

Opinion No. 41.

Clerk of Court—Fees—Action or Proceeding Defined—Joint Tenants.

Held: A proceeding in court to determine legal title in the survivor of two joint tenants under a deed is a "proceeding" under the provisions of Section 4918, Revised Codes of Montana, 1935, and requires the payment of fees for filing petition and entry of judgment or decree.

May 22, 1945.

Mr. J. J. McIntosh
County Attorney
Rosebud County
Forsyth, Montana

Dear Mr. McIntosh:

You have requested an opinion as to the authority of the clerk of the district court to charge and collect a fee for filing a decree of the court under the following circumstances:

A person filed in the district court a proceeding through petition, setting up as an exhibit a joint tenancy deed and alleging the death of his wife. The petitioner sought a determination of inheritance tax and a decree that on the death of the wife, full title to the real property vested in the petitioner, the surviving husband.

It is elementary a public officer may not exact a fee for any service unless authorized to do so by statute. (State ex rel. Baker v. District Court, 24 Mont. 425, 427, 62 Pac. 688.)

There is no specific statutory provision for the procedure followed in this instance. It is not an "action" as that term is generally used and understood so as to bring it within the provisions of Section 4918, Revised Codes of Montana, 1935, requiring the payment of a fee upon the commencement of an action. However, in my opinion it does

come within the term "proceeding" as used in said section. Section 4918, as pertinent here, provides in part:

"At the commencement of each action or proceeding, the clerk must collect from the plaintiff the sum of five dollars . . .

"On the entry of judgment in favor of plaintiff, he must pay the additional sum of two dollars and fifty cents." (Emphasis mine.)

If the clerk is authorized to collect a fee in this instance, it must be because the procedure here followed comes within the term "proceeding" as used in Section 4918, supra.

Section 8997, Revised Codes of Montana, 1935, defines the term "action" as follows:

"An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."

And Section 8998, Revised Codes of Montana, 1935, provides:

"Every other remedy is a special proceeding."

Our Supreme Court in the case of State v. Northern Pacific Ry. Co., et al, 88 Mont. 529, 550, 295 Pac. 257, defines the word "proceeding" as follows:

"The word 'proceeding' means special proceedings provided for by statute (State ex rel. Carleton v. District Court, 33 Mont. 138, 8 Ann. Cas. 752, 82 Pac. 789), and includes every application to a court for a judicial remedy not comprehended in the term 'action'." (Emphasis mine.)

In Volume 8, Page 413, Report and Official Opinions of Attorney General, it was held the filing of a petition for the creation of an irrigation district is not the commencement of an action, but is the commencement of a proceeding; consequently the clerk of the court must collect a fee of five dollars on the filing of such a petition.

In volume 11, page 61, Report and Official Opinions of Attorney General,

the opinion in Volume 8, *supra*, was approved and the Attorney General further held:

“The order establishing the district is equivalent to a judgment, and in my opinion, a fee of \$2.50 is due for the filing of the order, all of which is covered by Section 4918, Revised codes of Montana, 1921.”

In Volume 12, page 268, Report and Official Opinions of Attorney General, it was held that a submission to arbitration under the provisions of the statute is a special proceeding and requires the payment of fees as provided under Section 4918, Revised Codes of Montana, 1935.

It is therefore my opinion the procedure followed in this instance is a “proceeding” as that term is used in Section 4918, Revised Codes of Montana, 1935, and the clerk of the court is authorized, and it is his duty to charge and collect a fee of Five Dollars upon the filing of the petition and the further fee of Two Dollars and Fifty Cents when decree or judgment is entered.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General