

STATUTORY CONSTRUCTION:
RULE 29.01, SUPREME COURT RULES
OF CRIMINAL PROCEDURE:
SECTION 485.120 LAWS OF 1951:

Fee of official court reporter of
circuit court for transcripts made
by him from notes taken of court
proceedings had under provisions of
Rule 29.01, Supreme Court Rules of

Criminal Procedure, cannot be taxed as costs of the case. Only in those circuit court cases which are contested, and those in which the testimony is to be preserved shall the circuit clerk tax the \$5.00 fee prescribed by Section 185.120 RSMo. 1949, as costs of the case. When collected, the clerk shall pay said fee into the county or city treasury.

FILED
34

January 21, 1954

*see letter of
Dec-8-54 J.M.D*

Honorable Arthur U. Goodman, Jr.
Judge of the Circuit Court
Twenty-Second Judicial Circuit
Kennett, Missouri

Dear Sir:

Your recent request for a legal opinion of this department has been received and reads in part as follows:

"(1) When the Official Court Reporter reports the evidence and files a transcript thereof, pursuant to Rule No. 29.01 of the Supreme Court, should a fee for the Reporter's transcript and/or services be taxed as costs in the case? If so, is this amount, when collected, to be paid to the Reporter or into the county treasury?

"(2) Should the fee of \$5.00 mentioned in Section 485.120 be taxed as costs in all cases heard in Circuit Court? We are thinking particularly of uncontested suits for divorce, on accounts, notes, etc., where the evidence is taken down by the Reporter."

The general rule prevailing in most jurisdictions with reference to whether or not a court reporter's or stenographer's fees for preparing a transcript taken in any court procedure is that such fees are not to be included in the costs of the case unless specifically so provided by statute. Said general rule has been given in Volume 20, C.J.S., p. 483, and reads as follows:

" * * * in general, in the absence of statute or of some special agreement between the parties authorizing it, stenographer's fees are not taxable as costs. However, stenographer's fees constitute an item proper to

Honorable Arthur U. Goodman, Jr.

include in the taxable costs under statutory provisions in force in various jurisdictions, and where it is authorized by consent or express agreement of the parties. When authorized by statute stenographer's fees can only be allowed in cases which the statute provides for; and under some statutes the right is limited to fees of official stenographers; and, under other statutes, to cases in which an answer is filed, tax suits excepted. Also, under various statutes fees for transcripts may be taxed as costs, subject in various jurisdictions to specified conditions and restrictions on the right, such as that they must be ordered by the court, and, it has been held, by the successful party, or used in subsequent proceedings in the cause. Ordinarily in the absence of statute, rule of court, custom equivalent to rule of court, order of court in a specific case, or special agreement between the parties, the cost of a transcript or copy of the evidence, or of a part thereof, obtained for the convenience of the parties or their counsel, cannot be taxed as part of the costs, even though ordered and used by the court."

In order to determine whether or not this rule applies in Missouri, requires an examination of various sections of the statutes regarding the duties of the court reporter, the fees allowed to him by law for services rendered, and whether or not such fees are to be included in the costs of the case, and if so, under what circumstances this may be done.

The first section of the statute to which we call your attention is Section 485.050, RSMo. 1949, setting up the duties of the official court reporter of the circuit court and reads as follows:

"It shall be the duty of the official court reporter so appointed to attend the sessions of the court, under the direction of the judge thereof; to take full stenographic notes of the oral evidence offered in every cause tried in said court, together with all objections to the admissibility of testimony, the rulings of the court thereon, and all exceptions taken to such rulings; to preserve all official notes taken in said court for future use or reference, and to furnish to any person or persons a transcript of all or any part of said

Honorable Arthur U. Goodman, Jr.

evidence or oral proceedings upon the payment to him of the fee herein provided."

The second section of the statute to which we direct your attention is Section 485.100, Laws of 1951, p. 449, which prescribes the amount of fees the court reporter shall receive for making a transcript from his notes taken in every cause in the circuit court, and under what circumstances such fees shall be taxed as court costs. Said section reads as follows:

"For all transcripts of testimony given or proceedings had in any Circuit Court, Court of Common Pleas or Court of Criminal Correction, the court reporter shall receive the sum of forty-five cents per twenty-five line page for the original of said transcript, and the sum of fifteen cents per twenty-five line page for each carbon copy thereof; said page to be approximately eight and one-half inches by eleven inches in size, with left-hand margin of approximately one and one-half inches and right-hand margin of approximately one-half inch; answer to follow question on same line when feasible; such page to be designated as a legal page. Any judge may, in his discretion, order a transcript of all or any part of the evidence or oral proceedings for his own use, and the court reporter's fees for making the same shall be taxed in the same manner as other costs in the case; Provided that in criminal cases where an appeal is taken or a writ of error obtained by the defendant, and it shall appear to the satisfaction of the court that the defendant is unable to pay the costs of such transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished and the court reporter's fees for making the same shall be taxed against the state or county as may be proper; and in such case the court reporter shall furnish two transcripts in duplication of the notes of the evidence, for one of which he shall receive the sum of 45 cents per legal page for the original, but shall receive no compensation for the other."

It is noted that only in two instances are the court reporter's fees for making a transcript to be taxed with other costs in the case under this section, namely: 1) when the judge orders a transcript of all or any part of the evidence or oral proceedings to

Honorable Arthur U. Goodman, Jr.

be made for his own use, and 2) when an appeal is taken or a writ of error is obtained by the defendant in a criminal case and it appears to the satisfaction of the court that the defendant is unable to pay the costs of the transcript, when the transcript is for the purpose of perfecting his appeal, the court shall order a transcript furnished and the court reporter's fees for making same shall be taxed against the state or county as may be proper.

Reference is made in the opinion request to Rule 29.01 of the Rules of Criminal Procedure adopted by the Supreme Court of Missouri, which Rule reads as follows:

"(a) In every criminal prosecution in any court of this state, the accused shall have the right to appear and defend the same in person and by counsel. If any person charged with the commission of a felony appears upon arraignment without counsel, it shall be the duty of the court to advise him of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel. If the defendant so requests, and if it appears that the defendant is unable to employ counsel, it shall be the duty of the court to appoint counsel to represent him. If, after being informed as to his rights, the defendant indicates his desire to proceed without the benefit of counsel, and the court finds that he has intelligently waived his right to have counsel, the court shall have no duty to appoint counsel unless it appears to the court that, because of the gravity of the offense charged and other circumstances affecting the defendant, the failure to appoint counsel may result in injustice to the defendant. Counsel so appointed shall be allowed a reasonable time in which to prepare the defense. They shall serve without compensation unless counsel so appointed shall be associated with a Public Defender Bureau or Committee which employs or retains lawyers whose services are available, without charge, to indigent persons accused of the commission of a crime, or unless provisions are made by public authority to compensate counsel.

"(b) In every case where the defendant in a felony case appears upon arraignment without counsel, the reporter of the court shall record accurately all proceedings taken by the court under the provision of this Rule, and, in

Honorable Arthur U. Goodman, Jr.

the event counsel is not appointed by the court, the court reporter shall prepare a transcript of such proceedings, shall certify to the correctness thereof, and such transcript shall be filed with the other papers in the case, but the failure of the court reporter to comply with the provisions hereof shall not be indicative that the court has failed to observe the requirements of this Rule."

We construe this Rule to mean that in every felony case in which the defendant is arraigned and is not represented by counsel, it is the duty of the court reporter to keep an accurate record of " * * * all proceedings taken by the court under the provisions of this Rule, and, in the event counsel is not appointed by the court, the court reporter shall prepare a transcript of such proceedings, shall certify to the correctness thereof, and such transcript shall be filed with the other papers in the case * * * ".

It is apparent that any or all proceedings taken by the court, which are to be shown in the transcript made by the court reporter, can relate only to those authorized under the Rule. The Rule relates solely to such matters as the defendant in a criminal case being present in court, his right to counsel, appointment of such counsel by the court, defendant's arraignment without counsel, and the duties of the court reporter in taking notes of the proceeding, preparing and certifying to the correctness of the transcript made by him from such notes, and the filing of same with the other papers of the case.

Upon a comparison of the provisions of the above quoted Rule with those of Section 485.100 supra., it is readily seen that the transcript referred to in the Rule is not the same or one of the same nature, nor is it made or filed for the same purpose as the transcript authorized under the provisions of Section 485.100 supra.

As already noted, the transcript prepared under authority of said Rule, is not a complete transcript of all the testimony or other oral proceedings had in a criminal case, but contains only that information required under the Rule. Apparently, it is for the purpose of preserving a record of the proceedings of the Court under the Rule, and must be made and filed in every criminal case (regardless of whether or not an appeal is taken or writ of error obtained by the defendant) in which the defendant is arraigned when not represented by counsel.

Honorable Arthur U. Goodman, Jr.

Section 485.100 supra., specifically states that in every criminal case when an appeal is taken or writ of error obtained and it appears that the defendant is unable to pay for the transcript, then the court shall order the transcript made by the court reporter, for the purpose of allowing the defendant to perfect his appeal, and that the fee for the reporter's services shall be taxed as other costs of the case, which shall finally be paid by the state or county.

Therefore, in view of the foregoing, our answer to the first inquiry of the opinion request is in the negative.

Your second inquiry is whether the fee mentioned in Section 485.120, Laws of 1951, p. 450, shall be taxed as costs in all cases heard in circuit court. Said section reads as follows:

"In every contested case, or case in which the evidence is to be preserved, except for the collection of delinquent or back taxes, in any circuit court or division thereof, when an official court reporter is appointed, the clerk of said court shall tax up the sum of five dollars, to be collected as other costs, and paid by said clerk into the county or city treasury, toward reimbursing the county or city for the compensation allowed such court reporter as herein provided."

Whether the answer to your inquiry shall be in the affirmative or in the negative will depend upon the construction given this section, and in this connection we wish to remind you that the cardinal rule of statutory construction in Missouri is that the statute under consideration must be construed in such a manner as to give effect to the legislative intent, and, if possible, such intention must be ascertained from the language used in the statute. This rule is so well established that we believe it is unnecessary to cite any cases upholding such rule, for to do so would unduly lengthen this opinion without any benefits resulting therefrom.

Keeping said cardinal rule of statutory construction in mind, we shall attempt to construe Section 485.120 supra. in accordance with what we believe to be the legislative intent. The pertinent parts of said section are:

"In every contested case, or case in which the evidence is to be preserved, except for the collection of delinquent or back taxes, in any circuit court or division thereof * * *

Honorable Arthur U. Goodman, Jr.

the clerk of said court shall tax up the sum of five dollars, to be collected as other costs and paid by said clerk into the county or city treasury * * *."

It is to be noted that the word "or" is used between the first two phrases of the section, and we believe that it is necessary to our discussion herein to determine whether it has been used disjunctively or conjunctively so that the proper meaning may be given to the parts of the sentence it connects. The word may be used either disjunctively or conjunctively but it is ordinarily used disjunctively. Regarding such use of the word, the following statements are found in Volume 67, C.J.S., p. 513:

"In its elementary sense, the word 'or' ordinarily, and in ordinary use and in its accurate and natural meaning, is a disjunctive particle, ordinarily used it means one or the other of two, but not both, as, you may read or write, that is, you may do one of two things at your pleasure, but not both; generally corresponding to 'either,' as 'either this or that,' or 'one or the other,' being frequently used with 'either' as a correlative. The word 'or' may be used to mark off and separate alternative ideas, and it may indicate one or the other of two or several persons, things, or situations, and not a combination of them."

Also in the case of Nordberg v. Montgomery, 351 Mo. 180 l.c. 186, the court said:

"The word 'or' is ordinarily used as a disjunctive to mean 'either' as 'either this or that.' Dodd v. Independence Stove & Furnace Co., 330 Mo. 662, 51 S.W. (2d) 114."

It appears that the legislative intent with reference to the use of the word "or" in Section 485.120 supra., was that the word should be used in the disjunctive rather than in the conjunctive, and was intended to separate the words which refer to separate and distinct classes of cases filed in circuit courts rather than only the one such class of cases. In other words, the reference is to: 1) every contested case, and 2) every case in which the evidence is to be preserved.

Not every case filed in circuit court cases is contested, and the testimony in every case filed in the circuit court is not required to be preserved, but only in those cases which are contested

Honorable Arthur U. Goodman, Jr.

and those in which the testimony must be preserved is it the duty of the circuit clerk to tax the five dollar fee as court costs under the statute.

Therefore, in answer to your second inquiry, it is our thought, that the five dollar fee mentioned in Section 485.100 supra., is not required to be taxed as costs in every case filed in circuit court, but that said fee shall be taxed as costs only in those cases which are contested, and those in which the testimony is required to be preserved.

CONCLUSION

It is the opinion of this department that the fee of the official court reporter of the circuit court for preparing a transcript from his notes of the proceedings had by said court under the provisions of Rule 29.01, Rules of Criminal Procedure as adopted by the Supreme Court of Missouri, cannot be taxed as costs of the case.

It is the further opinion of this department that only in those cases filed in the circuit court which are contested, and those cases in which the testimony is to be preserved shall the clerk of said court tax the five dollar fee prescribed by Section 485.100, Laws of 1951, p. 449, as costs of the case, and when collected, he shall pay same into the county or city treasury as provided by said section.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General

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