

No. 493

**CLERK OF COURT—FEES—SOLDIERS' AND SAILORS'
RELIEF ACT**

Held: Clerk of Court must collect trial fee, provided by Section 8932, Revised Codes of Montana, 1935, where attorney appointed by court, upon filing of affidavit relating to military or naval service, files general denial.

September 29, 1942.

Mr. R. F. Hibbs
County Attorney
Yellowstone County
Billings, Montana
Attention: Mr. Charles B. Sande
Deputy County Attorney

Dear Mr. Hibbs:

You have submitted for the opinion of this office, a request of the Clerk of the District Court, reading as follows:

"A short time ago this office advised members of the local bar that, in accordance with a recommendation of Mr. Lowe, Deputy State Examiner, a stenographer fee would be collected from plaintiff and defendant in each case where an issue of fact is tried to the Court or Jury, regardless of the fact that the services of the stenographer may be waived by implication or otherwise.

"A question now arises as to what should be done in a case where, under the provisions of United States Statutes, an attorney is appointed by the court to represent defendants who are absent and whose status as to being in the military or naval services of the United States is unknown. In these cases the attorney usually files an answer denying the allegations of the complaint. This raises an issue of fact to be tried by the court.

"In a case of this kind should a stenographer fee be collected from each party the same as in other cases where the facts of the complaint are controverted by one or more defendants?

"Please give this office your opinion as to our duties under Section 8932, R. C. M."

You state, that in your examination of Section 8932, Revised Codes of Montana, 1935, and Opinion 225, Volume 17, Report and Official Opinions of Attorney General, you find no help in interpreting the statute so as to provide an exception to relieve from payment of the fee. You suggest, that by reason of the fact that before an attorney is appointed for defendants, whose military status is unknown, the affidavit of nonmilitary service usually states the time for appearance of defendants has expired, therefore, the matter might be truly one of default, although the attorney appointed for the defendants pleads a general denial, said pleading being made after time for appearance as provided in the summons.

As the matter has been fully covered by the opinion of this office above cited as to fees in the usual case, the only question requiring consideration is whether an exception applies under the particular facts under examination.

The Soldiers' and Sailors' Relief Act of 1940 (Oct. 17, 1940, c. 888, 54 Stat. 1178), requires the procedure outlined in your letter, but a reference to the act demonstrates no exception is made with reference to the payment of fees.

Neither can it be said that under the facts set forth, the judgment entered is a "default judgment", in view of the holding of our Supreme Court, to the effect the provisions of Section 9322, Revised Codes of Mon-

tana, 1935, providing for entry of default are directory (State ex rel. Kohl, 46 Mont. 348, 355, 128 Pac. 582), and unless the party entitled to default takes affirmative action for entry thereof, he, by his conduct, in effect grants further time to the other party (Edenfield v. Seal Co. Inc., 74 Mont. 509, 512, 241 Pac. 227; Mitchell v. Banking Corp. of Montana, 81 Mont. 459, 469, 264 Pac. 127).

While it is true under the facts stated, and by reason of the Soldiers' and Sailors' Relief Act, supra, default cannot be entered without the filing of the affidavit showing nonmilitary service, still, in the absence of an exception in that act or in Section 8932, Revised Codes of Montana, 1935, providing for relief from the payment of fees, no exception can be read into the act or the section. Relief can only be extended by the legislature.

It is, therefore, the opinion of this office it is the duty of the clerk of the court to collect the fees in question, under the facts stated.

Sincerely yours,

R. V. BOTTOMLY
Attorney General