

Opinion No. 16-1772

April 3, 1916

BY: FRANK W. CLANCY, Attorney General

TO: Guilfoil-Mossman & Company, Albuquerque, New Mexico.

As to compensation to be paid to sheriffs and jailers, and as to collection of fees and mileage by sheriff for serving tax execution.

OPINION

{*342} I have received your letter of the first of April, and in view of your quite positive statement that my answering your questions will not be objected to by Mr. Remley, the District Attorney, I will give you my views as to the matters mentioned by you.

You say that you would like to know if the sheriff of Union County is entitled to make a regular monthly or annual charge during his entire term of office, for the employment of jail guards, when such employment was not made or had with the approval or authority of the county commissioners or the judge of the district court. You say that the employment of such jail guards is independent of and in addition to the employment or payment to the sheriff for the employment of a jailer, which is covered, as you understand it, by definite provision in the salary bill passed at the last session of the legislature.

I do not think that the salary fixed in the act of the legislature for jailers is to be paid to the sheriff at all. This question was presented to me in June, 1915, and the opinion which I then expressed was as follows: --

"As to what should be allowed for the county jailer, I am of opinion that this cannot properly be included in the sheriff's account, although it is true that he is to be appointed by the sheriff. I have reached the conclusion, taking into account the title of the bill which is 'An Act Relating to County Officers,' that the effect is to create a new county office of county jailer. If we do not so hold, then the section about compensation of jailers would be invalid on account of the constitutional provision that the subject of every bill shall be clearly expressed in its title and no bill embracing more than one subject shall be passed, except general appropriation bills and bills for the codification or revision of the laws. This being so, the County Commissioners should make their settlement {*343} with the jailer himself, and under the provisions of Section 9 he must be given credit up to the limit of compensation fixed in Section 4, even though he may have been employed and paid at a lower rate."

As to the jail guards, the provision in Section 4 of the act that none shall be employed except upon order of the district judge, or in his absence, by the board of county commissioners, cannot possibly be made applicable to guards who had been employed

prior to the passage of the act as there had been no such provision of law prior to that time, and yet the employment of jail guards might have been necessary. If the sheriff actually employed jail guards. I am forced to the conclusion, under the language to be found in Section 9, that the sheriff might be allowed \$ 2.00 per day for such guards during the time that they served, even though he may have paid them less than that amount. You will notice that in Section 9 it is provided that upon the accounting with county officers, each officer may take credit for all amounts allowed him in any form, or on any account, under the terms of this act, as applicable to the time prior to the passage thereof. The employment of the jail guards would seem to be in the same category as the employment of deputy county clerks, provided for in Section 2 of the act, and as to those deputies, it has been held that the clerk should be allowed, up to the time of the passage of the salary bill, the full amount of the maximum provided for deputies' salary. There is a like provision as to employment of deputies upon authority of the board of county commissioners, but under Section 9, the county clerks have been allowed the maximum of the salary fixed for deputies.

Of course, after the passage of the salary bill, the compensation of the jailer and of the guards must be fixed by the county commissioners and would be payable to those persons and not to the sheriff, although the sheriff is to appoint and control them.

You next ask whether the sheriff is entitled to fees received by him for service performed in a city or town court where he has made arrests and where fines have been assessed against defendants and paid by them. You say that the sheriff claims that such fees belong to him as being personal transactions of no interest to the county. He must have performed the services by virtue of his being sheriff. He could not have acted in any other capacity and he is no more entitled to those fees than to any other fees which he might collect in any other class of cases. Section 1 of Article X of the Constitution distinctly provides that no county officer shall receive to his own use any fees other than the annual salary provided by law, and that all fees earned by such officer must be collected and paid into the county treasury.

You further say that the sheriff of Union County was, by the county treasurer, designated as a deputy county treasurer and given what was termed "tax executions" for collection, such executions being issued on account of delinquent taxes, and that the sheriff collected commissions for the collection of taxes represented by such executions, and an additional fee of \$ 1.50 for service and return. You say that this seems muddled to you as you had never {**344*} before heard of such an instrument as a tax execution, but that the only point of interest is as to whether the sheriff would be entitled to retain the commission collected by him and the fees for service and return.

The so-called tax executions originated under the provisions of Sections 4062 and 4064 of the Compiled Laws of 1897 and the appointment of deputies to perform the service of collection is provided for in said section 4064. That section also provides that each deputy shall receive ten per cent of the amounts collected and paid over by him, and in case of a sale, the fees and mileage allowed a sheriff for levy and sale on executions, all of which must be collected from the delinquent, together with the whole amount of

the taxes and interest. These two sections, however, have been omitted from the Codification of 1915 and are no longer in force. Under Section 4062 the collector was authorized to collect all taxes by distraint and sale of personal property and the tax list was his warrant for such distraint. This provision is reproduced, in substance, in Section 5493 of the Codification, which was a part of Chapter 84 of the Laws of 1913. Up to 1913, Section 4062 appears to have been in force and I am inclined to the belief that Section 4064 continued in force until it was repealed by its omission from the Codification. This being so, the collector had authority to appoint any person to act as his deputy in making these collections, and the fact that he selected a person who happened to be sheriff would not deprive that person of his right to the compensation fixed by the statute. The service would not be performed by the deputy as sheriff and I do not believe that he would be required to account for the commission and fees so received under the provision of Section 1 of Article X of the Constitution. They would not be fees or emoluments earned by him as sheriff. I will send a copy of this letter to Mr. Remley so that he may understand why I have written it.