

GRAND JUROR: Fees as a witness in other proceedings.

February 27, 1940

Mr. Willis Stephens
Clerk of the Circuit Court
Dent County
Salem, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of February 16, 1940, which reads as follows:

"Mr. M. Butts was summoned and served as a Grand Juror at the August term Circuit Court 1939, he was also subpoenaed about the same time to serve as State witness in case State of Missouri vs. Bryan Mounce. The Grand Jury was in session every day of the Circuit Court term. Mr. Butts thinks that he should be paid for both. He was paid for all of the time as Grand Juror."

We are herewith enclosing copy of an opinion which was rendered by this department to Mr. Nat W. Benton, Prosecuting Attorney, Greene County, on March 23, 1938, which goes into the right of grand jurors to collect mileage, etc.

We are assuming for the purposes of this opinion that Grand Juror M. Butts received his full compensation in the office of grand juror, and the only question that is confronting you is whether or not he is entitled to witness fees. Section 11798, R. S. Mo. 1929, reads as follows:

"Witnesses shall be allowed fees for their services as follows: For attending any court of record, reference, arbitrators, commissioner,

clerk or coroner, at any inquest or inquiry of damages, within the county where the witness resides, each day, \$1.50. For like attendance out of the county where witness resides, each day, \$2.00. For traveling each mile in going to and returning from the place of trial, .05. For attending before a justice of the peace, each day, \$1.00. For traveling each mile in going to and returning from the place of trial before a justice of the peace, .05. For attending under the law to perpetuate testimony, the same fees as are allowed for attending a court of record in like cases; but witnesses attending in more than one case on the same day and at the same place shall only be allowed fees in one case; and any witness who shall claim fees for attendance in two or more cases on the same day and at the same place shall not be allowed any fees that day. Each witness shall be examined on oath by the court, or by the clerk when the court shall so order, or by the justice as the case may be, as to the number of days of his actual necessary attendance, under subpoena or recognizance, and the number of miles necessarily traveled; and in every case where a witness shall not, as such, actually and necessarily attend such court, or before such justice, and withdrawn himself from his business during the full time for which pay is claimed, he shall not be allowed for more than one day's attendance."

It will be noted that in the aforementioned section the title to said section reads, "Fees for witnesses", and the first line of the section reads, "Witnesses shall be allowed fees for their services * * * ." Then the section goes on and sets out the per diem, etc. It will also be

noted that the section provides, "* * * but witnesses attending in more than one case on the same day and at the same place shall only be allowed fees in one case; * * *"

So the first question involved is whether or not, when Mr. Butts served as a grand juror on this particular day, he was prohibited, because of that fact, from collecting witness fees, as is set out in the aforementioned section.

In 12 R. C. L. at page 1014, under definition, a grand jury is regarded rather as an informing or accusing body than as a "judicial tribunal". Therefore, the members of this tribunal do not themselves act as witnesses, but are a body before whom witnesses appear and give testimony. This being a fact, we are of the opinion that a grand juror could not be charged and held to the prohibition as set out in Section 11798, wherein it is said, "* * * and any witness who shall claim fees for attendance in two or more cases on the same day and at the same place shall not be allowed any fees that day. * * *" Furthermore, this section reads, as heretofore set out, that witnesses shall be allowed fees for their services.

Section 3837, R. S. Mo. 1929, reads as follows:

"No officer, appointee or employee holding a state, county, township or municipal office, including police officers and policemen, either by election or appointment, shall claim, be allowed or receive any fee or compensation as a witness for testifying before a coroner's inquest, grand jury, or in any criminal cases. All officers, appointees and employees as aforesaid, shall be compelled to attend the trial of all criminal cases, coroner's inquests and grand juries, when legally subpoenaed; Provided, that the provisions of this section shall not apply to any officer who is a witness in any case where the residence of such officer is five miles from the place where the

trial or coroner's inquest is held; or where the grand jury is in session: Provided further, that the provisions of this section shall not apply to prevent any officer, who is a member of any police relief association organized under the laws of this state, from receiving witness fees for the benefit of said relief association of which he is a member in all cases in all courts of record; coroner's inquests, justice of the peace courts, whenever attending therein in matters pertaining to the discharge of their duties as witnesses; said witness fees to be collected solely by such officer as may be designated and authorized to collect the same, under the corporate authority of said relief association and for its exclusive benefit."

It will be noted from the aforesaid section that certain officers are not entitled to receive witness fees. Therefore, the question arises as to whether or not a member of a grand jury comes under the prohibition of this section and precludes him from receiving fees under Section 11798.

In the case of *People v. Hopt*, 3 Utah, 396, 1. c. 401, the court, in that case, differentiated between an officer and a juror, and reached the conclusion that a juror was not a public officer.

In the case of *Territory v. Hopt*, 4 Pac. 250, 1. c. 255, the court, in ruling that a juror was not a public officer, reasoned thusly:

"In *U. S. v. Hartwell*, 6 Wall, 393, the court say: 'An office is a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, employment and duties.'

Mr. Bouvier, in his dictionary, defines office to be 'a right to exercise a public function or employment, and to take the fees and emoluments belonging to it.'

'The idea of an office, clearly defined, embraces the ideas of tenure, duration, fees or emoluments, rights and powers, as well as that of duty; a public employment confirmed by appointment of government.' Burrill, Law Dict.

In 20 Johns. 493, Platt defines office to be 'an employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental.'

An office is defined to be 'a right to exercise a public function or employment, and to take the fees and emoluments belonging to it.' Streeter v. Rush, 25 Cal. 98; People v. Stratton, 28 Cal. 388.

Jury duty is in the nature of service due from the citizen to the government, necessarily required in the administration of its laws. Its character has but little similarity to tenure, duration, power, and the right to exercise powers conferred by the appointment of government, which are essential characteristics of office, 'and not mere transient, occasional, or incidental.' The name of the man is selected, and, with 199 others, is placed in a box which is denominated the jury-box, from which it is drawn by chance; and, without his knowledge of any previous steps, he is summoned to appear in court to perform the duty of a juror. It is true, he has a duty of a public nature to perform, and for it he is compensated out of the public

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treasury; but in what other respect does his position or his duties correspond with the essential elements of office? He has no certain term of office. He has no right to, and has no power to enforce a right to, the performance of any act or service which constitutes the performance of official duty. He is liable at any moment to be discharged by the court from all service; and to be excused by either party from serving in the trial of any cause without consulting his wishes or interests. The oath he takes, in its terms and scope, limits his duty to the facts of the particular case then on trial, and is not the oath required by the laws of this territory, or by the constitution and laws of the United States, to be taken by public officers. State v. Bradley, 48 Conn. 535. The position of a jurymen is, to a certain extent, a 'place of public trust and emolument,' but not in the sense of these statutory provisions."

Industrial Commission v. Rogers, 171 N. E. 35; Adams v. State, 17 N. E. (2d) 84.
See also 35 C. J., page 428.

In conclusion, we are of the opinion that Grand Juror Butts is not precluded under Section 3837, R. S. Mo. 1929, or under the prohibition set out in Section 11798, R. S. Mo., and is, therefore, entitled to collect his witness fee for the day he testified. However, in accordance with the opinion herewith enclosed, we are of the opinion that he has received his mileage, and, being present in the town where he gave his testimony, it was not necessary for him to travel in order to testify, and he would only be entitled to the witness fee.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT