Opinion No. 36-1270

January 15, 1936

BY: FRANK H. PATTON, Attorney General

TO: Mr. Herbert Gerhart, Secretary, Capitol Addition Commission, Santa Fe, New Mexico.

*{*95}* We have your letter of December 12, 1935, referring to Section 4 of Chapter 14, Laws of 1934, in which you ask our opinion upon the following questions:

"Is the fee referred to in the above statute payable by litigants who are permitted by the district courts to receive free process upon filing an affidavit that they are 'too poor to pay costs'?

Is the fee payable by persons who file petitions in tax matters such as for the correction of assessments, notwithstanding the fact that the Tax Commission has given its approval to the filing of such petition without the payment of costs?"

The first question has reference to suits filed pursuant to Section 105-1311, 1929 Code, which reads as follows:

"If any person wishing to institute a suit, or having done so, shall make oath that he is too poor to pay the costs, he shall have all and any process of the court free of costs."

Your second question doubtless has reference to suits filed pursuant to Section 141-306, 141-307, 1929 Code. I think that there can be very little question but that suits filed pursuant to the sections above quoted are civil actions filed by private individuals for the enforcement of private rights. In cases of complaints filed pursuant to Section 141-306 for the correction of errors in the assessment law even though the complaint may be filed by the District Attorney, it is my opinion that it is filed by him in behalf of the individual making the complaint and not in behalf of the State.

Consequently, the only question which remains to be considered, in my opinion, is whether or not the $ 2.50 fee referred to in Section 4, Chapter 14, Laws of 1934, is a part of the "costs" in a civil action within the meaning of the sections of the 1929 Compilation herein referred to.

It is my opinion that said fee does not constitute a part of the costs within the meaning of the sections above referred to, rather it is a tax levied for revenue purposes. In the act imposing this fee it is variously referred to as a fee or tax. While the question here under consideration was not expressly before the court in State ex rel. Capitol Addition Building Commission vs. Connelly, 39 N.M. , P. (2d) , the opinion in that case leaves a distinct impression that the court considers the fee as an excise tax.

If it is a tax then it is not a part of the costs in the civil action. In the case of Ex Parte Griffin, 88 Tenn. 547, 13 S.W. 75, this express question is decided. In that case the petitioner, John Griffin, applied for a writ of habeas corpus. He had been convicted of the offense of carrying a pistol and sentenced to pay a fine of $ 50.00. He was committed to the workhouse in default of paying or securing the fine and costs. The fine was remitted by the Governor and the petitioner had remained in the workhouse long enough to work out all of the items in the cost bill **except the state and county tax.**

*{*96}* It appears that at that time in Tennessee a tax of $ 5.00 was imposed upon the unsuccessful party in civil suits and upon each indictment or presentment. It was provided in said act that "all the above taxes shall be taxed in the bills of cost and are hereby declared part of the costs in the case." Nevertheless, the court held:

"It is equally true that the act of 1889 now undertakes to declare it costs, and collectible as such. But the fact remains that it is a specific tax imposed for revenue only, and that, if it is to be collected by imprisonment, it is a tax that is so collected, unless the legislative declaration changes its nature. We are of opinion that the legislature has not by such declaration changed its nature; it is still a tax, and as such may be put in the bill of costs and collected with the costs so far as judgment and execution may be efficacious for that purpose. But so long as it remains in the revenue bill as a specific tax, it cannot, by a mere declaration in such bill that it is costs, become costs in fact, so as to justify imprisonment for its payment. We have no disposition to abridge in the slightest the power of the legislature to imprison for the payment of fine and costs, but we do not feel at liberty to recognize as fine or costs what are not so in fact, simply because of a declaration in the revenue bill that a tax shall be called costs."

This case was followed in State vs. Davidson County (Tenn.) 33 S.W. 924. To the same effect, see State vs. Mitchell (Tenn.) 198 S.W. 68, and Keith Brothers vs. Stiles, 92 Wis. 15, 64 N.W. 860.

For the reasons above stated, it is my opinion that both the questions asked in your letter should be answered in the affirmative. As to any other exceptions where the question might arise whether or not the $ 2.50 fee would have been applicable, none occur to me at the present moment.

Doubtless many questions will arise from time to and when they do, if the matter is called to our attention, we will be glad to give you an opinion upon the same.

By QUINCY D. ADAMS,

Asst. Atty. General