

## Opinion No. 202.

**Clerk of Court — Fees — Adoption —  
Justice Court Appeals.**

HELD: The Clerk of Court has no authority to charge a fee for filing petition for adoption, or for filing transcript on appeal from Justice Court in a criminal matter.

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November 30, 1937.

Mr. E. O. Overland  
County Attorney  
Big Timber, Montana

My dear Mr. Overland:

You have submitted, for my opinion, the following questions:

“1. In adoption proceedings should the clerk of the court make a charge of \$5.00 for filing the petition for adoption?”

2. In an appeal in a criminal case by the defendant in Justice Court to the District Court, should the clerk make a charge of \$5.00 for filing the transcript of appeal?”

Section 4918, and so much thereof as is applicable, provides:

“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)."

It will be noted herein that the above section refers to the fees a plaintiff and defendant must pay.

Section 9008 provides for one form of action only, and in such actions (see Section 9009) the party complaining is known as the plaintiff, and the adverse party as the defendant. Such form of actions can only be commenced within the periods prescribed in sections 9012 to 9066.

Adoption proceedings have no relation to the above described actions, and a party to an adoption proceeding is not designated as either a plaintiff or a defendant. A proceeding for adoption is made by application, and is properly styled "application for adoption," and is sometimes styled as "petition for adoption." Either form is correct.

Section 5861 refers to the proceedings as an application for adoption. Jurisdictional requisites required for an action are dissimilar to those required for an adoption proceeding. This refers not only to the forms of the proceedings, but also the manner and requirements relating to process of service. An adoption proceedings is usually one of an ex parte nature and Section 4918 has no reference to ex parte proceedings; it usually contemplates an action or proceeding involving parties plaintiff and defendant. The clerk of the court cannot charge a fee in any matter unless clearly authorized to do so, and Section 4918, being the only statute applicable, does not clearly, or at all, authorize the clerk of the court to charge the applicant a fee in an adoption proceeding.

State ex rel Baker v. District Court,  
24 Mont. 425.

Section 4918 requires the payment by both plaintiff and defendant of certain filing fees, and the party appealing, whether plaintiff or defendant, from the Justice Court to the District Court must pay the sum of \$5.00.

Inasmuch as the state is not compelled to pay the fees to file a criminal action, and inasmuch as the state cannot appeal ordinarily from a judgment in a criminal action, it is quite apparent that Section 4918, as far as fees are

concerned, has no application in criminal actions, and such action generally applies only to civil and other actions or proceedings.

It is the policy of the law to afford every defendant in a criminal action the free and untrammelled privilege of exercising all of his constitutional rights, and to subject an appellant in such an action to pay a fee in order to make an appeal from a Justice to a District Court would tend to thwart that right and invade his constitutional prerogatives. Therefore, it is my opinion that the clerk of the court is without authority to make a charge for filing a petition for adoption or for filing a transcript of appeal in a criminal case from a Justice Court to the District Court.