

Dear Mr. Hayden:

You submit the question whether under Chapter 117, Laws of 1939, amending certain statutes on insanity proceedings, the county is liable for the payment of an attorney fee and, if so, how much, when the person against whom proceedings are brought demands, and the court appoints, a lawyer to represent him.

Section 11886, R. C. M., 1935, provides for the appointment by the district court of counsel to defend a person accused of a criminal offense when he is unable to employ counsel. Section 11887, Id., provides for the compensation of such attorney when appointed by the court to defend a person charged with a criminal offense. Chapter 117 does not expressly provide either for the appointment of counsel to represent a person charged with being insane or fix any compensation for services rendered by such attorney, nor do we find any other statute giving such authority. We do not think a charge of insanity may be considered a criminal offense. An insanity proceeding or hearing is in its nature a civil action as distinguished from a criminal action.

14 R. C. L. 560, Section 11;  
32 C. J. 627, Section 167.

Moreover, Section 1443, R. C. M., 1935, as amended by Section 8 of said Chapter 117, specifically provides:

"\* \* \* and the trial must be had as provided by law for the trial of civil causes before a jury \* \* \*,"

This section further provides:

"If the person sought to be committed is not a poor or indigent person, the costs of the proceedings are a charge upon his estate, or must be paid by persons legally liable for his maintenance, unless otherwise ordered by the judge. If the alleged insane person is adjudged not to be insane, the judge may, in his discretion, charge the costs of the proceedings to the person making the application for an order of commitment, and judgment may be entered against him for the amount thereof and enforced by execution."

Section 9802, Id., provides what are costs. Attorney fees are not included. It has been held by our Supreme Court

#### Opinion No. 172.

##### Insanity—Costs—Attorney Fees.

HELD: The statutes do not authorize the payment of an attorney fee to a lawyer representing a person charged with insanity at an insanity hearing.

December 5, 1939.

Mr. Clyde Hayden  
County Attorney  
Hamilton, Montana

that since Section 9802 is exclusive except so far as certain cases are taken out of its operation by special statutes, and does not mention attorneys' fees as one of the items which may be recovered as costs in ordinary actions, attorney fees are not recoverable as costs independently of rule of court or stipulation of parties.

Bovee v. Helland, 52 Mont. 151, 154, 156 Pac. 416; see also

McBride v. School District No. 2, 88 Mont. 110, 117, 290 Pac. 252;

Compare Smith v. Fergus County, 98 Mont. 337, 384, 39 Pac. (2) 193, and cases cited.

We do not have before us any rule of the district court and therefore need not decide whether the court may adopt a rule on the subject. So far as we are advised, no district court has adopted a rule allowing attorney fees as costs in such cases. In the absence of statute authorizing it, and on the facts before us, it is our opinion that the county commissioners may not allow an attorney fee to a lawyer representing a person charged with insanity at an insanity hearing.