

Action, County a Party to on Appeal From Board of County Commissioners. Board of County Commissioners, Appeals From Action of. Same, Power to Employ Special or Additional Counsel. Same, Power to Transport Non-Resident Paupers Who Become Lawful County Charges. Same, Power to Act Confined to Board, Not Individual Members. Same, Power of Individual Members to Care for Poor.

Where a claim against the county is presented to the board, and an appeal is taken from the action of the board, under section 2947 the county is a party to the action in the district court.

The board of county commissioners has power and authority to employ special or additional counsel in these appeals in all cases to which the county is a party, but may not employ additional counsel for the purpose of securing advice, where no litigation is pending, but must rely upon the advice of the county attorney, and if not satisfied, they may call upon the attorney general for such advice.

The board of county commissioners has authority to transport, at the public expense, paupers who are properly county charges to points without the state, when that action is less expensive than caring for such persons.

The board of county commissioners, in all matters except in emergency cases where it is necessary to provide for the care of the poor, must act as a board and not through the individual members.

Helena, Montana, March 2, 1910.

Board of County Commissioners,

Thompson Falls, Montana.

Gentlemen:

I am in receipt of your letter of February 26, 1910, signed by C. H. Doenges, chairman, in which several questions concerning the affairs of Sanders county by the board of county commissioners are submitted for official opinion.

"1. Is the county a party to suit or action when a claim is presented to the board for allowance, and the claim is either allowed or disallowed, and an appeal is taken from the action of the board?

"2. Has the board any authority in law to employ special or additional counsel, in such appeals referred to in question 1. or in any civil action, or where the board desires legal advice, in all of which matters the board determines that it is for the best interest of the county to employ such counsel, or obtain such advice, mindful of the fact that there is a county attorney?

"3. Have the commissioners any authority in law to transport non-resident paupers, sojourning in this county who become lawful county charges to their homes, or relatives or friends, to points outside of this state, even if the board can demonstrate that it is the cheapest and best thing for the county to do?

"4. Is it necessary in the matter of caring for poor persons who are county charges that the board act as a board, or may any individual member order the person to be provided for?"

In reply to your first question, you are advised that where a claim against a county is presented to the board of county commissioners for payment, and the claim is acted upon, and appeal is taken from the action of the board as provided by section 2947, revised codes, the county is certainly a party to the action tried in the district court on such appeal.

It is possible that you may have gotten a different idea from the case of Ind. Pub. Co., v. L. & C. County, wherein a claim was presented by the publishing company to Lewis and Clark county, which was disallowed by the board of county commissioners and an appeal taken from such order disallowing the claim to the district court, where the case was adjudicated, and again an appeal was taken from the judgment of the district court to the supreme court of the state of Montana.

The nature of the claim presented by the publishing company, however, was for the printing of a brief in a criminal action, in which the State of Montana was plaintiff and a resident of this state defendant.

The supreme court in the case above referred to holds that the county was not a party to the original action out of which the publishing company's claim for printing grew. The court in this case held that the state and not the county was responsible for the payment of the claim. But that decision is based upon a claim incurred in a criminal case and not upon any claim which arose out of an appeal from the board of county commissioners to the district court.

In reply to your second question, you are advised that it is within the power and authority of the board of county commissioners to employ special or additional counsel in such appeals as are referred to in question one, and also in other civil action. But it must, of course, appear to the board, exercising its judgment and discretion, that it is for the best interest of the county to employ additional counsel. The county attorney is by law made the legal adviser of the board of county commissioners, and his duties include, among others, the prosecution of all criminal actions arising in his county, and the prosecution or defense of all civil actions to which his county is a party. Cases, of course, might, and do, arise where, on account of the importance of certain criminal actions, the board of county commissioners might determine that assistance should be given to the county attorney in the prosecution thereof. The same is true of civil actions.

Section 3053, revised codes, makes the county attorney the legal adviser of the board of county commissioners. He must attend their meetings, when required, and must attend and oppose all claims and accounts against the county which are unjust or illegal. And section 3052, subdivision 6, makes it his duty to give his opinion, in writing, to all county, district and township officers on matters relating to the duties of their respective offices. Section 2894, revised codes, gives jurisdiction and power to the board of county commissioners to direct and control the prosecution and defense of all suits to which the county is a party. And chapter 61, session laws of 1909, confers upon the board of county commissioners, in all counties except those of the first class, the power to employ, or authorize the county attorney to employ, special counsel to assist in the prosecution of any criminal case pending in such county, or to represent said county in any civil action in which such county is a party. This, however, only when, in the judgment of the board the ends of justice or the interests of the county require it.

However, the law does not specifically confer upon the board of county commissioners the power to employ additional counsel where it desires advice upon questions relating to the official duties of the board, except where actions civil or criminal are pending. The county attorney is, as heretofore pointed out, made the legal adviser of the board of county commissioners. But, in addition to this, boards of county commissioners are included in the list of officers who may ask the official opinion of the attorney general in matters relating to their official duties; and, if for any reason, the board desires to go beyond the advice given by the county attorney in said matters, or if the advice of the county attorney is withheld, the board then may present these questions to the attorney general of the state, whose duty it is to advise state officers, boards of county commissioners and county attorneys in matters relating to their official duties.

I would, therefore, hold that the board of county commissioners is not warranted in incurring expense by the employment of counsel to advise them with respect to their official powers, duties or acts, on account of the fact that they may, if not satisfied with the opinion of their county attorney, direct their questions in this regard to the attorney general.

In answer to your third question, you are advised that the board of county commissioners is given power and authority, under section 2894, conferring general jurisdiction and powers upon the board of county commissioners, to transport to their homes, or to relatives or friends without the state, paupers sojourning in the county who become lawful county charges.

In illustration of your third question, you cite the case of a sick pauper, suffering from an incurable disease, who makes application to the board to be sent to a point outside of the state, where she can be taken care of without expense to Sanders county.

In the event that the care of this person is a legal charge against the county, a necessary condition thereto being that he has for at least two months prior to the application to the board, been a resident of the county, and the board of county commissioners in exercising their judgment and discretion determine that it is less expensive to transport the person to a point where he will be taken care of without charge to the county, than it would be for the county to provide such care and attention as the law of this state contemplates, then the board is justified in providing means of transportation and bearing the expense thereof. It should, however, always be borne in mind that the board must satisfy itself that the patient will be taken care of without further expense to the county or the state.

In answer to your fourth question, you are advised that it is the general rule of law that the board of county commissioners is clothed with authority, as a board, and that the individual members of the board have not, as such, the authority provided by the law.

In *Williams v. County Commissioners*, 28 Mont., at page 365, it is said, in substance: To bind the county by its contracts, the board of county commissioners must act as an entity, its members may not discharge its important functions by casual sittings, and its chairman, unless lawfully authorized by the board to do some act or acts, has no more power than any other member of the board.

"The statutes do not vest the power of the county in three county commissioners, acting individually, but in them as a single board, and the board can act only when legally convened."

This is the present law in this jurisdiction. To exercise the governmental functions of the county the board must act as a board and not through its individual members. However, in the one case provided for the care of the poor, any member of the board may, upon application made to him, and satisfactory evidence being presented that the applicant has been a resident of the county for two months preceding the date of the application, make an order for the relief of the poor person so applying.

This authority is conferred by section 2060, revised codes. However, this exception is confined to the chapter concerning the care of the poor, and that chapter deals only with the ordinary cases where the poor are taken care of in the manner prescribed by the statute, and as the authority of the board to transport persons out of the state is found in the chapter conferring general jurisdiction and powers upon the board, it

seems that this special authority conferred upon the individual members relates only to cases where the poor are cared for within the county, and if the board should, in the exercise of its discretion, determine to bear the expense of transportation of a poor person to a point without the state, I would advise you that the safe and legal method to be pursued would be to make the order either at a regular session of the board or to call a special meeting, designating the action contemplated as the only business of the special meeting, and then have the minutes of that meeting show the action taken.

You mention incidentally that in emergency cases, and where the poor have contagious diseases, immediate action must be taken, and it is impractical to wait for a regular meeting or to delay for the calling of a special meeting.

This suggestion seems to me to show exactly the reason for the enactment of section 2060, above referred to, but it seems also clear that "emergency cases and cases of contagious disease" would not be the kind of cases where the commissioners might decide to transport the patients to points without the state.

Very truly yours,

ALBERT J. GALEN,

Attorney General.