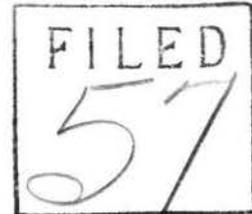


SHERIFF: Sheriff is prohibited from transporting or committing females to the State Industrial Home for Girls or the State Industrial Home for Negro Girls.

December 5, 1938

Mr. W. L. Marlin
Sheriff of Pettis County
Sedalia, Missouri



Dear Sir:

This will acknowledge receipt of your letter of December 2, 1938, requesting an opinion from this department, which reads as follows:

"I am writing you for an opinion in regard to transporting and committing Juveniles to the different Institutions in the State.

A Mrs. W. H. Fewell has been taking care of the Girl Prisoners although the Commitments are addressed to the Sheriff. Please advise me if the Sheriff is supposed to furnish transportation and receive fees for this work, whether they be male or female."

Section 8357, R. S. Mo. 1929, reads as follows:

"In all cases of conviction of felony, wherein the punishment is commitment to the reformatory, the cost of the proceedings and of the delivery of such person to the reformatory shall be paid by the state; and in all cases of misdemeanor, wherein the punishment is commitment to the reformatory, the cost of the proceedings and of the delivery of such person to the reformatory shall be paid by the county in which the conviction is had. The sheriff, marshal or other person charged with the

delivery of any person to the reformatory shall be allowed the necessary traveling expenses of himself and such person, and a per diem of two dollars for the time actually occupied in taking such person to said reformatory and in returning therefrom, to be paid by the state or county, as the case may be."

This section applies to the transportation of incorrigibles or convicts to the Missouri Reformatory.

Section 8374, R. S. Mo. 1929, reads as follows:

"The circuit court of each county shall appoint women attendants to take to said industrial home for girls all girls committed to said home by the court. The same fees that are now allowed by law for conveying prisoners to the penitentiary shall be allowed to the said women attendants of the several counties of this state for the service of taking to said industrial home such girls as may be committed there, and such fees shall be paid by the state in the same manner as now provided by law in section 11791, chapter 84, R. S. 1929."

This section applies to the transportation of incorrigibles or convicts to the State Industrial Home for Girls.

Section 8387, R. S. Mo. 1929, reads as follows:

"The circuit court of each county shall appoint women attendants to take to said industrial home for negro girls all negro girls committed to said home by the court. The same fees that are now allowed by law for conveying prisoners to the penitentiary shall be allowed to the said women attendants of the several counties of this state for the service of taking to said industrial home such girls as may be committed there, and such fees shall be paid by the state in the same manner as now provided by law in Section 11791, Chapter 84, R. S. 1929."

This section applies to commitments of incorrigibles or convicts to the State Industrial Home for Negro Girls.

It will be noticed that in Sections 8374 and 8387, supra, the word "shall" is used and should be considered as mandatory and not directory. It was so held in the case of Kansas City, Mo. vs. J. I. Case Threshing Machine Co., 337 Mo. 913, 87 S. W. (2d) 195, 1. c. 205, where the court held as follows:

"The words 'may, must, and shall' are constantly used interchangeably in statutes and without regard to their literal meaning; and in each case are to be given that effect which is necessary to carry out the intention of the Legislature as determined by ordinary rules of construction. 59 C. J. 1081, sec. 635; 25 R. C. L. 768, sec. 12; 2 Lewis-Sutherland (2d Ed.) 1153, sec. 640; Maxwell on Interpretation of Statutes (5th Ed.) 389; Endlich on Interpretation of Statutes, 416-419, secs. 306, 307. 'A mandatory construction will usually be given to the word "may" where public interests are concerned and the public or third persons have a claim de jure that the power conferred should be exercised or whenever something is directed to be done for the sake of justice or the public good.' 59 C. J. 1083, sec. 635. Of course, all of these rules of construction are auxiliary rules. 'The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent.' Meyering v. Miller, 330 Mo. 885, 51 S. W. (2d) 65, 68."

The legislative intention should be construed according to the purpose of the Act and by Sections 8374 and 8387, supra, it was the purpose and intention of the Legislature that the sheriff should not be permitted to transport or commit females to the reformatory institutions.

In the case of State ex rel. Ellis v. Brown, 33 S. W. (2d) 104, 1. c. 107, 326 Mo. 627, the court said:

"A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory." 25 R. C. L. sec. 14 pp. 766, 767."

The act of the Legislature should also be construed so as to carry out the intention and not some absurd and different meaning than that intended by the Legislature. As in the case of prohibiting the sheriff from committing incorrigibles or convicts to the Industrial Home for Girls, the section which provides that a woman attendant should commit or transport incorrigibles or convicts to the Industrial Home for Girls is not in conflict with the general law which provides for the transportation of convicts to the State Penitentiary or to the Missouri Reformatory.

In the case of *Fischbach Brewing Co. v. City of St. Louis*, 231 Mo. App. 793, 95 S. W. (2d) 335, 1. c. 339, the court said:

"A cardinal rule of statutory construction is to give effect to the legislative intent, where ascertainable; another is to favor such a construction which would tend to avoid injustice, oppression, and absurd and confiscatory results and be in harmony with the rule of reason. The benign objectives heretofore pointed out were surely within the legislative intent as shown by all the surrounding circumstances covering the period in which this law was enacted. *Rutter v. Carothers*, 223 Mo. 631, 643, 122 S. W. 1056."

CONCLUSION

In view of the above authorities, it is the opinion of this department that the sheriff is prohibited from furnishing transportation or transporting females to the State Industrial Home for Negro Girls or the State Industrial Home for Girls, but is permitted to furnish transportation and commit male incorrigibles or convicts to the Missouri Reformatory.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR