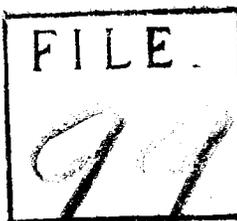


WITNESS BEFORE
GRAND JURY -

Any witness appearing before a grand jury is entitled to witness fees and it is the duty of the county treasurer to pay such witness out of any money in the county treasury appropriated for other expenses provided such witness has the proper scrip for his fees as is provided in Sec. 13421, R. S. Mo. 1939.

October 31, 1941

Hon. Carl F. Wymore
Prosecuting Attorney
Cole County
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an official opinion as of October 30, 1941, which request reads as follows:

"During the examination of witnesses by the Grand Jury now in session under order of the Judge of the Circuit Court for the October Term of the Cole County Circuit a question has arisen upon which I should like to have an opinion from your office.

"The County Court of Cole County has ordered the Treasurer of the County not to pay the witnesses who have appeared before the jury in response to subpoena. After a witness has testified a certificate of attendance is signed by the foreman of the jury this certificate is then presented by the witness to the circuit clerk who issues to the witness a form of warrant or order upon the county treasurer, signed by the clerk and which is afterwards signed by the foreman of the Grand Jury. The Treasurer following the

orders of the county court is refusing to honor these orders. I should like to have the opinion of your office as to whether or not the county of Cole is liable for these witness fees."

Section 13421 R. S. Missouri, 1939, reads as follows:

"The clerk of each court of record shall, on the application of any witness to have his fees allowed, enter on his book, under the title of the cause in which the witness was summoned or recognized, or if before the grand jury, the name of the witness, the number of days he has attended and the number of miles he has necessarily to travel in consequence of the summons or recognition, and shall swear the witness to the truth of the facts contained in said entry, and it shall be the duty of the clerk to make out and deliver to each witness attending before the grand jury, and entitled to fees therefor, a scrip as required in case of grand jurors, which scrip shall be countersigned by the foreman of the grand jury, and shall be paid by the county treasurer in like manner as now by law required for the pay of grand jurors; and the clerk shall be allowed the same compensation for said services as is now allowed by law for like services in issuing scrip to grand jurors."

It will be noted from a reading of this Section that the word "shall" is used throughout said Section, and further that said Section gives directions to the Clerk of each

Court and to the County Treasurer, they being county officers. In construing statutes wherein the word "shall" is used and directed to a public officer the term is mandatory in meaning and the section containing such word shall be construed to be mandatory and not directory.

> We call attention to the case of City of Newton v. Board of Supervisors, 112 N. W. 167, l. c. 168, wherein the Court had this to say:

" * * * The uniform rule seems to be that the word 'shall,' when addressed to public officials, is mandatory and excludes the idea of discretion. People v. Board, 39 N. Y. 81; French v. Edwards, 80 U. S. 506, 20 L. Ed. 702. There are many reasons for this rule which need not be elaborated upon, as the cases cited fully present the grounds upon which it is based."

Also, the case of Bon Homme County Farm Bureau v. Board of Commissioners, 220 N. W. 618, l. c. 620, where the Court said:

" * * * The word 'shall,' when used in a command to a public officer, is mandatory. People v. De La Mater, 213 Mich. 167, 182 N. W. 57."

For other authorities see McDunn v. Rounby, 181 N. W. 453, l. c. 454, 191 Ia. 976; In re O'Rourke, 30 N. Y. S. 375, l. c. 377, 9 Misc. 374,

In the case of *Ex parte Brown* (Mo.), 297 S. W. 445, l. c. 447, the Court had this to say:

" * * * When a fair interpretation of a statute which directs acts or proceedings to be done in a certain way shows that the Legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, then such statute is mandatory. 36 Cyc. 1158; *Hope v. Flentge*, 140 Mo. 390, loc. cit. 401, 41 S. W. 1002, 47 L. R. A. 806. * * * "

It will be noted from reading this opinion that the Court makes reference to *State ex inf. McAllister ex rel Lincoln v. Bird*, 295 Mo. 344, 244 S. W. 938, in which a statute was held directory because there was no consequence provided in the event the statute was not complied with. In this connection we call attention to Section 13453 R. S. Missouri, 1939, which reads as follows:

"Every person violating the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined for each offense in any sum not less than fifty dollars nor more than one thousand dollars, and conviction thereunder shall work a forfeiture of his office."

It will be noted that both Sections 13421 and 13453, supra, are contained in Article 2, of Chapter 99, R. S. Missouri, 1939. Therefore, a penalty is provided for and the reasoning in the *Bird* case supra would not be applicable.

Therefore, we are of the opinion that when the legislature used the word "shall" in Section 13421, supra, and said Section was directed to public officials that the Section was mandatory not directory. This being true said Section casts upon a county treasurer the duty to pay out of the county treasury in like manner as now by law required for the pay of grand jurors the fees of witnesses appearing before a grand jury.

Now turning to the law applicable to the payment of fees of a grand juror, we are directed to Section 714 R. S. Missouri, 1939, which reads as follows:

"Each grand and petit juror on the regular panel shall receive three dollars per day for every day he may actually serve as such, and five cents for every mile he may necessarily travel going from his place of residence to the courthouse and returning to the same, to be paid out of the county treasury."

We find that this Section has been construed in the case of Scott v. Young, 113 App. 46, 87 S. W. 544, as well as the Sections following, namely Sections 715, 716, and 718. Said Sections read as follows:

"The clerk of the court shall keep a book in which he shall enter, upon the application of each juror, the number of days such juror shall have served, and the number of miles necessarily traveled, in obedience to the summons to serve on the jury, and such entry shall be verified by the oath of such juror."

"Upon the demand of such juror, the clerk shall give him a scrip, verified by his official signature, showing the amount which such juror is entitled to receive out of the county treasury."

"The treasurer of the county is hereby required, upon the presentation to him of any scrips given by the clerk aforesaid, to pay the same out of any money in the treasury appropriated for county expenses, in the same manner and subject to the same rules as county warrants; and said scrip shall be received by the sheriff, collector or other proper officer in the payment of any debt due the county."

Turning to the case of Scott v. Young, supra, we find that the Court had this to say: (l. c. 50)

" * * * On this question our statutory provisions seem plain and simple. Sec. 3778, R. S. 1899, provides that each grand and petit juror on the regular panel, shall receive \$2.00 per day for every day he may actually serve as such and five cents for every mile he may necessarily travel coming from his place of residence to the court house and returning to the same, to be paid out of the county treasury. It is clear, under this section, that the county and not the litigant, pays the expense of the regular panel. * * * Section 3779 provides that the clerk shall keep

a book in which he shall enter upon application of each juror, his time of service, mileage, etc. Section 3780 provides that every clerk shall issue to the juror scrip, evidencing their services and the amount to which they are entitled therefor. Section 3782 provides that the treasurer of the county, upon presentation of such scrip, is required to pay same out of any money in the treasury, appropriated for county expenses, and such scrip shall be received by the sheriff, collector and other proper officers in payment of any debt due the county. * * * * It is apparent from these sections that the county pays the jury in the circuit court. This is true as to the regular panel and jurors summoned which are not of the regular panel, each likewise receive scrip from the clerk and are paid by the county out of the county funds. * * * * "

(Sections 3778, 3779, 3780 and 3782 are now Sections 714, 715, 716 and 718, respectively, of the Revised Statutes of Missouri, 1939).

It will be noted from the reading of the case of *Scott v. Young*, supra, that each of the Sections referred to in this opinion are identical with the Sections as they now appear in the Revised Statutes of Missouri, for the year 1939, save and except that Section 3778 R. S. Missouri, 1899, has been amended changing "\$2.00 per day" to "\$3.00 per day" which no one could say is a material change in said Section.

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It will be particularly noted in the excerpt of the opinion above set forth, supra, that the Court emphatically held that the county was liable for the costs accruing under Section 3778 R. S. Mo., 1889, supra, now Section 714 R. S. Mo., 1939, supra, and said Section being the Section referred to in Section 13421, supra. It is true that in the Scott case the Court had before it the question of petit jury costs; but, it will be noted that this Section refers to grand jurors the same as it does to petit jurors. Therefore, the ruling of this case must control in the situation presented to us in your opinion request.

Therefore it is the opinion of this Department that the law is clear that a witness who appears before a grand jury in answer to a subpoena from said body is entitled to receive his witness fees and mileage. Furthermore, the mandatory duty is cast upon the county treasurer to follow the mandates of Section 13421, supra, and pay such witness out of the county treasury out of any funds appropriated for county expenses then in his hands as is required in Section 718, supra.

CONCLUSION.

We are of the opinion that Cole County is liable for the fees of any witness appearing before the grand jury in answer to a subpoena from said body, as referred to in the opinion request, and it is the duty of the treasurer of said county to pay such witness his fees and mileage out of any money in the treasury appropriated for county expenses, provided such witness has the proper scrip as is provided in Section 13421 R. S. Missouri, 1939.

Respectfully submitted

APPROVED:

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BRC:RW