

Stenographers Fee, Section 374, Political Code—Sheriffs Commission, Section 3644, Political Code,—Butchers License, Sections 4064 and 4065, Political Code.

The term "each party to the action," Sections 374, C. C. P., has reference to the different sides of the controversy rather than to the individuals named as plaintiffs or defendants, and when their interests are so united as to be a unit, but one stenographers fee can be charged to each side of the case; but where separate issues are raised, the party so raising them must pay a separate fee.

A sheriff is entitled to his commission on the purchase price of property sold by him, either under foreclosure or execution.

A butcher is not required to pay a separate license for using a wagon in connection with his business where he has paid a merchants license.

Helena, Montana, July 18, 1905.

Hon. F. H. Ray, Assistant State Examiner, Helena, Montana.

Dear Sir:—This office is in receipt of your letter of July 11, 1905, submitting certain sections of the code of civil procedure for construction. The propositions presented will be considered in the order submitted.

1. Does Section 374, Code of Civil Procedure, require the payment of

a stenographer's fee by each person named in the action as plaintiff or defendant, or will the payment of one fee by each side to the controversy satisfy the provisions of this section?

Section 374 provides that "in every issue of fact in civil actions * * each party to the suit" must pay three dollars, to be applied upon the payment of the salary of the stenographer. Under our statute in all civil actions, whether general or special, "the party complaining is known as the plaintiff and the adverse party as the defendant." (Secs. 461 and 1930, C. C. P.) And in a criminal action the party prosecuted is designated as the defendant. (Sec. 1354, Penal Code). The word "party" in all these statutes is used in the singular number, but Section 3463, Code of Civil Procedure, provides, with reference to the construction of words, that "the singular number includes the plural."

In *State v. Reed*, 47 N. H. 466, it is said: "A party in law may be said to be those united in interest in the performance of an act; it may then be composed of one or more persons." In *Stone v. Segur*, 11 Allen 568, the court, in defining the word "party," says: 'It imports the person or persons in whom a joint legal right, interest, or title is vested, or against whom a joint liability exists, and is properly applied to one person or many persons, according to the subject matter of the contract or cause of action, and relates to or imports a sole or joint interest or title or liability.' These decisions are quoted and approved in *People v. O'Laughlin*, 1 Pac. (Utah) 653.

In *Schmidt v. C. & N. W. Ry. Co.* 83 Ill. 405, the court said: "The word 'party' when applied to the defendant, can only mean the person or persons named as defendant or defendants, in the judgment. The definition given to the word as defined by lexicographers, is, a plurality of persons. * * * Thus it is seen that the word is applied as well to a number of persons as to a single individual." To the same effect is the decision in *People v. Croton Acceuduct Board*, 5 Abb. Prac. Rep. 316. "Parties litigant means the antagonistic sides of the controversy. If there are a plurality of parties, they are all only one party litigant. (*Cumberland T. & Co. v. Ware's Adm'x.* (Ky.) 74 S. E. 289). This same construction is given in *Hargrave v. Vaughn*, 18 S. W. (Tex.) 695. (See also, 6 Words and Phrases, 5202.)

The term "each party to the action," as used in said section 374, code of civil procedure, has reference to the different sides of the controversy rather than to the individuals named as plaintiffs or as defendants, and where their interests are so united in their relations to each other as plaintiffs or as defendants as to be a unit with respect to the issue or issues presented by their respective sides, then but one stenographer's fee can be charged to each side of the case. But where separate issues of fact are raised by separate pleadings, or otherwise, (if they can be otherwise raised) that require "a trial by the court or jury," then the party presenting such issue is liable to the payment of a separate stenographer's fee. This latter condition may frequently arise, especially in actions to foreclose liens or to establish claims to water rights, where

each answering defendant may set up a separate lien or claim which requires separate evidence and separate adjudication.

2. Under Section 4634, Political Code, should a sheriff collect a commission "for receiving and paying over money" where the property sold is bid in by the judgment creditor or other party in interest?

This question is answered in the affirmative in *Jurgens v. Hauser*, 19 Mont. 184, where the court said, in effect, that under Section 4634, Political Code, a sheriff is entitled to his commission on the purchase price of real estate sold by him under an order of sale in a suit of foreclosure where the mortgagee buys the premises. This same principle applies to sales under execution.

3. Does the act of March 3, 1905, amending Section 4066, Political Code, relating to peddlers licenses, apply to a butcher who pays a merchants license at a fixed place of business and also runs a wagon from which meat is sold?

Section 4064, Political Code, as amended by the laws of 1901, p. 144, specifies the amount which must be paid by merchants doing business at a fixed place. Section 4065, of the same code, as amended by the laws of 1897, p. 199, refers back to the provisions of Section 4064, and says: "and no further or other license is required of any butcher by reason of any wagon used in connection with his business." It is therefore apparent that where a butcher pays a merchants license that he is not required to pay an additional license for using a wagon in connection with his business, but this only applies to the county in which he pays such merchants license.

Respectfully submitted,

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Attorney General.