

## Opinion No. 31-104

March 28, 1931

**BY:** E. K. Neumann, Attorney General

**TO:** Mr. Henry S. Glascock, Assistant District Attorney, Gallup, New Mexico.

{\*56} This is in reply to your letter of March 25, 1931 in which you ask the following questions:

1. Please advise me whether, in your opinion, the sheriff is accountable for fees retained by deputies who receive the process without his knowledge.
2. Please advise me if, in your opinion, the sheriff is permitted to turn process forwarded to him over to an unpaid deputy who is to serve the same, making his return by affidavit and retaining the fees therefor.

Answering your first question in a broad, general way I should say "Yes."

"When sheriff's fees are given by statute, they are given to the sheriff, {\*57} although the services may be rendered by a deputy." 35 Cyc. 1557.

"The official acts of a deputy or **his acts under color of office** are considered the acts of the sheriff himself." 25 Am. & Eng. Enc. of Law 677.

So long as a special deputy sheriff acts in his official capacity in the service of process and charges fees therefor, it is my opinion that he must account for such fees to the sheriff and the sheriff, in turn, must account to the county.

This question, however, necessarily involves the question of whether or not a special deputy sheriff may in his capacity as a private individual serve civil process, make his own arrangements with the party for whom process is served in regard to compensation, and retain moneys so collected. It is my opinion that he may. There seems to be nothing in our existing statutes to prevent him from so doing, and sheriffs (which should also include deputy sheriffs) need not account for "amounts received for services in his individual rather than official capacity". Drexel v. Douglas Co., 62 Neb. 862, 87 N. W. 1053. If the return of service is made by affidavit, not mentioning the fact that he is a deputy sheriff, that, in my opinion, would be evidence that he made the service in his individual rather than his official capacity. However, I believe much doubt concerning this matter might be avoided by omitting from the commission of special deputies any authority to make service of civil process. This would leave them free to serve process as private individuals and to collect for themselves whatever fees and expenses parties for which such process was served would agree to pay. I see no reason why this could not be done.

"Special Deputy. But although a principal may not limit the authority of a general deputy, he may specially depute an agent to do a particular act." 9 Am. and Eng. Enc. of Law 380.

In answering your second question. it would be my opinion that if the summons or other process is handed to the sheriff for service, the sheriff is personally responsible for its being properly served, and would therefore be entitled to the fees therefor and accountable to the county for fees so collected, whether he makes the service himself or delegates his authority to someone else.

"For all civil purposes the acts of a deputy sheriff or constable are those of the principal, and hence the sheriff or constable is liable for the acts, defaults, torts, or other misconduct done or committed by his deputy colore officii, his liability in this respect extending not only to acts of misfeasance but also to official nonfeasance.

"A sheriff or constable is liable for the official misconduct, defaults, etc., of a person whom he has held out as his deputy, and who has acted as a deputy, with the consent of the sheriff or constable, and been generally reputed to be such, although such person may not have been legally appointed a deputy, or may not have qualified in the manner required by statute." 35 Cyc. 1618.

Since the sheriff must accept responsibility for the acts of his deputies and is entitled to the fees collected by his deputies (35 Cyc. 1557, cited above), he would under our existing statutes be accountable to the county for such fees, regardless of whether the return of the deputy is made by certificate or affidavit.

Under my view of the law, the only cases in which special deputies may retain fees for service of civil process is when the process is delivered to them personally for service and they may make such service as private individuals under a special agreement as to compensation with the parties for whom the process is served.

Trusting that I have answered fully the questions submitted in your letter, I am

By Quincy D. Adams,

Asst. Att'y General