

**Costs, In Criminal Cases—Transfer of Criminal Cases—Removal
of Criminal Cases—Prosecuting Attorney.**

On the removal of a criminal case from one county to another it is the duty of the county to which the action is removed to furnish a prosecuting attorney, and the county from which the action is removed is not liable for the fees of such prosecuting attorney.

Helena, Montana, August 1, 1905.

Hon. J. F. Wegner, Chairman, Board of County Commissioners, Helena,
Montana.

Dear Sir:—I am in receipt of your letter of July 21, in which you submit to me for opinion the question as to the liability of Lewis and Clark County for costs incurred by Cascade County in the prosecution of State of Montana v. James S. Keerl, a criminal case transferred for trial from Lewis and Clark County to Cascade County.

Under the provisions of Section 3682, Political Code, Lewis and Clark County is liable:

1. For the payment of all costs accruing upon a removal of the case;
2. And is also liable for all costs accruing upon the trial of the case,

in the same manner, and to the same extent, that it would be liable for such costs had the action been tried in Lewis and Clark County .

All of the items enumerated in the bill filed by Cascade County against Lewis and Clark County, which bill you have submitted to me, appear to be of a class proper to be paid, except the single item therein enumerated, to-wit:

“Allowance to R. W. Berry, attorney at law, for his services in representing the State\$600

It appears that the Board of County Commissioners of Lewis and Clark County did not employ, authorize the employment, or ratify any employment of Attorney Berry in said case, and that said attorney, R. W. Berry, was appointed by the court of Cascade County as special prosecutor in the case, that upon such appointment he appeared and acted as such therein, and that the county attorney of Cascade County did not take any part in the prosecution of the case, claiming to be disqualified. Under the provisions of Section 4450, Political Code, as amended by the act of February 20, 1899, (Laws of 1899, p. 76) it is the duty of the county attorney to conduct on behalf of the state all prosecutions for public offenses and to represent the state in all matters and proceedings to which it is a party, within the limits of his county. The status of a criminal case removed from one county to another seems quite clear from the provisions of Section 1978, Penal Code, wherein it is provided, “The court to which the action is removed must proceed to trial and judgment therein, as if the action had been commenced in such court.”

In *State v. Whitworth*, 26 Mont. 107, the supreme court in determining what county should prosecute in case of a transfer of a criminal action, says:

“The county attorney of the county to which the case is removed must prosecute in the same manner as if the action had been begun in that county.”

From the law above cited it seems quite clear that it was the duty of the county attorney of Cascade County to prosecute the case, and, therefore, it was the duty of the county to provide an attorney for that purpose, if for any reason the county attorney of Cascade County could not act in the case. This it appears, was what was done, however, the expenses thereof, to-wit, the sum of \$600, should be paid by Cascade County and is not a proper charge against Lewis and Clark County.

You also submit a separate bill filed by Mr. R. W. Berry against Lewis and Clark County for expenses incurred in the prosecution of the case above named. These expenses as appears from the bill, are of a class proper to be charged in a case of that kind, and for aught that appears from the bill filed, are proper charges in this case to the same extent that they would be a proper charge against Lewis and Clark County had the case been tried in Lewis and Clark County and the expenditures made by the county attorney of Lewis and Clark County in connection with the prosecution of the case. However, before the payment of such charges, the district court of Cascade County should certify to their correctness and reasonableness to the Board of County Commis-

sioners of Cascade County, and the County Commissioners of Cascade County should forward to the treasurer and Board of County Commissioners of Lewis and Clark County a certified copy of the total amount of costs allowed by the court, giving each item. (See Sec. 4683, Pol. Code, and also opinion of Attorney General to H. S. Green, County Attorney, Cascade County, June 12. 1905.)

I return herewith the bills by you submitted.

Respectfully yours,

ALBERT J. GALEN,
Attorney General.