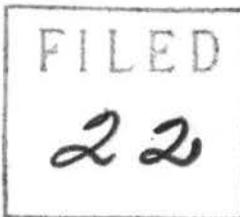


MAGISTRATE AND PROBATE COURT FEES: County is liable to pay clerk's fees in magistrate cases where prosecuting attorney enters nolle prosequi; clerk's fees in probate court in sanity hearings of indigent insane; and attorney's fees for attorney appointed by court to represent indigent insane at hearing. Duty of the Department of Revenue to collect these fees when county court refuses to pay them.

November 22, 1949

Mr. W. A. Despain  
Judge of the Probate and  
Magistrate Court  
Eminence, Missouri



12/1/49

Dear Sir:

This office is in receipt of your recent request for an official opinion. Your request is expressed in your letter to this office as follows:

"In Re: Fees of Magistrate and Probate Clerk Fees, in counties of less than 30,000 population.

"Is the County liable for clerk's fees in Magistrate Court and Probate Court, in criminal cases where the Prosecuting Attorney enters Nolle prosequi?, also in insanity cases where the patient is ordered confined in some State Institutions?, also the payment of Attorney's fee where appointed by the Probate Court in insanity cases?

"If so, who should bring suit to collect Clerk's fees? as all clerks' costs are fees of the State and the clerk stands charged by the State for collection of said fees?"

For the purpose of greater convenience to us in considering these various matters we take the liberty of restating your request thus:

"(1) Is the County liable for clerk's fees in Magistrate Court in criminal (misdemeanor) cases where the Prosecuting Attorney enters nolle prosequi?" (In your conversation with me at the time you presented your opinion request, you stated that you referred to misdemeanor cases.)

"(2) Is the County liable for Clerk's fees in Probate Court in sanity cases (cases of indigent

insane) where the patient is ordered confined in some state institution?"

"(3) Is the County liable for the payment of attorney's fees in sanity cases (indigent insane) where an attorney is appointed by the probate court to represent the alleged insane person in the sanity hearing."

"(4) If the county is liable for the payment of the above fees, who should bring suit to collect clerk's fee, (assuming that a fee bill has been presented to the county court and that the court has refused to pay them, which you informed me verbally was the case) as all clerks' costs are fees belonging to the state, and the clerk stands charged by the state for the collection of said fees?"

We will now consider your first question, which is: Is the county liable for clerk's fees in the Magistrate Court in criminal (misdemeanor) cases where the prosecuting attorney enters nolle prosequi?

We believe that this question is fully answered by an official opinion rendered November 12, 1947, by this department, to Honorable Mark Wilson, Judge of the Magistrate Court of Henry County. We quote from that opinion:

"A further question presented concerns the liability for criminal costs in a case where a person is charged with a misdemeanor on information by the prosecuting attorney but said charge is dismissed by the prosecuting attorney before trial.

"Prosecutions before magistrates for misdemeanors are by informations made by the prosecuting attorney of the county in which the offense may be prosecuted. Upon the filing of an information by the prosecuting attorney it is the duty of the magistrate to forthwith issue a warrant for the arrest of the defendant. The filing of such an information has the effect of instigating a criminal prosecution. This was recognized by the Supreme Court in Ex Parte Bedard, 106 Mo. 616, 1.c. 622:

"\* \* \*The determination of the question here hinges upon the scope and meaning of the words "Criminal prosecution," as used in section 4174, supra. We have no doubt they include a criminal information for a misdemeanor, \* \* \*!"

"If, after the prosecution has commenced, the prosecuting attorney wishes to dismiss the charges brought against the defendant, he must enter a nolle prosequi. For the purpose of criminal costs statutes, a nolle prosequi is considered the same as if the defendant had been acquitted. We find this rule set out in the case of the State ex rel. Tudor v. The Platte County Court, 40 Mo. App. 503, at page 506:

"The sole question that was tried below, and is for trial here, is whether the county of Platte is liable for the costs arising under the above-mentioned indictment.

"The controversy is whether the state or county is liable for relator's costs and the case depends upon a construction of the criminal costs statute; and in passing on the question we shall consider the case as though the defendant had been acquitted. The nolle prosequi amounted to an acquittal in the sense of the statute."

We would call your further attention to the following section in Laws of Missouri, 1945, p. 750, (Sec. 3856.27 Mo. R.S.A. 1939:

"When the proceedings are prosecuted before any magistrate, at the instance of the injured party, for the disturbance of the peace of a person, or for libel or slander, or for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, the name of such injured party shall be entered by the magistrate on his record as a prosecutor; and if the defendant shall be discharged or acquitted, such prosecutor shall be adjudged to pay the costs not otherwise adjudged; and in every other case of acquittal, if the magistrate

Mr. W. A. Despain

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or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the magistrate shall enter judgment for costs against the prosecution or party at whose instance the information was filed, and shall issue execution therefor; but in no case shall the prosecuting attorney be liable for costs. In other cases of discharge or acquittal the costs shall be paid by the county, except when the prosecution is commenced by complaint and the prosecuting attorney declines to file information thereon, in which case the proceedings shall be dismissed at the cost of the party filing the complaint."

Our answer to your first question is, therefore, that a county is liable for clerk's fees, which are criminal costs, in magistrate courts in counties of 30,000 population, or less, in criminal (misdemeanor) cases, where the prosecuting attorney enters nolle prosequi, except in such cases as costs are adjudged against the prosecutor, i.e., the complaining witness.

Your second question is: Is the County liable for clerk's fees in probate court in sanity cases (cases of indigent insane) where the patient is ordered confined in some state institution?

In answer to this question, we would call your attention to Section 453, Mo. R. S. A. 1939, which states:

"When any person shall be found to be insane according to the preceding provisions, the costs of the proceedings shall be paid out of his estate, or, if that be insufficient, by the county."

The case of Van Loo v. Osage County, 141 S.W.(2d) 805, states:

"\* \* \*When a person is adjudged insane in the probate court, and the costs cannot be paid out of the estate of such insane person, then the county is liable for such costs, and the fact that the probate court committed Anna Van Loo to the state hospital at Fulton, instead of ordering her held for disposition by the county court, would not relieve the county of its duty to pay the costs."

Our answer to your second question is, therefore, that the county is liable for clerk's fees in the probate court insanity cases, since they are part of the costs, in cases of indigent insane, where the person for whom the hearing is held is ordered committed to some state institution.

Your third question is: Is the county liable for the payment of attorney's fees in sanity cases where an attorney is appointed by the probate court to represent the alleged insane person at the sanity hearing?

In answer to this question we would direct your attention to Section 449, Mo. R. S. 1939, which states:

"In proceedings under this article, the alleged insane person must be notified of the proceeding by written notice stating the nature of the proceeding, time and place when such proceedings will be heard by the court, and that such person is entitled to be present at said hearing and to be assisted by counsel, such notice to be signed by the judge or clerk of the court under the seal of such court, and served in person on the alleged insane person a reasonable time before the date set for such hearing. If no licensed attorney appears for the alleged insane person at such hearing then the court shall appoint an attorney to represent such person in such proceeding and shall allow a reasonable attorney fee for the services rendered, same to be taxed as costs in such proceeding."

This section has been sustained in many cases, including State ex rel. Johnson v. Hagadon, 251 S.W. 131; Moberly v. Powell, 86 S. W.(2d) 383, and Hurst v. Cramer, 195 S.W.(2d) 738, all of which hold that all provisions of this section must be strictly complied with.

It is the opinion of this department, therefore, that the county is liable for the payment of attorneys' fees in sanity cases where an attorney is appointed by the probate court to represent the alleged indigent insane at the sanity hearing.

Your final question is: If the county is liable for the payment of the costs in the three instances enumerated above (and we have held that the county is liable to pay these costs) who should bring suit to collect clerk's fees (assuming that fee bill

has been presented to the county court and that the court has refused to pay them) as all clerk's costs are fees belonging to the state, and the clerk stands charged by the state for the collection of said fees?

In connection with the above we would direct your attention to Section 13403.1, Mo. R.S.A., parts 2 and 3 of which state:

"(2) In each criminal proceeding and in each preliminary hearing instituted in any magistrate court, a magistrate court fee of two dollars and fifty cents (\$2.50) shall be allowed and collected to be in full for the services of the magistrate or the clerk of said court. Such fees shall be charged, collected and disposition thereof shall be made as provided by law applicable thereto.

"(3) All such fees shall be charged on behalf of the State or county paying salary of such clerk or magistrate and shall be paid and accounted for in the same manner as magistrates fees."

You will note that the above states that "all such fees \* \* \* shall be paid and accounted for in the same manner as magistrates fees."

The payment and "accounting for" of magistrate fees, referred to above, is provided for in Section 2811.123, Mo. R.S.A., which states:

"A fee of five (\$5.00) dollars shall be allowed the magistrate in each civil proceeding, general or special instituted in his court. Upon the commencement of any such proceedings in the magistrate court except in cases instituted by the state, county or other political subdivision the party commencing the same shall pay to the clerk of said court such 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, one of which he shall immediately file with the state treasurer and shall at the end of each month make out an itemized and accurate list of all fees collected by him, or by the magistrate, giving the name of the person or persons paying the same, and turn the same over to the director of revenue, said report to be verified by affidavit. On or before the 31st day of January of each year the clerk of the magistrate court shall file a verified report with the director of revenue showing all fees due and unpaid in his office in cases where the liability therefor has been finally determined and established during the preceding year, showing the name of the person or persons owing same and stating that he has been unable, after the exercise of diligence, to collect the same. The director of revenue shall collect such unpaid fees and shall have the same rights in connection with the judgment therefor as the prevailing party in the litigation.

"All magistrate fees received by the director of revenue shall be deposited by him with the state treasurer in a special fund to be denominated 'magistrate fund', and all moneys in said fund shall be used exclusively for the payment of salaries of magistrates, their clerks, deputies and employees and for the payment of the cost of any surety bonds furnished by a clerk or deputy clerk; provided, however, that such salaries may also be paid from the general revenue of the state whenever either the balance in the magistrate fund or the appropriation from such fund is insufficient to pay such salaries."

Section 23a referred to above is now 2811.123a, and relates to the appointment of additional magistrates by the circuit judge and is therefore not pertinent to the issues before us in this instance.

It will be recalled that section 13403.1, quoted above, related to magistrate clerk's fees in criminal cases. It stated that "all such fees \* \* \* shall be paid and accounted for in the same manner as magistrate fees." Also that Section 2811.123, quoted above, states that "on or before the 31st day of January of each year the clerk of the magistrate court shall file a verified report with the Director of Revenue showing all fees due and unpaid in his office in cases where the liability therefor has been finally determined and established during the preceding year, showing the name or names of the persons owing same and state that he has been unable, after the exercise of diligence, to collect the same. The director of revenue shall collect such unpaid fees and shall have the same rights in connection with the judgment therefor as the prevailing party in the litigation."

The answer to the first part of your final question would therefore be that the Director of Revenue of the State of Missouri shall have the duty of collecting unpaid fees due magistrate clerks.

It is our further opinion that unpaid fees due the clerk of the probate court in the case of an indigent insane hearing should also be collected by the Director of Revenue of the State of Missouri inasmuch as in counties of 30,000 population or less (which is the case here) all probate fees are to be paid over to the Director of Revenue, which pays the salaries of probate judges in such counties.

We would call your further attention to Laws of Missouri, 1945, page 1516, (Sec. 13404, Mo. R.S.A. 1939, and to that part of the aforesaid law which reads:

"In counties now or hereafter having 30,000 inhabitants or less, the judge or clerk of the court shall, at the end of each month, file with the director of revenue a written report, verified by his affidavit specifying the name and court number of each estate in which fees were paid during such month and at the same time pay over to the director of revenue, to be deposited by him with the state treasurer in the 'magistrate fund', all moneys collected by him or his clerk as fees, taking two receipts therefor, one of which he shall immediately file with the state

treasurer. Each judge or clerk of the court shall, within thirty days after the expiration of each calendar year file with such director of revenue a written report, verified by his affidavit specifying the name and court number of each estate in which fees accrued in his court in such calendar year, and the amount of fees unpaid and due in each estate at the end of such year. Such judge or clerk of the court shall also specify in said written report to the director of revenue all fees which have been due and unpaid for more than one year, the amounts thereof and the name of the estate in which the same are due, which report shall be verified by affidavit of the judge or clerk of the court that he has been unable after the exercise of diligence, to collect the same; and it shall thereupon be the duty of the director of revenue to cause the same to be collected by law and turned over to the state treasurer." (Underscoring ours.)

It is the further opinion of this department that it is the duty of the Department of Revenue of the State of Missouri to collect these clerk's fees when the county court refuses to pay them.

#### CONCLUSION

It is the conclusion of this department (1) that the county is liable to pay clerk's fees in magistrate court in misdemeanor cases when the prosecuting attorney enters nolle prosequi; (2) that the county is also liable to pay the clerk's fees in probate courts in sanity hearings of indigent insane where the patient is ordered confined in a state institution; (3) and that the county is also liable to pay an attorney appointed by the probate court to represent an indigent insane at a sanity hearing; and (4) if said clerk's fees are not paid the Director of Revenue may enforce collection of the same after they are certified to him as delinquent.

Respectfully submitted,

HUGH P. WILLIAMSON  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General

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