

**Mortgages Upon State Land—Sheriff's Fees in Connection With Foreclosure Proceedings.**

Chapter 124 of the Laws of 1917 construed to deny compensation to a Sheriff for services rendered in connection with the foreclosure of mortgages to the State, but to allow a Sheriff reimbursement for expenses incurred in performing such duties.

H. V. Bailey, Esq.,  
Register State Lands,  
Helena, Montana.

My dear Mr. Bailey:

You have asked for an opinion as to the meaning of the word "fees" as used in Section 12 of Chapter 124 of the Session Laws of 1917, the Farm Loan Act, and whether it includes mileage so as to prohibit the Sheriff from charging mileage in connection with foreclosure proceedings brought by the State under this Act.

Section 12 provides in part as follows:

"No fees of any kind shall be charged \* \* \* by Sheriffs for the institution of actions to foreclose such mortgages, or upon sales of lands under such foreclosure proceedings."

In the case of *Roberts v. Board of Commissioners of Brown County (Ind.)*, reported in 99 N. E. 1015, the court said:

"If the mileage allowed by law to sheriffs is to be considered as a fee provided by law on account of services rendered in the discharge of his official duties, such mileage belongs to the county and does not belong to the sheriff. \* \* \* On the other hand, if the mileage allowed by law is not intended as a fee or compensation to the officer for the performance of any official act, but is intended, as claimed by appellant, to reimburse him for his expenses incidentally incurred in the service of such writs, then such mileage, when collected, would belong to the sheriff personally and not to the county."

It was contended in that case that as defined by lexicographers and as construed by judicial opinions, mileage means a reimbursement to public officers for expenses incurred in the performance of official duties. And the following definitions of the word "mileage" are cited: "A compensation of so much per mile allowed to officers traveling on the public business, or to any person authoritatively summoned in respect to a matter of public importance, as to a witness." Cyclopedic Law Dict. p. 594. "Traveling expenses which are allowed to witnesses, sheriffs, and bailiffs." Wharton's Law Lexicon (7th Ed.) p. 525. "An allowance for traveling expenses at a certain rate per mile." Webster's International Dictionary, "mileage." Payment allowed to a public functionary for the expenses of travel in the discharge of his duties, according to the number of miles passed over." Century Dictionary, "mileage."

In this case the question was whether money collected as statutory mileage in the service of writs, summonses, subpoenas, venires and notices could be recovered from the county when turned in as fees, and it was held that it could not be recovered.

The case of *United States v. Smith*, 158 U. S. 346, 15 Sup. Ct. 846, 39 L. Ed. 1011, was one construing a statute which allowed district attorneys, in addition to salary of \$2,500, certain fees, but for fees and salaries together not more than \$3,500. The plaintiff claimed the per diem and mileage, although, if such mileage were treated as a fee, his salary and fee would exceed \$3,500 per annum. The Government contended that mileage was a fee and should be considered in computing the annual salary. In holding that mileage was not a fee but was intended to reimburse the officer for expenses, the Supreme Court of the United States said:

"While an allowance for travel fees or mileage is, by section 823 (U. S. Comp. St. 1901, p. 632), included in the fee bill, we think it was not intended as a compensation to a district attorney for services performed, but rather as a reimbursement for expenses incurred, or presumed to be incurred, in traveling from his residence to the place of holding court, or to the office of the judge or commissioner. The allowance of mileage to officers of the United States, particularly in the military and naval service when traveling in the service

of the government, is fixed at an arbitrary sum, not only on account of the difficulty of auditing the petty items which constitute the bulk of traveling expenses, but for the reason that officers travel in different styles; and expenses, which in one case might seem entirely reasonable, might in another be deemed to be unreasonable. There are different standards of traveling as of living, and while mileage in one case may more than cover the actual expenses, in another it may fall short of it. \* \* \* The object of the statute is to fix a certain allowance, out of which the officer may make a saving or not, as he chooses or is able. And while, in some cases, it may operate as a compensation, it is not so intended, and is not a fee, charge, or emolument of his office within the meaning of section 834 (U. S. Comp. St. 1901, p. 643). It is much like the arbitrary allowance for the attendance of witnesses and jurors, which may or may not be sufficient to pay their actual expenses, depending altogether upon the style in which they choose to live."

The case of *Scharrenbroich v. Lewis and Clark Co.*, 33 Mont. 250, 83 Pac. 482, was a case in which the Sheriff brought suit to recover the difference between his mileage for conveying prisoners to penal institutions in the State and his actual traveling expenses. It was held in this case that this was not a reduction of his salary within the provisions of Section 31 of Article V of the Constitution, prohibiting the increasing or diminishing of a public officer's salary or emolument during his term of office, the court saying:

"The salary pays the sheriff for taking the person to prison. The 'mileage' paid the expense incurred. The actual expense was paid by the 'mileage,' were it more or less. Now the actual expense, and not any more or less, is paid by the people."

While our Supreme Court has held in the case of *State v. Story*, 53 Mont. 573, and in *State ex rel. Payne v. District Court*, 53 Mont. 350, that the word "fees" in Section 9006 of the Revised Codes of 1907, relating to the removal of officers for collecting illegal fees, was sufficiently broad to include mileage as well as per diem on the ground that either would be money that the officer had no right to take or receive from the county, I do not believe that these cases are of any moment in solving the question involved in your inquiry.

I do not think that the Legislature intended, by Section 12 of Chapter 124 of the 1917 Laws, to require a Sheriff to perform the duties therein referred to at his own expense without being entitled to reimbursement. In other words, I believe that the Legislature used the word "fees" in its strict sense and intended to confine it to compensation for services rendered, and that it was not intended that the officers should not be reimbursed for expenses actually incurred.

It is my opinion, therefore, that an officer serving papers, and otherwise performing the duties specified in Section 12 of Chapter 124 of the Laws of 1917, is not entitled to compensation for services actually rendered, but is entitled to reimbursement for expenses incurred in performing the duties therein referred to and that in fixing the amount of expenses incurred by him, the statutory method of allowing mileage may be resorted to.

Very truly yours,

WELLINGTON D. RANKIN,  
Attorney General.