

**Eminent Domain—Appearance Fee—Costs—Clerk's Fees
—State—Stenographer's Fee.**

A defendant in condemnation proceedings instituted by the state is not required to pay a stenographer's fee as provided for by Section 8932 R.C.M. 1921, the said section relating only to civil actions and not special proceedings. The defendant in such actions cannot be taxed with the appearance fee or fee for entering judgment. These must be paid by the party seeking to condemn and when the state is the plaintiff in the action it is not chargeable with said fees by virtue of statute and therefore no charge should be made either to the state or to the defendant for said fees.

C. P. Larkin, Esq.,
Clerk of the District Court,
Red Lodge, Montana.

July 10, 1929.

My dear Mr. Larkin:

You have requested my opinion on the following questions:

"1. Is the defendant in condemnation proceedings instituted by the state required to pay the stenographer's fee provided for by Section 8932 ?

"2. Must the defendant in such action pay the appearance fee and fee for entering judgment as provided in Section 4918 R.C.M. 1921 ?"

In answer to your first question, Section 8932, supra, provides as follows:

"In every issue of fact in civil actions tried before the court or jury, before the trial commences, there must be paid into the hands of the clerk of the court, by each party to the suit, the sum of three dollars, which sum must be paid by said clerk into the treasury of the county where the cause is tried, to be applied upon the payment of the salary of the stenog-

rapher, and the prevailing party may have the amount so paid by him taxed in his bill of costs as proper disbursements."

Section 9000 R.C.M. 1921 defines a civil action as follows:

"A civil action arises out of:

1. An obligation.
2. An injury."

Our court has held that "condemnation proceedings are special proceedings provided for by statute."

State ex rel. Davis vs. District Court, 29 Mont. 153,
74 Pac. 200.

The proceedings are in the nature of an inquisition on the part of the state. They are special proceedings and not civil actions.

Kennebeck Water Dist. vs. City of Waterville, (Me.)
52 Atl. 774;

Garrison vs. Mayor, etc., 21 Wall. 196;

Convers vs. G. R. & I. R. Co., 18 Mich. 459;

Lake Erie, etc., vs. Heath, 9 Ind. 588.

And "unless a fee is provided for the specific service a public officer may not charge one."

State vs. District Court, 24 Mont. 425.

Since Section 8932, supra, provides for the payment of a stenographer's fee in civil actions only, and condemnation proceedings are special proceedings and not civil actions, no stenographer's fee can be charged.

As to your second question, Section 4918 R.C.M. 1921 provides in part as follows:

"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).

"On the entry of judgment in favor of plaintiff, he must pay the additional sum of two dollars and fifty cents;

"And if in favor of defendant, the defendant must pay the sum of five dollars (which includes all the clerk's costs for all services rendered in any action or proceeding, except issuing execution or order of sale, and the fees for transcript on appeal. If the action is dismissed, no fee for the entry of judgment need be paid, unless the party desires the entry of such judgment)."

Section 9953 R.C.M. 1921 provides:

"Costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court."

The above provisions relate generally to the payment of fees in civil actions and proceedings, but I am of the opinion that the defendant in a condemnation action may not be required to pay any of said fees. Neither would the court be justified in assessing against the defendant any cost in the condemnation proceeding, Section 9953 R.C.M. 1921, above quoted, notwithstanding.

Section 14 of Article XI of the Constitution of Montana reads as follows:

“Private property shall not be taken or damaged for public use without just compensation having been made to or paid into court for the owner.”

California has an identical constitutional provision and a statutory provision identical with our said Section 9953. In the case of City and County of San Francisco vs. Collins et al. 33 Pac. 56, the California Supreme Court held that in condemnation proceedings the constitutional provision forbade the taxing of any costs to the owner of the land notwithstanding the statutory declaration on the subject. The court said:

“As a result of the authorities upon this point, Mr. Lewis, in his work on Eminent Domain, Section 559, says: ‘It seems to us that courts should be guided by the following principles and considerations in the matter: By the constitution the owner is entitled to just compensation for his property taken for public use. He is entitled to receive this compensation before his property is taken or his possession disturbed. If parties cannot agree upon the amount, it must be ascertained in the manner provided by law’. As the property cannot be taken until the compensation is paid, and as it cannot be paid until it is ascertained, the duty of ascertaining the amount is necessarily cast upon the party seeking to condemn the property, and he should pay all the expenses which attach to the process. Any law which casts this burden upon the owner should, in our opinion, be held to be unconstitutional and void.”

It is therefore my opinion that as the appearance fee and fee for entering judgment are a necessary part of the costs of the defendant in the condemnation proceeding these constitute part of the costs which the state must bear in these proceedings, and as the state is by statute exempted from paying these costs itself the clerk should make no charge to the defendant for these fees.

This opinion is not to be considered as indicating that the defendant in condemnation proceedings may not be liable for his and the state's costs incurred subsequent to the award by the commissioners appointed by the court to appraise the property condemned as there are other laws and facts which govern these costs and which need not be considered here.

Very truly yours,

L. A. FOOT,
Attorney General.