

deemed a succession and taxable as such under the inheritance tax laws, and was enacted to prevent the taking advantage of the exemption of the year's allowance.

I am therefore of the opinion that in addition to the three thousand (\$3,000) dollars allowed in section 5332-1 G. C. as exempt from the inheritance tax succession, there must also be allowed those things or amounts set forth in section 10654 G. C.

Respectfully,  
C. C. CRABBE,  
Attorney General.

555.

WITNESS FEES—MISDEMEANOR CASES BEFORE JUSTICES, POLICE JUDGES AND MAYORS, WHERE WITNESS RESIDES OUTSIDE COUNTY, NOT ENTITLED TO MILEAGE—IN FELONY CASES WHEN PROPERLY SUBPOENAED, WITNESS MAY RECEIVE MILEAGE—FEES PAYABLE UNDER SECTION 3014 G. C. IRRESPECTIVE OF WHETHER STATE WINS OR LOSES—SECTIONS 3011, 3012, and 3014, GENERAL CODE, CONSTRUED.

**SYLLABUS:**

1. *Under the provisions of sections 3011, 3012 and 3014 of the General Code a witness attending a criminal trial under a subpoena in the Court of Common Pleas, justice's court, mayor's court or police court, entitled to receive one dollar for each day's attendance, and mileage at the rate of five cents per mile for the distance necessarily traveled from his place of residence to the place of giving testimony and return in those cases in which his attendance could have been compelled. The special enactments relating to municipal courts must be examined in each instance in order to determine what witness fees are properly charged therein.*
2. *In misdemeanor cases before justices, police judges and mayors, wherein the witness resides outside of the county, mileage cannot legally be paid.*
3. *In felony cases when properly subpoenaed the witness may receive mileage from his place of residence to the place of trial and return from anywhere in the state. The same is true of misdemeanor cases pending in the Court of Common Pleas.*
4. *Where a witness voluntarily reports to the court upon notice to do the same and receives a subpoena, under such circumstances he is entitled to his statutory mileage and fees and only when his attendance could have been required by compulsory process.*
5. *Where due to the postponement of the case under order of the court, it is necessary for a witness to make another trip, he is entitled to his fees and mileage for the second attendance.*
6. *Witness fees are payable as provided in section 3014 of the General Code irrespective of whether the state wins or loses, and it is not necessary to await the final determination of a proceeding in error in order that such fees may be paid.*
7. *An employe of the state attending a trial in line of his duty cannot receive mileage and also be paid his traveling expenses from the state. In the event mileage is collected it should be applied to such expense.*

COLUMBUS, OHIO, July 5, 1923.

HON. JOHN E. MONGER, *Director of Health, Columbus, Ohio.*

DEAR SIR:—You have requested my opinion as follows:

“Following is a list of questions submitted to me by the Chief of the Division of Laboratories.

In explanation of these questions I would inform you that the laboratories of the Department of Health do all of the analytical work for this Department, the Department of Agriculture and the Prohibition Commissioner. As a result of this work, our chemists are very frequently called into court as witnesses in cases prosecuted by the state. I shall be very glad to have your answers to these questions for the guidance of these witnesses:

- (1) Is the amount of mileage to be paid by the court established by any state regulation or each court set its own rate? Many of the justices of the peace and mayors ask the chemist what rate they should pay.
- (2) Where the chemist desires to collect from the court and no subpoena had been issued on account of the emergency character of the trial is it possible to have a subpoena made out after the chemist arrives at the court?
- (3) Where a case is appealed is it permissible for the court to pay any expenses of the chemist at the time of the first trial or must such expenses be paid when the case is finally settled?
- (4) Where a case is postponed or otherwise delayed and the chemist makes several trips can he collect from the court for each trip?
- (5) When the state loses the case is it possible for the court to pay any expense of the chemist?
- (6) It is optional with the chemist to submit his expense by mileage or by actual expenses or is this point to be decided by the court in each instance?

In considering your first inquiry it will be necessary to examine the provisions of section 3011, 3012 and 3014 of the General Code.

Section 3011 specifies that every person subpoenaed as a witness shall be allowed one dollar for each day's attendance and the mileage allowed in courts of record in all cases not specifically designated in that chapter.

Section 3012 provides that for each day's attendance in civil cases in a court of record a witness shall receive one dollar for each day's attendance, and five cents for each mile necessarily traveled from his place of residence to the place of giving such testimony and return providing the distance be more than one mile.

Section 3014, which relates to fees in criminal cases, 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, 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 al-

lowed 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."

From the foregoing it will be seen that there is a fixed rule provided by statute for the charging of fees and mileage in criminal cases, and applies to mayors' courts, police courts, justices' courts and courts of record. The rule is the same as to amount of fees. However, it must be kept in mind that the legislation establishing municipal courts must be examined in each instance in order to determine what, if any special provisions, have been made in reference to witness fees in such courts. Of course, if there is no special provision upon the subject then the foregoing rule relative to justices and mayors will apply to said municipal court.

Another 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. If it be a misdemeanor case before a justice, mayor or police judge, the jurisdiction extends throughout the county. (Section 13495 G. C.) In this event a witness residing in the county attending the trial would be permitted to receive mileage for the distance traveled from his residence to the place that court is held and return. In the event that it is a felony case then, of course, compulsory process can be had in any county in the state and in that event mileage could be charged for the full distance the witness is compelled to travel.

It will further be noted that a witness residing in any county of the state may be compelled to attend any criminal trial in the Court of Common Pleas (section 13662), whether the case be a felony or misdemeanor.

It was held in the case of *Wylie v. Duffy*, 1 N. P. (N. S.), 353:

"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.

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."

From the foregoing it seems to be clear that in those cases in which attendance may be compelled the witness may receive his fees and mileage, when subpoenaed, even though he voluntarily reports. However, it appears to be equally clear that when his attendance cannot be compelled by compulsory process he cannot receive mileage, but when subpoenaed may receive one dollar for each day's attendance. It is believed what has been said will dispose of your first two inquiries.

In reply to your third inquiry you are referred to section 3014 heretofore quoted, which provides that the fees of witnesses shall be paid upon the certificate of the Clerk of Courts if the case is pending before the Common Pleas Court, and upon the certificate of the justice of the Peace or Magistrate in cases pending before such tribunals. Said fees to be paid from the county treasury in state cases and from the municipal treasury in ordinance cases,

Therefore, you are advised that it is not necessary for the witness to await the final settlement of the case when error proceedings are instituted, in order to receive his proper fees and mileage.

In reply to your fourth question you are advised that sections 3011 and 3012 above referred to, which relate to fees and mileage, each provide "for each day's attendance" certain fees and mileage shall be paid. This would indicate that in the event a case is postponed that the witness is entitled to his fees and mileage in a proper case for each day that he is required to so attend. Of course, in the event that he attended on two different days but was required to travel but once, in that event he would not be entitled to mileage for both days.

In reply to your fifth question you are advised that section 3014, which provides for the method of payment of witness fees and mileage, makes no distinction as to cases wherein the state fails and in cases wherein a conviction is had.

In reply to your sixth inquiry you are advised that it is the duty of the court, or the clerk thereof, when there is such, to determine the amount of fees and mileage to which a witness is entitled based upon the information and evidence submitted by the witness to the court.

This opinion is written upon the assumption that you are making no claim for fees as expert witnesses, therefore, no consideration has been given to this phase of the question.

What has been said in the foregoing, of course, relates to persons generally who attend as witnesses as contradistinguished from persons who are in the employ of the state. In an Opinion of the Attorney General found in the Reports for 1915 at page 2477, it was held:

"When the services of assistant fire marshals are required as witnesses in the trial of criminal cases with which they have heretofore 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 an opinion rendered by this department and found in the Reports for 1916 at page 872, it was held:

"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."

From the foregoing it will be seen that if the attendance of the chemists from your department is in line with their duty for the state and they are receiving compensation and expenses, they should receive no fees or mileage whatever. On the other hand there seems to be no objection to the charging of such fees and mileage as a part of the costs, and in the event that the mileage when collected is applied to the expense of the chemist in attending the trial, this, of course, would not be improper. In other words if the employe does not receive mileage in addition to his expenses there seems to be no objection. However, it would seem that he cannot properly under any circumstances receive the one dollar and his compensation at the same time. It is suggested that in view of the foregoing the most practical method would be for the expenses of such witnesses to be paid from the traveling expense fund of your department or from the department which is insti-

tuting the prosecutions. However, as above stated, there would seem to be no objection to the collection of the mileage in a proper case and applying it to the expense of such employe.

Respectfully,

C. C. CRABBE,  
*Attorney General.*

556.

POLLING PLACES—FOR TOWNSHIPS SHOULD BE WITHIN SAID TOWNSHIP—SECTION 4844 G. C. CONSTRUED.

*SYLLABUS:*

*Under section 4844 G. C., polling places for township precincts are to be at such places within the township as the trustees shall determine to be the most convenient of access for the voters of such township precinct.*

*Polling places for a municipal or ward precinct of a village are to be located at such places as the council thereof shall designate, whether within or without the precinct.*

*In registration cities, polling places are to be designated at such places within the precinct as the deputy state supervisors shall designate.*

COLUMBUS, OHIO, July 5, 1923.

HON. THAD H. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—The receipt is acknowledged of your communication of recent date requesting the opinion of this department upon the following:

“We are asked for a construction of section 4844 G. C. The question asked of us comes from the City of Akron, where they desire to know whether the polling place for a city precinct may be located outside of that precinct, legally.”

Section 4844 G. C., about which you inquire, provides as follows:

“Elections shall be held for each township precinct at such place within the township as the trustees thereof shall determine to be most convenient of access for the voters of the precinct. Elections shall be held for each municipal or ward precinct at such place as the council of the corporation shall designate. In registration cities, the deputy state supervisors shall designate the places of holding elections in each precinct.”

In 67 O. L., 47, enacted April 12, 1870, it was provided that elections were to be held

“At such place within the township as the trustees thereof shall designate; and for each ward precinct, at such place *therein* as the council of the proper city or village shall designate.”