Opinion No. 225.

Clerk of Court — Fees — Stenographer Fees—When Collectible.

HELD: 1. Stenographer fees may only be collected in civil actions where an issue of fact is raised, and such fees must be collected before trial.

2. No stenographer fees are chargeable in default actions.

January 11, 1938.

Mr. George S. Smith
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My dear Mr. Smith:

You have asked how Section 8932, Revised Codes of Montana, 1935, applies to certain specific situations enumerated below. Section 8932 is as follows:

> "Amount to be paid by each party in civil action. In every issue of fact in civil actions tried before the court or jury, before the trial commences, there must be paid into the hands of the clerk of the court, by each party to the suit, the sum of three dollars, which sum must be paid by said clerk into the treasury of the county where the cause is tried, to be applied upon the payment of the salary of the stenographer, and the prevailing party may have the amount so paid by him taxed in his bill of costs as proper disbursements."

Before taking up your question in detail it might be well to make a few general observations on the meaning of the terms used in this section, and the construction given them by the Montana Supreme Court. These statutes relating to cost are penal in character and must be strictly construed to arrive at the legislative intent. (15 C. J. 24.) The essence of Section 8932 is contained in the first three lines: "In every issue of fact in civil actions tried before the court or jury, before the trial commences" a stenographer's fee must be charged. This narrows the application of the statute considerably. (1) It must be a civil action. (2) It must be paid before the trial commences. (3) There must be an issue of fact.

The word "trial" has been judicially defined in State ex rel Carleton v. District Court, 33 Mont.. 138-146. There the court, quoting from the case of Tregambo v. Comanche M. and M. Co., 57 Cal. 501, defined a trial as "An examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue. When a court hears and determines any issue of fact or of law for the purpose of determining the rights of the parties, it may be considered a trial." This definition was also approved in State ex rel Montana Central Railway Co. v. District Court, 32 Mont. 37. In that case the court cited the phrase "at any time before the trial" as used in Section 1004, Codes and Statutes of Montana, 1895, now Section 9317 Revised Codes of Montana, 1935, and under that decision the rule is that the trial commences when all dilatory proceedings have been disposed of and when all ordinary affairs, the object of which is to prevent trial, have been ineffectively exhausted and the cause is called for trial and nothing remains to be done except proceed therein. (See State v. Johnson, 124 N. W. 847.) It has been held that a hearing, or demurrer, or motion for change of venue, is the beginning of a trial under the definition in the Tregambo case. (Hume v. Woodruff, 38 Pac. 191.)

But there must also be an issue of fact involved, the whole object of the pleading is to develop material issues. The trial determines the issues as developed. The issues are of two kinds; of law and of fact. An issue of fact is raised by a denial in the answer of facts stated in the complaint or by a denial in the reply of new matter or counter-claim contained in the answer. With this preliminary matter in mind, I shall take up your questions in order.

1. "Should the fee be collected in a divorce case when defendant defaults or when defendant appears by waiver, demurrer, or answer admitting allegations of plaintiff's complaint?"

When the defendant defaults or appears by waiver or answer admitting the allegations of the complaint, there is no issue of fact raised and the fee should not be collected. In this connection, Section 5767, R. C. M. 1935,

"Divorce not granted by default alone, etc. No divorce can be granted upon the default of the defendant alone, but the cause must be heard in open court, and the court must require proof of all the facts alleged."

must be considered. A similar statutory provision was cited in Hamblen v. Superior Court, 233 Pac. 337, and Foley v. Foley, 52 Pac. 122, both California cases, and it was there held that the code provision requiring proof of all facts alleged before granting divorce did not have the effect of raising "issues of fact" or of constituting the taking of proof submitted by plaintiff in cases where defendant has not answered before a trial. (24 Cal. J. P. 717.) A demurrer, of course, raises an issue of law; hence, in all these cases the fee prescribed by Section 8932 should not be collected.

2. "Should the stenographer's fee be collected from either or both parties when a hearing is had on an order to show cause and proof is submitted?"

An order to show cause is generally used as a method of shortening the notice of motion prescribed by law and when so used is equivalent to a motion. (42 C. J. 489.) The most customary form of submitting proof for a motion is by means of affidavits and generally no evidence is taken. Thus, save in exceptional cases, the stenographer's fee is not collected.

3. "In other civil cases, (a) when both parties appear and submit proof; (b) when only one party appears and submits proof and the other fails to appear?"

When both parties appear and submit proof there is clearly an issue of fact. If the defendant has answered the issue is raised, and whether he appears or not is immaterial. It must be kept in mind that this fee is collectible when an issue of fact is raised and before trial. If the defendant fails to answer and defaults, then, of course, no issue of fact has been raised and the fee would not be collectible.

4. "Should the fee be collected when two or more actions are consolidated for trial and the jury is selected and sworn, but the cases are dismissed without evidence being submitted?"

Again the question is answered by a reiteration of the rule that the fee is due and collectible **before trial.** Under our definition of "trial," the trial can be said to commence when the selection of the jury begins. The fee should have been collected by that time and what happens thereafter is immaterial, since there is no provision for the return of the fee. At this time it is proper to indicate that the fee does not depend upon whether a record is actually made or not.

5. "Should a fee be collected before issues are joined in a mandamus proceeding when a hearing is had and evidence submitted?"

The issue is joined and trial is had at any time after the pleadings are in. If after an alternative writ of mandate is issued there is an answer denying facts stated in affidavit, then an issue of fact is raised and the fee is due. If on the other hand there is a motion to quash or a demurrer, there is an issue of law and no fee is collectible.

6. "In foreclosures and quiet title proceedings where all defendants de-

fault and plaintiff appears and submits proof?"

This is similar to the situation analyzed under divorce, supra, and the same result would be reached.