

SHERIFF'S FEES: ) Fees received by sheriff for mileage must be  
MILEAGE FEES: ) accounted for under Section 11828, R. S. 1929.  
Sections 11791, 11792, 11793, 11828 and 8357,  
R. S. 1929, construed as to "mileage."

December 14, 1936.

12-30



Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Mr. Smith:

This is to acknowledge receipt of your letter of November 20, 1936, in which you request the opinion of this Department. Your letter reads as follows:

"Section 11828., 1929 fixes the sum of \$5,000 as the maximum amount that a sheriff may retain in fees for any one year.

"We would like an opinion from your department as to whether mileage in serving all processes, and mileage and expenses in bringing prisoners to the Penitentiary and other state institutions is classified as expenses or fees which should be included in the \$5,000 received for the year.

"In determining this \$5,000, what expenses, if any is the sheriff entitled to deduct from the total amount of money which he has received."

As we understand your question, it is whether or not mileage received by a sheriff in the serving of all processes and mileage and expense in bringing prisoners to the State Penitentiary and other State institutions are classified as expenses, or fees which should be included in the \$5,000 received for the year.

Section 11828, R. S. Mo. 1929, Mo. St. Ann., at page 7036, provides in part as follows:

"The fees of no executive or ministerial officer of any county, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of five thousand dollars for one year. \* \* \*."

And said section further provides that,

"\* \* \* such officer shall make return quarterly to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail and verifying the same by his affidavit; \* \*"

Sections 11789, 11791 and 11792, R. S. Mo. 1929, provide the statutory authority for fees and compensations for services rendered by the sheriff in performing his official duties.

Section 11789, supra, states,

"Fees of sheriffs shall be allowed for their services as follows:"

and then follows a list of services and the stated amount of fees for each service, relative to mileage, as follows:

"For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip . . . . . .10"

Section 11791, supra, provides in part as follows:

"Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows: \* \* \* \* \*"

and provides compensation for services rendered in taking convicts to the penitentiary - both per diem and mileage for that service - and certain other mileage and transportation expenses for the convicts.

Section 11792, supra, provides that the sheriff, county marshal and other officers, shall be allowed mileage in certain cases. Said section provides in part as follows:

"Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held: \* \* \* \* \*"

Section 11793, R. S. No. 1929, provides:

"No sheriff or ministerial officer in any criminal proceeding shall be allowed any fee or fees for any other services than those in the two preceding sections enumerated, or for guards not actually employed."

Your question turns on the proposition of whether remuneration or compensation, or whatever you may call it, received for "mileage" is a "fee" within the meaning of Section 11828, supra, and whether it must be accounted for by the sheriff in the statements required to be returned quarterly by him to the county court, by Section 11828.

If the money received for mileage is a fee within the meaning of the above statute it must be accounted for by the sheriff in his quarterly statement required to be filed with the county court, but if the mileage is an allowance for expenses of the office it need not be accounted for by him. There are many cases in Missouri which hold that the officer is entitled to certain expenses. In the much cited case of *Ewing v. Vernon County*, 216 Mo. 681, 1. c. 694, the Supreme Court said:

"Conceding there are no fees allowed for the delivery of a deed after recording or for transmitting a deed from one county to another, yet the statute does not contemplate that he should pay money out of his pocket in the performance of his official duty. Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo."

In the above case the court held that if the recorder purchased stamps to return recorded instruments to the party to whom they belong he was entitled to reimbursement from the county for this outlay as it was an obligation of the county. And further in the above case the court said:

"The conclusion we have come to comports with the general doctrine announced in 23 Am. and Eng. Ency. Law (2 Ed.), 388. 'Where,' say the editors of that standard work, 'the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. Prohibitions against increasing the compensation of officers do not apply to such cases. Thus, it is customary to allow officers expenses of fuel, clerk hire, stationery, lights, and other office accessories.'"

In the case of State ex rel. Saline County v. Price, 246 S. W. 572, it was held that money received by the sheriff from the county for the board of prisoners in the county jail was not fees for which he had to account to the county court in determining the \$5,000 limitation under the provisions of Section 11828, on the theory that it was money paid to the sheriff to reimburse him for expense incurred by him in the performance of a duty imposed upon him. And further in this case it was held that the court, in its capacity as representative of the people of the county, should itself assume the duty of providing reasonable sustenance for prisoners through the officer charged with their custody, who should not be permitted to profit by the performance of that duty. While his fees for other services pertaining to his official duties were fixed by law, and protected by constitutional immunity from change during his term of office, his compensation for feeding prisoners remained under the control of the county court to be fixed annually as circumstances might indicate.

Under the statute the outlay paid by the sheriff for the keep of prisoners might fluctuate from year to year during the sheriff's term as may be fixed by the county court at the November term preceding. It is, therefore, readily observable that the statute recognizes that it is not a "fee" and may be changed up or down during the sheriff's term of office and not come within the constitutional barrier that an officer's compensation and fees cannot be increased during his term.

In the two cases cited above it will be seen that where the obligation rests on the county to furnish certain necessities for the use of the officer, in the Ewing case furniture, fixtures, etc., to preserve the county records and make them usable by and useful to the general public, and stamps for the officer, the officer, if he furnishes same, is entitled to reimbursement; and where the sheriff furnishes board of prisoners, as in the Price case, which is an obligation of the county, it is not considered a "fee" but is an expense of the office for which he is entitled to reimbursement.

Coming now more directly to the question in your request - Is the mileage of the sheriff a fee, or is it an expense for which the sheriff does not have to account for in the \$5000 limitation under Section 11828?

First, we shall examine the authorities in other states as to whether remuneration received for "mileage" is a "fee." In the case of *Cremer v. Wapello County*, 117 Iowa 580, Syl. 1, it is said:

"Code 511, fixes the mileage of sheriffs for serving process, and Code Supp. 902, Section 510a, authorizes retention by the sheriff of all such mileage collected but declares that all 'fees' earned and uncollected at the end of each year shall belong to the county. Held that mileage charges were 'fees' within the latter section, and, when uncollected at the end of the year, in which the services were rendered, belonged to the county."

In *Board of Managers, Grady County v. Castleman*, 160 P. 891, 892, 66 Okla. 43, it is said:

"Under a statute giving the sheriff sixty per cent of all 'fees' earned in serving or endeavoring to serve all criminal processes within the State, the term 'fees' clearly includes mileage."

To the same effect in the case of *Harter v. Boone County*, 116 N. E. 304, 306, 186 Ind. 301, it was held that "sheriff's mileage charges" on processes originating in their county being "fees" and are therefore sheriff's costs.

In the case of *Roberts v. Brown County*, 99 N. E. 1015 (Ind.) it was held that the amounts charged and collected by a sheriff as statutory mileage in the service of writs, summons, notices etc., are to be considered as fees provided by law on account of services in the discharge of the official duties, and not as a reimbursement to him which expenses

Dec. 14, 1936.

incidentally incurred in the service of such writs, so that when collected, they belong to the county and not to the sheriff personally.

The Supreme Court in the case of State ex rel. Selleck v. Gordon, State Auditor, 162 S. W. 629, 254 Mo. 471, l. c. 476, which was a mandamus proceeding to compel the Auditor to pay certain items of costs to the sheriff in a criminal case, the Court held that mileage was a "fee" within the meaning of Section 8, Article XIV, of the Constitution, in the following language:

"The statute authorizing sheriffs to receive fees for mileage in subpoenaing witnesses in criminal cases was first enacted in 1909, and after Sheriff Roland had begun his term of office. The sheriff was therefore not entitled to these fees, for the reason that, if allowed, they would amount to an increase of his fee during the term of office. (Art. XIV, Const. of Mo. Sec. 8.)"

From the language used in the above sections designating "mileage" as a "fee," the listing of same in the column as "other fees" in Sections 11789 and 11791, R. S. Mo. 1929, the interpretation given similar statutes in other states, and our Supreme Court's decision in the Gordon case, supra, it is our opinion that "mileage" is a "fee" within the meaning of Section 11828, supra, and must be accounted for in the sheriff's quarterly statements required to be filed under the above section.

We find some difficulty in construing and reconciling the various statutes where mileage fees are allowed the sheriff. We find running through all of these statutes and the interpretation given same in analogous cases, that where the obligation rests on the county or the public to furnish certain things or services, it is an expense of the public or county, but where the obligation rests on the officer to perform certain duties for which a certain fee is fixed by statute, it is not an expense of the office but is such a fee

as he must account for under Section 11828, supra. With this thought in mind we shall undertake to give you our opinion on the various statutes mentioned above, viz: (1) The ten cents per mile allowed the sheriff in serving writs and subpoenas, etc., under Section 11789, is an accountable fee under Section 11828; (2) The five cents per mile received by the sheriff for services of taking convicts to the Penitentiary and returning therefrom, under Section 11791, is an accountable fee under Section 11828; (3) the five cents per mile received by a guard accompanying the officer, under Section 11791, is not such a fee as must be accounted for by the sheriff; (4) the five cents per mile allowed the sheriff to cover all expenses of each convict while being taken to the Penitentiary, under Section 11791, is not an accountable fee, as it is expressly designated as expenses; and (5) under Section 8357, the traveling expenses and per diem allowed the officer in taking a person convicted to the Missouri Reformatory, are not accountable fees under Section 11828.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General

APPROVED:

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ROY MCKITTRICK  
Attorney-General

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