consideration the construction of such a statute says, l. c. 103:

"\* \* \* At common law no recovery of costs was allowable, and when statutes were passed authorizing their allowance they--the statutes--were always strictly construed. State ex rel. vs. Seibert, 130 Mo. l. c. 213, and cases there cited. And this rule of statutory construction obtains in this State. Steele v. Wear, 54 Mo. 531; Shed v. Railroad, 67 Mo. 687; Sinclair vs. Railroad, 74 Mo. App. 500; Houts vs. McCluney, 102 Mo. 13; Thompson vs. Elevator Co. 77 Mo. 520; St. Louis vs. Meintz, 107 Mo. 611; Hoover vs. Railroad, 115 Mo. 77, State ex rel. vs. Oliver, 116 Mo. 188; State ex rel. vs. Seibert, 130 Mo. 302."

In the case of State vs. Oliver, 116 Mo. 188, l. c. 191, the Court in construing statutes relating to fees (and whether mandamus would lie) says:

"The right of a witness to have his fees taxed as costs against one party or the other, if it exists at all, must be found within some statutory provision. 'No final costs were recoverable by the plaintiff or defendant at common law.' Tidd's Practice (3 Am. Ed.) 945; Hoover vs. Railroad, 115 Mo. 77, and cases cited. The statute makes provision that 'in all civil actions or proceedings of any kind the party prevailing shall recover his costs against the other party except in those cases in which a different provision is made by law.' Provision is also made for taxing as costs, the fees of witnesses attending the trial of all civil cases under process of the court, and for the collection of the same. Under these provisions the clerks of courts of records, under the supervision of the court, examine and audit the fees of all witnesses. Secs. 2920, 2925, 2946, 4980. Under these sections of the statutes, and not otherwise, the witnesses in civil cases are given the right

to their fees as incident to the judgment in the case. But it is held even with these statutory rights that the witness has no control of the judgment, independent of the party in whose favor it was rendered.

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"In civil actions the parties to the suit are present, at every step in the proceeding, watching its progress and guarding against unnecessary cost and expense, not knowing upon whom it may fall. A plaintiff may be required to give security for the payment of costs, or, if unable to do so, may be allowed, in the discretion of the court, to prosecute his suit 'without fees, tax or charge.' Sec. 2918. It is manifest that these provisions under which litigants are able to protect themselves against improper and unjust allowance of cost would afford no safeguard against extravagance, impositions and frauds in case the costs should be payable out of the public treasury. A more careful investigation in the allowance of costs in criminal cases and proper limitation upon the number of witnesses in whose favor costs should be taxed became therefore necessary.\* \* \* \*"

(Here are set out Sections 3841, 3942 and 3850, Revised Statutes of Missouri, 1929.)

"The proceedings through which the witnesses, after properly making their claim, were to secure payment of their fees, out of the state treasury, were confined to these sections of the statutes.\* \* \* \*"

1. c. 195:

"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 case of State ex rel. Johnson vs. Draper, 48 Mo. 58, the Court had under consideration the question of payment of a supplemental cost bill which had not been presented to the State Auditor within two years after the claim accrued and a construction of the statute prohibiting payment of claims if not so presented to the Auditor within that time. (We do not understand such a statute to enter into the question now propounded). In ruling against the payment in the above case the Court says, l. c. 58:

"It is admitted that these supplemental costs bills were not presented until after the expiration of two years from the final determination of the prosecutions, and I can see no reason for excluding this class of claims from the operation of the statute. The language is general, and if the statute should be held not to apply to the claims of those interested in costs bills, I know not whose should be included, or how to fix any rule for enabling the auditor to decide what must be presented within two years, or what may lie by for an indefinite period. The reason of the requirement certainly applies with as much force to this as to any other class of claims, and we have no authority to say that the Legislature did not intend to require their prompt presentation. It is clear that the legislature intended to limit the power of the auditor to recent and fresh claims, reserving to itself the power, if any strong equity should be shown in favor of an older one, to pass upon it by a special act."

We think that the legislative intent is clearly evidenced by the statutory enactments to take away the harsh treatment of the common law which allowed no fees to witnesses and to provide that witnesses in criminal cases may receive the statutory fee if they follow the steps set forth by the statutes, but only in that event.

The law provides with great detail the steps necessary and throws many checks and safeguards about the payment of such fees and watches with a zealous eye against improper payments.

The witness claiming fees must present himself to the clerk and make the statutory affidavit. It provides that the clerk shall

"immediately after the adjournment of the court and before the next succeeding term, tax all costs."

It is his duty to "forthwith" deliver to the Prosecuting Attorney the completed fee bill.

The idea of speedy ascertainment of what charges the County or the state may be called on to pay is emphasized and unmistakably given prominence throughout the enactments relating to witness fees.

As is said by McFarland, J. in the Oliver case supra:

"A more careful investigation in the allowance of costs in criminal cases\*\*\*\* became therefore necessary."

In addition to the fact that statutes such as now under consideration are strictly construed, they are also construed in the light of the conditions existing prior to the enactment and which its remedial provisions are designed to correct. State ex rel. Collins vs. St. Louis San Francisco Railroad Company, 142 S. W. 379, 238 Mo. 605:

We do not think the statute contemplates that a witness may either negligently or ignorantly fail to properly claim his attendance at the term and thereafter be entitled to it.

The matters referred to by the statute providing for supplemental costs bills mean that such as therein contained was therefore properly made a charge in the case but the clerk overlooked placing them in the original bill of costs. The situation you inquire about is quite different and where the clerk did not overlook anything.

Hon. Percy W. Gullie .

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May 9, 1935.

It is our opinion that such a supplemental cost bill containing claims of witnesses made later than the term of court to which they were subpoenaed and appeared, is not lawful.

Respectfully submitted,

James L. HornBostel,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

JLH:DW/mm