

of his possession is referable only to his former contract. It can be referable to no other, for no other exists."

The authorities above noted support the view that the right which the lessee or licensee under the contract here in question has to the use of the leased equipment after the extension of the primary one year period is to be considered as an extension of the rights given to him for such one year period and for the rental therein provided for and is not to be considered a new contract for the lease of the equipment from month to month after the expiration of such one year period provided for in the contract. Other authorities supporting this view are: *Neal v. Harris*, 140 Ark., 619, 624; *Pugsley v. Aikins*, 11 N. Y., 494; *Swan v. Inderlied*, 187 N. Y., 372; *Tiffany Landlord and Tenant*, Vol. 1, page 122, Vol 2, page 1514.

It follows from this that the right of the lessee or licensee to the continued use of the leased equipment after the expiration of the period of one year provided for in the contract is likewise referable to the contract as originally executed by the parties, which contract, under the authorities, is to be considered as one not only for a term of one year but for a term of one year and for such additional time as the lessee in the exercise of his option from month to month may continue in the possession and use of such equipment.

I am of the opinion, therefore, in answer to the question presented in your communication, that the continued possession by the lessee or licensee of equipment leased to him under this contract, after the expiration of the one year period therein provided for, is not a transaction which under the Sales Tax Law is subject to the incidence of the tax therein provided for.

Respectfully,

JOHN W. BRICKER,
Attorney General.

6103.

JURORS—ENTITLED TO PER DIEM COMPENSATION AND MILEAGE—WHEN THEY APPEAR ON ORDER OF COURT BUT ARE EXCUSED FOR THE DAY.

SYLLABUS:

A person who is on a jury list and who, in answer to an order of the court, appears in court but who is excused from sitting as a juror for that day, is entitled to his per diem compensation as fixed by the court and his mileage, as provided by Section 11419-43, General Code.

COLUMBUS, OHIO, September 21, 1936.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: This will acknowledge receipt of your request for my opinion, which reads as follows:

“When a person is summoned to appear in court for the purpose of qualifying as juror, is such person, if excused from jury duty, entitled to such per diem as the court may fix for jurors’ fees for one day, and mileage?”

In a subsequent communication, you informed me that your question does not concern the selection of the annual jury list or a supplementary list thereto wherein the person who is summoned to appear before a jury commissioner for the purpose of qualifying as a juror, is excused from jury duty, but rather a situation where a person is on the jury list and is excused by the court from sitting as a juror for a certain day or days.

The compensation of jurors is provided for by Section 11419-43, General Code. This section, in so far as it is pertinent, reads as follows:

“ * * * and the compensation of each juror shall be fixed by order of the common pleas judge or judges of the county, not to exceed five dollars for each day’s attendance, and in addition thereto, said juror shall be allowed three cents a mile for each mile traveled by said juror by the nearest route from said juror’s place of residence to the county seat and return to home once per week, payable out of the county treasury.
* * *”

The language in the above section, which is material to the present question, is contained in the words “for each day’s attendance”. Do these words mean that a person who has been excused by the court from jury service, regardless of the reason for such discharge, shall be entitled to per diem compensation and his mileage as provided in Section 11419-43, General Code supra? In this connection I call your attention to the case of *State ex rel. Beverstock v. Merry*, 34 O. S. 137. The first branch of the syllabus of that case reads as follows:

“1. Under section 22 of the act to regulate the fees of jurors, etc. (73 Ohio L., 134) jurors are to be allowed compensation for days spent in whole or in part in going to and returning from court, and for days of attendance during the term, whether

impaneled or not; and the clerk is not authorized, in addition to such days, to certify that the jurors are entitled to compensation for days as to which they were discharged and not in attendance."

The pertinent language of the statute at the time of the above case read as follows:

"That each grand and petit jurer shall be allowed the sum of Two Dollars per day for each and every day he may serve and if not a talesman, five cents per mile from his place of residence to the county seat." 73 O. L. 134.

It would appear that so far as your question is concerned there is no substantial difference between present Section 11419-43, General Code, supra, and the statute as it existed at the time of the Merry case supra. The following pertinent language in the Merry case appears at Pages 139 and 140:

"* * *

* * *

* * *

By what rule is the clerk to determine what constitutes days of service, within the meaning of the sentence quoted?

It is certain that no inflexible rule can be prescribed, the enforcement of which would not, in some instances, do injustice to jurors; and this should be avoided if possible in all cases. On the other hand, injustice should not be done to the public, by allowing jurors compensation for every day from and including the day they first appeared in court, until they were finally discharged at the close of the term, in many instances embracing several weeks, without reference to whether they were required by the court to be in attendance or not, and when, in fact, they may have been discharged and at home for a number of consecutive days at a time, attending to their private affairs, and not incurring expenses usually incident to their attendance at the county seat.

No rule should be adopted, therefore, which will operate to the prejudice of jurors on the one hand, or of the public on the other; and we think that the following general rule will constitute such a guide, that injustice, in either respect, will rarely be done by following it, viz: Jurors should be allowed compensation for every day spent in going to and returning from court, and for every day they are in attendance at the county seat as jurors, whether they are impaneled or not; fractions of a day to be counted as an entire day in estimating compensation.

It follows that where, as in this case, jurors are discharged from attendance by order of the court for several consecutive days at a time, during the term, the clerk is not authorized to certify that the jurors are entitled to compensation for the days they were so discharged, and not required to be in attendance.

* * *

* * *

* * *

The question you present, therefore, depends on what the legislature intended when they used the words "day's attendance". Would it include a person who in answer to an order of the court appears for jury service and is excused by the court from actually sitting in the trial of a case? It may be that he is excused by the court because of illness or some other valid reason. It may be that he is excused by the court as a result of a challenge for cause or a peremptory challenge. Again he may be excused by the court because a sufficient number of jurors have been qualified for a particular case. The important thing to be remembered is that he is present in court by virtue of a summons or other order of the court. If he is excused, it would seem that this was a day's attendance and he should receive his per diem compensation and his mileage as provided in Section 11419-43, General Code. Although he has not been impaneled, this should not prevent him from receiving his compensation and mileage as is indicated by the Merry case, supra. Likewise, the fact that the juror has asked to be excused because of illness or some other reason and the court has granted the same, should not prevent his receiving the statutory compensation and mileage. The juror has reported by order of the court and is in attendance. The judge does not have to excuse the juror and if, in the exercise of his judicial discretion, he does so, the juror should be paid. It should be borne in mind that the juror has obeyed a judicial process and has suffered certain expense and trouble in being present, even though he is later excused from jury service.

An examination of the Merry case, supra, indicates that there is nothing in that case in conflict with the conclusions herein indicated. A situation, however, may present itself where the judge will discharge the juror for several days. During the time he has been discharged, with the exception of the day he is in court, by order of the judge, he should not receive his statutory compensation and mileage. This is plainly indicated by the Merry case supra.

Without extending this discussion, it is my opinion, in specific answer to your inquiry, that a person who is on a jury list and who, in answer to an order of the court, appears in court but who is excused from sitting as a juror for that day, is entitled to his per diem com-

pensation as fixed by the court and his mileage as provided by Section 11419-43, General Code.

Respectfully,

JOHN W. BRICKER,
Attorney General.

6104.

APPROVAL—CONTRACT FOR HIGHWAY IMPROVEMENT
IN CRAWFORD COUNTY, OHIO.

COLUMBUS, OHIO, September 22, 1936.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

6105.

APPROVAL—ABSTRACT OF TITLE, ETC., TO LAND IN
FRANKLIN TOWNSHIP, ROSS COUNTY, OHIO—CORABURTON.

COLUMBUS, OHIO, September 23, 1936.

HON. CARL E. STEEB, *Secretary, Board of Control, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval an abstract of title, warranty deed, contract encumbrance record No. 29, and other files relating to the purchase by the Board of Control of the Ohio Agricultural Experiment Station of certain tracts of land which are owned of record by one Cora Burton in Franklin Township, Ross County, Ohio, and which, following a recent survey thereof, are described by metes and bounds as one tract of land as follows:

Being part of Surveys Nos. 3041, 10723 and 3711:

Beginning at a stone set by H. W. Redd, D. C. S. June 6, 1892, (See Surveyors Record Book, "B", pages 112 & 113) marking the North corner to Cadwallader Wallace's Survey No. 13441 and the North East corner of McArthur's Survey No. 13474 in the south line of Charles Scott's Survey No. 3041; THENCE with the line Cadwallader Wallace's Survey No. 13441, S. 22 deg. 6' E. 1114.8 feet to a round concrete monument stamped "State of Ohio, Division of Forestry, Boundary Marker", lo-