

Opinion No. 57-170

July 15, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilario Rubio, Assistant Attorney General

TO: Mr. Paul W. Robinson, District Attorney, Second Judicial District, County Court House, Albuquerque, New Mexico

QUESTIONS

QUESTIONS

Under § 36-3-13, N.M.S.A., 1953 Compilation, in cases where a justice of the peace has been disqualified and another justice of the peace has been designated, does the disqualified justice of the peace pay over to the designated alternate all costs and fees except those disbursed for service of process?

CONCLUSION

Yes, both in criminal and civil cases.

OPINION

ANALYSIS

Section 36-3-13, N.M.S.A., 1953 Compilation, reads as follows:

"Upon the designation of an alternate to the disqualified justice as hereinabove provided the disqualified justice shall forthwith pay over to the said designated alternate all costs and fees received by such disqualified justice and not disbursed for the service of process and shall further promptly pay over all costs thereafter received by him. The designated alternate shall proceed to try said cause and conduct any further proceedings therein, and the designated alternate may not be disqualified by either party except for cause."

Volume 34 of Words and Phrases, at pages 146 and 147, defines the word "process" as follows:

"Any means of acquiring jurisdiction is properly denominated 'process.' Alexander Lumber Co. v. Kellerman, 192 N.E. 913, 916, 358 Ill. 207.

The word 'process' is a generic term and is defined as a means of compelling the defendant to appear in court. McArdle Real Estate Co. v. McGowen, Sup., 163 A. 24, 26, 109 N.J.L. 595.

'Process' is not required for protection of plaintiff, but is notice for sole benefit of defendant to afford him opportunity to be heard on claim made against him in court of competent jurisdiction, and at regular term thereof, duly constituted by law. *Mosaic Templars of America v. Gaines, Tex.*, 265 S.W. 721, 722."

Also on page 148 of the same volume of *Words and Phrases*, "process" is defined as follows:

"'Process' is defined by Blackstone to be the means of compelling a defendant to appear in court, and although literally, perhaps, it can only be strictly characterized as the initial step in a case, it has come to be indicated by the two terms, 'mense' and 'final' which are used to designate the two stages in the progress of a cause in which it is employed. Process is always directed to some officer to be executed, and is strictly the mandate of the court to the officer, commanding him to do certain things or perform certain services within his official cognizance, and it is this character of it and the injunctions it contains that makes his return evidence.' *Utica City Bank v. Buell, N.Y.*, 9 Abb. Prac. 385, 390, 17 How. Prac. 498, 501."

The pertinent language of § 36-3-13 is very clear, specific and mandatory that all costs or fees received by such disqualified justice and not disbursed for the service of process shall be paid over promptly to the designated alternate justice of the peace.

You state that the procedure in your county has been to turn over to the designated alternate \$ 2.00 of the fee at the time disqualified, and the disqualified justice retains the balance for his work in connection with the preparation of the papers. This procedure or practice is illegal and should be discontinued.

In view of the wording of the statute and other authority cited, it is our conclusion that § 36-3-13 is explicit and that a disqualified justice of the peace cannot retain any fees or costs collected by him in any criminal or civil case except those costs or fees disbursed for service of process.