



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

GROVER SELLERS
~~XXXXXXXXXXXXXXXXXXXX~~
ATTORNEY GENERAL

*Superseded
by H-107*

Honorable Geo. H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Dear Sir:

Opinion No. 0-7327
Re: Authority of the Comptroller of
Public Accounts to issue warrants
in payment of the certificates
described herein.

Your request for an opinion upon the above question has been received and considered by this department. The facts from the attached witness certificates, letters and affidavits are as follows: The Assistant Criminal District Attorney of Tarrant County, Texas, wrote a letter to claimants, J. C. Riley and Harvey Riley of Clarendon, Texas, asking them to appear before the grand jury of Tarrant County to testify concerning an alleged felony. The claimants appeared and testified and the Assistant Criminal District Attorney made an affidavit to such facts and further stated that such testimony was material and that no subpoena was issued to either claimant. The claimants seek to recover their statutory fees.

The authority of the Comptroller of Public Accounts to approve the above mentioned claims for payment must be found in Article 1036, Code of Criminal Procedure, as amended in 1941. The pertinent provisions of said Article are as follows:

"Witnesses shall receive from the State, for attendance upon District Courts and grand juries in counties other than that of their residence in obedience to subpoenas issued under the provisions of law Three (3) Cents per mile, going to and returning from the Court or grand jury, by the nearest practical conveyance, and Two Dollars (\$2) per day for each day they may necessarily be absent from home as a witness to be paid as now provided by law; and the foreman of the grand jury, or the District Clerk, shall issue such witness certificates therefor, after deducting therefrom the amounts advanced by the officers serving said subpoenas, as shown by the returns on said subpoenas; which cer-

tificates shall be approved by the District Judge, and recorded by the Clerk in a well-bound book kept for that purpose; provided, that when an indictment can be found from the evidence taken before an inquest or examining trial, no subpoena or attachment shall issue for a witness who resides out of the county in which the prosecution is pending to appear before a grand jury. When the grand jury shall certify to the District Judge that sufficient evidence can not be secured upon which to find an indictment, except upon testimony of nonresident witnesses, the District Judge may have subpoenas issued as provided for by law to other counties for witnesses to testify before the grand jury, not to exceed one witness to any one fact, nor more than three (3) witnesses to any one case pending before the grand jury."

When the foregoing provisions of the statute are considered together, as they must, it is apparent that the State of Texas, under the facts above stated, does not pay the mileage and per diem therein prescribed to a witness who attends a grand jury without the county of his residence unless he does so in obedience to a subpoena "issued under the provisions of law." The statute prescribes the procedure to be followed in obtaining a subpoena for such a witness:

"When the grand jury shall certify to the District Judge that sufficient evidence cannot be secured upon which to find an indictment, except upon the testimony of non resident witnesses, the District Judge may have subpoenas issued as prescribed by law to other counties for witnesses to testify before the grand jury . . ."

Article 461, Code of Criminal Procedure defines a "subpoena." The pertinent part of said Article is as follows:

"A 'subpoena' is a writ issued to the sheriff or other proper officer commanding him to summon one or more persons therein named to appear . . . on a certain day . . . before . . . the grand jury . . . The writ shall be dated and signed officially by the court or clerk issuing same, but need not be under seal."

By the terms of Art. 463, C. C. P. the district clerk or his deputy is the officer designated to issue subpoenas to other counties.

We have found no statute empowering a county attorney, district attorney or criminal district attorney or an assistant of either of said officers to issue a subpoena for a witness to appear before a grand jury.

The undisputed facts are that no subpoena of any character was ever issued by the district clerk of Tarrant County for either of said witnesses or that the grand jury of said county ever applied to the Judge of the Criminal District Court of said county for a subpoena for either of them, but that both witnesses appeared before the grand jury upon the written request of an Assistant Criminal District Attorney of said county.

In view of the foregoing, we are forced to the inevitable conclusion that these claims for witness fees and mileage may not be legally paid by the State of Texas. Any other conclusion would do violence to the plain provisions of the statute and permit payment of such fees and mileage to a witness for attending a grand jury without the county of his residence upon the request of some officer, other than in obedience to a subpoena issued by a district clerk upon the order of the district judge of his county, as provided by Article 1036, as amended.

We are herewith returning both witness certificates and the affidavits attached thereto.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By s/James Anderson, Jr.
James Anderson, Jr.,
Assistant

JA:zd:wc
Encl.

APPROVED SEP 5, 1946
s/Carlos C. Ashley
FIRST ASSISTANT
ATTORNEY GENERAL

Approved Opinion Committee By s/BWB Chairman