

only be a member of the board of county commissioners, but must in addition thereto be the president of the board of county commissioners.

You are therefore advised that it is my opinion that the member of the board of county commissioners authorized to act as a member of the county board of revision is the present elected, qualified and acting president of the board of county commissioners.

And I here reaffirm the holding made in Opinion No. 27, dated January 26, 1927, as follows:

Under the provisions of Section 5580 G. C., and Section 5592 G. C., when a president of the board of county commissioners ceases to be such president, his office as a member of the county board of revision also ceases, and upon the election of a new president of the board of county commissioners, he thereby becomes, *ipso facto*, a member of the county board of revision.

Respectfully,

EDWARD C. TURNER.

Attorney General.

127.

WITNESS FEES—WHEN WITNESS FROM WITHIN THE STATE VOLUNTARILY REPORTS—FROM WITHOUT STATE—PAYMENT OF FEES UNDER SECTION 3004, GENERAL CODE.

SYLLABUS:

1. *Where a witness voluntarily reports to the court upon notice to do so and there receives a subpoena, under such circumstances he is entitled to his statutory fees and mileage only when his attendance could have been required by compulsory process.*

2. *There being no jurisdiction to compel a witness who is without the State of Ohio to appear in a court of this state to testify in a criminal case, such witness, who voluntarily reports to the court at the request of the prosecuting attorney, and is there subpoenaed, is entitled to one dollar and no more.*

3. *The prosecuting attorney may in his discretion pay such witness an amount equal to the mileage out of funds in his hands by virtue of Section 3004, General Code, such item being one of expense in furtherance of justice.*

COLUMBUS, OHIO, March 1, 1927.

HON. CHARLES B. COOK, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 5, 1927, which reads as follows:

“We have the following situation: In a first degree murder case, a witness was located outside of the state. He was interviewed and at our request, reported at court for service.

Under Section 3014, we requested our clerk of courts to issue a voucher for one day's attendance and for mileage from our state line that he traveled when coming to court to report as per my request. This the clerk refused to do, but issued a voucher for one day's attendance. Our contention is that he was entitled to one day's attendance and mileage.

Will you kindly advise as to correct procedure in this matter?”

In the absence of statute the state is under no obligations to pay the fees or expenses of its witnesses or of the witnesses for the accused.

Section 3014, General Code, provides:

“Each witness attending under recognizance or subpoena, issued by order of the prosecuting attorney or defendant, before the court of common pleas, or grand jury, or other court of record in criminal causes, shall be allowed the same fees as in civil causes, * * * unless otherwise directed by special order of the court. * * * ”

Section 3012, General Code, provides:

“Each witness in civil cases shall receive the following fees: For each day’s attendance at a court of record, * * * one dollar, and five cents for each mile necessarily traveled from his place of residence to the place of giving such testimony and return, provided the distance be more than one mile. * * * ”

The question which suggests itself is—from what point is the mileage to be charged? This question, it is believed, must be decided with reference to the jurisdiction of the court to require the attendance of the witness by compulsory process. This being a felony case, compulsory process could be had from any county in the state.

Section 13662, General Code, provides:

“In all criminal cases the clerk of the court of the county, upon a precipe being filed, shall issue writs of subpoena for witnesses named therein, directed to the sheriff of such county or the county where such witnesses reside or are found, which shall be served and returned as in other cases. * * * ”

Your attention is called to the case of *Wylie vs. Duffy*, 1 O. N. P. (N. S.) 353, the syllabus of which reads as follows:

“1. A witness residing in the county of the suit, or in an adjoining county, who is notified to report, and in good faith to facilitate justice and prevent delay does report and is subpoenaed upon arrival, is entitled to statutory mileage from his place of residence.

2. But there being no jurisdiction to compel attendance beyond these limits, a witness from beyond the adjoining county who so reports voluntarily and is there subpoenaed, is entitled to one dollar and no more.”

That case came on for hearing on a motion to re-tax costs in a civil case. The general rule laid down in that case applies to both civil and criminal cases.

Two essential elements are necessary before a witness is entitled to mileage fees in a felony case:

1. He must be in attendance either under recognizance or subpoena, issued by order of the prosecuting attorney or defendant, as provided in Section 3014, General Code.

2. He must be physically present within this state so that his attendance could be compelled by compulsory process.

In those cases in which attendance may be compelled the witness may receive his

fees and mileage, when subpoenaed, even though he voluntarily reports. But when his attendance could not be compelled by compulsory process he cannot receive mileage, but when subpoenaed may receive one dollar for each day's attendance.

If a witness who is beyond the bounds of this state be subpoenaed at his place of residence in a foreign state such command would have no force or vitality. A subpoena issued from a court of this state does not have any extra-territorial operation; no obligatory force upon a witness, who is beyond the bounds of this state to obey the command therein contained.

You request advice as to the correct procedure in such a case. Your attention is called to Section 3004, General Code, which provides:

"There shall be allowed annually to the prosecuting attorney in addition to his salary and other allowance provided by Section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. * * * "

The case that you present is an expense in furtherance of justice and may be properly paid by you out of said allowance.

In connection with the above discussion, your attention is directed to the fact that Section 13662, General Code, relates to courts of record; Section 13495, General Code, making provision for the attendance of witnesses before justices of the peace, police judges and mayors in misdemeanor and felony cases.

It is my opinion that in felony cases, when properly subpoenaed, a witness may receive mileage from his place of residence to the place of trial and return from anywhere in the state. But where a witness voluntarily reports to the court at the request of the prosecuting attorney and there receives a subpoena, under such circumstances he is entitled to his statutory mileage only when his attendance could have been required by compulsory process.

In the case that you present, there being no jurisdiction to compel attendance beyond the boundary lines of this state, a witness who is without the state and reports voluntarily is entitled to one dollar and no more.

As heretofore pointed out, I am of the opinion that you may properly pay the mileage of this witness from the funds in your hands under Section 3004 of the General Code, such expenditure being one in furtherance of justice.

Respectfully,

EDWARD C. TURNER.

Attorney General.

128.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND McCURREN BROTHERS, XENIA, OHIO, TO CONSTRUCT SEWER C. N. & I. DEPARTMENT, WILBERFORCE UNIVERSITY, WILBERFORCE, OHIO, \$40,875.00—SURETY BOND EXECUTED BY THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

COLUMBUS, OHIO, March 1, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State