

MAGISTRATES - \$5.00 fee not refunded when no summons is issued and cause dismissed by plaintiff.

December 31, 1949

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Honorable S. F. Wier
Judge of Probate Court
Atchison County
Rock Port, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"This office respectfully requests an opinion from the Office of the Attorney General upon the following matter:

"An Attorney-at-law entered the office of the Magistrate Court and filed with the Clerk a Petition in a civil action, together with the Five (\$5.00) Dollar filing fee. Upon his entrance he asked the whereabouts of the Sheriff, stating that he would like to have service as soon as possible as he understood that the Defendant in the action was about to remove from the community.

"The Clerk filed the original Petition and receipted for the filing fee setting the case on the 27th day of December, 1949. The attorney for the Plaintiff requested that we obtain service, but set the hearing for a later date as he was to be out of the community over the holidays. The hearing date was therefor moved up to the 3rd day of January, 1950, and the Clerk inquired if the Attorney had a copy of the petition, that it would be a courtesy to attach a copy to the Summons. The attorney for the Plaintiff wasn't sure, but stated that he would look in his file at his office.

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"Due to more pressing matters the Summons was not issued at that moment. Approximately two and one-half hours later the Attorney for the Plaintiff telephoned the Magistrate's Office and asked that the suit be dismissed as the Defendant had come to his office and paid the amount sued for. This attorney further requested the return of the Five (\$5.00) Dollar filing fee to himself.

"This office is not sure that it is within its rights to refund a filing fee to the Plaintiff under these circumstances.

"What constitutes filing a suit in the Magistrate Court? When, if ever, would the filing fee be remitted to the Plaintiff?"

Section 23 of the Magistrate Court Law, Laws of Missouri, 1945, page 765, provides in part:

"Upon the commencement of any proceedings in the magistrate court the party commencing the same shall pay to the clerk of said court a fee of five dollars (\$5.00).
* * *"

Section 15 of said act provides:

"Suits may be instituted before a magistrate, either by the voluntary appearance and agreement of the parties or by process; and the process for the institution of a suit before a magistrate shall be either a summons or an attachment against the property of the defendant; if by agreement, the action is deemed commenced at the time of filing the case; if by process, upon delivery of the writ to the sheriff to be served; and he shall note thereon the time of receiving the same."

Section 19 of said act provides in part as follows:

"Magistrate courts shall be courts of

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record. No formal pleadings upon the part of either plaintiff or defendant shall be required in magistrate courts, but before any process shall issue in any such suit, the plaintiff shall file with the clerk of the magistrate court the instrument sued on, or a statement of the account, or of the facts constituting the claim upon which the suit is founded, * * *

When the language of Section 23 is considered in the light of Section 15, it would appear that no liability to pay the five dollars (\$5.00) magistrate fee arises until the delivery of the summons to the sheriff. However, we feel that in Section 23, the Legislature did not use the phrase, "commencement of any proceedings," in the sense that such commencement is defined by Section 15. The time of commencement of the proceedings referred to in Section 15 is the time so far as the defendant is concerned. Insofar as the plaintiff and his liability to pay the magistrate fee is concerned, we feel that the commencement of the proceedings within the meaning of Section 23 is the time of institution of the proceedings by filing either a complaint or the statement of account or instrument sued on in the magistrate court. Such filing is accomplished upon delivery of the petition or instrument to the clerk of the court.

That the time of commencement of an action may vary as to the parties thereto, was pointed out in the case of United States v. American Lumber Company, et al., 80 Fed. 309. In the opinion in that case the court said, 80 Fed. 315:

"* * * While, commonly speaking, an action is said to be 'commenced' or 'brought' when the complaint is filed, still the general rule in the United States, except where it has been otherwise provided by statute, is that the action is deemed, in law, to be brought, so far as the defendant is concerned, from the time the summons or other process is issued and delivered, or put in course of delivery, to the officer, with a bona fide intent to have the same served. * * *

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"But, where this general rule has not been changed by statutory enactment, the action, while it may be deemed 'commenced' or 'brought' so far as the plaintiff is concerned, when the complaint is filed, is not considered 'commenced' or 'brought' so far as the defendant is concerned, so as to stop the running of a statute of limitations, until legal steps have been taken to make him a party by suing out the appropriate process and making a bona fide effort to serve the same. * * *"

(Underscoring ours.)

We feel that the proper view to be taken of Section 23 is that the proceeding is 'commenced' so as to render the plaintiff liable for payment of the five dollars (\$5.00) magistrate fee upon filing of the complaint, statement of account or instrument sued upon. Such being our view of the matter, there would be no refund of the fee once the complaint or statement of account or instrument sued on has been filed by the clerk of the court.

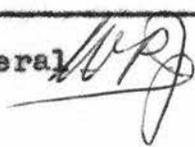
CONCLUSION

Therefore, this department is of the opinion that the five dollars (\$5.00) magistrate fee required by Section 23 of the Magistrate Court Law, Laws of Missouri, 1945, page 765, to be paid "upon the commencement of any proceedings in the magistrate court" is payable upon the filing of the complaint, statement of account or instrument sued upon, and the plaintiff is not entitled to a refund of said fee after such filing, although no summons is issued in the matter, and the cause dismissed by the Plaintiff.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General 

RRW/feh