

**County, Liability Of, For Defense of Commissioners in  
Failing to Perform Ministerial Duty—County Commissioners  
—Liability, Personal.**

Oct. 8th, 1919.

Mr. John J. Cavan,  
County Attorney,  
Jordan, Montana.

Dear Sir:

I have your letter of September 4th, in which you request an opinion from this office upon a charge of \$160.00 which you have against the commissioners of your county for services rendered. The facts stated in your letter are somewhat meagre. In rendering an opinion, therefore, I am obliged to assume that certain things are true.

I am assuming that third parties presented a claim against Garfield County, and that said claim was properly made out, verified, presented in due time, and that insofar as the formalities of the claim were concerned, the complainants complied with the law. I further assume that the claim was filed with the County Clerk and that the County Commissioners failed and refused to act upon this claim, neither approving nor rejecting it.

The Political Code of this state defining the duties of the County Commissioners, clearly provides that when a claim, properly made out as to form, is presented against the county, it becomes the duty of the County Commissioners to pass upon such claim. They must exercise their discretion either to approve or reject the claim. They are bound to act one way or another. I am assuming that the County Commissioners failed to discharge the duties imposed upon them in this respect and for that reason the claimant brought mandamus proceedings against them for the purpose of making them allow or reject the claim so that the claimant from such action might appeal to the district court in case such action was adverse to the claimant.

If my assumption of the facts is correct, the mandamus suit brought against the County Commissioners was one not against the county but against the County Commissioners personally. This has been decided in the case of *State vs. Toole*, 26 Mont. 22. It is held by courts generally to be the law. The rule is that an action brought against state or other officials merely to compel them to perform a ministerial duty is not an action against the state. Under the facts in this case this was the situation in Garfield County.

Coming now to the question of whether or not the county is liable for the expense which the commissioners incurred in this action, I am of the opinion that the County Commissioners are personally liable and that they have no claim against the county for such expense. The rule upon this subject is well stated in 15 C. J. 454, Section 3, as follows:

"Ordinarily members of county boards are entitled to no other allowance or emolument whatever outside of the compensation fixed by law for their services, and to be entitled to that compensation they must bring their services and expenses within the terms of the statute authorizing payment, it being the rule that they are entitled neither to ordinary or extraordinary compensation or reimbursements for services rendered, or expenses incurred in the doing of unauthorized acts outside the scope of their official duties, even though the services are for the benefit of the county."

Under the facts which you present the County Commissioners would be considered to have neglected their duties as such officers and the suit was brought for the purpose of compelling them to discharge the duties of their office for which they sought election. Under such circumstances, the expenses incurred in this connection, in my opinion, are not a valid charge against the county. If the mandamus proceedings were brought for the purpose of compelling the County Commissioners to approve a claim which they had rejected the situation would be entirely different. In such a case the County Attorney, as the law officer of the county, would be called upon to defend the action of the Board of County Commissioners. In such a case the county would be directly interested, but in a case such as you cite, the county was not interested as it was merely to compel the

commissioners to perform a ministerial duty. I am therefore of the opinion that the charge which you make is one for which the county of Garfield is not liable.

Respectfully,

S. C. FORD,

Attorney General.