Counties—Attorney's Fees—Mandamus—Supervisory Control—Costs.

A county is not liable for attorney's fees incurred in an action brought to review the action of the district court in suspending sentence of one convicted of crime.

R. V. Bottomly, Esq., August 11, 1925.
County Attorney,
Chinook, Montana.

My dear Mr. Bottomly:

You have requested my opinion whether the claim presented against Blaine county for attorney's fees by the attorney for respondent in the case of State ex rel. Bottomly vs. District Court, is a proper claim against Blaine county.

In the case of State ex rel Shea vs. Cocking, 66 Mont. 169, it has been held that the word "dámages," as used in section 9858, R. C. M. 1921, includes attorney's fees. Section 9858 has subsequently been amended by chapter 5, laws of 1925. As amended it provides:

> "If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referees, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay;
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> "Provided, however, that in all cases where the respondent is a state, county or municipal officer all damages and costs, or either, which may be recovered or awarded shall be recovered and awarded against the state, county or municipal corporation represented by such officer, and not against such officer, so appearing in said proceeding and the same shall be a proper claim against the state or county or municipal corporation for which such officer shall have appeared, and shall be paid as other claims against the state, county or municipality are paid; but in all such cases, the court shall first determine that the officer appeared and made defense in such proceeding in good faith."

Chapter 5, in my opinion, is not applicable to this case. In the first place it is questionable whether it applies to any but strictly mandamus proceedings.

The case of State ex rel. Bottomly vs. District Court was brought to review the action of the district court in suspending the sentence of one convicted of crime and was, on its surface, an application for a writ of supervisory control, and not one of mandamus. And it is very doubtful whether mandamus would lie where the district judge had already acted on the question. (18 R. C. L., page 295 et seq.)

However, let it be assumed that it was, in effect, a mandamus proceeding; still the statute purports to award *damages* against the respondent and applies only to those cases where judgment is given to the applicant. In the case of State ex rel. Bottomly vs. District Court judgment went in favor of respondent and against the applicant.

There is no statutory provision other than chapter 5, laws of 1925, authorizing either party to recover *damages* from the other, in addition to costs. The legislature evidently intended, as evidenced by sections 9788 and 9796, to confine the party in whose favor judgment is rendered in the supreme court in special proceedings (other than those embraced within chapter 5, supra), to costs only.

Inasmuch as chapter 5 does not, in my opinion, have application to this case it becomes unnecessary to consider the question as to whether the respondent in the case of State ex rel. Bottomly vs. District Court represented the state or county, within the meaning of that chapter, in making the appearance in that case.

If the county may be regarded as a party to the action, or as the party beneficially interested, it would seem that in its defense the board of county commissioners rather than the district judge is given authority under the statute to employ counsel. (Subd. 15, sec. 4465, R. C. M. 1921.)

It has been held, however, in certiorari proceedings directed against a court or judge that the real party in interest is the party who sought and obtained the order complained of.

State ex rel. Surety Co. vs. Probate Court (Minn.) 69 N. W. 908;

Hickman vs. Hunter, District Judge (Iowa), 140 N. W. 425.

It is, therefore, my opinion that the claim in question for attorney's fees is not a proper charge against Blaine county.

Very truly yours,

L. A. FOOT,
Attorney General.