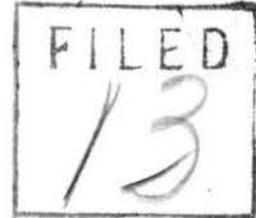


FEES--CRIMINAL COSTS--JUSTICE OF THE Peace: Mileage fee in transporting prisoner more than 5 miles to preliminary in Justice Court is not a legal charge against the State or County,

(This opinion is in accord with opinion dated November 14, 1935 written to Judge Arthur S. Shaw, Excelsior Springs, Mo. No. 33)

May 21, 1936.

Honorable N. Elmer Butler,  
Prosecuting Attorney,  
Stone County,  
Galena, Missouri.



Dear Sir:

We acknowledge your letter of April 28, 1936, together with the enclosed letter from Judge R. A. Andoe. Your request is as follows:

"Please find enclosed letter from a Justice of the Peace regarding the fees of the Constable, as it states the matter on which he desires an opinion will you please give me that opinion?"

Judge Andoe's letter reads as follows:

"In the matter of fees, of Constable Dale M. Davis of this township, Mr. Davis informs me that either the State Auditor or the Circuit Clerk, is cutting out certain fees of his in criminal cases.

"The fee of which Mr. Davis complains, is where a defendant has been committed to the county jail, in default of recognizance, and when the case came up for trial or preliminary examination and the defendant requests and is granted a change of venue, and fails to give recognizance for his appearance before the Justice whom the cause is sent to. Sec. 3431 R. S. 1929 sets out that the constable shall convey the prisoner before

the Justice to whom the cause is sent, to abide the judgement and order of the Justice in the premises. I have been allowing the Constable in my transcripts a mileage fee of ten cents per mile for this service as set out in Sec. 11777 which states that a Constable shall be allowed ten cents per mile actually traveled in serving any process Sec. 3431 states that the Constable shall perform this service, and I feel that he should be allowed a fee for his service, and I think that the fee of ten cents per mile is the proper fee. Would thank you to kindly submit this matter to the Honorable Attorney General of this state for his opinion."

The question here inquired about is whether the constable is entitled to a fee where he transports a prisoner who is charged with a crime from the jail to the court where his preliminary is about to be held, the distance being more than five miles.

Section 3431, R. S. Mo. 1929, places the duty on the constable to convey before the justice the defendant to abide the judgment and order of such justice in the premises, but is silent as to the fee therefor, if any.

Section 11777, R. S. Mo. 1929, has a provision relating to constable's fees that they shall be allowed fees for their services as follows:

"And for every mile traveled in taking a criminal to jail and returning therefrom, provided the distance so traveled be more than five miles, the sum of,  
per mile . . . . . \$ .10

\* \* \* \* \*

"For each mile actually traveled in serving any process . . . . . .10"

The first quoted portion can not apply because the defendant or prisoner at that stage is not a "criminal" within the meaning of the law. Every man is presumed to be innocent until his guilt is shown and established by a trial or a plea of guilty, and this provision merely applies to criminals and the transporting thereof.

The latter quoted portion does not apply because the constable is not serving any "process". "Process" means the serving of a paper which has been issued under authority of the court and placed in the hands of the officer directing him to perform a certain duty.

In the case of *Williams v. Monroe*, 125 Mo. 574, 1. c. 585, the court says:

"In other words, not only must process be served in the manner prescribed by law, but the process itself must be the mandate of a court, judge or officer authorized by law to issue or require it to be issued. The stream can not rise higher than its source."

It is a well recognized principle of law that statutes relating to the compensation of officials are to be given strict construction.

In the case of *State ex rel. Troll v. Brown*, 146 Mo. 401, 1. c. 406, the court says:

"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. v. Wofford*, 116 Mo. 220; *Shed vs. Railroad*, 67 Mo. 687; *Gannon v. Lafayette Co.*, 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."

In the case of *King v. Riverland Levee District*, 279 S. W. 195, 1. c. 196, the court says:

"It is no longer open to question but that compensation to a public officer is a matter of statute and not of

contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. \* \* \* \* \* Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

For a like holding, see the case of State ex rel. v. Gordon, 245 Mo. 12, l. c. 27.

The question of whether a change of venue is taken is immaterial from the viewpoint as I see it. The point is that if the defendant is a criminal and is being so transported, the constable so transporting him is entitled to the statutory fee, or if the constable is engaged in serving any process within the meaning of the law, he is entitled to the statutory fee above referred to, but there is no information revealed by this inquiry to the effect that the constable is engaged in either of these duties.

#### CONCLUSION

We are of the opinion that under the facts revealed by your inquiry, the constable in transporting the prisoner a distance greater than five miles to his preliminary hearing is not transporting a criminal, and that the defendant does not become a criminal in the eyes of the law until he has been convicted on a trial or has pleaded guilty, and that the constable in so transporting the prisoner is not serving any process within the meaning of the law, bearing in mind the above definition of "process" as defined by the Missouri Supreme Court,

Hon. N. Elmer Butler

-5-

May 21, 1936.

and bearing in mind the fact that the statutes must be strictly construed with reference to the payment of fees, and that there is no statute authorizing the collection of a fee by the constable in so transporting said prisoner, it is a duty placed upon him by the statute to so transport the prisoner, and when an official duty is laid upon an officer by the statute and there is no explicit or clear authority by strictly construing the law which authorizes the payment of a fee for so doing, he is not entitled to a fee therefor, but must perform such services without compensation.

Yours very truly,

DRAKE WATSON,  
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,  
(Acting) Attorney General.

DW:HR