Opinion No. 214.

Clerk of Court—Fees—Appearance, What Constitutes—Courts.

HELD: An appearance fee is payable in the instances enumerated.

December 19, 1935.

Mr. Chris W. Demel
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Billings, Montana

With your letter of December 12 you enclosed copy of a letter addressed to you by the Deputy Clerk of the District Court of your county asking what constitutes an appearance in an action so as to require the payment of the fee of $2.50 mentioned by Section 4918, R. C. M. 1921, as payable by the defendant upon his appearance, and enumerating, particularly, the following instances: (1) when a defendant, or his attorney, is personally present in court in response to an order to show cause and offers testimony; (2) when a defendant files a return or answer to an order to show cause; (3) when a defendant files a motion to strike the complaint and quash the summons and argues the motion in court in person, or by attorney; (4) when a defendant files and makes and argues in open court a motion to dissolve a temporary injunction; (5) when a defendant participates in a hearing relating to the establishment of a drainage district; (6) when a defendant files a waiver of summons in a divorce action; (7) when a petition and bond for removal to United States court is filed; (8) when a motion and demand for change of venue is filed; (9) when a stipulation by the attorneys for plaintiff and defendant is made and filed; (10) when a motion is filed and made and argued in open court to quash an alternative writ of mandate.

You also enclosed with your letter a comprehensive memorandum of authorities, and your own views upon the question, with which we agree in substance.

The pertinent portions of our statutes are as follows:

"At the commencement of each action or proceeding, the clerk must collect from the plaintiff the sum of five dollars, and for filing a complaint in intervention the clerk must collect from the intervenor the sum of five dollars;

"And the defendant, on his appearance, must pay the sum of two dollars and fifty cents (which includes all the fees to be paid up to the entry of judgment)." Sec. 4918, R. C. M. 1921.

"A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him, or has such appearance entered in open court. * * *" Sec. 9782, R. C. M. 1921.

Our Section 9782 is substantially the same as Section 1014, Cal. Code of Civil Procedure, but somewhat broader, and was apparently adapted from California. As fairly expressing the views of the California courts, we quote: "While the statute requires the notice of appearance by defendant in pro. per. to be a written notice, such requirement is not exacted when the notice is given for him by an attorney. In such case, it need not necessarily be in writing. It may be given by the act of appearing in open court upon an application for affirmative relief which could only be granted upon the hypothesis that defendant had submitted himself to the jurisdiction of the court. Security, etc. Co. v. Boston, etc., Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296. The mere giving of a notice of a motion to be made at a certain time and place for the dissolution of an attachment issued in the cause would not constitute such an appearance. In Glidden v. Packard, 28 Cal. 649, it was expressly held that the notice of a motion to dissolve an attachment did not constitute an appearance authorizing the entry of defendant's default. If, however, pursuant to such notice, the attorney appears in court and makes the motion, such act on the part of the attorney would be sufficient to constitute notice of appearance. * * *" Salmonson v. Streiffer, 110 Pac. 144.

Corpus Juris states the rule as fol-

lows: "Broadly stated, any action on the part of a defendant, except to object to the jurisdiction over his person, which recognizes the case as in court, will constitute a general appearance." 4 C. J. 1333.

Our own court has said, in Grovelin v. Porier, 77 Mont. 260, at page 273:

"This rule applies where a defendant appeals from a judgment rendered in a justice court (Gage v. Maryatt, 9 Mont. 265, 23 Pac. 337), on moving for a change of venue (Feedler v. Schroeder, 59 Mo. 364; Jones v. Jones, 59 Or. 308, 117 Pac. 414), or entering into a stipulation for a change of place of trial (Jones v. Wolverton, 15 Wash. 590, 47 Pac. 36), and on filing an affidavit of prejudice of the presiding judge (Howe v. Sieberling, 2 Ohio N. P. 8, 2 Ohio Dec. 51). In fact, any act which recognizes the case as in court constitutes a general appearance, and even in the face of a declared contrary intention, a general appearance 'may arise by implication from the defendant seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to the plaintiff', other than one contesting only the jurisdiction of the court. (4 C. J. 1333.) The reason for the rule is that an application for an order of the court can only be made upon the assumption that the court has jurisdiction to make the order, and a party cannot be challenging the jurisdiction and invoking it at one and the same time.

"Here it must be presumed that the defendants sought to derive some benefit from the order of transfer or they would not have applied for the order; for some reason which was considered sufficient by counsel for the defendants, they invoked the jurisdiction of the court, and it is immaterial that such application was made orally. (Zobel, above; Honeycutt v. Nyquist, 12 Wyo. 183, 109 Am. St. Rep. 975, 74 Pac. 90.) Such an application falls within the same category as a motion for a change of venue—the change of the place of trial—or the disqualification of the presiding judge, mentioned above; it constituted a general appearance and waiver of the objection to jurisdiction of the person."

See also: State ex rel. Lane v. Dist. Ct., 51 Mont. 503, 154 Pac. 200; L. R. A. 1916 E 1079; State ex rel. Murphy v. Dist. Ct. (Mont. 1935), 41 Pac. (2d) 1113; State ex rel. Goldstein v. Dist. Co., 96 Mont. 475, 31 Pac. (2d) 311; Paramount Publix Corp. v. Boucher, 93 Mont. 340; 19 Pac. (2d) 223; Beale v. Lindquist, 92 Mont. 480, 15 Pac. (2d) 927; Whitman v. Moran (Nev. 1932), 13 Pac. (2d) 1107; Anderson v. Guenther (Or. 1933), 22 Pac. (2d) 339, 341; White v. Million (Wash.), 27 Pac. (2d) 320; State ex rel. Trickel v. Sup. Ct., 52 Wash. 13, 100 Pac. 155; Baizer v. Lasch, 28 Wis. 268; Foley v. Foley (Col. 1898), 52 Pac. 122, 65 A. S. R. 147; State ex rel. Bingham v. Dist. Ct., 80 Mont. 97, 257 Pac. 1014; State ex rel. Mackey v. Dist. Ct., 40 Mont. 359, 106 Pac. 1098, 135 A. S. R. 633; State ex rel. Carroll v. Dist. Ct., 69 Mont. 415, 423, 222 Pac. 444; 7 Op. Atty. Gen. 163; 11 Op. Atty. Gen. 61; 4 C. J. 1330, 1341; Childers v. Lahann (N. M. 1914), 138 Pac. 202, 204; Miller v. Prout (Ida. 1921), 197 Pac. 1023, 1024; In re Quick's Estate (Wash. 1931), 297 Pac. 198, 201.

Many of the authorities cited above deal with the question of distinguishing between a special appearance and a general appearance. However, our statutes above quoted make no such distinction, and it is our opinion that the appearance fee of $2.50 is payable in all of the instances enumerated herein above, and in your letter.