

State Fire Marshal—Condemnation—Fees—Court Actions.

An action by the state fire marshal to condemn private property is a special proceeding and no stenographer's fee can be charged. The defendant in such action is required to pay the five dollar fee for filing judgment required under section 4918, R.C.M. 1921.

Mr. R. N. Hawkins,
Deputy State Bank Examiner,
Helena, Montana.

December 18, 1930.

My dear Mr. Hawkins:

You have requested an opinion on the following questions:

"1. In an action brought by the state fire marshal to condemn private property as a public nuisance, is the defendant required to pay the stenographer's fee provided in section 4918, R.C.M. 1921?"

"2. When judgment in such action is in favor of the defendant, is the defendant required to pay the fee of \$5.00 for entering the same?"

In answer to your first question, section 8932, R.C.M. 1921, 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 stenographer, 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."

The procedure in question is a special proceeding provided for by statute (State ex rel. Davis vs. District Court, 29 Mont. 153, 74 Pac. 200) 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 cases only and a proceeding to condemn property as a public nuisance is a special proceeding and not a civil action no stenographer's fee can be charged.

In answer to your second question, will say that an action of this nature is not an action to condemn property for public use but is in the nature of an action to abate a public nuisance and therefore section 14 of article XI of our constitution, which provides "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" has no application and since section 4918, R.C.M. 1921, provides in part,

"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)."

I see no reason why the defendant in an action such as the one in

question should be exempt from paying the fees therein provided, and it is therefore my opinion that the defendant should be charged a fee of \$5.00 for filing judgment.

Very truly yours,

L. A. FOOT,

Attorney General.