

SHERIFFS:

Fees in reference to non est returns on search and seizure warrants.

December 22, 1937

Mr. Conn Withers,
Prosecuting Attorney,
Liberty, Mo.



Dear Sir:

This will acknowledge receipt of your letter requesting an official opinion under date of December 1, 1937, which reads as follows:

"There have been several instances where upon a complaint signed by myself as Prosecuting Attorney a search warrant was issued by one of the Justices of the peace of this county pursuant to the provisions of Section 3783, R.S. of 1929, which warrant was thereafter executed by the sheriff or some other officer with power to execute it requiring traveling of a good many miles and sometimes the employment of assistance in an endeavor to make the search effective with the result that no property whatever as described in the warrant was found or that such as might be found did not contain sufficient money to pay the costs of the officers or even a part of their bare expenses.

Under facts as outlined above I would appreciate and do hereby request the opinion of your office as to whether or not it is proper for the Justice to make up a transcript of the proceedings of the search warrant and certify it for the payment of costs by the County in the same manner as would be the case where an individual would be prosecuted in the Justice Court upon a charge of misdemeanor. If this method is not proper, will you please outline the proper procedure in order that these officers may recover their costs."

In answer to your request will say that Section 11791 R.S. Mo. 1929, sets out specifically the fees to which a sheriff is entitled to in criminal cases. Section 11777 sets out the fees which a constable is entitled to in criminal cases. Both of these sections are strictly construed by the courts.

Under Article 18, Chapter 29 which described the costs in criminal cases, Section 3827 reads as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Section 3830 in the same act reads as follows:

"When such prosecutions are commenced by a public officer whose duty it is to institute the same, and the defendant is acquitted, the county shall pay the costs; if he is convicted, and unable to pay the costs, the county shall pay all the costs, except such as were incurred on the part of the defendant."

Reading the two sections together it is necessary that the defendant be sentenced to imprisonment in the county jail or assessed with a fine, or both, or the defendant be acquitted, before the county is liable for the costs. There is no other section which provides that the county pay the costs except the two above described sections. In order that the sheriff should be allowed fees for services of a search warrant, there must be a conviction or an acquittal before the county would be authorized in paying any fees.

Under Sections 11791 and 11792, the exact fees are set out by both sections to which the sheriff would be entitled. Section 11793 of the Revised Statutes of Missouri, 1929, provides:

"No sheriff or ministerial officer in any criminal proceeding shall be allowed any fee or fees for any other services

than those in the two preceding sections enumerated, or for guards not actually employed."

In the case of Aldridge v. Zorn, 287 S.W. 650, a civil suit was brought by a sheriff against the defendant who was the owner of a newspaper seeking to recover damages for libel. A defendant set up as his defense that the article was true. Among other things the newspaper charged that the sheriff had been guilty of accepting money for services that was not allowable under the law. The sheriff asked for an instruction to the effect that he was entitled to other compensation except the fees allowed under the statute. The trial court gave the following instruction:

"The court instructs the jury that plaintiff had a right as sheriff of Howell county to accept the sum of \$500.00 paid him through the prosecuting attorney's office for services that he had rendered and expenses incurred therein."

The appellate court held:

"There is no law to support these instructions. Learned counsel for plaintiff make no attempt in their brief to defend these instructions. Nor do they cite any statute or case to support the theory that the \$500 was lawfully received by plaintiff when he was sheriff. All the pertinent law we have been able to find is to the contrary. Section 8 of article 14 of our constitution provides that the compensation or fees of no state, county, or municipal officer shall be increased during his term of office. Section 3196, R.S. 1919, among other things, provides that every officer who shall by color of his office unlawfully and willfully exact, demand, or receive any fee or reward to execute or do his duty, shall be adjudged guilty of a misdemeanor. Section 10999 and 11000, R.S. 1919, fix the fees of sheriffs in criminal cases, and section 11001 prohibits the receipt of any other fees in criminal proceedings except for guards
*****."

Section 11001 of the Revised Statute of 1919 mentioned in this opinion is now Section 11793 of the Revised Statutes of 1929.

Under Section 3841 of the Revised Statutes of Missouri, 1929, the clerk of the court in which any criminal cause shall

shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of service and the fee therefor.

Section 3851 reads as follows:

"Whenever the state or county shall be liable under the provisions of this article, or any other law, for costs incurred in any examination of any felony, or in the trial of any misdemeanor before any justice of the peace, it shall be the duty of such justice to make out, certify and return to the clerk of the circuit or criminal court of the county a complete fee bill, specifying each item of service and the fee therefor, together with all the papers and docket entries in the case; and it shall thereupon be the duty of such clerk to make out a proper fee bill of such costs, which shall be properly and legally chargeable against the state or county, which shall be examined by the prosecuting attorney, and proceeded with in all respects as a fee bill made out for costs incurred in such court of record."

Under Sections 3841 and 3851, the clerk or the justice of the peace can only allow fees allowed by the statute and specifically set out, to the constable or sheriff.

In the case of State ex rel. Troll, Sheriff, v. Brown, et al., Auditor, Appellants, 146 Mo. 401, the court, in their opinion, stated:

"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. v. 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. 545."

In the syllabus the court stated that no officer is entitled to fees of any kind for any service unless they are provided for by statute, and statutes allowing such fees must be strictly construed. In this case the court also held in their opinion that:

"If the sheriff was not entitled by statute to the fees claimed, neither the certificates of the judges of the criminal courts, nor of the court of criminal correction could create such right in him. Nothing short of statutory enactment could do so. These certificates were therefore without authority, and of no binding force upon the city."

As suggested in your letter that the justice of the peace make a transcript of the proceedings of the search warrant and certify it for the payment of the costs by the county. This action would be null and void and under the decision in State v. Brown, it would be of no effect. That the statute in regard to fees of a sheriff or constable or any other officer should be strictly construed was also held in the case of Sanderson v. Pike County, 195 Mo. 598, and in their opinion at page 605:

"It is well-settled law in this State that the right to compensation for the discharge of official duties is purely a creature of the statute, and that the statute which is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute, and he is entitled to none for services he may perform as such officer, unless the statute gives it. (State ex rel. v. Adams, 172 Mo. 1-7; Jackson County v. Stone, 168 Mo. 577; State ex rel. v. Walbridge, 153 Mo. 194; State ex rel. v. Brown, 146 Mo. 401; State ex rel. v. Wofford, 116 Mo. 220; Givens v. Daviess Co., 107 Mo. 603; Williams v. Chariton Co., 85 Mo. 645; Gammon v.

Lafayette Co., 76 Mo. 675.)"

This opinion was also held in *King v. Riverland Levee District*, 218 Mo. 490 where in their opinion the court at page 493 said:

"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. (State ex rel. *Evans v. Gordon*, 245 Mo. 12, 1.c. 27, 149 S.W. 468; *Sanderson v. Pike County*, 195 Mo. 598, 93 S.W. 942; State ex rel. *Troll v. Brown* 146 Mo. 401, 47 S.W. 504.) Furthermore our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. *Wedeking v. McCracken*, 60 Mo. App. 1.c. 565, 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. (State ex rel. *Evans v. Gordon*, supra.)"

In view of the fact that the statute does not allow fees to a sheriff it is strictly construed, where there is no conviction or acquittal of the defendant. The legislature is empowered to provide and regulate fees under Article 9, Section 12 of the Constitution of Missouri. This section reads as follows:

"Fees of County Officers--How Provided for.

The General assembly shall, by a law uniform in its operation provide for and regulate the fees of county officers, and for this purpose may classify the counties by population."

In the case of State ex rel. *Buder v. Hackman*, 305 Mo. 342, the court held:

"The words 'he and his deputies shall be entitled to receive their actual

necessary expenses incurred in the performance of their duties,' fall far short of constituting clear and satisfactory authority for the payment by the State of clerk hire for assessors.

The argument of hardship and that an officer should not be compelled to incur a financial loss, in performing the duties incident to his office, cannot be considered by the courts in passing upon the rights of relator, as fixed by the statute. Failure to provide a salary or fee for a duty imposed upon an officer by law does not excuse his performance of such duty. (State ex rel. v. Brown, 146 Mo. l.c. 406.) It may be that an assessor actually sustains a financial loss in the performance of his duties under our State Income Tax Law. But such fact is for consideration by the Legislature, and not by the court."

In your letter you asked this office to outline the proper procedure in order that these officials may recover their costs and all that we can say in this respect is to refer you to the above case, State v. Hackman, in which they state that it is for consideration by the legislature and not by the courts.

CONCLUSION

It is the opinion of this office that it is not proper for the justice of the peace to make up a transcript of the proceedings of the search warrant and certify it for the payment of costs by the county where a defendant has not been convicted or acquitted in accordance with Section 3827 and Section 3830 of the Revised Statutes of Missouri, 1929.

Respectfully submitted

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APPROVED:

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