SHERIFF FEES: The Sheriff is not entitled to fees for serving subpoena until the litigation is at an end.

April 14, 1939.

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Honorable R. Homer Gerster, Sheriff
St. Clair County
Osceola, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of March 22nd, which reads as follows:

> "Please give me your opinion as to Sheriffs Fees in serving Civil case such as Summons where there has been a deposit put up by the plaintiff to the Circuit Clerk when should the Sheriff be paid for his services, from this deposit."

The rule now in this state is different from that of Common Law. At Common Law each party was required to pay for services rendered at the time such services were performed and the successful parties recovered the costs paid by him when judgment was rendered. By statute in this state, security for costs is required to protect the fees of officers of the court. (Section 1237-1238 R. S. Mo. 1929.

In State ex rel. Dale vs. Ashbrook, 40 Mo. App. 64, l. c. 66-67, In holding costs are not paid step by step as demands are made for service on the officer, but accumulate until the litigation is at an end, the court said:

> "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 the 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."

The St. Louis Court of Appeals in Allen Trail vs. William Somerville; Arba N. Crane, Appellant, 22 Mo. App. 308 l. c. 310-11-12-13-14, leaves no doubt as to the law in this state regarding the time an officer of the court shall receive a fee for services rendered. It holds he is not entitled to his fee until the litigation is at an end. This is what the court said:

> "The question is, whether in this state a referee has the power to withhold his report as a security for the payment of his compensation. We are of opinion that he has not. An examination of the statutes relating to referees (Rev. Stat., sects. 3605, 3626), shows that he is, for the purposes of the particular case, and within the scope of the order of reference, a judicial officer of the court clothed with large powers. By section 3626, Revised Statutes, he shall, in the absence of any special agreement, receive such compensation for his services as the court,

in which the case is pending, may allow, not exceeding ten dollars per day. The statute does not in terms say that such allowance shall be taxed as costs, but the inference is irresistible that it is to be so taxed, and such has always been the practice, in the absence of special stipulations to the contrary. By Section 986, Revised Statutes, '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 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 the plaintiff fails to give security, the court may dismiss the suit. We are of opinion that a referee is an officer of the court within the meaning of this last statute, and that he may, in case the payment of his compensation is endangered, as therein provided, procure a rule on the plaintiff to give security for the costs, which will protect him in the payment of his compensation, whatever the ultimate termination of the suit may be. It is forcibly argued on behalf of the appellant that this statute ought not to be held to apply to referees, because it would be unseemly for a judicial officer of a court, who must decide a pending controversy between the parties, to bring himself into a state of antagonism with the plaintiff, by moving against him for a rule to give security for the costs. The answer to this is that it is entirely a matter of choice with a member of the bar, to whom a cause is

referred, whether he will accept the office of referee or not. He is not, like the permanent officers of the court, obliged to perform certain prescribed duties for whomsoever shall call upon him to perform them; but he may accept the office or decline it, and he may subsequently accept it upon terms. He may, before accepting it, require that the plaintiff shall give security for the costs, or require that the parties shall, by stipulation, or otherwise, properly secure the payment of his compensation.

"It seems to have been the practice in the English courts of common law to allow an arbitrator to refuse the publication of his award until his charges are paid. Musselbrook v. Dunkin, 9 Bing. 605; McArthur v. Campbell, 5 Barn. & Ad. 518. The supreme court of New York in 1848, citing these and other English decisions to the same effect, held that this was the law. Ott v. Schroeppel, 3 Barb. 56, 62. Decisions of the supreme court of New York have extended this rule to referees, and, as late as the year 1880, it was stated in the court of appeals of that state by Rapallo, J., arguendo, that a referee undoubtedly is not bound to part with his report without the payment of his legal fees. Geib v. Topping, 83 N. Y. 46. It was so held in Little v. Lynch (1 How. Pr. N. S. 95), decided by the supreme court of New York in 1885. It is also to be observed that the statute of New York provides in express terms for the taxation of the compensation of referees as costs. 3 Rev. Stat., N. Y. 1875, 533.

"But the practice touching the payment of costs in legal proceedings in this state seems to have departed very materially from the practice of the English courts of common law; and different principles prevail in this state touching the subject of costs from those which prevail in New York. By the ancient practice in England writs were purchased, and each party seems at every step in a proceeding to have paid the fees of the officers of the court for their services, as fast as such services were rendered. Indeed 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. P. C. 556; Anon, 1 Wils. 130. It does not seem to have been a part of the idea requiring security for costs, that the plaintiff should be required to give security for his own costs, since he was obliged to pay the ministerial officers of the court for their services, step by step, as the cause proceeded. Hence, when the cause had finally progressed to a judgment, so much of the judgment as related to costs recited that the plaintiff (or the defendant) recover his costs, the theory being that each party had paid his own costs as they accrued, and that the successful party was entitled to recover from the other party such costs as he had paid. Our entries of judgments preserve the same ancient form, although the costs are in fact collected for the benefit of the officers of the court in whose

favor they are taxed, and are never paid to the successful party, except in exceptional cases where he may have paid them, and may be entitled to recover them. As litigation seems to have been thus conducted in the English courts upon what may be termed a cash basis, instead of upon a credit basis, as with us, no statute exists in that country, so far as we know, similar to our statute (Rev. Stat., sect. 986), allowing the ministerial officers of the court to move against the plaintiff in a pending suit for security for their fees. Such being the important difference between the English practice as to costs and our practice, the decision of the English courts, upholding the practice of arbitrators in refusing to publish their awards until their charges should be paid, would seem to have no application to the case of referees under our system. The learned counsel for the appellant, in citing to us the New York decisions already referred to, have pointed out that, under the New York statute, the fees of referees are taxable as costs in the case; and such undoubtedly is the rule, though not expressed in terms under our statute. But they have not shown us that there is in New York such a statute as section 986 of our Revised Statutes, allowing the officers of the court to protect themselves by moving against the plaintiff for security for their fees. We have not been able to discover the existence of such a statute in New York, and the absence of it marks a very important distinction, applicable to the question before us, between the law of costs in that state and in this. Another very important distinction was adverted to in the opinion of this court, recently delivered in the case of Roberts v. Nelson (ante, p. 30),

namely, that in New York an attorney has a lien upon the judgment of his client for his fees, whereas, no such lien is allowed in this state.

"Upon the whole, we are of opinion that a referee in this state is in no better position in respect of his costs than any other officer of the court. He is entitled to the same remedies which are accorded to them, and has the further advantage over them of being able to protect himself, by declining the reference, or by requiring the parties, as a condition of his entering upon the discharge of its duties, to secure the payment of his compensation. The rule which is here invoked, although not so stated in the printed arguments submitted to us, amounts, really to this, that a referee ought to have an artizan's lien upon what he produces to secure the payment of his labor in producing it. If a referee ought to have such a lien, we see no reason why a sheriff or clerk ought not to have the same lien. But if a clerk should withhold a writ or refuse to draft the entry of a judgment, or if a sheriff should refuse to execute a writ or to serve a subpoena, until his fee should be paid, such conduct would be justly regarded as illegal and oppressive. The duties discharged by a referee are analogous to those discharged by a jury; but what would be thought if a jury in a court of record, should come into court with a sealed verdict and announce to the court that they were ready to deliver it whenever the parties paid to the jurors their per diem?

"It seems unnecessary to prolong this argument. The system of paying costs in advance, or step by step, to the officers of the court, has never obtained in this state as in England, but in lieu of this the statute has conferred upon such officers the power to require security for their costs, as already pointed out.

> They may have this security; but, nevertheless, except where interlocutory orders awarding costs are made, they must, as a general rule, wait for their payment until the final determination of the suit. It results from these views, that we are of opinion that the circuit court was right in ruling the referee to file his report before the payment of his compensation, which had been fixed by the court."

CONCLUSION

Therefore, in view of the foregoing authorities, it is the opinion of this department that the Sheriff is not entitled to his fee for services rendered until the litigation is ended.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

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