SHERIFFS:
FEES AND MILEAGE:

Where, by order of court, the sheriff of Christian County went to St. Louis, Missouri, and transported a witness in a criminal case to Christian County, sheriff cannot be compensated for so doing.

Where, by order of the circuit court, the sheriff of Christian County, went to the Missouri State Penitentiary in Jefferson City, secured therefrom a prisoner and transported him to Christian County to serve as a witness in a criminal case, after which the sheriff transported such witness back to the Missouri State Penitentiary, sheriff cannot be compensated for such service.

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June 12, 1957

Honorable Sam Appleby
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"In a recent murder case (Arthur Clark) tried three times in Christian County, which came here on a change of venue from Taney County heavy costs have been incurred and two question concerning Sheriffs' fees and mileage have developed of which I do not find a clear answer in our statute.

"The first problem is:

"The Sheriff of Christian County, by order of the Circuit Court of Christian County, was ordered to transport both ways a minor child from a childrens' home in St. Louis as a material witness and did transport the child several round trips (the child was the child of the person accused of murder and has previously been declared a ward of the juvenile court of Taney County by that Court and placed in St. Louis.)

"The Question is:

"May the Sheriff be paid for his services by the State of Missouri? If not, then is Taney County (original venue county) liable for the costs?

"The second problem is:

"In an order granting Writ of Habeas Corpus ad testificandum wherein the witness is a prisoner in the Missouri Penitentiary, the Sheriff of Christian County, under said order did deliver said witness(prisoner) to court as material witness in a murder case is the Sheriff entitled to his fee and mileage payable by the state of Missouri? If not is the County of original venue responsible for the costs."

We shall consider both your first and second questions together, since we believe they both are to be answered in the negative and that reason for answering them in the negative is the same in both instances, to wit, that there is no statutory provision for a sheriff to be paid for his services in either of the instances which you set forth.

The fees of sheriffs in criminal cases may be found in Section 57.290, RSMo 1949, which section was amended by the laws of 1953, page 386, section 1.

As we stated, we find nothing in that section to cover either of the situations which you set forth.

Section 57.300, RSMo 1949, reads:

"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."

At first sight it might appear that the above section would embrace the situation which you present, but we feel that it must be read in connection with Section 491.090, RSMo 1949, which reads:

"In all cases where witnesses are required to attend the trial in any cause in any court of record, a summons shall be issued by the clerk

> of the court wherein the matter is pending, or by some notary public of the county wherein such trial shall be had, stating the day and place when and where the witnesses are to appear."

And also Section 491.110, RSmo 1949, which reads:

> "Subpoenas shall be directed to the person to be summoned to testify, and may be served by the sheriff, coroner, marshal or any constable in the county in which the witnesses to be summoned reside or may be found, or by any disinterested person who would be a competent witness in the cause, and the sheriff, coroner, marshal or constable of any county may serve any subpoena issued out of any court of record of their county, in term time, in any county adjoining that in which the court is being held."

In connection with the above, it would appear to us that under the circumstances no authority exists for paying the sheriff.

In the second situation, wherein the witness is a prisoner in the Missouri penitentiary, we find no authority vested in the sheriff of Christian County to go to the Missouri penitentiary and bring the prisoner to Christian County to serve as a witness. We might also note that we find no authority vested in the warden of the Missouri state penitentiary to release a prisoner in his custody under such circumstances.

In this regard we direct attention to the case of Maxwell v. Andrew County, 146 S.W. 2d 621, which, at l.c. 625 states:

> "It is well established law that the right of a public officer to be compensated by salary or fees for the performance of duties imposed on him by law does not rest upon any theory of contract, express or implied, but is purely a creature of the statute. Gammon v. Lafayette County, 76 Mo. 675; State ex rel Evans v. Gordon, 245 Mo. 12, 149 S.W. 638; Sanderson v. Pike County, 195 Mo. 598, 93 S.W. 942; Jackson County v. Stone, 168 Mo. 577, 68 S.W. 926; State ex rel Troll v. Brown, 146 Mo. 401, 47 S.W. 504; Bates v. City of St. Louis, 153 Mo. 18, 54 S.W. 439,

> 77 Am. State Rep. 701; Williams v. Charitan County, 85 Mo. 645.* * *"

We construe the above excerpt from the Maxwell case to mean that before the sheriff of Christian County can be compensated for his services in either of the situations set forth by you, that he must be able to point to a statute which would entitle him to be so compensated. Since we are unable to find any such statute and do not, in fact, believe that any such statute exists, we do believe that the sheriff cannot be compensated for his services in these two situations.

In regard to the writ of habeas corpus ad testificandum, we note that this writ is properly directed to the custodian of the witness rather than to the sheriff, and requires the custodian to have the witness in court at the time of the trial in order that such witness may give his testimony.

In reference to this matter the Missouri Supreme Court en banc, in the case of State v. Ryan, 38 S.W. 2d717, at l.c. 717 stated:

> "The warden questions the authority of the circuit court to issue the writ. Circuit courts have jurisdiction over criminal cases. Section 22, art. 6, Const. They are authorized by the Constitution to try such cases. They cannot do so without witnesses. Authority to compel the attendance or production of witnesses is an element of jurisdiction. It is essential to the existence of said courts and to the due administration of justice. 15 C.J. 752. Without such authority, there is no jurisdiction. In other words, said courts have the inherent power to compel the attendance or production of witnesses. Having such power, they are authorized to issue process, 'according to the principles and usages of law.' for that purpose. Yeoman v. Younger, 83 Mo. 424, loc. cit. 429. Furthermore, by statute, declaratory of the common law, 'all courts shall have power to issue all writs which may be necessary in the exercise of their respective jurisdictions, according to the

> principles and usages of law.' Section 1844, Rev. St. 1929. The writ under consideration is of ancient origin, and has been available at all times to compel the custodian to produce a prisoner in court to give testimony. We have no doubt of the full and complete authority of the circuit court of the city of St. Louis to issue the writ. Having such authority, said court is authorized to compel the warden to obey the writ. However, it must be understood that the writ is grantable in the discretion of the court. Abuse of the process should not be permitted. On the hearing of the petition for the writ, the court should require strict proof of the materiality of the testimony and the necessity of the attendance of the prisoner as a witness. If it appears that the application is in good faith and the testimony is material and important, the petition for the writ should be granted."

In further reference to this matter we note in 70 C.J., Section 54, page 64, the following:

> "Where a person whose attendance as a witness is desired is lawfully restrained of his liberty, as where he is in prison, or in an insane asylum, his attendance is secured by means of a writ of habeas corpus ad testificandum, which is directed to the custodian of the witness, and requires him to have the body of the witness in the court at the time of the trial in order that such witness may give his testimony. Such writ is available where a person under detention wishes to testify for himself, as well as where his testimony is desired by another, and except as otherwise provided by statute, where he is serving a sentence as well as where he is awaiting trial. The power to issue such process is inherent in the courts, and in some jurisdictions is confirmed, but in others superseded, by statute."

Honorable Sam Appleby

CONCLUSION

It is the opinion of this department that where, by order of court, the sheriff of Christian County went to St. Louis, Missouri, and transported a witness in a criminal case to Christian County that the sheriff cannot be compensated for so doing.

It is the further opinion of this department that where the sheriff of Christian County, by order of the circuit court, went to the Missouri State Penitentiary in Jefferson City, secured therefrom a prisoner and transported him to Christian County to serve as a witness in a criminal case, after which the sheriff transported such witness back to the Missouri State Penitentiary, that the sheriff cannot be compensated for such service.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

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