

Habeas Corpus—Sheriffs—Mileage—Fees.

A sheriff is not entitled to demand his mileage fees from the person filing a petition in a habeas corpus proceeding, either in advance or at any other time but the same is a proper charge against the county.

Hugh N. Marron, Esq.,
County Attorney,
Wolf Point, Montana.

October 20, 1925.

My dear Mr. Marron:

Your have requested my opinion whether a sheriff is entitled to demand his mileage fees in advance from the person filing the petition in a habeas corpus proceeding.

Sections 12348, 12351 and 12353, R. C. M. 1921, provide as follows:

"12348: Who may prosecute writ. Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint."

"12351: Writ must be granted without delay. Any court or judge authorized to grant the writ, to whom a petition therefor is presented, must, if it appear that the writ ought to issue, grant the same without delay."

"12353: How served. If the writ is directed to the sheriff or other ministerial officer of the court out of which it issues, it must be delivered by the clerk to such officer without delay, as other writs are delivered for service. If it is directed to any

other person it must be delivered to the sheriff, and be by him served upon such person by delivering the same to him without delay. If the person to whom the writ is directed cannot be found, or refuses admittance to the officer or person serving or delivering such writ, it may be served or delivered by leaving it at the residence of the person to whom it is directed, or by affixing it to some conspicuous place on the outside either of his dwelling-house, or of the place where the party is confined or under restraint."

"The writ of habeas corpus, which has for centuries been esteemed the best and only sufficient defense of personal freedom, is a high prerogative common law writ, having for its object the speedy release by judicial decree of persons who are illegally restrained of their liberty."

12 R. C. L. 1179.

The court having in its judicial discretion (as provided in section 12351, supra) decided that the writ ought to issue, is then bound to issue the same without delay, and if the writ is directed to the sheriff it must be at once delivered to that officer by the clerk of the district court and by the sheriff served without delay, as provided in section 12353.

It necessarily follows that once the writ is delivered to the sheriff he is then acting as an officer of the court, in compliance with the court order, in serving the writ, the same as though he were serving a warrant or other court process, and in doing so he is engaged in the discharge of his duties and is entitled to 10c per mile from the county, as provided in section 4885, R. C. M. 1921.

It is, therefore, my opinion that the sheriff is not entitled to demand his mileage fees from the person filing the petition in a habeas corpus proceeding, either in advance or at any other time, but that the same is a proper charge against the county.

Very truly yours,
L. A. FOOT,
Attorney General.