

Cost Mandamus Case Against Clerk, by Whom Paid. Mandamus Cast Against County Officer, Costs of. Officer When Mandamused, Cost of.

Facts of this case examined, and held that the county rather than the clerk should pay the costs of the mandamus proceeding.

March 28th, 1913.

Hon. John L. Slattery,
County Attorney,
Glasgow, Montana.

Dear Sir:

I am in receipt of your letter of the 25th instant, submitting the question:

“Should the costs in the recent mandamus proceedings in the supreme court against the county clerk and recorder be paid by the county or by the clerk, the judgment in said cases being against the clerk?”

Section 7177, R. C., referred to by you provides that where an officer is prosecuting or defending an action on behalf of the state or the county, the costs thereof shall be taxed against the state or county as the case may be.

The clerk in this matter refused to place upon the ballot the names of certain localities as candidates for the county seats of the proposed new county, upon the ground that such places were not cities and towns within the meaning of the statute, not being incorporated, and were therefore not entitled to a place on the ballot.

Chapter 112, Session Laws of 1911, provides for the nomination of cities and towns within the proposed new county, as candidates for the county seat, but the act itself does not attempt any definition of the word “cities” or the word “towns.” The clerk was therefore justified in concluding that the general definition of such places as given in the general law, Sec. 3206, should be followed, and that definition has reference only to incorporated municipalities. Under the literal meaning of this law, then the clerk was justified in refusing to place upon the ballot the names of any place not an incorporation, for the clerk has no authority to give to the law any extended meaning.

Furthermore, it appears that prior to taking this action the clerk used every precaution by consulting with his legal advisers, as to his duties in the premises. In answer to an inquiry addressed to this department by the Hon. John Hurly, then county attorney at Glasgow, Montana, Attorney General Galen rendered an opinion to the effect that only incorporated cities and towns were properly entitled to a place on the ballot. It is therefore presumed that the county clerk was advised by the county attorney of this fact. From these considerations, it appears that the clerk not only followed the literal meaning of the law, but that he also followed the direction and advice of those who were selected as his legal advisers, and that under these considerations he would not have been justified in doing otherwise than to refuse to place the names of these two unincorporated villages upon the ballot.

It is true that the supreme court sustained the application for mandamus by merely ordering the clerk to place the names of these two localities upon the ballot, but the court has rendered no opinion in the matter, hence we do not know on what ground the decision is based. It may have been on some technical procedure wholly beyond the jurisdiction of the county clerk. For the foregoing reasons

I am of the opinion that the costs of these cases may and should be charged to the county and not to the clerk.

Very truly yours,

D. M. KELLY,
Attorney General.