SHERIFFS FEES: Allowable only where he serves papers officially and not recoverably where he attempts and fails to serve.

5-13

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Hon. C. H. Robards
Presiding Judge
Dunklin County Court
Kennett, Missouri

Dear Sir:

This acknowledges receipt of your letter of April 29, which is as follows:

> "We have a question like this--The sheriff was given a warrant for a man supposed to be insane living thirty miles away from the county seat. He made two trips failing to find the man. On the third trip, he got him. The sheriff turned in mileage for the 90 miles or $18.00 mileage. I held that he is only entitled to mileage for the one trip.
>
> Will you please give us the law."

Section 11789 R. S. Mo. 1929, among other things provides:

> "Fees of sheriffs shall be allowed for their services as follows:" * * * * *
>
> For each mile actually travelled 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.....$.10"

This appears to be the nearest provision of the statutes providing for pay of the sheriff for services referred to in your inquiry.

The compensation allowed the sheriff for his official services performed is allowed only where there is statutory provision for the payment thereof. If there is no statute providing for his compensation he is not entitled to compensation notwithstanding the law may make it his official duty to perform certain services.

In the case of State ex rel. Troll vs. Brown, 146 Mo. 401, l. c. 406, the Supreme Court of this State says:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed vs. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

In the case of State ex rel. vs. Gordon, 245 Mo. 12, l. c. 27, the Supreme Court of this State declares as follows:

> "Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed, but is incidental to the office.

Throop on Public Officers (Sec. 443) says: 'It has been often held, that an officer's right to his compensation does not grow out of a contract between him and the State. The compensation belongs to the officer, as an incident of his office, and he is entitled to it, not by force of any contract but because the law attaches it to the office.'

Mechem on Public Offices and Officers says: 'Sec. 856. Unless, therefore, compensation is by law attached to the office, none can be recovered. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously, and he cannot recover anything upon the ground of an implied contract to pay what the service is worth,'* * * *

In Bank v. Refrigerating Co., 238 Mo. 414, Brown, J., speaking for the court says: 'When the law requires a specific service to be performed by a public officer, he must perform that service regardless of whether any provision has been made to pay him for same.'

Not only is the right to compensation dependent upon statute, but the method or particular mode provided by statute must be accepted. On this point the Kansas City Court of Appeals says: 'It seems the general rule in this country, as announced by the decisions and text-writers, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefore is provided by statute. And further, it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or

> to any different mode of securing the same.'* * * * *"

And at page 29 the Court says:

> "As the Legislature may fix such compensation to a public office as it sees fit, or none at all, we can see no constitutional objection to its attaching such conditions as it deems proper to the payment of the compensation, such conditions to be binding upon any one who thereafter enters upon such office and performs its duties. As stated above, the compensation has no relation to the amount or value of the service. There can be no application of the doctrine of quantum meruit. The officer takes the office cum onere. Having accepted it with the conditions imposed by the Legislature, upon whose will he must depend for any compensation at all, he cannot afterwards challenge the power of the Legislature to impose such conditions.* * * * *"

In the case of King vs. Riverland Levee District, reported at 279 S. W. 195, the Court says, l. c. 196:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office.* * * * * * * Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking vs. McCracken, 60 Mo. App. loc. cit, 656, to the effect that

> the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

We do not find where the courts in this State have construed the particular question involved in your inquiry. However, in other states the question appears to have been passed on. In the case of Yavapai County vs. O'Neal, 29 Pac. 430, an Arizona case, the Court held that under a statute fixing fees of a sheriff for executing a warrant of arrest and allowing him mileage for each mile necessarily traveled in executing a warrant of arrest, no mileage can be allowed where an unsuccessful attempt has been made to execute a warrant of arrest. And in the case of Braughton vs. Santa Barbara County, 65 Cal. 257, 3 Pac. 877, under a statute there authorizing the sheriff to charge mileage in going and executing a warrant of arrest or for mileage in any criminal proceeding, the Court held the sheriff is not entitled to mileage for going in different directions to look for a person when he is not arrested.

In the case of Vannatta vs. Brewer, 85 Ill. 144, the Court holds that if the officer fails to make service he cannot charge any mileage and if he has to travel beyond the residence of the witness he cannot charge except for the distance of his residence and return.

It will be noted that the statutory provision relating to payment of sheriff's mileage states "for each mile actually traveled in serving;" It does not state for each mile traveled in attempting to serve.

Bearing in mind that these statutes providing for payment of fees are strictly construed, it is our opinion that the sheriff is not entitled as a matter of law to the statutory fees for trips made in search for the party, and when he failed to serve the papers. The statutory provision only provides for payment of fees when service is made.

Respectfully submitted,

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APPROVED:

ROY McKITTRICK,
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JLH/DW:MM