

**Costs in Contempt Proceedings. Witness Fees and Mileage,  
By Whom Borne in Contempt Proceedings. Contempt Proceed-  
ings, Taxing of Costs In.**

The per diem and mileage of witnesses subpoenaed in a contempt proceeding arising out of a civil action are properly chargeable to the unsuccessful party therein.

Helena, Montana, June 19, 1908.

Hon. A. P. Heywood,  
County Attorney,  
Helena, Montana.

Dear Sir:—

I have your letter of June 13th, requesting an opinion of this office upon the following question:

“Are witness fees and mileage, and the mileage of a sheriff in serving subpoenas, proper charges against the county in a proceeding where the defendant was cited to show cause why he should not be punished for disobeying an injunction.”

The action is in the nature of a special proceeding brought for the purpose of adjusting civil rights, and it would seem that the costs of witness fees and mileage, both for witnesses and for the sheriff in serving subpoenas, are properly chargeable to the parties causing the subpoenas to be issued. Application for the citation was made by one of the parties to a civil action in which an injunction was issued, and neither the county nor any officer of the county, in his official capacity, was a party to the proceeding. It is true that if the injunction order of the court was treated contemptuously by the person to whom it was directed the state would be interested in the matter to the extent of preserving the dignity of its courts.

The authorities make a distinction between civil and criminal contempt. Civil contempt being defined as a remedial proceeding for the benefit of some party in a previous civil case. Criminal contempt is defined as being a wilful violation of some rule or order of the court, which proceeding is in its nature punitive, and in which the court or the state is the moving party. See 9 Cyc. 34, where the distinction

above drawn between civil and criminal contempt is made. The general rule is, however, laid down in Vol. 4, Ency. Pleading and Practice at page 806:

“Costs are generally allowed the moving party, if successful, in all contempts which partake of a remedial character. If his application is refused the ordinary rule prevails and he becomes responsible for the costs.”

See also 9 Cyc 57.

9 Cyc. page 69.

In *State ex rel News Pub. Co. vs. Milligan*, 29 Pac. (Wash.) 763, the court holds that costs are properly chargeable to the county where the contempt is “criminal” and the party is discharged.

Section 2181, Code of Civil Procedure, while not directly in point, nor a governing statute on the question submitted, seems to indicate where the burden of costs should rest in the case under consideration.

The above statute provides that where a warrant of arrest in a contempt proceeding has been returned served, and the person arrested does not appear on the return day, and, having entered into an undertaking with sureties to appear, that the court may issue another warrant of arrest, or may order the undertaking to be prosecuted, or both. And if the undertaking be prosecuted the measure of damages in the action is the extent of the loss or injury sustained by the aggrieved party by reason of the misconduct complained of, and the costs of the proceeding, by which, I take it, is meant, not the costs of the action by which the undertaking is prosecuted, but the costs of the contempt proceedings. If sureties, who by the undertaking guarantee the appearance of their principal in court, are responsible for costs in cases wherein he is cited, in the event of his non-appearance, the principal should be likewise bounden.

In two cases bearing directly on this question, decided by the supreme court of the state of Montana, the distinction between civil and criminal contempt is eliminated.

In *State ex rel Morse et al, relators, vs. District Court of the Seventh Judicial District et al, respondent*, 29 Mont., p. 230, it is held that in a proceeding for contempt of court the costs should not be charged to the contemnors. In the case above cited the court follows the rule laid down in *State ex rel Flynn vs. Fifth Judicial District*, 24 Mont. 33, wherein the principle is stated that costs incurred in contempt proceedings must be paid from any funds imposed. However, in the question submitted by you, the additional statement is made that the contempt proceedings were abandoned, and the party complained of discharged; so that no fine was imposed and therefore the costs in this case could not be paid out of the money received from a judgment of fine.

In *Morse vs. Seventh Judicial District Court, supra*, Justice Milburn said: “There is no provision of law for charging the costs in contempt proceedings to the contemnors,” and that statement embodies the law

by which we must be governed in determining the question herein submitted.

This latter case was brought against certain officials who suspended and obstructed the execution of a writ of habeas corpus issued on application of a prisoner who was confined under a criminal charge. However, the case of Flynn vs. Fifth Judicial District Court, supra, is a case where an injunction order of the court was disobeyed by the party to whom it was directed, and the person charged with contempt was by the lower court fined in the sum of five hundred dollars. Under Section 293, Penal Code, contempt of court is made a misdemeanor and the greatest fine which can be imposed for a misdemeanor is five hundred dollars, and the additional burden in that case of \$304.40, charged to the contemnor as costs, is beyond the statutory limitation placed upon fines for misdemeanor.

We think there is a sufficient distinction to be drawn between the case submitted by you and the cases decided by the supreme court of Montana, to warrant us in advising you that the costs incurred at the instance of an unsuccessful moving party should be borne by him.

Very truly yours,

ALBERT J. GALEN,  
Attorney General.