

Fees—Costs—Witnesses—Officers.

The cost of witness fees in ouster proceedings brought by a taxpayer under section 11702 should be borne by the county as in any other criminal case, subject to the right of the county to have judgment for the same, against the officer or against the complaining witness in the cases specified in said section.

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Redstone, Montana.

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My dear Mr. Sherry:

You have requested my opinion as to who should pay witness fees in ouster proceedings brought by a taxpayer to remove members of the board of county commissioners from office, under section 11702.

The latter part of the section contains the following provision:

“If, upon such hearing or trial, the charge is sustained, the court must enter a judgment that the party accused be deprived of his office, and for such costs as are allowed in civil cases, and if the charge is not sustained, the court may enter a judgment against the complaining witness for costs as are allowed in civil cases.”

It is my opinion that the above statute contemplates two things:

First: That a judgment for costs in the same amount as are allowed in civil cases **must** be entered against the accused officer if the accusation is sustained.

Second: That a like judgment **may** be entered against the complaining witness if the charge is not sustained.

The entering of a judgment for costs against the complaining witness is apparently a discretion vested in the trial court, to be exercised in the event the ouster proceedings have been unjustifiably instituted. As said by our supreme court in the case of *Griggs vs. Glass et al*, 58 Mont. 476-481:

"The statute as amended provides a penalty in the discretion of the court for abuse of the right afforded by the statute in the case of proceedings unjustifiably instituted; but a similar penalty is likewise provided in other instances, as incident to prosecutions in criminal actions instituted without probable cause. In illustration see sections 9372, 9612 and 9613, Revised Codes."

Costs, therefore, are ultimately taxed against the offending officer if he is removed, and against the complaining witness if the action is unjustifiably instituted. It remains only to be determined who pays the cost in the first instance.

In my opinion this question is answerable by reference to the nature of the ouster proceedings. In *State ex rel. Rowe vs. District Court*, 44 Mont. 318, *State vs. Driscoll*, 45 Mont. 558, and *State ex rel. McGrade et al vs. District Court*, 52 Mont. 371, the Supreme court of Montana has held that even though proceedings under section 11702 may be instituted by a private person, they are to be classed as prosecutions for crime.

Also in the case of *State ex rel. Houston vs. District Court*, 61 Mont. 558, the court reviewed at considerable length the various constitutional and statutory proceedings dealing with the removal of public officers and re-affirmed its conclusion that "proceedings for the removal of civil officers under section 9006 (now section 11702), as amended, are criminal in their nature." Since, therefore, ouster proceedings are criminal, it is my opinion that the costs of witness fees incurred in such an action, whether instituted by a taxpayer or by a public officer, should be paid in the first instance by the county, precisely as in any other criminal case.

In the case of *Griggs vs. Glass*, *supra*, the supreme court held that where removal proceedings are instituted by the attorney general the county is liable for the payment of witness fees. I cannot see any reason why any different rule should apply in a case where such proceedings are instituted by a private citizen. As said by the supreme court in the case of *Griggs vs. Glass*:

"Clearly a proceeding for the removal of a public officer is not a mere controversy between the petitioner and the officer accused. * * *

"In all its essentials it is a public proceeding essentially for the benefit of the public, to the end that they may have faithful public servants."

Such being the nature of the action it is in my opinion wholly immaterial whether it is instituted by a public officer or by a private citizen. In either event the cost should be borne by the county as in any other criminal case, subject to the right of a judgment against the officer or against the complaining witness in the cases specified in the statute.

Very truly yours,

L. A. FOOT,
Attorney General.