

SHERIFF: When entitled to additional fees and mileage for resubpoenaing witnesses after first trial resulted in a hung jury.

March 16, 1940.



Judge Louis H. Schult
38th Judicial Circuit
Caruthersville, Missouri

Dear Judge:

We are in receipt of your letter of March 9th, wherein you state as follows:

"We have a murder case pending in our Circuit Court which was tried at the last term and resulted in a hung jury. The witnesses are scattered over various parts of the county. The question now comes up if the witnesses are re-subpoenaed by the sheriff will the sheriff be entitled to his regular fees for serving the subpoenas and for mileage.

"I have been unable to find anything in the statutes concerning this. No doubt this question has been presented to your office before. Please advise whether in your opinion the sheriff would be entitled to his regular fees and mileage, for re-subpoenaing witnesses after the first trial had resulted in a hung jury."

The rule in Missouri as to the taxation of costs in criminal cases is laid down in the case of Ring vs. Vogel 46 Mo. App. 374 l. c. 377 as follows:

"Preliminary to the discussion of the items of cost here in controversy, it may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the of-

March 16, 1940.

ficer or other persons claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation."

Section 3839 R. S. Mo. 1929, provides as follows:

"Whenever a witness in a criminal case has been once subpoenaed or recognized to appear before any court or magistrate, he shall attend under the same as such witness, from time to time, and from term to term, until the case be disposed of, or he be finally discharged by the court or justice; and he shall be liable to attachment for any default or failure to appear as such witness, and adjudged to pay the costs and such fine as the court may properly impose; and no costs shall be allowed for any subsequent recognizance or subpoenas for any such witness."

The above section is clear and unambiguous and provides that whenever a witness is subpoenaed to appear before a court he is required to attend as "such witness" until the case is disposed of or he is finally discharged, and that no costs are to be allowed for any subsequent subpoena for "such witness."

The failure of the jury to agree upon a verdict does not dispose of a criminal case, and it is specifically provided in such instance that (Section 3700 R. S. Mo. 1929):

***** the cause must be tried again at the same or next term, as in the case of a failure of the jury to agree upon a verdict."

It is a well defined rule of statutory construction that legislative intention must be ascertained from the wording of the statute and said rule is well expressed in the City of St. Louis v. Pope 126 S. W. (2d) 1201 l. c. 1210:

March 16, 1940.

"In the Senter Commission Company Case, City of St. Louis v. Senter Comm. Co., 337 Mo. 238, 85 S. W. (2d) 21, this court laid down this rule (page 24), 'The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent ***** this should be done from the words used, if possible, considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose.'"

It will be noted that the underlined portion of Section 3839, supra, provides that no costs are to be allowed for any subsequent subpoena for any "such witness." It is evident that when a witness is discharged by the court that there is no duty imposed upon him by law to attend as "such witness." In the case of a new trial he would have to be resubpoenaed.

We are, therefore, of the opinion that a sheriff is not entitled to additional fees and mileage for resubpoenaing witnesses after the first trial has resulted in a hung jury, unless it is shown that the witnesses sought to be resubpoenaed were finally discharged by the court after attendance at the first trial.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General.

APPROVED BY:

COVELL R. HEWITT
(Acting) Attorney General

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