

Clerk of the District Court, Duties Of. Judgment by Default. Attorney's Fee, Allowance by Clerk.

In an action upon a promissory note providing for a reasonable attorney's fee, in case of default of the defendant, the clerk of the district court is not authorized to enter judgment, under subdivision 1, Sec. 6719 of the Revised Codes, but must proceed under sub-division 2 of said section.

January 10, 1912.

Hon. B. L. Powers,
County Attorney,
Fort Benton, Montana.

Dear Sir:

I am in receipt of your letter of January 6th, in which you request my official opinion as to the authority of the clerk of the district court to enter judgment by default where personal service of summons has been had, and the suit is upon a note which provides for a "reasonable attorney's fee," but does not specify what the amount of attorney's fee shall be.

The authority of the clerk to enter judgment on default of answer, is found by Section 6719 of the Revised Codes; Subdivision 1, provides:

"In actions arising upon contract for the recovery of money

or damages only * * * * the clerk * * * * must enter the default of the defendant and immediately thereafter enter judgment for the amount specified in the complaint."

Subdivision 2 provides:

"In other actions * * * * the clerk must enter the default of the defendant and thereafter the plaintiff may apply (to the court) for the relief demanded in the complaint * * ."

The clerk acts only in a ministerial capacity and exercises no judicial functions in proceeding under this section and his authority is only such as is expressly conferred upon him by statute.

Crossman vs. Vivierda W. Co., 136 Cal. 571; 69 Pac. 220.

The clerk can only act under the statute in question where as appears from the complaint, there is no necessity for judicial determination as to the amount of recovery.

Black on Judgments, 2nd Ed., Sec. 88.

Under statutes similar to ours, the Courts seem to hold that in a case of the kind under consideration, the clerk cannot act under Subdivision 1 of the statute and enter judgment for anything that he cannot determine by mere computation alone.

"If the cause of action is such that the plaintiff is entitled to recover a fixed sum or nothing at all, or if the amount of his damages is ascertainable by mere calculation, the default admits his right to recover the sum demanded in his complaint, and judgment may be entered therefor."

23 Cyc 753, D, citing cases from Arkansas, Louisiana and New York.

In the case of Parker vs. Dekle, 35 So. (Fla.) 4, this matter is thoroughly discussed, and I quote from that opinion as follows:

"The statute that gives authority to clerks to enter final judgments, contemplates that the clerk can enter a final judgment after default, only in cases where the cause of action is purely and simply a money demand founded upon a contract for the payment of money only. In cases where extrinsic evidence dehors the contract sued upon is necessary to ascertain the amount to be recovered, the clerk has no authority to entertain such evidence, or to found a final judgment thereon. The clerk acts in a mere ministerial capacity in entering judgments, and has no power to ascertain the damages, but on a writing ascertaining the plaintiff's demand. Had the note in question provided for a fixed percentage of the amount as an attorney's fee then the clerk could have entered the judgment, for he could have ascertained the amount by a mere calculation. However, in order to ascertain what would be a reasonable attorney's fee in any case requires the introduction of testimony."

Parker vs. Dekle, 35 So. (Fla.) 4.

In the following cases a judgment which included an attorney's fee the allowance of which was made without the introduction or consideration of evidence, as to the reasonable value thereof, was declared void.

Bank vs. Krance, 50 Iowa 235.

Wyant vs. Pottorff, 37 Ind. 512.

Orr vs. Sparkman, 120 Ala. 9.

The California statute (Sec. 585, Kerr's Code Civil Procedure) is identical with our statute, but it appears from the decisions of the supreme court of California, in each case that I have been able to find, that the note sued upon provided for a certain percentage of the amount thereof as attorney's fee, and in view of this provision in the instrument itself, the supreme court of California has universally held that the sum asked as attorney's fee is susceptible of exact determination by simple mathematical calculation, no evidence was required to be taken for the purpose of fixing that amount.

Alexander vs. McDow, 41 Pac. (Calif.) 24.

"To give an attorney the power of fixing whatever fee he should consider reasonable and adding it to the judgment would be to place the debtor too much at the mercy of his creditor."

Campbell vs. Goddard, 117 Ill. 256; 123 Ill. 220.

"If the amount is not fixed but the stipulation is for a reasonable attorney's fee, it is for the court, not for the attorney himself, to determine what is a reasonable fee and this contemplates a judicial proceeding by the court to determine the amount allowed."

23 Cyc. 719.

In a case of this kind the attorney's fee is not the cause of action but, like the costs, is a mere incident to it and therefore where the element of an unfixed attorney's fee enters into the action, it is not an action arising upon a contract for the "recovery of money only."

Thrasher vs. Moran, 81 Pac. (Calif.) 32.

White vs. Allott, 25 Pac. (Calif.) 420.

It is therefore my opinion that in an action upon a note providing for a "reasonable attorney's fee," where the note itself does not specify the amount or percentage to be added as such attorney's fee, and the defendant fails to answer the complaint or to challenge the jurisdiction of the court, the action of the clerk should be governed by Subdivision 2 of Sec. 6719, and he should enter the default, and that thereafter the plaintiff should apply to the court for the relief demanded in the complaint. I am further of opinion, that such an action is one of the "other actions" contemplated by Subdivision 2, Sec. 6719, and consequently the clerk of the district court is not vested with authority to compute "attorney's fee" or to find that any amount named is a "reasonable fee," nor is he authorized to enter any judgment unless the amount of the judgment can be ascertained by him from the contract itself and by mere computation, and in no event must the judgment entered exceed the amount specified in the complaint.

Very truly yours,

ALBERT J. GALEN,

Attorney General.