Costs in Habeas Corpus Proceedings. Habeas Corpus Proceedings, Brought in the County Other Than Where Prisoner is Confined. A District Judge, Designated by the Supreme Court to Hear Return on Habeas Corpus Should Certify Per Diem and Mileage of Witness to County Where Proceedings Originated. Costs Should be Paid by County in Habeas Corpus Proceedings Where Its Sheriff is Made Defendant, as Sheriff.

Where a prisoner in the custody of a sheriff of one county makes an application to the supreme court for a writ of Habeas Corpus, and the judge of another district is designated by the supreme court to hear the return on such writ, the clerk of the district court where the return is made should issue warrants in payment of witness fees, and the district judge should certify

the amount of the same to the county where the case originated for the purpose of being remunerated by the said county.

Helena, Montana, June 9, 1908.

Hon. J. W. Speer,
County Attorney,
Great Falls, Montana.

Dear Sir:—

I have your letter of June 1st, 1908, and the same has had my careful consideration. On May 18th, 1908, I addressed an opinion regarding the matter of the proper disposition of the costs incurred in the hearing of a habeas corpus proceeding entitled The State of Montana ex rel Isaac Hill vs. Ed. Hogan, as sheriff of Cascade county, in which I held that Lewis and Clark county should be reimbursed by Cascade county for the witness fees and per diem paid by Lewis and Clark county in said hearing.

After carefully considering your opinion of April 18, 1908, directed to the county auditor of Cascade county, in which you hold that Cascade county is not a party to the case, and therefore not liable for costs, together with a careful examination of the authorities on this question, I am constrained to reaffirm my opinion of May 18th, given to the county attorney of Lewis and Clark county. The authorities are widely at variance as to the nature of the action of habeas corpus. Many of the authorities holding squarely that it is a civil action in its nature; others holding that it is criminal, and still others holding that its nature is to be determined by the circumstances from which it arises. A case wherein a father institutes habeas corpus proceedings on behalf of a child detained by some other person, though not in confinement, is held to be a civil action. The case of a prisoner seeking release through this proceeding from a peace officer is held to be in its nature a criminal action.

The court in Foulke vs. Board of Commissioners of Arapahoe County, 48 Pac. (Col.) 153, refused to hold on the question as to whether a habeas corpus proceeding is civil or criminal in its nature, but in this particular case says that if it is a civil action then the county is not liable for costs, and if it be a criminal action that the plaintiff therein has not complied with the statute so as to make the county liable for casts. It has been held by the supreme court of Tennessee in the case of Henderson vs. Walker, 47 S. W. 430, that where a prisoner is discharged on habeas corpus proceedings the costs should be paid as if acquitted by a jury, indicating that the proceeding is in the judgment of this court of a criminal nature. And the court further holds that if the prisoner is not discharged the disposition of the costs is a matter resting within the discretion of the court. Upon reading the statutes of this state governing the disposition of costs, and the opinions of the courts interpreting them, we find that the action of habeas corpus is properly designated as a special proceeding in the nature of an action.

See State ex rel Newell vs. Newell, 13 Mont. 302.

Section 1851 of the Code of Civil Procedure reads as follows:

"Costs are allowed of course to the plaintiff, on a judgment in his favor, in the follows cases * * * :

1. * * * *
2. * * * *
3. * * * *
4. In a special proceeding."

Section 4648, Political Code, provides that witnesses are entitled to perdiem and mileage for appearing and testifying in any civil action or proceeding before any court of record.

Section 4683 of the Political Code provides that the costs incurred in criminal actions, when removed from one county to another before trial, must be borne by the county where the indictment or information was found.

In the case which we are considering the prisoner was discharged.

The case of Henderson vs. Walker, supra, holding that the costs should be paid where a prisoner is discharged, as if the defendant were acquitted by a jury, would seem to be authority for payment of costs by the county. Lewis and Clark county would therefore be liable for mileage and per diem of witnesses, but Lewis and Clark county had no more interest in the case, though tried by one of its judges, than any other county in the state. The application for a writ was previously made in Cascade county, and, being denied, a new application was made to the supreme court of the state and a district judge of the first judicial district was designated by the supreme court to hear the return upon said writ of habeas corpus. The supreme court might, at its pleasure, have designated any other district judge in the state to hear and determine the matter and Lewis and Clark county, in my opinion, is no more liable to bear the burden of the costs accruing than any other county. Neither Lewis and Clark county, nor any of its officers, were parties to the proceeding. The sheriff of Cascade county, as sheriff of said county, was a party to said action. If the proceedings is held to be a civil case in its nature then the costs must follow the judgment, and the sheriff of Cascade county, as sheriff of Cascade county, would be responsible for the costs. If the case is criminal, then upon the discharge of the petitioner, the county must bear the burden of the costs. While we have no statute governing the matter, it seems to be good policy and good law that officers acting under process of a court should be shielded from the burden of costs and other penalties incurred in testing the validity of orders and process which they in good faith seek to carry out and enforce, which enforecement is required of them by law and by their official oaths. Such a statute has been passed by the legislature of Iowa and is construed by the supreme court of that state in Hughes vs. Applegate, 98 N. W. 645.

The defendant Hogan was sued, not in his individual capacity, but as an officer of Cascade county. It is only because Hogan is sheriff of Cascade county that he was made defendant. The proceeding was

brought as the outgrowth ofa criminal action begun in Cascade county and at the time the application was made the prisoner was in the custody of the sheriff of Cascade county, who was holding said prisoner under process of some court of Cascade county. The sheriff had no volition in the matter, it was not discretionary on his part to restrain or discharge the prisoner, being commanded by an order of court to hold him in custody. And if the process under which he was acting was found to be void or insufficient, not the sheriff, the individual, but the county under whose process he was acting, should bear whatever burden follows that deficiency. We think the clerk of the court of Lewis and Clark county acted properly in issuing warrants for the payment of witness fees and mileage in this case, as the witnesses were in attendance in response to subpoenas issued out of the court of which he was clerk.

If we are correct in our interpretation of the law governing the question above discussed, the only question remaining for determination is as to whether Lewis and Clark county or Cascade county should finally bear the burden of the costs accruing in this proceeding. The statute is silent with regard to that question in special proceedings, but it is clear and explicit in civil and criminal actions removed from one county to another before trial. (See Session Laws 1903, 2nd Extraordinary Session; also Hughes vs. Applegate, supra).

See also Sec. 4682, Pol. Code.

See also opinion to Hon. S. W. Stewart, dated March 12th, 1908, copy enclosed; also opinion addressed to Hon. J. F. Wegner, chairman board county commissioners, Helena, Montana, dated August 1st, 1905, reported in Opinions Attorney General 1905-06, page 163.

See also Cascade Co. vs. Lewis and Clark Co. 34 Mont. 351.

From the statement of facts before us we are unable to determine whether the crime charged was a felony or a misdemeanor, and whether the person was waiting trial in the district court, or had been finally sentenced by a justice of the peace, so we are unable to say as to whether or not, through the agency of the writ, the case was removed before final trial from Cascade county.

The petitioner herein was arrested for some crime committed in Cascade county, and was there confirmed by a proper officer of said county. A petition for a writ of habeas corpus was addressed to the judge of the distrist court of Cascade county, and the writ did not issue on this application, or if it did, it was quashed upon the return. Cascade county, alone, was interested in the detention and punishment of the prisoner.

The statement may be safely made that the witness fees in this hearing are a proper charge against some county, and not being directed by statute in this particular case as to where the burden properly rests, we reason from analogy, and in an endeavor to determine and follow the trend of legislative action in somewhat similar cases, we are forced

to the conclusion that Cascade county should reimburse Lewis and Clark county for the payment of witness fees herein.

Bearing in mind the two statutes last above referred to, and the interpretation given to them in the two opinions of this office construing the same, the conclusion reached above seems sound and logical.

Very truly yours,

ALBERT J. GALEN,
Attorney General.