

COSTS:

Informant in insanity matter may be required to give bond for costs under Section 1237 if non-resident before suit is commenced, and if a resident and unsettled in his affairs, may be required to give security under Section 1238 after suit is commenced.

August 3, 1933.

Mr. J. E. Smith,
Judge of Probate,
Sedalia, Missouri.

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Dear Sir:

We are acknowledging receipt of your letter of July 28, 1933, in which you inquire as follows:

"Will you please give me an opinion as to whether or not a Probate Judge has the power and authority to compel an informant in an insanity matter to give bond or security for costs, before issuing process to the person alleged to be of unsound mind?

Will appreciate your opinion in the above matter."

Section 1237, R. S. Mo. 1929, provides as follows:

"In all actions on office bonds for the use of any person, actions on the bonds of executors, administrators or guardians, qui tem actions, actions on penal statutes when the penalty is given to the informer, and in all civil cases when the plaintiff or person for whose use the action is to be commenced shall not be a resident of this state, the plaintiff or person for whose use the action is to be commenced shall, before he institutes such suit, file with the clerk of the court in which the action is to be commenced the written undertaking of some person, being a resident of this state, whereby he shall acknowledge himself bound to pay all costs which may accrue in such action; and if any such action shall be commenced without filing such undertaking, or depositing with the clerk of the court in which said suit is brought, a sum of money sufficient to pay all costs that may accrue in the case, subject to be increased at any time, whenever the court may deem proper, and by its order of record require, the court, on motion, may dismiss the same, unless such undertaking be filed or sum of money be deposited before the motion is determined, and the attorney of the plaintiff shall be ruled to pay all costs accruing therein."

Section 1238, R. S. Mo. 1929, provides as follows:

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"If, at any time after the commencement of any suit by a resident of this state, he shall become non-resident, or in any case the court shall be satisfied that any plaintiff is unable to pay the costs of suit, or that he is so unsettled as to endanger the officers of the court with respect to their legal demands, the court shall, on motion of the defendant or any officer of the court, rule the plaintiff, on or before the day in such rule named, to give security for the payment of the costs in such suit; and if such plaintiff shall fail, on or before the day in such rule named, to file the undertaking of some responsible person, being a resident of this state, whereby he shall bind himself to pay all costs which have accrued or may accrue in such action, or deposit with the clerk of the court in which said suit is pending a sum of money sufficient to pay all costs that have accrued or will probably accrue in the case, subject to be increased at any time whenever the court may deem proper and by its order require, the court may, on motion, dismiss the suit unless such undertaking shall be filed or sum of money deposited before the motion is determined."

Under Section 1237 above, if the informant be a non-resident he may be required to give bond before he institutes such suit. If, however, the informant is not a non-resident or does not become a non-resident, the court, after the commencement of any suit, if the court is satisfied that the informant is unsettled in his affairs, may on motion of the defendant or any officer of the court, rule the informant to give security for costs, and make an order accordingly. A failure to comply with the order requiring security would warrant the dismissal of the action.

Section 455 R. S. Mo. 1929, provides as follows:

"If the person alleged to be insane shall be discharged, the cost shall be paid by the person at whose instance the proceeding is had, unless said person be an officer, acting officially according to the provisions of this article, in which case the costs shall be paid by the county."

Under Section 455, if the alleged insane person is discharged, the cost shall be paid by the person at whose instance the proceeding was had, unless the said person be an officer. It is apparent from Section 455 that the costs must be paid by the informant when the alleged insane person is discharged; such being true, the Probate Court, under general authority conferred in Sections 1237 and 1238, would have authority to require a bond or security according to the facts in the case. Section 724 R. S. Mo. 1929, provides

as follows:

"Suits may be instituted in courts of record, except when the statute law of this state otherwise provides, either, first, by filing in the office of the clerk of the proper court a petition setting forth the plaintiff's cause or causes of action, and the remedy sought, and by the voluntary appearance of the adverse party thereto; or, second, by filing such petition in such office, and suing out thereon a writ of summons against the person or of attachment against the property of the defendant. The filing of a petition in a court of record, or a statement or account before a court not of record, and suing out of process therein, shall be taken and deemed the commencement of a suit."

Under Section 724 a suit is not commenced until the petition is filed and the defendant enters his voluntary appearance or a writ of summons is issued to the defendant. Under Section 1237, the court may require the informant, when that Section applies, to give bond before he commences a suit. Under Section 1238, however, security cannot be required until after suit has been commenced, and a suit is commenced when the petition is filed and the writ of summons issued. *State ex rel v. Bates*, 286 S. W. 420. The mere filing of the petition is not a commencement of the suit, but the filing of the petition plus the issuing of the writ is the commencement of the suit. It is only under Section 1237 that bond may be required before suit is commenced. If the facts are such as bring it within Section 1238, then you as Probate Judge would not have authority to require a security until after process was issued, the process, however, need not necessarily be served because the suit is commenced by the filing of the petition and the issuance of process.

It is, therefore, the opinion of this Department that if the informant is a non-resident he may be required to give bond before the commencement of the suit. If, however, the informant is a resident of the State and security is required by an order of court because the informant is unsettled in his affairs, then he may be required to give such security after the suit is commenced by the filing of the petition and the issuance of process. In other words, if he be a non-resident he may be required to give bond before process is issued; if he is a resident, he may be required to give security for costs upon order duly made after the petition is filed and the process is issued. If he is a resident he cannot be required to give the bond required in Section 1237, and he cannot be required to give security for costs under Section 1238 until after the commencement of the suit, which is by filing the petition

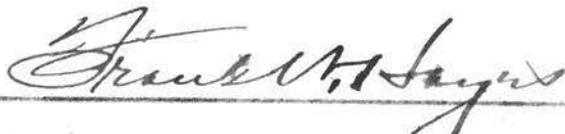
Mr. J. E. Smith,

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August 3, 1933.

and issuance of process, which gives the court jurisdiction
in the case.

Very truly yours,



Assistant Attorney General.

APPROVED:

Attorney General.

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