

COURTS: Witnesses must be served personally; service
SERVICE: by telephone, etc., is not legal service.

June 2, 1948



Colonel Hugh H. Waggoner
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Colonel Waggoner:

This is in reply to your request of recent date for an opinion which reads as follows:

"Frequently the attorney for the plaintiff or defendant in a civil case will leave a subpoena at one of our Troop Headquarters for a member of the department or will telephone the Troop Headquarters that he has a subpoena for the officer to appear in Civil Court on a certain date. We request your opinion as to whether or not this constitutes legal service and if the Patrol is obligated to forward the subpoena to the officer or require the officer to appear in court in answer to a subpoena of which they have been informed by telephone."

Section 1908, R. S. Mo. 1939, provides as follows:

"The service of a subpoena to testify shall be by reading the same or delivering a copy thereof to the person to be summoned: Provided, that in all cases where the witness shall refuse to hear such subpoena read or to receive a copy thereof, the offer of the officer or other person to read the same or to deliver a copy thereof, and such refusal, shall be a sufficient service of such subpoena. The return shall show the manner of service; and in civil cases, if the witness reside at a greater distance than forty miles from the place of trial,

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it shall be so stated in the return, and also whether his legal fees have been tendered or paid, and if served by an officer his return shall be conclusive of the facts therein stated; if served by a private person, the return shall be verified by affidavit, which shall be received as evidence, and such affidavit may be made before the sheriff of the county where such service is made."

We are unable to find a Missouri case wherein the first part of Section 1908, supra, has been construed.

In respect to the practice of leaving subpoenas at troop headquarters for patrolmen, we think that such service is insufficient. In the case of *Enos v. St. Louis and San Francisco Ry. Co.*, 41 Mo. App. 269, a statute providing for service on the plaintiffs was construed to mean service on the plaintiffs only and proper service could not be obtained by leaving the papers with an agent or attorney. Section 1908, supra, provides for service on the prospective witness and makes no provision for subpoenas being left with any other person or at the witness' place of employment or at his home.

We think that this statute contemplates personal service on the person who is to testify on the date set forth in the subpoena. We think this view is fortified by the language in the second part of Section 1908 which provides for a return showing the manner of service, if by an officer or by affidavit if served by a private person. A private person could not properly verify service when he would be without actual knowledge that the summons had come into the hands of the person named therein.

In the case of *Ex parte Terrell*, 95 S. W. 536, the court considered the proposition of service of a subpoena over the telephone. In the course of this opinion the court said, l.c. 537:

" * * * First, whether the service of a subpoena could be made over the telephone; and, second, concede that such service is authorized by our statute, judgment against applicant could not be made final in the first instance. When our statutes were passed on the subject of subpoenas and their service, it was before the invention of

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telephones - at least before their use in this state. Of course, the law originally contemplated personal service. The statute, in article 515, Code Cr. Proc. 1895, says: 'A subpoena is served by reading the same in the hearing of the witness, and the officer having the subpoena shall make due return thereof,' etc. There are other statutes in connection with this showing that the officer is entitled to fees for service, and certain fees for mileage traveled in making the service. Indeed, all of our statutes on this subject appear to contemplate a personal service, not only by reading the process in the hearing but in the presence of the witness. However, it is urged that service by phone is within the letter and spirit of our statutes on the subject of serving process. If this were clearly true, then the law might be applied to the new invention, or the new invention applied to the law. But we do not think so. In such case service by phone, the party served being without the view, could only be identified by the voice of the party on whom the service should be made, and this could only apply to but few cases, only to such as the officer making the service could know and recognize the voice, and this would be a rather unsatisfactory method of identification at best. The best means of identification would be recognition of the person on whom the service was made; such recognition based on personal view of the witness by the officer. Accordingly we hold that service by phone is not contemplated or embraced within our statutes on the subject of service of subpoena by an officer on a witness. *Clay v. State*, 40 Tex. Cr. R. 593, 51 S.E. 370; *Tooney v. State*, 5 Tex. App. 187; *Sullivan v. First Nat'l. Bank* (Tex. Civ. App.) 83 S. W. 421. None of these cases are exactly in point, but they are illustrative of the question here before the court."

We are of the opinion that the view taken by the Texas Court is the correct one and that personal service furnishes

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the only satisfactory method of knowing that service has been had on the person named in the subpoena.

Sections 1903-1905, R. S. Mo. 1939, provide for various penalties for nonattendance and means of enforcing attendance of a person summoned as a witness in a cause. In order to insure attendance of desired witnesses and respect for the summons of courts, together with protection to the person being summoned, we think it proper to view the statute providing for service to mean personal service upon the individual. This opinion is limited to service of subpoenas out of a court of record in this state.

CONCLUSION

It is the opinion of this department that service on a patrolman by leaving a subpoena at troop headquarters, or by telephone to the patrolman, is not legal service as contemplated by Section 1908, R. S. Mo. 1939.

Respectfully submitted,

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APPROVED:

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