

CLERKS OF COURTS -
COSTS -

) Circuit Clerk in issuing fee bills for
) costs should include therein all costs
) of case including jurors' and witness'
) fees, sheriffs' costs etc. If plaintiff
) deposits an amount for security of costs
) and the same is not sufficient to include
) all costs of case the plaintiff if he is
) losing party can be required to pay the
) difference. Fee bills, and executions
) thereon can be issued up to or during
) such time thereafter as judgment for costs
) might be revived.

May 22, 1939

Hon. John E. Short
Circuit Clerk
Ray County
Richmond, Missouri



Dear Sir:

We have received your letter of May 2nd, which reads as follows:

"In the matter of issuing fee bills for costs in civil cases, there seems to be a question as to whether the Circuit Clerk can issue the fee bill for his costs or include the costs of the case in the fee bill, that is the witnesses, sheriff's costs or any that might accrue.

"Under section 11785 R. S. 1929, it mentions that 'The remedy of officers for their fees is by fee bill.' Does that mean that the clerk in issuing a fee bill for costs in a case shall include another cost other than his costs?

"Another question is, where the filing fee of \$5.00 is paid the clerk and after the case is in court there is by order of court a \$50.00 fee for security for costs paid the clerk by the Plaintiff and the Plaintiff loses

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his case, and in case the costs or more than the \$55.00, can the clerk collect more than the \$55.00 or is the amount of \$55.00 all he can get because the security was put up for costs. Can a fee bill be issued for the rest of the costs against the plaintiff.

"Can a clerk issue a fee bill for costs after three years have elapsed since the judgment was rendered.

* * * * *

"P.S. Where the Clerk prorates the amount that he has and cannot collect the full amount should the proration include all parties who are entitled to a fee or use the amount collected for officers of the court only."

The first question you ask is whether a clerk of a Circuit Court can or shall include costs other than his own in a fee bill such as witness' fees and sheriff's costs.

Section 11776 R. S. Missouri, 1929, makes such a requirement of circuit clerk's. This section reads in part as follows:

"The several officers hereinafter named, and jurors and witnesses, shall be allowed such fees for their services rendered in

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discharging the duties imposed upon them by law as are hereinafter provided, and the clerks of the courts of record and the presiding officers of courts of inferior jurisdiction shall strictly examine the accounts of all fees accruing during the progress of any civil suit pending in their said courts, and shall correct the same if wrong in any manner, and shall thereupon enter the amount thereof upon their fee books, and the said clerk and the other officers before mentioned shall after the term of the court at or before which the services were rendered, if required by the party entitled to fees, certify a fee bill of such services and deliver the same to the sheriff or other officer of the proper county charged by law with the service of executions, who shall proceed forthwith to collect the same; and if the person or persons and their sureties for costs properly chargeable with such fees shall neglect or refuse to pay the amount thereof, and costs for issuing and serving the same, within thirty days after demand of said sheriff or other officer aforesaid, the same shall be levied of the goods and chattels, moneys and effects of such persons or their sureties, in the same manner and with like effect as on an execution; * "

Section 11789, R. S. Mo. 1929 and contained in the same article as is 11776, supra, provides what

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fees sheriffs shall be allowed for their services. Consequently the fees of sheriffs are included within the meaning of section 11,776, supra, and are to be included by the Circuit Clerk in making up his fee books.

All of the fees and costs mentioned in section 11776 are to be entered on the Circuit Clerk's books and as stated in said statute each Circuit Clerk shall " if required by the party entitled to the fees certify a fee bill of such services " and deliver the same to the sheriff or officers for collection.

Therefore, in answer to this question it is quite apparent that the Circuit Clerk should include witness' fees and sheriff costs together with his own allowable costs in making up fee bills.

Your second question can be stated in this form: Suppose a plaintiff pays a five dollar filing fee and deposits an additional fifty dollars for security of costs, making a total of fifty-five dollars paid to the Clerk. If the total costs for which the plaintiff might become liable should amount to sixty-five dollars, can the ten dollars be collected from the plaintiff.

Section 1238 R. S. Mo. 1929 provides that under certain circumstances a plaintiff may be required to give a cost bond or make a deposit, this section reads as follows:

"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

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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 be deposited before the motion is determined."

It will be observed that after the original deposit is made the plaintiff may be required to increase the amount if the court deem it proper to so order. Whether or not the amount of the bond is to be increased, however, is a discretionary matter with the court.

The statute says that "whenever the court may deem proper and by its order require" the amount of deposit shall be increased. In other words, the intent seems to be that the plaintiff shall pay all costs that might be adjudged against him whether the original deposit is large enough to cover the same or not.

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Neither this statute nor any other states that the plaintiff shall be liable only to the extent of the deposit, whatever it should happen to be. The effect of this statute is that the original deposit required might be too low, in which event the court may increase it. The only purpose in increasing it would be to insure the payment of all the costs which might be assessed against the plaintiff and not that the plaintiff should be liable only for any amount which he might deposit as security for costs.

We also call your attention to section 1242 R. S. No. 1929, which reads as follows:

"In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law."

This section states that in all civil actions the party prevailing shall "recover his costs from the other party." This section does not say a part of the costs, or the amount of any deposit the court might require, but says "his costs". This necessarily means all of the costs. We conclude then that the plaintiff is liable for the payment of the ten dollars and costs which is over and above the amount deposited by the plaintiff and that the same can be collected from the plaintiff.

You state your next question in the following language: "Can a clerk issue a fee bill for costs after three years have elapsed since the judgment was rendered?"

Section 11776, supra, states that the civil officers and jurors, and witnesses, shall be allowed such fees for their services rendered as provided by law, and the clerks of the courts of record shall strictly examine

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the accounts of all such fees accruing during the progress of any civil suit pending in their said courts and such clerks "shall thereupon enter the amount thereof upon their fee books". This section further provides that said clerk "shall, after the term of the court at or before which the services were rendered, if required by the party entitled to fees, certify a fee bill of such services and deliver the same to the sheriff or other officer of the proper county charged by law with the service of executions, who shall proceed forthwith to collect the same."

In this connection we again quote section 1242, supra, regarding the liability for costs in civil suit. This section is as follows:

"In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law."

The effect of the above section is that when one party to a suit is successful, a judgment for the costs is rendered in his favor at the same time against the losing party to the suit. In the case of *McCrary v. Michael*, 109 S. W. (2d) 50, the St. Louis Court of Appeals reversed a judgment for costs and said: (l.c. 53)

"It follows, therefore, that the judgment of the trial court in so far as it taxes the costs against the estate should be reversed and the cause remanded to the circuit court, with directions to tax the costs against the unsuccessful contestants, and it is so ordered."

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Since a judgment for costs is rendered against the losing party and the prevailing party is entitled to recover such costs by execution after requesting the issuance of a fee bill by the Circuit Clerk, we believe that section 886 R. S. Mo. 1929, is the applicable statute with reference to the time during which a fee bill and execution thereon might issue. Section 886 R. S. Mo. 1929, reads as follows:

"Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever."

It follows, therefore, that since the judgment for costs rendered the prevailing party in a civil action

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is a judgment, order or decree of a court of record that the same shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof or after any period during which the same might have been revived and that the issuance of a fee bill and execution thereon can be accomplished during such period the same as in connection with any other judgment. The fact that there is a judgment for costs rendered which is in the nature of a judgment is further brought out by the case of Garner v. Hays, 3 Mo. 436. In that case the plaintiff had recovered a judgment against the defendant for his debt and costs. The defendant paid the debt recovered but refused to pay the costs. After the expiration of a year and a day from the rendition of the judgment the plaintiff caused a scire facias to be issued out to revive the judgment for costs and the court held that the judgment for costs could be so revived. The court said:

"Only such costs as were legal and proper could have been recovered under the original judgment, and such only are recoverable by execution on the judgment as revived. * *

A judgment for costs generally is good.

* * * * *

Upon the whole, therefore, the circuit court did right in refusing to quash the scire facias, and giving judgment as to the costs recovered in the original suit, and its judgment is therefore affirmed, with costs."

In your next question you ask whether a clerk when he cannot collect the full amount of costs should pro rate the amount he does have on hand with all of the parties entitled to fees. It is our opinion that the clerk should pro rate such funds among all parties entitled to fees, including yourself, the sheriff, witnesses and jurors. There is no statute in this state

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which gives any of these persons a prior claim to any of the deposits on hand or amounts collected for the payment of costs. None of the appellate courts, as far as we have been able to determine have ever passed on this question, but since the law does not give any prior claim to any of such parties, it is only equitable and fair that the same should be pro rated.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

JFA:RW