Opinion No. 178.

Counties—Municipal Corporations—Appeals From Police Court—Fees, Witness—Sheriffs.

HELD: 1. The county is liable for witness fees and costs of service on appeals from police court for violation of a city ordinance.

October 18, 1937.

Mr. J. W. Lynch
County Attorney
Fort Benton, Montana

My Dear Mr. Lynch:

You have submitted the following facts:

The City of Fort Benton arrested a certain person for an alleged violation of a city ordinance, and such person having been found guilty in the police court appeals to the District Court, the action and appeal being in the name of the City of Fort Benton. The question being whether or not the county is liable for the payment of witness fees in this action.

The enumeration of county charges is set forth in Section 4952, R. C. M. 1935. Subsections 2, 3, and 4 provide:

> (2) "One-half of the salary of the county attorney, and all expenses necessarily incurred by him in criminal cases arising within the county.
>
> (3) The salary and actual expenses for traveling when on official duty, and for the board of prisoners allowed by law to sheriffs, and the compensation allowed by law to constables for executing process on persons charged with criminal offenses.
>
> (4) The sums required by law to be paid to grand and trial jurors and witnesses in criminal cases."

Hence, the county is liable for expenses incurred by the county attorney in criminal cases arising within the county, for expenses incurred for executing process on persons charged with criminal offenses within the county, and for the sums required by law to be paid grand and trial jurors, and witnesses in criminal cases. There is no doubt about the validity of the claim presented, the only question being

whether it is to be a charge against the City of Fort Benton or against Chouteau County. The answer to that question lies in the nature of the action for violation of city ordinances. If in the State of Montana, the violation of city ordinances is held to be a civil action, then the cost would be allocated as in other civil matters. If criminal, the above statute would be applicable and the cost would be a valid charge against the county. In matters of this kind some states also have a third type of action, quasi-criminal, and if in Montana such actions are quasi-criminal, then the cost would also be on the county.

In 57 Corpus Juris, 1134, it is said that:

> "A county is liable to a sheriff, constable, or deputy sheriff for his fees and expenses in connection with the enforcement and execution of criminal offenses when there is a statute so providing."

Note 65 (b), 57 Corpus Juris, 1134, says:

> "Liability of county extends to quasi-criminal offenses, such as violation of city ordinances."

Citing People v. Columbia County, 67 N. Y. 330, and on page 333 of that case:

> "It is urged that some of the items were not strictly criminal offenses, but they were all for criminal offenses, such as violation of city ordinances and the like, and as to the latter the only conclusion would be that, instead of the statutory fee, the board of supervisors would have power to fix the compensation for the service."

In Montana both the fee for witnesses and service of process is specifically set, so there would be no authority in the board of county commissioners to set the fee at another figure, but the claim would be a valid charge against the county and the statutory fee would have to be paid.

There has been considerable confusion as to the true nature of the action for violation of an ordinance in this state. However, it is now safe to say that it is either criminal or quasi-criminal. That is shown by the opinion of Justice Angstman in State ex rel Marquette v. Police Court et al, 86 Mont. 297; 283 Pac. 430. There it is held that the nature of an action for the violation of an ordinance must be determined by the nature of the relief sought; that the violation of a city ordinance, so that a fine or imprisonment may be imposed, is a public offense within the meaning of Section 10721 of the Revised Codes of Montana, 1935. The court cited the case of Castle Dale City v. Woolley, 61 Utah, 291, 212 Pac. 1111, and other cases therein cited. In the Castle Dale City case the court said, at page 1112:

> "An action prosecuted by a city for violation of a city ordinance is a criminal case."

Then the Marquette case goes on to discuss the case of the City of Bozeman v. Nelson, 73 Mont., 147; 237 Pac. 529; and the City of Helena v. Kent, 32 Mont. 279; 4 Ann. Cas. 235; 80 Pac. 258; where it was expressly held that proceedings for the infraction of a local police regulation are not criminal in nature. State ex rel City of Butte v. District Court, 37 Mont. 202; 95 Pac. 841; State ex rel Streit v. the District Court, 45 Mont. 375; 48 L. R. A. New Series 256; 123 Pac. 405, intimating that such actions were civil in nature, and the Court declares, page 313, that:

> "The conclusion there announced is not supported by the cases cited and it is hereby modified to conform to the views herein stated."

Therefore, it is my opinion, from the study of the decisions, that the charge is collectible from the county. This view is borne out by the statute under Section 11608, R. C. M. 1935. A criminal action is defined, and the definition is such as would include a violation of a city ordinance. The mere fact that the legislature did not insert the words "or municipal" in Section 11609 cannot overcome the definition of Section 11608 or the implications in Sections 11621 and 11622. Also, in Section 5089, entitled, "Jurisdiction for violation of ordinances, and civil and criminal jurisdiction," it is provided that: "The police court also has exclusive jurisdiction: (1) Of all proceedings for the violation of any ordinance of the city or town, both civil

and criminal, which must be prosecuted in the name of the city or town."

Section 5092 provides: "Proceedings in police courts in criminal actions are regulated by Sections 12302 to 12347 of the Penal Code."

Section 12343 declares that subpoenas for witnesses be issued as provided in Section 12179, a section which defines subpoena, and Section 12180 gives the form of a subpoena which is issued in the name of the State of Montana.

Exclusive jurisdiction is given police courts for violation of ordinances, but in all criminal matters this is merely in the nature of a preliminary hearing and the action is tried de novo in the District Court on appeal. Section 12339. And the case after it is appealed is treated in the same manner as in other criminal actions, except it is brought in the name of the city whose ordinance has been violated and the city attorney prosecutes in lieu of the county attorney.

In view of the cases and statutes herein cited, it is my opinion that the cost of serving witnesses their mileage and per diem fees in cases where an appeal is taken from police court to District Court is a valid charge against the county wherein such criminal act occurs.