

MAGISTRATES — State of Missouri is not required to deposit \$5.00 when commencing a suit in the magistrate court; a magistrate shall not require plaintiff to provide security for costs in all proceedings; a \$5.00 magistrate fee is not to be apportioned for the purpose of paying costs of any proceeding.

March 26, 1947

OPINION NO. 57

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

We hereby acknowledge receipt of your letter of recent date requesting an opinion of this department, which, for the sake of brevity, we have restated as follows:

- (1) Does the State of Missouri have to deposit the \$5.00 magistrate fee when filing a proceeding in the magistrate court?
- (2) May the magistrate require that a plaintiff provide security for costs in all proceedings?
- (3) Is the \$5.00 magistrate fee that must be paid upon the commencement of a civil proceeding in the magistrate court a cost deposit to be apportioned among the costs of the proceeding?

Section 23 of Senate Bill 207 of the 63rd General Assembly provides in part as follows:

"Upon the commencement of any proceedings in the magistrate court the party commencing the same shall pay to the clerk of said court a magistrate fee of five dollars (\$5.00). The fees herein provided shall be charged against the losing party, and if recovered from said party the same shall be repaid to the party making the deposit of such fee. Except as

provided in Section 23a of this act, it shall be the duty of each clerk of the magistrate court, with the approval of the magistrate to charge upon behalf of the State every fee that accrues in his office and to receive the same, and at the end of each month, pay over to the director of revenue all monies collected by him as fees, taking two receipts therefor, * * * * *

It is noted that this is a general provision and does not specifically provide that the state shall pay the \$5.00 fee. If this \$5.00 were paid by the state when filing a proceeding in the magistrate court it would go back to the state and be deposited in the magistrate fund. This would merely be going through an absurd proceeding - taking money from the state and immediately giving it back.

The general rule, that the state is not liable for costs unless specifically named, is stated in 59 C. J. page 332, Sec. 503, which reads in part as follows:

"While a state may be excused from the payment of costs because of express statutory exemption, it is a general and well established rule, apart from statute, that costs are not recoverable from a state, in her own courts, whether she has brought suit as plaintiff or has properly been sued as defendant; or whether she is successful or defeated; and if a state has paid costs for which it is not liable, it may recover the amount paid from the party who is liable. Costs, however, may be awarded against a state when it is expressly permitted by statute; but only in a case coming clearly within the terms of the statute, and general statutes providing for taxation of costs in favor of the prevailing party or against the unsuccessful party do not authorize an award for costs against a state."

This rule has been followed by the Supreme Court of this state in the case of Murphy et al., v. Limpp, 147 S. W. (2d) 420, which was a case brought by the members of the Unemployment Compen-

sation Commission against one Rufus H. Limpp for the purpose of collecting contributions under the provisions of the Unemployment Compensation law. Judgment was rendered for the defendant and the lower court assessed costs incurred against the plaintiff, the Unemployment Compensation Commission. After citing the above quotation from Corpus Juris, they stated that in the absence of a statutory provision the costs cannot be assessed against the state. For other cases affirming this doctrine, see Hartwig-Dischinger Realty Co. v. Unemployment Compensation Commission, 168 S. W. (2d) 78, 350 Mo. 690; State ex rel. State Social Security Commission v. Butler's Estate, 181 S. W. (2d) 768, 353 Mo. 14.

The second question presented by your request is whether or not the magistrate may require a cost deposit upon the filing of a civil suit. It is well settled that courts of record have the inherent power to make rules of procedure and practice with reference to matters that have not been provided for by statutory or constitutional provisions.

Section 1401, R. S. Mo. 1939, provides that only in specific cases can the defendant be required to put up security for costs. Section 1402, R. S. Mo. 1939, provides that after the commencement of any suit that the officers of the court and the defendant may file a motion requiring plaintiff to give security for the costs and that the court shall allow the motion when certain named circumstances exist. Section 33 of Senate Bill 207 of the 63rd General Assembly, which specifically provides the rules of procedure to be followed in magistrate courts, also names certain circumstances where the magistrate may require security for costs. It can readily be seen that the General Assembly has enacted rules of procedure governing the instances when it is necessary to deposit security for costs in filing a suit. This raises the question of whether or not the magistrate may make rules of procedure that go beyond the limits provided by a statute. The courts of the different states are divided on this question but Missouri follows the majority which holds that rules of the court cannot broaden or go beyond a statutory provision.

In the case of State ex rel. Plummer v. Gideon, 119 Mo. 94, relator brought mandamus to require the judge of a circuit court to allow him to subpoena 28 witnesses after the judge had ruled that they could subpoena only 15 witnesses in conformance with a regulation set up by a rule of the court. Relator

relied on a statute and a section of the Constitution which gave defendant the unlimited right to subpoena witnesses when indicted for a criminal offense. The court, in holding that this rule was void, stated at l. c. 98 and 100:

"It has been uniformly held by this court that if a rule of court went beyond, or contradicted a statute of the state, it would not be enforced here. * * *"
(Underscoring ours.)

"It is sufficient to add that this rule imposes harder terms than the statute does, and for that reason it cannot be enforced. The conclusion we have reached accords not only with our own decisions, but with those of many other courts of last resort in the several states. * * * *"
(Underscoring ours.)

Also in the case of state ex rel. Hoffman v. Withrow, 135 Mo. 376, the rule of the court was in question which attempted to require the filing of a bill of exceptions in less time than was required by statute. Holding this was beyond a rule-making power, the Supreme Court stated at l. c. 382:

"That such a rule, if observed, would relieve the court of much labor and greatly facilitate business therein is, doubtless, true, but it seems quite clear to us, that it had no power to adopt such a rule or to enforce its observance. In Works on Courts and Their Jurisdiction, page 177, it is said: 'A court can not make and enforce a rule that will deprive a party of a right given him by law or granting the right upon terms more onerous than those fixed by law.'
* * * *"

We believe that this is the type of a situation that is before us for consideration. The General Assembly has stated that in only specific situations may the courts require security for costs, and now the court has attempted to broaden this statutory provision by saying that at all times the plaintiff must deposit security for costs. A rule of this type, we believe, is not within the inherent power of the magistrate courts.

You have also presented a question of whether or not the \$5.00 deposit required by Section 23 of Senate Bill 207 of the 63rd General Assembly should be used to pay the costs in the proceeding for which it is deposited. Section 23 of Senate Bill 207, supra, specifically states that this is a magistrate fee and is to be paid over to the Department of Revenue. It is clear, then, it cannot be used for any of the other fees in the proceeding.

Conclusion

Therefore, it is the opinion of this department that (1) the State of Missouri is not required to deposit the \$5.00 magistrate fee on the commencement of a proceeding in a magistrate court; (2) the magistrate is not authorized to make a rule requiring the plaintiff to provide security for costs in all proceedings; and (3) the \$5.00 magistrate fee is to be paid over to the Department of Revenue and is not to be apportioned for the payment of the costs of the proceeding.

Respectfully submitted,

PERSHING WILSON
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APPROVED:

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