

PETIT JURORS: When order to appear for adjourned term of court
COST: entitled to mileage from home to court and return.



April 2, 1942

Honorable M. J. Huffman
Prosecuting Attorney
Wright County
Hartville, Missouri

Dear Sir:

This will acknowledge receipt of your letter of March 25, requesting an official opinion from this Department, which reads as follows:

"For many years, in this county, it has been the custom to pay members of the regular Petit Jury, mileage for two trips from their home when the jury was ordered back at an adjourned Term of Circuit Court. However, a controversy has arisen as to that procedure being proper, some members of the county court taking the position that such jurors are only entitled to one mileage.

"In this county, our regular term of Circuit Court convened on February 23, 1942. The jury was present some four days and was ordered by the court to report back for duty on March 11, 1942, at an adjourned term of said court. The jury did return at that time and was here for some four days at said adjourned term. The question is, were those jurors entitled to mileage for both trips to the county

seat, or were they only entitled to mileage on the first trip to the regular term of said Circuit Court."

Section 714, R. S. Missouri 1939, provides compensation for members of the petit jury and further provides that they shall receive five cents for every mile that they may necessarily travel going from their place of residence to the courthouse and returning to the same, and reads:

"Each grand and petit juror on the regular panel shall receive three dollars per day for every day he may actually serve as such, and five cents for every mile he may necessarily travel going from his place of residence to the courthouse and returning to the same, to be paid out of the county treasury."

Section 715, R. S. Missouri 1939, requires the clerk of the court to keep a record of the number of days such juror shall have served and the number of miles necessarily traveled in obedience of the summons to serve as juror.

"The clerk of the court shall keep a book in which he shall enter, upon the application of each juror, the number of days such juror shall have served, and the number of miles necessarily traveled, in obedience to the summons to serve on the jury, and such entry shall be verified by the oath of such juror."

It is well established that the primary rule of construction is to ascertain and give effect to the lawmakers' intent and this should be done from words used, considering the language honestly and faithfully. In *City of St. Louis vs. Senter*

Commission Co., 85 S. W. (2) 21, l. c. 24; 37 Missouri 238; the court said:

"* * * * 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. (2) 65; Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S. W. (2) 920. This should be done from the words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose. * * * * *"

One of the cardinal rules of construction is to favor such construction which would tend to avoid injustice, oppression, and absurd and confiscatory results and be in harmony with rule of reason. Fischbach Brewing Co. vs. City of St. Louis, 95 S. W. (2) 335, l. c. 339; 231 Missouri Appeal 793.

"* * * * 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. * * * * *"

Section 2015, R. S. Missouri 1939, specifically provides for adjourned terms of court.

"Special or adjourned sessions of any court may be held in pursuance of such proclamation or in continuation of the

regular term, when so ordered by the court in term time, the order being entered in its record."

In *Fannon vs. Plummer et al.*, 30 Missouri Appeal 25, l. c. 27, the court, in holding that when a court in session is adjourned to a specified day prior to the next ensuing term, the sitting thus adjourned to is a continuance of the term adjourned from and not a special or different term, said:

"We see no error in this. The plaintiff's whole argument proceeds on the premise that the adjourned term was a separate term from the term at which the default and final judgment were entered; but we are of opinion that it was merely a continuance of the same term.

"The statute provides: 'Special or adjourned sessions of any court may be held in pursuance of such proclamation or in continuation of the regular term, when so ordered by the court, in term time, the order being entered in its records.' Rev. Stat., sec. 1044. We see no reason why this so-called 'adjourned term' should not be regarded as a continuation of the regular term. The circuit court of Ozark county meets on the third Mondays in April and October. Rev. Stat., sec. 1157. The date to which the special judge adjourned the term was within the period during which the regular term might have been continued by adjournments from day to day, or for any longer or shorter interval. The order of adjournment does not describe the time to which the adjournment was had, as a special term or even as an adjourned term. It was nothing more than an ordinary order of adjournment, such as might have been made according to the exigencies of

the case, for any longer or shorter period of time prior to the commencement of the next regular term."

If the court orders an adjourned term and requests the jury to return on a certain day during the same regular term of court, we think it will be conceded that the jurors have no discretion in the matter and must report back for jury service on the specified date set by the court. The jurors receive no compensation whatsoever during the interim and to hold that said jurors by reason of the order of the court, and not by any act of their own, shall not be entitled to mileage for their return trip to court and home the second time would certainly be most unreasonable. In many instances it is a saving to all concerned for the jurors to go home and return at an adjourned term of court and pay for mileage covering said trips rather than to remain in court on per diem until such time for them to serve. We must not lose sight of the fact that it is each and every citizen's duty to serve when summoned for jury service but the lawmakers never contemplated they shall serve without compensation and expenses. Section 714, supra, provides that jurors shall receive five cents for every mile they may necessarily travel going from their places of residence to the courthouse and returning to same. In view of the fact that the jurors have no discretion in the matter but are acting upon the orders of the court and are subject to contempt of court if they shall fail to return on the date set for the adjourned term of court, it cannot be denied but that such mileage traveled by said jurors does constitute necessary travel.

In case of an adjourned term of court, under the law it is not necessary that said jurors shall be served with a summons a second time. They are still acting under the original summons and subject to the order of the court. Persons acting as jurors are required to leave their homes and business for such jury service and fees for such services, in many cases, constitute only a very small part of their average daily income which they would receive if they were not serving as jurors. We must not lose sight of the fact that the court in ordering an adjourned term of court has in mind the interest of the state, taxpayers, and party litigants, as well as the jurors, in that the court endeavors to keep down the costs and permit the jurors to return to their families and homes as soon as possible.

In Corpus Juris, Volume 70, Section 94, page 79, it is held that witnesses may be entitled to double mileage for serving in response to summons or subpoena.

"Under a statute allowing mileage for each mile necessarily and actually traveled by a witness, the witness who, on postponement of the trial, is directed by the parties to return to his home and come again to the court when called for is entitled to recover for mileage for every trip back and forth he makes under such conditions, and, a fortiori, the same rule applies where witnesses are permitted or directed by the court to return home during postponement and to be in attendance on the later day; but in such case permission of the court is necessary and must be entered of record, and it has also been held that, where postponement is by agreement of the parties, and not by order of the court, except to carry the agreement into effect, the witnesses will not be allowed another travel unless it was a part of the agreement, but their continued attendance until discharged will be allowed in such case. In some cases a second allowance for mileage in case of adjournment for a longer period than over night is within the discretion of the court; and in a federal court double mileage may be allowed during adjournment where less than the per diem would have been, if the witness had remained in attendance. * * * * *

In Richards et al., vs. Silveria, 275 Pacific 478, l. c. 480, the District Court of Appeals, Third District, California, had before it the question of allowance of mileage to a witness who had been ordered to return at a later date for trial of the

case and the court in holding that said witness was entitled to mileage for both trips said:

"* * * * * There was no error in the allowance as costs of mileage paid to witnesses. The trial commenced September 29, 1925. On the next day a continuance was ordered to October 8, 1925, and the court directed the witnesses to appear at that time or at any subsequent time to which the case might be continued. The trial was resumed October 20, 1925. Witnesses were properly allowed mileage for their first attendance and also for their return at the time to which the case was continued. United States v. Venable Const. Co. (C. C.) 158 F. 833. * * * * *

At the time the above opinion of the California court was rendered California had the following law in respect to witnesses' fees: (Deerings Consolidated Supp. 817, Section 4300g.)

"For each days actual attendance when legally required to attend upon the superior courts, per day \$2.00 in civil cases, and \$1.50 in criminal cases. Mileage actually traveled, one way only, per mile, 10 cents."

In Pennsylvania County Court Reports, Volume 29, page 81, l. c. 81, in the case of Commonwealth vs. McQuiston, the court had before it the question of allowance of double mileage to witnesses and the court in holding that the lower court had a certain amount of control and inherent power over such matters properly held that they were entitled to double mileage.

"The most important question raised by prosecutor is in the third exception which raises the question as to whether witnesses who are in attendance upon court, and the case is put over until a later date and not called until the following week, and they go to their homes in the meantime and return at a later date, can charge double mileage as was allowed by the clerk. * * * *

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"It seems to us that the latter take the more consistent view, in a case where, by consent or direction of court, the case has been continued to or set for a later date and the parties and witnesses are directed to be present at that time. Such was the fact in this case, and we distinctly recollect that this postponement was at the suggestion or request of the prosecutor.

"Were this method not permitted the witnesses might have remained in attendance upon court for more than a week and drawn their per diem fees. This would have had the appearance and effect of oppression, and the court has control of such matters. We feel, therefore, that we have some control over the matter here presented, and where the witnesses have so acted as to make the expense of their attendance upon court less than another method they might have legally adopted, it seems that we should approve of their act, and that the double mileage should be allowed."

At the time that the above decision was rendered the law of the State of Pennsylvania in reference to fees as witnesses

and their return was as follows:

"The fees to be received by witnesses shall be as follows: namely: each day's attendance at court, one dollar. Each mile circular in traveling to and from such court, three cents." Brightly's Purdon's Digest Supp., 1885, 1891, p. 2508.

The language of the California and Pennsylvania statutes herein above quoted on the question of mileage for witnesses is somewhat similar to the language used by the Missouri lawmakers when our statutes pertaining to mileage for petit jurors, Sections 714 and 715, supra, were enacted. In the case of Commonwealth vs. Smith, Pennsylvania County Court Reports, 321, l. c. 327, the court discussed at length the same question and said:

"Fourth exception. The fee bill for witnesses says: 'Mileage, each mile circular in traveling to and from.' There is nothing in the bill about double mileage. The practice is to only allow single mileage at each session of the court. In Chester county such seems to be the general rule. I am of opinion that it would be to the interest of suitors, including defendants in criminal cases, that there should be some exceptions. It so often becomes apparent in the fore part of the week that certain cases cannot be tried during that week, owing to the amount of business before the court, and that to keep the witnesses in attendance until the next week would be to materially and unnecessarily enhance the costs and expenses of the trial. When, therefore, for sufficient cause, a case is continued before the last day of the week until the following week, and the witnesses are excused by the court from attend-

ance during the remainder of the week, but to return the following week, it would often be less expensive to allow them mileage for going and returning than to allow them pay for remaining in attendance at the court. There should, however, be special permission by the court. In the present case, if the witnesses had remained over one day, their fees would have amounted to more than their mileage. If the case had been continued at an earlier day of the week than Friday, the fees of the witnesses for remaining would have amounted to much more. Such would probably be the result in all cases where the witnesses reside in the county and have but a short distance to travel. As stated, in all cases of the continuance of cases from week to week, where the witnesses are permitted to leave the court, there ought to be permission entered of record. The court might not grant such permission in a case where the mileage for going and returning would amount to more than the daily pay of the witnesses, if they remained in attendance at court. If a witness residing in Philadelphia or Erie was allowed mileage for going and returning, it would, in this county, amount to more than a few days' pay for attendance at court, and the court would not grant the permission so as to allow double mileage. It seems to me that this would be a convenient, just and equitable rule to adopt. Witnesses are often very poor, and they must either be allowed their daily pay for remaining at court, or mileage for going and returning. I will adopt this rule until I am convinced that it is unjust or oppressive. In the present case, the defendant saved money even by the allowance of the mileage of the witnesses. Their fees for remaining

would have been \$1.50 per day each. The mileage for going and returning amounted to \$1.20 each. Had the case been continued earlier in the week the saving would have been still more. Ordinarily, only single mileage can be allowed, and double mileage never, except where, under the circumstances, the witnesses have the permission of the court to return home and come back again, with the understanding that they are to be paid their traveling fees allowed by the fee bill, in lieu of their pay for remaining in attendance at court until the case can be tried at the time to which it has been continued. To hold that, where a case is continued, say, at the beginning or at any time before the last day of the week, until the following week, the witnesses must go home and return without being paid their mileage, would be unjust. The subpoena holds them for the term, and they need not be subpoenaed over. If they are allowed to remain at the county seat in attendance at court from the time of the continuance of the case until the time fixed for the trial, I can see no good reason why they are not entitled to their pay for the days they so remain. If this is so, then certainly the rule we have adopted is for the interest of all parties, defendants in criminal cases included."

Therefore, in view of the foregoing authorities under similar statutes authorizing mileage for witnesses when required at an adjourned term of court to Sections 714 and 715, supra, and in view of the fact that such mileage is necessary under orders of the court, it is the opinion of this Department that to place any other interpretation on Sections 714 and 715, supra, than to hold that said jurors are entitled to mileage from their residence to court and return for an ad-

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journe'd term of court during the regular term of court would be an absurdity and something that was never contemplated by the lawmakers at the time said provisions were enacted.

Respectfully submitted

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APPROVED:

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