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WITNESS FEES — COUNTY OFFICIAL SUBPOENAED, OTHER THAN ONE IN DISCHARGE OF OFFICIAL DUTIES REQUIRED TO ATTEND UPON COURT, ENTITLED TO USUAL WITNESS FEES — SECTIONS 3012, 3014 G.C. — ENTITLED TO SUCH FEES WHEN SUBPOENAED AS WITNESS IN COUNTY OTHER THAN ONE IN WHICH HE WAS ELECTED OR APPOINTED — WHEN PAID REGULAR SALARY AND TRAVEL ALLOWANCE, WITNESS FEES RECEIVED SHOULD BE TURNED BACK TO COUNTY TREASURY, ORIGIN OF SALARY AND EXPENSES.

SYLLABUS:

1. *When a county official, other than one who in the discharge of his official duties is required to attend upon the court, is subpoenaed as a witness in a case, he is entitled to the usual witness fees prescribed in Sections 3012 and 3014, General Code.*

2. *A county official who, in the discharge of his official duties, is required to attend upon the court is not entitled to the usual witness fees unless he is subpoenaed as a witness in a case pending in a county other than the one in which he was elected or appointed.*

3. *In the event a county official is paid his regular salary and travel allowance during the period he is under subpoena as a witness, any witness fees received by such official should be turned back to the county treasury from which his salary and travel allowance was paid.*

Columbus, Ohio, June 9, 1941.

Bureau of Inspection and Supervision of Public Offices,  
State House Annex,  
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion on the following:

“In numerous instances, county officials or their deputies are subpoenaed to testify in civil cases concerning records in their respective offices, and in many cases, the sheriff or deputy sheriff is subpoenaed in criminal cases.

Where witness fees are paid to such officials or their deputies in these cases, are such officials or deputies entitled to retain same for their personal use, or are such fees to be considered as an earning of the office and paid into the county treasury as provided in Section 2983, General Code?”

An answer to your specific request requires first a consideration of whether or not county officials are entitled to witness fees.

Provisions for witness fees in civil and criminal cases are contained in Sections 3012 and 3014, General Code, respectively. Said sections read as follows:

Section 3012, General Code:

“Each witness in civil cases shall receive the following fees: For each day’s attendance at a court of record, before a justice of the peace, mayor or person authorized to take depositions, to be paid on demand by the party at whose instance he is subpoenaed, and taxed in the bill of costs, 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; for attending coroner’s inquest, the same fee and mileage, provided above, to be paid from the county treasury on the certificate of the coroner.”

Section 3014, General Code:

“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, to be taxed in only one cause, when attending in more causes than one on the same days, unless otherwise directed by special order of the court. When certified to the county auditor by the clerk of the court, such fees shall be paid from the county treasury, and, except as to the grand jury, taxed in the bill of costs. Each witness attending before a justice of the peace, police judge or magistrate, or mayor, under subpoena, in criminal cases, shall be allowed the fees provided for witnesses in the court of common pleas, and in state cases said fees shall be paid out of the county treasury, and in ordinance cases out of the municipal treasury, upon the certificate of the judge or magistrate, and the same taxed in the bill of costs.

When the fees herein enumerated have been collected from the judgment debtor, they shall be paid to the public treasury from which said fees were advanced."

It will be noted that these sections allow certain fees to "each witness" and draw no distinction between witnesses who are public officials and those who are not. An examination of the General Code of Ohio fails to reveal any specific enactment regulating the right of county officials to witness fees. In the absence of any such regulatory statute, the general rule as stated by Weygandt, C. J. in *State, ex rel. Shaffer v. Cole*, 132 O.S. 338, at page 339, would apply:

"In approaching this problem it is helpful to remember the general rule that when a public officer, in the discharge of his official duties, is not required to be present in person upon the trial of a particular case, he is entitled to the same fees as any private person if he is called as a witness therein. \* \* \* "

See also 42 O. Jur. 26; 28 R.C.L. 662; 70 Cor. Jur. 71; 19 Ann. Cas. 168.

It next becomes necessary to determine whether or not county officials in the discharge of their official duties, are required to be present in person upon the trial of a cause. In this connection your attention is directed to Section 2833, General Code, wherein are set forth the general powers and duties of a county sheriff. Said section provides in part as follows:

" \* \* \* He (sheriff) shall attend upon the common pleas court and the court of appeals during their sessions, and, when required, upon the probate court. \* \* \* " (Parenthetical matter mine.)

By reason of this provision it would appear a county sheriff or one of his deputies is under duty to be present during the sessions of the courts therein specified. This being true, under the general rule above set forth, I am of the view that county sheriffs are not entitled to witness fees in connection with causes tried in the county in which each was elected or appointed. The duty of the county sheriff, as set forth in Section 2833, supra, of course extends only to courts within his county and the conclusion expressed above, therefore, would not apply in cases outside the territorial limits of the county to which a sheriff may be subpoenaed to testify.

What has been said with respect to the county sheriff would, of course, apply with equal force to other county officials who, in the discharge of their official duties, are required by statute to attend upon the court, as for example, the prosecuting attorney and the clerk of courts. Based on the foregoing, it is my opinion that when a county official, other than one who in the discharge of his official duties is required to attend upon the court, is subpoenaed as a witness in a case, he is entitled to the usual witness fees prescribed in Sections 3012 and 3014, supra.

In arriving at this conclusion I am not unmindful of Opinion No. 1143, Opinions of the Attorney General for the year 1915, Vol. III, page 2477, wherein the then Attorney General held as disclosed by the syllabus as follows:

“When the services of assistant fire marshals are required as witnesses in the trial of criminal cases with which they have theretofore had an official connection, such services are within the scope of their official duties and while so in attendance as witnesses they should be paid their regular salary and expenses, but no further fees or mileage as witnesses should be demanded or paid to them or taxed as costs in said cases.”

In face of this holding however, the Attorney General remarked at page 2478, as follows:

“It may be said in this connection that in some states and under the federal law payment of witness fees to state or government officials is prohibited when they are called upon as witnesses in cases which are in the line of their official duties.

In this state no such qualifications are attached to the payment of witness fees and mileage, and, under our statutory provisions covering the payment of the same, *it must be admitted that such assistant fire marshals have the legal right to demand and receive their fees and mileage as witnesses. \* \* \**”  
(Emphasis mine.)

I am of the opinion that the above language which is in apparent conflict with the syllabus of the opinion is a correct statement of the law and is in full accord with the views already expressed in the instant opinion.

Nor am I unmindful of the syllabus of Opinion No. 1599, Opinions of the Attorney General for the year 1916, Vol. 1, page 872, which is likewise in apparent conflict with my holding. Said syllabus reads as follows:

“Inspectors appointed by the state liquor licensing board are not entitled to witness fees and mileage in cases of criminal prosecution of offenses against the liquor laws, where such inspectors are at the same time receiving their salaries and expenses for their time and services as such inspectors.”

This opinion, however, followed and adopted the reasoning of the 1915 opinion, *supra*. For the reason stated above I do not, therefore, feel bound by the conclusion set forth in the syllabus.

In Opinion No. 555, Opinions of the Attorney General for the year 1923, Vol. 1, page 436 and Opinion No. 3750, Opinions of the Attorney General for the year 1934, Vol. III, page 1900, the then attorneys general had occasion to consider and discuss the 1915 and 1916 opinions above referred to. In each of the later opinions it was not the right to receive witness fees which was questioned, but rather the right to retain same upon receipt thereof.

The position I have taken is further strengthened by the case of *State, ex rel. Shaffer v. Cole*, *supra*, the syllabus of which reads as follows:

“The provisions of Section 3024, General Code, do not prohibit payment of the usual witness fees to a police officer who, in response to a subpoena, appears and testifies before a grand jury or in the trial of a criminal case in the Court of Common Pleas.”

At the time this case was decided (March 31, 1937), Section 3024, General Code, read as follows:

“No watchman or other police officer is entitled to witness fees in a cause prosecuted under a criminal law of the state, or an ordinance of a city before a police judge or mayor of such city, justice of the peace, or other officer having jurisdiction in such causes.”

At page 340 of the court's opinion the following is said with respect to said statute:

“It must be conceded that this statute is inartistically drawn as to both phraseology and punctuation. It is likewise true that the precise meaning of the language is not free from doubt. As has been indicated already, if this statute is to serve as a limitation upon the general rule and upon the provisions of Section 3014, General Code, it must do so in clear and unambiguous

terms. This it fails to do in so far as a grand jury and the Court of Common Pleas are concerned. Therefore the relator as a police officer is not prevented from obtaining the usual witness fees for testifying before the grand jury and in the trial of a criminal case in the Court of Common Pleas."

The court, however, did not pass upon the question of whether or not the witness fees so paid to a police officer might be retained for his personal use.

Being of this view, I turn now to your specific question as to whether those county officials who are entitled to witness fees may retain same for their personal use or whether such fees must be paid into the county treasury pursuant to the provisions of Section 2983, General Code. Said section reads as follows:

"On the first business day of each month, and at the end of his term of office, each of such officers shall pay into the county treasury, to the credit of the general county fund, on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office during the preceding month or part thereof for official services, provided that none of such officers shall collect any fees from the county; and he shall also at the end of each calendar year, make and file a sworn statement with the county commissioners of all fees, costs, penalties, percentages, allowances and perquisites of whatever kind which have been due in his office, and unpaid for more than one year prior to the date such statement is required to be made."

The term "such officers" refers to the county auditor, county treasurer, probate judge, sheriff, clerk of courts, surveyor and recorder (see Sections 2977 and 2978, General Code). This section requires such officers to pay into the county treasury all fees, costs, etc. collected by their respective offices for official services rendered. The word "fees" appearing in this section does not, in my opinion, include witness fees received by county officials. As pointed out earlier in this opinion county officials are entitled to witness fees only in those instances when attendance is not required as part of their statutory duties. Thus, it would follow that witness fees are not collected for "official services" rendered and in so far as the provisions of Section 2983, *supra*, are concerned, they need not be paid into the county treasury.

However, this office has repeatedly held that public officials may not

retain witness fees for their personal use in those instances in which such persons were paid their salaries and travel allowance by the governmental unit which they represent. In the 1915 opinion, *supra*, the then Attorney General held that assistant fire marshals should not be paid both witness fees and their regular salaries. However, at page 2478 of the opinion he said:

“ \* \* \* When, however, it appears that any assistant fire marshal has accepted fees and mileage as a private citizen for attendance as a witness and has also for the same time received his salary and expenses from the state, he should be required to refund to the state the salary and expenses so paid.”

The 1923 opinion, *supra*, adhered to the same position with respect to retention by a public official of both witness fees and regular compensation. The same view was adopted in the 1934 opinion, *supra*, the syllabus of which reads as follows:

“Where a State Highway Patrolman is subpoenaed to appear before the Grand Jury or in a criminal prosecution before a Court of Common Pleas as a witness in a case in which he made the arrest, such patrolman is entitled to his witness and mileage fees, which in the event he is paid his salary and traveling expenses, while so testifying, by the State Highway Department, should be turned back into that Department.”

The rationale of those opinions is to the effect that public officials are receiving their regular compensation and travel allowance for the period they are acting as witnesses and should not be enriched by retention, for personal use, of witness allowances; such allowances should properly be turned over to the source from which the regular compensation and travel allowance is paid. I have examined the above opinions of this office and see no cause to depart from the settled policy with respect to retention of witness fees by public officials therein expressed.

Accordingly, it is my opinion that:

1. When a county official, other than one who in the discharge of his official duties is required to attend upon the court, is subpoenaed as a witness in a case, he is entitled to the usual witness fees prescribed in Sections 3012 and 3014, General Code.
2. A county official who, in the discharge of his official duties, is

required to attend upon the court is not entitled to the usual witness fees unless he is subpoenaed as a witness in a case pending in a county other than the one in which he was elected or appointed.

3. In the event a county official is paid his regular salary and travel allowance during the period he is under subpoena as a witness, any witness fees received by such official should be turned back to the county treasury from which his salary and travel allowance was paid.

Respectfully,

THOMAS J. HERBERT,

Attorney General.