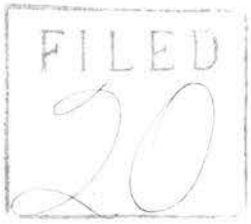
FEE BILLS: When Constable is entitled to a fee bill and his right to mandamus when fee bill is refused.

March 28, 1934.



Hon. Elliott M. Dampf
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your letter of February 5, 1934, requesting an opinion of this office which is as follows:

> "Will you kindly give me your opinion on the following matter.
>
> Section 11776, Revised Statutes 1929, states that the Justice of the Peace shall issue fee bills and Section 11809, Revised Statutes 1929, states that the Justice of the Peace may issue fee bills, therefore will you kindly advise me as to which section applies in issuing fee bills."

Chapter 84 R. S. Mo. 1929, entitled "Salaries and Fees" and Art. II, entitled "Fees, payment and disposition of," provides in Section 11776 as follows:

> "The several officers hereinafter named, and jurors and witnesses, shall be allowed such fees for their services rendered in 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 officers 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; and if any officer shall neglect or refuse to levy and collect such fees, or to pay over the money collected thereon to the person entitled thereto, within three months after such fee bill shall have been delivered to him, the court wherein such fees accrued shall, upon ten days' previous notice given to such officer, on motion, enter up judgment against him and his sureties for the amount of the fee bill, interest and costs thereon. All provisions of this section concerning the collection of fee bills shall also apply to fee bills issued by justices of the peace."

In the same chapter and Article, Section 11777 provides before itemizing allowable fees of Constables in the following language:

> "Constables shall be allowed fees for their services as follows:* * * *"
> (We omit setting out the specified fees itemized.)

In the same chapter and Article, Section 11809 provides as follows:

> "<u>Justices of the peace may issue fee bills</u> for all services rendered in their courts, and if the person chargeable shall neglect or refuse to pay the amount thereof to the constable or proper officer, within twenty days after the same shall have been demanded by such officer, he may and shall levy such

fee bills on the goods and chattels of such persons, in the same manner and with like effect as on a fieri facias.

Section 1242 R. S. Mo. 1929 provides 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."

Section 1269 R. S. Mo. 1929, provides as follows:

"In all cases where costs shall be awarded, either before or upon final judgment, execution shall be issued therefor forthwith by the clerk, unless otherwise ordered by the party in whose favor such costs shall be awarded."

Section 2311 R. S. Mo. 1929 provides as follows:

"Every citation issued under the preceding sections shall be directed to the party to be served therewith, and placed in the hands of the constable of the township in which the suit is pedding, which shall be executed by him in any part of his county; and the time and manner of service shall be like that of a summons, for which he shall receive similar fees."

Section 2319 R. S. Mo. 1929, provides as follows:

"Before any execution shall be delivered, the justice shall state in his docket, and also on the back of the execution, an account of the debt, damages and costs, as in this section provided, and of the fees due to each person, and the rate of interest on the judgment, separately; and the officer receiving such execution shall indorse thereon the time of the receipt of the same; and the execution, from the time of delivery to the constable, shall be a lien on the goods, chattels and shares in stocks of the defendant found within the limits within which the constable or other officer can execute the

process, but not upon any property exempt by law from execution sale, or which shall be sold or pledged to an innocent purchaser before the levy of the writ. And every fee bill and writ of fieri facias issued by any justice shall have written or printed thereon a true statement of each and every item of all the taxable costs in the case, and over against each item so stated there shall be set the amount of money taxed thereunder, and when the same shall come to the hands of any officer authorized by law to enforce the collection thereof, he shall also itemize all the costs to be added thereto by him for his own services. Every justice of the peace issuing a fee bill or writ of fieri facias in violation of the provisions of this section, and any officer undertaking to collect money thereon without having himself complied with the provisions of this section concerning himself, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall forfeit his office. "

The parties litigant are amply protected from any injury which might grow out of fee bills in the hands of the Constable for Section 2330 R. S. Mo. 1929, provides as follows:

"Upon filing of a statement by the party injured against a constable and his sureties, jointly or severally, stating any of the following causes of action: First, that the constable has failed to return an execution or fee bill according to the command thereof; second, that he has made a false return thereof; third, that he has failed to have money by him collected on execution or fee bill before the justice on the return day thereof, ready to be paid to the persons entitled thereto, or to have receipts therefor; fourth, that he has failed to use diligence in the service of an execution or fee bill, or to institute suit on a demand placed in his hands for suit, and for which he has given his receipt, whereby the complainant has been damaged; or fifth, that he has failed to pay or deliver, upon demand of the party entitled thereto, money received by him on judgment or on demand placed in his hands for collection, and for which

> he has given his receipt, or money or property received in pursuance of any of the provisions of this article, and stating the facts constituting such default or negligence, the justice shall issue a summons against the defendants named in the statement."

Missouri Constitution, Section 37, Article VI provides as follows:

> "In each county there shall be appointed or elected, as many justices of the peace as the public good may require, whose powers, duties, and duration in office shall be regulated by law."

Missouri Constitution, Article II, Section 10, provides as follows:

> "The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay."

Missouri Constitution, Article VI, Section 23, provides as follows:

> "The circuit court shall exercise a superintending control over criminal courts, probate courts, county courts, municipal corporation courts, justices of the peace, and all inferior tribunals in each county in their respective circuits."

It was said in State ex rel. v. Ashbrook, 40 Mo. App. 64, l. c. 66:

> "The contention of the defendants on this appeal is that, after the party, in whose favor a judgment is rendered, acknowledges satisfaction of it, it cannot be the foundation of an execution, even for the costs which are due the officers of the court. We do not take this view. At common law litigation was not conducted on a credit system, as with us, but the plaintiff purchased his writ, and each party paid his costs step by step as the services were procured and as the

cause proceeded. At the end of the litigation the successful party recovered his costs-- that is, the costs which he had paid out. The idea of requiring the plaintiff to give security for costs seems to have been to indemnify the defendant against the costs to which he might be put by the litigation, in case it should turn out to be unfounded. Accordingly, the language of such a rule frequently was that the plaintiff be required to give security for the defendant's costs. Roberts v. Roberts, 6 Dowl. 556; Anon., 1 Wils. 130.

"But with us the costs are not ordinarily paid step by step, as each party demands of the proper officer of the court the rendition of some particular service; but they generally accumulate until the litigation is finally ended, and then they are recovered nominally by the successful party, but really by the officer of the court to whom they are due. Trail v. Somerville, 22 Mo. App. 308, 312. We still keep up the ancient form, so far that according to the judgment entry, the costs are recovered by the successful party, and the execution runs in the same way, so as to conform to the judgment; but they are never, in fact, collected by him, nor paid over to him. According to a usage which, it is believed, has existed from the foundation of our judicial system, the name of the successful party is thus used in the judgment and execution as the person in whose behalf the costs are recovered and collected, but the real beneficiaries are the officers of the court to whom they are due. This usage has acquired the force of law. The officers of the court and the witnesses are so entirely the real beneficiaries that they can maintain an action in their own names for the breach of an undertaking given for the security of costs in a litigation. Garrett v. Cramer, 14 Mo. App. 401. The party in whose name the costs are recovered is, in respect of them, at most, a trustee of a dry trust--so dry that he is not allowed to handle any of the trust fund. His name in the judgment

> and execution is a mere naked name of record. The use of it by the officers of the court, in securing their dues, saddles him with no responsibility and endangers his rights in no way. As this portion of the judgment nominally recovered by him belongs to others, and not to him, he cannot satisfy it, or bargain it away with the other party to the record without their consent. He can waive his own rights, but he cannot waive the rights of others."

In the case of Watkins v. McDonald 70 Mo. App. 357, l. c. 362, the court said:

> "It has been repeatedly held that costs of suit under our practice can be allowed, taxed, or collected, only by statutory warrant.* * * * They are divisible into two kinds: First, those within the purview of Section 4980 Revised Statutes, 1889, (Nos. Sec. 11776 R. S. Mo. 1929, supra.) in relation to the issuance of fee bills accruing during the progress of the litigation. Secondly, those which are allowable by the court under the general statutes awarding costs to 'the party prevailing' and providing for the issuance of execution therefor. R. S. 1889, Sec. 2920-2946. (Now R. S. Mo. 1929 Sec. 1242-1269 supra) (All Parenthesis ours)"

Thus we see that in Missouri, under the provisions of statutory law which have been on the books a long time, that costs of a suit are recoverable by two methods, either by fee bill allowed the officer or by execution allowed the party prevailing in the suit.

In the case of City of Carterville v. Cardwell, 152 Mo. App. 33, l. c. 37, the court said:

> "As between a party to a suit and the officer or witness, the charges allowed are usually denominated fees; but as between the parties to the suit, these charges are usually called costs. The word costs when used in relation to the expenses of legal proceedings, means the sum prescribed by law as charges for the services enumerated in the fee bill."

Thus we see that costs of a case would necessarily include the items of a fee bill due the constable, in a proceeding before a Justice of the Peace.

In the case of Hoover v. The Mo. Pac. Ry. Co. 115 Mo. 77, l. c. 81, the court said:

> "The general rule that none but the parties to a suit will be allowed to interpose in its control obtains in this state as well as in other jurisdictions.* * * *
>
> "The fact that they (officers) have earned their fees, which have been taxed as costs, does not entitle them to interfere in the settlements of other stipulations of the parties. Their claim is based upon the fact that their services have been taxed as costs, but the judgment for these costs was not rendered in their favor.* * * * *
>
> "It will thus be seen that the only judgment for costs authorized by these statutes is in favor of one of the parties to the suit. No provision is made by law for any such judgment in favor of any clerk or other officer of the court, or any of the witnesses attending thereon. The remedy provided for the collection of their fees is a fee bill. They have therefore no right to intermeddle with the parties in their control of the suit."

The statutory law that the above case was decided upon is identical with the statutory law existing today. Thus we seethat a constable has no right to control any judgment for costs in a suit because he is not a party to the suit. He has no right to order an execution on the judgment of the court. Does this leave the constable entitled to fees without a remedy? We think not.

As was said in Beedle v. Mead, 81 Mo. 297, l. c. 309:

> "To place the command of an execution for costs, which the plaintiff has never paid, entirely at his disposal, would result in a possible defeat of the undoubted lien of officers for costs.*****
>
> "If the party can refuse execution when necessary to collect costs of court, then the officer would be compelled to resort to equity for enforcement

> of their lien. When the costs cannot be collected on fee-bill, and the party has refused or failed to pay the costs, presumably covered by the judgment, the officers of the court are entitled to process by execution for their costs, even though the plaintiff may refuse to order one."

It was said in Manewal v. Proctor, 112 Mo. App. 315 l. c. 319:

> "We have no doubt that a referee is an officer of the court appointed to perform certain work and that compensation for that work may be taxed as costs in the case. Neither do we see any good reason why he should not have the right to a fee bill to collect his costs the same as other officers have, instead of having to wait for final judgment. But the statutes have made no provision in his favor and, hence, he does not enjoy the remedy which is available to the officers named in the statutes."

In the case at bar the constable is one of these officers named in the statutes entitled to enjoy the remedy to which the court above refers.

Again Farris v. Smithpeter, 180 Mo. App. 466 l. c. 471, the court said:

> "A fee bill does not need a judgment for its basis but it does need a proper taxation of costs."

Section 1271 R. S. Mo. 1929, provides as follows:

> "Every fee bill and every writ of <u>feri facias</u> issued by any justice of the peace, or issuing out of any court of record in this state, shall have written or printed thereon a true statement of each and every item of all the taxable costs in the case, and over against each item so stated there shall be set the amount of money taxed thereunder; and when the same shall come to the hands of any officer authorized by law to enforce the collection thereof, he shall also itemize

all the costs to be added thereto by him for his own services."

Section 1240 R. S. Mo. 1929, provides as follows:

"If any court shall, before or after the commencement of any suit pending before it, be satisfied that the plaintiff is a poor person, and unable to prosecute his or her suit, and pay the costs and expenses thereof, such court may, in its discretion, permit him or her to commence and prosecute his or her action as a poor person, and thereupon such poor person shall have all necessary process andproceedings as in other cases, without fees, tax or charge; and the court may assign to such person counsel, who as well as all other officers of the court, shall perform their duties in such suit without fee or reward, <u>but if judgment is entered for the plaintiff, costs shall be recovered, which shall be collected for the use of the officers of the court.</u>"

In the case of Wilson v. Geitz, 75 Mo. App. 11 L. C. 13, the court said:

"It is insisted that no fee bills were issuable in this case because plaintiff prosecuted his action in <u>forma pauperis</u> and failed to recover judgment. To support this contention appellant invokes Section 2918 of the Revised Statutes of 1889. (Not Section 1240 R. S. Mo. 1929)* * * * It was not the intention of the legislature in this provision to relieve the defendant from any liability for costs created by him on account of services for which a fee bill might issue under section 4980 of the Revised Statutes of 1889. (Now Section 11776 R. S. Mo. 1929.)"

In the case of State ex rel. v. McCracken, 60 Mo. App. 650 l. c. 653, the court said:

"The first contention is that mandamus will not lie in a case of this nature. This point must be ruled against the appellant.* * * * * * * * "that the justice had therein no judicial discretion, but there devolved on said officer the duty to perform an act purely ministerial in its

nature, and, to secure the performance thereof, mandamus would lie.* * *

"Then section 5007 provides that 'the justice of the peace may issue fee bills for all services rendered in their courts, and if the person chargeable shall neglect or refuse to pay the amount thereof to the constable, or proper officer within twenty days after the same shall have been demanded by such officer, he may and shall levy such fee bills on the goods and chattels of such person, in the same manner and with like effect as on a fieri facias.'* * *

"He is entitled to enforce the collection of such fees in the manner pointed out by statute* * *"

In the case of Brownfield v. Thompson, 96 Mo. App. 340, l. c. 342, the court said:

"A justice's court is not only a court of limited jurisdiction, but its powers are limited within its jurisdiction. It can only do such things where it has jurisdiction as the Legislature has provided it may. The manner of exercising its jurisdiction is limited by the same law that created it.* * * *The Legislature has defined the jurisdiction of justices of the peace and has provided in a very careful and specific manner their dutes and their mode of procedure."

In the case of In Re Wallace, 19 S. W. (2d), 625, the court said:

"It will be noted that the word 'may' is used in section 681 in conferring on the courts the power to remove or suspend attorneys. The power conferred is for protection of the bench, the bar, and the public. For the reason the word 'may' as used is mandatory."

Again in State v. Bevins, 43 S. W. 432, l. c. 434, the Court said:

"It will be noticed that section 3703 says that the jury 'may' assess and declare the punishment and the court 'shall' render judgment accordingly,

> 'except as hereinafter provided.' The word 'may' is interpreted to mean 'shall' when referring 'to a "power given to public officers, and (which) concerns the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner." '"

> "Any attorney* * * * *guilty of any felony* * * * may be removed or suspended from practice* * * *

The Court said in State ex rel. Jones v. Laughlin, 73 Mo., 443, l. c. 449:

> "The proper rule of construction in cases of this sort, as we understand it, is that <u>may</u> is to be held as meaning <u>shall</u> whenever the statute requiring construction relates to a power conferred on public officers, concerning the public interest and the rights of third persons, who have a claim <u>de jure</u> that the power shall be exercised in this manner for the sake of justice and the public good. * * * * No argument is necessary to show that the rule of construction mentioned is applicable here, since the matter under consideration, the suspension or removal of an attorney for felony or infamous crime or professional misconduct, obviously concerns justice and the public good."

Corpus Juris on Mandamus Vol. 38, p. 617, Sec. 100 citing Mo. cases provides:

> "In conformity to general rules already stated, mandamus lies to compel a justice to perform ministerial duties."

<u>CONCLUSION.</u>

It is the opinion of this office that under the provisions of Section 10809 R. S. Mo. 1929 which provides: "Justices of the peace may issue fee bills," the phrase "<u>may issue fee bills,</u>" is to be interpreted as a statutory command upon all justices of the peace, commanding them to perform a ministerial act wherein no judgment or discretion must be exercised by the court. The word "may" in this section can only reasonably be interpreted as "shall", for as was indicated in the Bevins case, it refers to a power given to a justice of the peace which concerns the administration of justice without sale or delay, and the claim of a Constable is de jure.

The legislature said in Section 11776 R. S. Mo. 1929, that: "The Several officers hereinafter named," * * *shall be allowed such fees for their services rendered in discharging the duties imposed upon them by law as are hereinafter provided," and then immediately thereafter provided in Section 11777 R. S. Mo. 1929 that: "Constables shall be allowed fees for their services", itemizing each particular fee for each particular service. If the legislature had intended for the justice of the peace any right to adjudge the allowance or amount of fee for a particular service on the part of the constable, they would not have expressed themselves to the contrary with such particularity as they did express themselves in these two sections of law allowing fees.

It is our opinion that a Justice of the Peace must issue fee bills to a constable who has requested a fee bill for services specifically itemized in this statute, and in the amount specified for each service. After the service is performed the constable has a beneficial interest in the case in the amount of his statutory fee, which continues as a beneficial interest until it be paid. The fact that under section 1242, R. S. Mo. 1929, the party to the suit prevailing shall recover costs, and even though costs have been held in the Cardwell case to include all the items authorized in a fee bill, does not mean that the Constable mustlook to the prevailing party for an execution as his only action, in order that his fees will be satisfied. The McDonald case expressly holds that the Constable can proceed independent of the parties litigant to collect his fees by fee-bill, and the Ashbrook case shows us that even where a judgment is satisfied in a Justice Court, still a fee bill should properly be issued to compensate the constable for his beneficial interest in the fees of a case.

In Beedle v. Mead we see that it would defeat the "Undoubted lien of officers for costs" where only a party to the suit can command an execution for costs. Even where a plaintiff sues as a poor person under Section 1240 R. S.Mo. 1929, the court held in the Geitz case that the Legislature did not intend to relieve the defendant for paying costs created by him for which a fee bill might issue under the provisions of 11776 R. S. Mo. 1929.

The emoluments of an office are deserving of as much protection as the honor of office, in the office holder. In fact, a public office would usually be an empty honor, without the emoluments, and since our code of law provides for a constable as an officer of the court, prescribes certain mandatory duties of him, requires a

penal bond of him for the faithful performance of his duties, it would be a strained construction of law that had to be twisted so that this official is not protected in his fees which the legislature said "shall be allowed". Such a strained construction would not be an incentive to good government or efficient courts, for the Constable is the right arm of justice of peace court.

In many instances it is not possible for a constable to collect his prescribed fees, which are due and owing, except by a fee bill. True the power to issue a fee bill rests with the Justice of the Peace. Are we to say that this is an arbitrary power resting in the justice? To so hold would nullify all the other laws allowing fees. In the Smithpeter case we learn that a fee bill does not need a judgment for its basis but needs only a proper taxation of costs. We say that costs are properly taxed when the justice complies with Section 2319 R. S. Mo. 1929, and states on his docket and on the back of the execution all fees due to each person, and when the fee bill contains in writing a true statement of each and every item of all taxable costs in the case, and over against each item of taxable costs the amount of money taxed thereunder, there is a proper taxation of costs as provided by law. This duty on the justice to properly tax costs is mandatory under the statute.

The Thompson case holds that a justice court is of limited jurisdictionand that its powers are even limited within its jurisdiction. A justice of the peace has no power beyond the statutes and is limited to act only within the statutes, since the Legislature limited the justices' powers while considering fees, and provided that certain fees shall be allowed and taxed by him. It follows that fees allowed and taxed and according to the mandates of law must contain precisely the same data on the docket in writing as would properly be evidenced by a fee bill in writing, or the taxing of same in any other manner on the docket does not follow the Statute. When the fees were ordered taxed the Legislature intended a fee bill to issue, and under legal procedure it takes no more effort to make the entries on a fee bill than on the docket and in fact can be done by the same stroke with the aid of a little carbon paper. A fee bill must issue before the Constable on his own motion can establish his lien for fees. The only statutory method of taxing cost is by fee-bill. That the officers may secure their allowable fees is the very purpose that the Legislature had in mind when they stated the law allowing the taxing fees. It was not intended by the Legislature to leave the officers only partially secure in their fees. This preliminary statutory detail is of no use or avail to the officers

unless a fee bill be simultaneously issued, at the same time as the mandatory docket entries are made. There is no sense in a law that was made to secure officers in their fees, providing for allowing and taxing same, where the officer may be stopped short of an actual collection of his fee simply because a justice of the peace construes the phrase "may issue fee-bills" to mean that he may use arbitrary discretion, as a consequence of which the Constable stands perchance to loose his fees in spite of the other statutes to the contrary, and because a justice might choose to act arbitrarily in allowing fees, taxing costs or issuing fee bills to him. The Justice must issue fee bills for costs, when requested by the Constable, for that was the very purpose (to secure the officer in his fees) the Legislature had in mind when they made it mandatory on the court to allow and tax fees on the docket, and "may" in Section 11809 means "shall".

It is our opinion where a Justice of the Peace refuses to issue fee bills when commanded by the Constable, mandamus should be issued out of the Circuit Court, which court, under the Constitution, has the supervisory control over courts of inferior and limited jurisdiction, such as justice courts, and jurisdiction over justices of the peace in the performance of ministerial acts.

Respectfully submitted,

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APPROVED:

ROY McKITTRICK,
Attorney General.

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