Opinion No. 19-2431

November 21, 1919

BY: N. D. MEYER, Assistant Attorney General

TO: Mr. T. W. Holland, County Clerk, Silver City, N.M.

Fees of District Clerks.

OPINION

Referring to your letter of recent date, asking this office to interpret for you certain provisions of the new fee bill, which appears as Chapter 149 of the Session Laws of 1919, we beg to advise:

First. It is our opinion that where there is an answer or some other pleading in the nature of an answer on the part of the defendant there should be a charge of $ 2.50 when judgment is rendered, and if the case is tried by a jury then the charge should be five dollars.

Second. Where there is no appearance or any pleading filed by or in behalf of defendant and judgment is taken by default, no charge whatsoever should be made unless the judgment exceeds twenty folios.

It appears that it is not clear in your mind what the word "issue" in its legal sense signifies, and of course it is necessary to understand the meaning of this word in order to give the proper interpretation to the law under discussion.

A case is at "issue" when there is a direct affirmation and denial of the facts in dispute. Where there is no fact controverted, there is no issue. Under our statutes it is necessary of course that the pleadings of both plaintiff and defendant should be reduced to writing.

Third. In a suit upon a promissory note where no appearance is made by the defendant, and plaintiff takes judgment by default, submits his note as evidence and final judgment is rendered, no charge should be made unless the judgment exceeds twenty folios.

Fourth. In a divorce suit wherein no answer or pleading has been filed by the defendant, and judgment by default is taken, testimony submitted and final decree entered, no charge should be made unless the judgment exceeds twenty folios.

Fifth. Your question in regard to whether or not the answer of a garnishee puts the case at issue is rather difficult to answer.

In garnishment proceedings the plaintiff generally alleges that the garnishee is indebted or has in his possession some property belonging to defendant. If, in his answer, the

garnishee admits the truth of this allegation, of course no issue arises, for the allegation is not controverted, and in such a case I would say that there would be no charge for entering judgment in case the defendant defaulted. On the other hand, if the garnishee answers that he is not indebted to the defendant then this material allegation in the complaint would be at issue; or, if the garnishee should file some answer not satisfactory to the plaintiff the plaintiff could then controvert the same in writing and this would also put that particular phase of the case at issue, which should be tried as in ordinary cases as is specifically provided in section 2542 of the Code.

Sixth. Where a defendant not only files an answer but files a cross complaint, I do not believe that it was the intent of the legislature that another filing fee of $ 7.50 should be exacted for filing the cross complaint. It appears that the legislature intended that but one filing fee of $ 7.50 should be charged in each case and that said filing fee was intended to cover all charges in connection therewith except these extra charges specifically provided for in the fee act. When a defendant files a cross complaint it is an action on his part arising out of the original case, and I presume that clerks enter the filing of cross complaints on the same docket page that the case in which the cross complaint arose is entered and that no new docket number is assigned to the cross complaint.

Seventh. In no event should a charge be made against a defendant in any case for filing his answer.

This office has been heavily engaged with important work appertaining strictly to the duties incumbent upon the Attorney General, and it was impossible to give your letter attention before this. Our administration has been inclined not to invade the jurisdiction of district attorneys as the advisers of county officers as specifically provided by law. In your case, however, we have taken the liberty to give our opinion on Chapter 149, trusting that Mr. Vaught will not feel that we are assuming too much in rendering you this service. Nevertheless, we prefer that county officers should submit the questions to the district attorney of their respective districts and if, in turn, he should wish our views he can submit the question to us and then we would all be acting strictly within the law.