

court held the action to be criminal in nature.

Section 4918, Revised Codes of Montana, 1935, 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 fifty cents (which includes all the fees to be paid up to the entry of judgment). . . .

"For filing the papers and transcript on appeal from a justice or other inferior court or other tribunal, the party appealing must pay the sum of five dollars (which includes all costs up to the entry of judgment)."

It is to be noted that the parties required to pay fees are designated "plaintiff" and "defendant". In a criminal action "the state, or any county, or any subdivision thereof" cannot be charged any fees under the provisions of Section 4893, Revised Codes of Montana, 1935. Also the state cannot ordinarily appeal in a criminal action and it must be assumed that the above quoted portions of Section 4918 have reference to civil cases only.

Our Supreme Court in *State ex rel Baker v. Second Judicial Court*, 24 Mont. 425, 62 Pac. 688, in considering fees to be charged by a clerk of court, said:

"Under the familiar rule that no officer may demand a fee for any official service unless clearly authorized to do so, the clerk of the District Court could not lawfully collect the fee charged in the bill."

There is no specific provision requiring a defendant, in a criminal case, who appeals to the district court to pay a filing fee and also the policy of the law is to give a defendant in a criminal proceeding the unrestrained right to have his case reviewed by a higher court and the charging of a filing fee would be a hinderance to the exercise of this constitutional right.

See Opinion 202, Volume 17, Report and Official Opinions of Attorney General.

It is therefore my opinion that a clerk of court is without authority to

#### Opinion No. 172.

##### Clerk of Court—Fees—Appeal From Police Court.

Held: A clerk of court is without authority to charge a fee for filing a transcript on appeal from a police court in a criminal case.

January 29, 1944.

Mr. Frank J. Roe  
County Attorney  
Silver Bow County  
Butte, Montana

Dear Mr. Roe:

You have requested my opinion concerning the following question:

"In an appeal from a fine imposed in the police court for the violation of a city ordinance pertaining to license fees should the clerk of the district court charge a filing fee of five dollars?"

In the case of *State ex rel Marquette v. Police Court*, 86 Mont. 297, 283 Pac. 430, the court considered a case involving a fine for the violation of a city ordinance which required a practicing physician to procure a license. The

charge a fee for filing a transcript on appeal from a police court in a criminal case.

Sincerely yours,  
R. V. BOTTOMLY  
Attorney General