

CRIMINAL COSTS:

Criminal Clerk should issue execution at the end of the term against parolee who is not protected by the insolvency act.

Oct. 21, 1938

11-4



Mr. Fred C. Bollow  
Prosecuting Attorney  
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Dear Sir:

This is to acknowledge receipt of your letter of October 19, 1938 with reference to costs in a criminal case. Your letter reads as follows:

"While there is no dispute that the trial judge has a right to grant bench paroles, I am wondering if he may continue such parole indefinitely without requiring the defendant to pay the cost. There has been a practice in this County of never requiring defendants to pay the cost, and thus make these costs fall on the County eventually.

"It has always been my opinion that no one could waive the payment of cost. I would therefore like to know whether or not while a bench parole is in effect if I have a right, in vacation, to procure an execution and commitment from the clerk's office against the defendant for the amount of unpaid cost."

In accordance with the above request, we first cite Section 3825 Revised Statutes of Mo., which reads as follows:

"Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county."

Under this section, whenever a defendant is convicted or pleads guilty to any crime, a judgment must be rendered against him for the costs and under no circumstances except as hereinafter set out should the cost be paid by the state or county. Shelby county has a population according to the last 1930 census of 11,983. The power of a judge to parole a defendant is governed by Section 3809, Revised Statutes of Mo., 1929, which reads as follows:

"The Circuit and criminal courts of this state, and the court of criminal correction of the city of St. Louis, shall have power, as hereinafter provided, to parole persons convicted of a violation of the criminal laws of this state."

This section 3809 was amended by the laws of 1935 page 307, and laws of 1937 page 400, in reference to the City of St. Louis and Jackson County. Section 3811 reads as follows:

"When any person of previous good character and who shall not have been previously convicted of a felony, shall be convicted of any felony except murder, rape (where the rape charged and the proof shows said rape to have been committed by means of force, violence or by putting the female in fear of immediate injury to her person), arson or robbery, and imprisonment in the penitentiary shall be assessed as the punishment therefor, and sentence shall have been pronounced, the court before whom the conviction was had, if satisfied that such person, if permitted to go at large, would not again violate the law, may in his discretion, by order of record, parole such person and permit him to go and remain at large until such parole be terminated as hereinafter provided: Provided, that the court shall have no power to parole any person after he has been delivered to the warden of the penitentiary."

It will be noticed under Section 3811 that it only excepts certain felonies and only applies to felonies and not misdemeanor. Section 3814 reads as follows:

"Any person confined in jail under judgment of conviction before a justice of the peace may be paroled, his parole terminated and absolute discharge granted by the court or judge of the court having jurisdiction of appeals from justices of the peace in criminal cases in the county wherein the justice rendering the judgment resides, in the same manner and subject to the same restrictions as if such person had been convicted in said court."

Under this section the Circuit Judge has the power to parole a defendant, who has been convicted before a Justice of the Peace. Section 3810 partly reads as follows:

"The courts named in section 3809 of this article, or the judge thereof in vacation, subject to the restrictions hereinafter provided, may, in their discretion, when satisfied that any person against whom a fine has been assessed or a jail sentence imposed by said court, or any person actually confined in jail under judgment of a justice of the peace, or sentenced to the state industrial home for girls, or to the Missouri training school for boys, will, if permitted to go at large, not again violate the law, parole such person and permit him or her to go at large upon such conditions and under such restrictions as the court or judge granting the parole shall see fit to impose \* \* \* \*"

Under Section 3810, the court after a parole has been granted and revoked, may grant a second parole upon the payment of all costs in the case.

You will notice that under Section 3813 of the Revised Statutes of Missouri 1929, it refers to Section 3811; which covers a punishment by imprisonment in the state penitentiary only. In setting out the procedure of parole in this section 3813, it provides that before granting such parole, to require such person, with one or more sureties, to enter into bond to the state of Missouri in a sum to be fixed by the court, etc. Under Section 3810 Revised Statutes of Missouri 1929, this section sets out the procedure for the paroling of a person who has been sentenced by a jail sentence or by an imposed fine only, either by the Circuit Court or a Justice of the Peace. As you notice by this Section 3810, there is no requirement as to making bond before parole as is set out in Section 3813 of the Revised Statutes of Missouri 1929.

Under Section 3817 of the Revised Statutes of Missouri 1929, this section provides that no person under the provisions of Section 3810 shall be granted an absolute discharge at an earlier period than six months after the date of his parole, nor shall such parole be continued for a longer period than two years from date of parole, as set out above 3810 is the section where the conviction imposed a sentence to the county jail or imposed a fine only. Section 3817 further provides that under the provisions of Section 3813 no person shall be granted an absolute discharge at an earlier period than two years from the date of his parole, nor shall such parole continue for a longer period than ten years. Under this latter part of Section 3817, it refers to Section 3813 where the punishment imposed by imprisonment in the state penitentiary. Section 3818 of the Revised Statutes of Missouri 1929 reads as follows:

"It shall be the duty of the court granting the parole to require the person paroled to pay or give security for the payment of all costs that may have accrued in the cause, unless the person paroled shall be insolvent and unable to either pay said costs or furnish security for the same. In the latter case the costs shall be paid by the state or county as in other cases without such persons being required to serve any time in jail for non-payment of fine or costs. Such payment of costs by the state or county shall not relieve such person from liability for the same, but if at any time before his final dis-

charge he shall become able to pay said costs, it shall be the duty of the court to require said costs to be paid before granting a discharge, and said costs when so paid shall be turned into the state or county treasury as the case may require."

As you notice in Section 3818 it specifically sets out to require the person paroled to pay or give security for the payment of all costs that may have accrued in the cause, unless the person paroled shall be insolvent and unable to either pay said costs or furnish security for the same. In the latter case the costs shall be paid by the state or county as in other cases without such person being required to serve any time in jail for non-payment of fine or costs. It also further says that the payment of the costs by the state or county shall not relieve such person from liability for the same, but if at any time before his final discharge he shall become able to pay said costs it shall be the duty of the court to require said costs to be paid before the granting of a discharge. Section 3730 reads as follows:

"It shall be the duty of the clerk of the court having criminal jurisdiction for the county at the end of each term, to issue executions for all fines imposed, and the costs of conviction in criminal cases, during the term and remaining unpaid, which shall be executed in the same manner as executions in civil cases, and the property of the defendant may be seized and sold thereon, notwithstanding he may be in custody for the same demand."

Under this section it is the duty of the clerk of the court to issue executions for all fines imposed and the costs of conviction in criminal cases. This execution may be issued and the sheriff may make a nolle bona return. Upon an execution issued, the parolee may avail himself of the insolvency act described in Article 20, Chapter 29 of the Revised Statutes of Missouri 1929 and in that event he will be relieved of the payment of any criminal costs. The parole is not a part of the criminal case and it was so held in the case of state vs. Kelley 274 S. W. 731, local citation 733, where the court said:

"Of course, the special judge may pass on the motion for a new trial, grant an appeal, settle the bill of exceptions, etc. This because such matters, being but procedural steps to be taken in arriving at the ultimate determination of defendant's guilt or innocence, are so related to the trial of the cause as to be deemed incident thereto. But the granting of a parole has naught to do with the ascertainment of guilt or innocence. It presupposes the defendant's guilt. An application for parole cannot be entertained until after a judgment of conviction has been rendered (sections 4156 and 4157, R. S. 1919) and that judgment has become a finality (section 4167, R. S. 1919). The granting of a parole, therefore, whether it be deemed a conditional suspension of sentence or a conditional pardon is no part of the trial of a cause which culminates in a judgment of conviction, nor is it in any way incident thereto. No appeal lay from the judgment entered on the pleas of guilty of defendants Morgan and Burnett. It was a final determination of the cause. When Judge Ing rendered that judgment, his powers and duties as special judge came to an end. Consequently he was not the judge of the Cape Girardeau county circuit court on the 31st day of August, 1923, for any purpose whatever."

#### CONCLUSION

In view of the above authorities it is the opinion of this department that the parolee must pay the court costs where he has property that is subject to levy upon an execution but if the parolee takes advantage of the Insolvency Act, described in Article 20, Chapter 29 of the Revised Statutes of Missouri 1929, the state where liable must pay the costs, and the county where liable must pay the costs. It is further

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the opinion of this department that the court can not waive the payment of costs except where the parolee takes advantage of the Insolvency Act, and in that event the parolee could not be incarcerated again for the payment of said cost. Under Section 3730 an execution could be issued at any time within the Statute of Limitations for the payment of the costs. It is further the opinion of this department, that where the costs shall be paid by the state or county as in other cases, without such person being required to serve any time in jail for non-payment of fine or costs, such payment of costs by the state or county shall not relieve such person from liability for the same, but at any time before his final discharge, if able to pay, the court shall require the cost to be paid before granting a discharge. When the costs have been paid in this manner by the parolee, the money should be returned to either the state or the county, into the state treasury or the county treasury, as the case may require.

Respectively submitted,

W. J. BURKE  
Assistant Attorney General

APPROVED:

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J. W. BUFFINGTON  
(Acting) Attorney General

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