

SHERIFFS:

Entitled to ten cents per mile for serving  
commitment to jail on a preliminary where  
the justice court is more than 5 miles  
from the county jail

November 30, 1938



Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of October  
24, 1938 requesting an opinion from this department  
which reads as follows:

"There have been opinions rendered from the Attorney General's office from time to time relating to mileage of sheriffs in committing a prisoner to jail for preliminary hearings.

Some of these opinions hold that the word "commitment" as used in Section 11791 R. S. Mo. 1929 means the "receiving of the prisoner into jail", for which the sheriff is entitled to a fee of \$1.00, but that the mileage for "taking a prisoner to jail" is a constable's fee only (Section 11777 R. S. Mo. 1929), and that if a sheriff performs this service he is entitled to no fee for mileage. Another opinion holds that where a conviction is had in justice court, the sheriff is entitled to a fee for mileage in serving the commitment.

We would like for you to advise us concerning the mileage of sheriffs

in preliminary hearings; i.e., that if a commitment to jail is issued by the justice of the peace in a preliminary hearing in a criminal case, and the same is handed to the sheriff and the sheriff takes the prisoner to jail, acting under the authority of said commitment, is he entitled to a fee for mileage for this service?"

Section 11518 Revised Statutes of Mo. 1929 partly reads as follows:

"Every sheriff shall quell and suppress assaults and batteries, riots, routs, affrays and insurrections; shall apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by justices of the peace \* \* \* \*"

Either a sheriff or any constable may execute a commitment of a prisoner to jail. Section 3443 R. S. Mo. 1929 sets out the form of commitment after judgment of imprisonment and names the sheriff or "any constable".

Section 11791 R. S. Mo. 1929 in granting fees to sheriffs, marshalls, or other officers designates the fee for committing to jail as \$1.00. In the case of Thomas vs. County 61 Mo. 547 l.c. 548 the Supreme Court said:

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

Under the holding of this case, committing a prisoner to jail means the serving or execution of the commitment as made out by the justice of the peace in the preliminary hearing. Section 11777 R. S. Mo. 1929 only applies to fees of constables and allows a fee of \$1.00 for "taking a criminal to jail".

Section 11792 R. S. Mo. 1929 reads 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: 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."  
(R. S. 1919, Section 11000.)

In the case of Carter vs. Exposition Co. 124 Mo. Appeals l.c. 538, the court said:

"The definition of a rule or order, which are synonymous terms, includes commands to lower courts or court officials, to do a ministerial act."

Under the above case the sheriff in serving a commitment to jail is only performing a ministerial act under a legal order of court.

42 Corpus Juris, page 464, Section 2 states the law as follows:

"The usual statutory definition is

in words or substance that every direction of a court or judge made or entered in writing and not included in a judgment is an order, but under some statutes an order may be unwritten. In the practice of courts the term 'order' means a decision made during the progress of the case, either prior or subsequent to final judgment, settling some point or practice or some question collateral to the main issue presented by the pleadings and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment.  
\* \* \* \*"

#### CONCLUSION

In view of the above authorities, it is the opinion of this department that either a constable or sheriff may serve an order of commitment from a justice court in a preliminary hearing and that under Section 11777 R. S. Mo. 1929, the constable is entitled to \$1.00 for taking a criminal to jail and under Section 11792 R. S. Mo. 1929, a constable is entitled to ten cents per mile for each mile actually traveled in serving an order of court, which in this case would be the commitment to jail, where the justice court is more than five miles from the county jail.

It is further the opinion of this department that a sheriff in serving an order of court which in this case is a commitment to jail under a preliminary hearing, is entitled to \$1.00 for committing to jail and in addition, entitled to ten cents per mile for each mile actually traveled in serving said order of court, where the justice court is more than five

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miles from the county jail.

Respectfully submitted,

W. J. BURKE  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney General

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