

✓ SHERIFF FEES: Fees of sheriff in transporting convicts to Penitentiary.

11791 R. S. Mo. 1929

July 5, 1933

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Hon. Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Mr. Smith:

This department is in receipt of your letter of June 29th, in which you make the following request for an opinion from this office:

"Section 11791 R. S. Mo. 1929, provides that sheriffs shall receive 5¢ per mile for the distance necessarily traveled in going to and returning from the Penitentiary, the time and distance to be estimated by the most usually traveled route from the place of departure to the Penitentiary.

The method previously employed in this office for ascertaining the distance traveled by the sheriff in bringing prisoners to the Penitentiary, has been arrived at by railroad transportation; thus the sheriff from Carroll County has been allowed 125 miles less miles in bringing prisoners to the Penitentiary than the sheriff from Platte County.

Please advise us as to the interpretation of the distance necessarily traveled in going to and returning from the Penitentiary, whether that can be interpreted the highway distance or the railroad distance."

Section 11791 R. S. No. 1929, in so far as it is applicable, provides:

"For the services of taking convicts to the penitentiary, the sheriff, county marshal or other officer shall receive the sum of three dollars per day for the time actually and necessarily employed in traveling to and from the penitentiary, and each guard shall receive the sum of two dollars per day for the same, and the sheriff, county marshal or other officer and guard shall receive five cents per mile for the distance necessarily traveled in going to and returning from the penitentiary, the time and distance to be estimated by the most usually traveled route from the place of departure to the penitentiary;" \* \* \* \* \*

The decision in this case necessarily depends upon the construction to be placed upon the words "necessarily traveled" and "usually traveled".

The case of *Pierce v. Delesdervier*, 17 Maine 431, involved the allowance of fees to a sheriff for levying executions. The court said:

"The statute provides that the travel shall be computed 'by the usual way', and it is not material whether the sheriff traveled a more or less distant way to suit his own convenience. In this case he will be entitled to fees for such travel, and on the amount collected, and to nothing more."

In the case of *Greene v. McGhee*, 37 Alabama 164, a statute allowed compensation to sheriffs for the removal of convicts to the penitentiary at a specified rate for every twenty miles of the distance to the penitentiary and back "by the land route usually traveled." The court said:

"\* \* \* and the rules of construction, which we laid down at the outset of this opinion, require us to decide, that the sheriff has no authority to carry a prisoner through another State, and is not entitled to compensation for

the increase of distance in consequence of his doing so, although he may go upon the usually traveled route. The land route usually traveled, over which he must pass, is the route within the State usually traveled.

It is urged against the foregoing construction of the statute, that the sheriff is required to make affidavit of the number of miles 'on the land route usually traveled;' that there may arise cases, in which there is no usually traveled land route within the State; \* \* \* \* \* In such cases, a route leading to the penitentiary, and the different parts of which are usually traveled, and which is in a reasonable direct course from point to point, is, within the meaning of the law, the land route usually traveled."

In Webster's New International Dictionary the word "usual" is defined as follows:

"Such as is in common use; such as occurs in ordinary practice, or in the ordinary course of events; customary; ordinary; habitual; common."

The word "usually" has been defined by the court in the case of "Chi. Traction Co. v. Chugren, 110 Ill. App. 547" to mean "ordinarily".

In Webster's New International Dictionary the word "necessarily" is defined as follows:

"In a necessary manner; by or of necessity; as a necessary consequence."

The word "necessary" as it is used in the above definition is defined as meaning:

"Impossible to be otherwise or to be dispensed with without preventing the attainment of a desired result."

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In your letter you desire an opinion as to whether the highway distance or the railroad distance should be used in determining the fees to which the sheriff or other officer is entitled. With the excellent road system in the State of Missouri, it is the opinion of this office that either the highway or the railroad could be said to be "the most usually traveled route". Therefore, the solution of our problem is dependent upon the words "necessarily traveled". Applying the definitions of the words necessary and necessarily traveled as given by Webster, it is the opinion of this office that the shortest possible route, whether that be by railroad or by highway is the proper gauge to be used in determining the fees to be allowed for the transportation of convicts from the place of departure to the penitentiary.

For example, let us assume that the highway distance between Jefferson City and Kansas City is fifty miles less than the railroad distance. Since we have already classified the highway and the railroad as being synonymous under the classification "most usually traveled route," the question then is what is the distance that must necessarily be traveled in order to reach Jefferson City from Kansas City. In our hypothetical case therefore the distance that must necessarily be traveled is the highway distance since that is fifty miles shorter than the railroad distance, it certainly not being necessary to travel by railroad which is fifty miles further in distance.

Now assuming that it is fifty miles further by highway to St. Louis from Jefferson City than it is by railroad, applying the above construction, the railroad being the shorter route should be used in the transportation of convicts from St. Louis to Kansas City.

In order that there may be no misunderstanding with reference to this opinion as it pertains to the shortest possible route, we expressly rule that in no event could an aeroplane be used since under no construction could transportation by aeroplane come within the definition of "the most usually traveled route."

In the case of "Scott v. Endicott," (Springfield Court of Appeals), 38 S. W. (2d) 67, the Court, in discussing the question of fees allowable to guards in the transportation of prisoners, said:

"Some of the earlier cases held that the right of a public officer to fees is derived solely from the statute, and he is entitled to no fees for services, unless the statutes give it. Gammon v.

Lafayette County, 76 Mo. 675; Williams  
v. Chariton County, 85 Mo. 645." \* \* \*

To collect fees for services not rendered is contrary to public policy, if not actually fraudulent, and the contract providing for such a method of compensation is illegal and void, in our opinion, whether made with the sheriff or with any other person." \* \* \* \* \*

Therefore, it is the opinion of this department that the fees allowable to sheriffs, county marshals or other officers for the transportation of convicts to the State Penitentiary shall be estimated by the shortest possible route from the place of departure to the penitentiary, whether that be by highway or by railroad since under this opinion both the highway and the railroad come within the provisions of the statute relating to "the most usually traveled route."

Respectfully submitted

JOHN W. HOFFMAN, JR.,  
Assistant Attorney-General.

APPROVED: \_\_\_\_\_  
ROY McKITTRICK  
Attorney General.

JWH:MM