

SHERIFF State not liable for commitment fees and mileage.

3-22

March 21st, 1935



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We have your request of December 12, 1934
for an opinion as follows:

"This office requests an opinion from
the office of the Attorney General of
Missouri as to the fee that can be
charged by a sheriff in the following
instance:

"Can a sheriff charge mileage on a
commitment issued by a justice of the
peace committing a defendant to jail for
failure to give a recognizance after a
preliminary hearing is had on a felony
charge binding said defendant over to
await the action of the Circuit Court
wherein in executing said commitment
said sheriff transports prisoner to
jail within the county from place of
preliminary hearing where the jail is
more than five miles from the place of
the preliminary. This office requests
an opinion as to whether a commitment
issued by a justice of the peace, as
above stated, is of the same meaning
as a writ or warrant as used in the
statutes."

#2 - Honorable Forrest Smith

In answer to your inquiry, we refer you to the portion of Section 11791, R. S. Mo. 1929 which, in part, provides as follows:

"Sheriffs, * shall be allowed fees for their services in criminal cases * as follows:

* * * * *

For committing any person to jail...\$1.00"

We find that the act of "committing any person to jail" means a judicial act. In *Thomas v. County of St. Louis* (1876), 61 Mo. 547, l.c. 548, the court said:

"The words 'committing any person to jail,' relate to the execution by the sheriff of an order or warrant of commitment made or issued by some officer exercising judicial functions."

The above quotation is set out with approval in *State v. Abel* (1902), 170 Mo. 59, l.c. 76. The original purpose of issuing a "commitment" is found in *State v. Shirley* (1910), 233 Mo. 335, l.c. 342:

"The reason for requiring the issuing of a commitment arose from the fact that the defendant was to pass out of the custody of the constable, and it was necessary for the keeper of the county jail to be legally informed that the defendant was under arrest upon a charge of violating a criminal law, so that the said jailer would have full evidence of his right to imprison the defendant and be prepared to justify his custody, if called upon by writ of habeas corpus. The law contemplates that the commitment should be delivered to the jailer."

#3 - Honorable Forrest Smith

It therefore appears that a "commitment" is one of the writs which a sheriff is required to execute, and for which mileage is provided under the provisions of Section 11792, R. S. Mo. 1929. In an opinion heretofore written by this office under date of August 13, 1934 by Mr. Charles M. Howell, Jr. to Mr. George D. Brownfield, Prosecuting Attorney of Cooper County, Missouri, it was held that the fee of the sheriff for serving a commitment from a justice court located more than five miles from the county jail was the above fee of \$1.00, plus ten cents per mile. However, under Section 11791, we find this provision:

" * all costs, incident to the issuing and serving of writs of * fieri facias, * shall in no case be paid by the state, but such costs * shall be paid by the defendant and his sureties, * "

It therefore appears that by this special statute these costs have been charged against the defendant. It may be urged that such costs are chargeable to the State under the provisions of Section 3628, R. S. Mo. 1929, which provides:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment * if the defendant is acquitted, the costs shall be paid by the state; * "

The costs covered by Section 3628 are those which have not previously been specifically charged against either party. State ex rel. v. Gordon (1931), 254 Mo. 471, l.c. 475. State v. Brigham, 63 Mo. 258. Statutes which specifically tax costs against either party to the litigant have been construed as controlling, such as a continuance granted under Section 3653, provided that

#4 - Honorable Forrest Smith

the continuance shall be at the costs of the party seeking it, and costs therein charged against the defendant are not payable by the State within the meaning of Section 3828, R. S. Mo. 1929. State ex rel. v. Holladay, 67 Mo. 299. It must be remembered that the sheriff is a public officer and is not entitled to any fees except those specifically provided for by statute. State ex rel. v. Brown, 146 Mo. 401. In State ex rel Buder v. Hackmann(1924), 305 Mo. 342, l.c. 351, this general rule is stated in the following terse language of the Supreme Court:

"Before the State can be held liable for the payment of a fee or expense incurred in its behalf, the person or officer claiming such fee or expense must be able to point out the law authorizing such payment. * "

State ex rel. v. Wilder, 197 Mo. 27. Rendition of services by public officer is deemed gratuitous unless compensation is provided by statute. King v. Riverland Levee Dist., 279 S. W. 195.

The term "fieri facias" means a judicial writ. 25 C. J. p. 1121. A "commitment" is a writ of fieri facias.

It is, therefore, the opinion of this office that the sheriff's fees for serving a commitment from a justice court located more than five miles from the county jail is \$1.00 plus mileage at the rate of ten cents per mile, but that such costs are specifically chargeable against the defendant, and in no event is the State liable for the payment of the same.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE