COSTS - PROBATE COURTS - Collectibility of costs assessed against estates containing insufficient assets for their payment.

July 29, 1937.

Hon. W. A. Holloway,
Chief Clerk, Office of the State Auditor,
Jefferson City, Missouri.

FILED
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Dear Sir:

A request for an opinion has been received from you under date of April 21, 1937, such request being in the following terms:

> "In making the examination of the office of one of the Probate Judges, we find that the Probate Judge has presented to the County Court and been paid from county revenue a considerable amount of fees covering the costs in what the Probate Judge classifies as insolvent estates.
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> "In supporting this claim for the collection of these fees and costs from the County, the Judge cites us to Section 1940, R. S. Missouri, 1929. We would like for your office to advise us if Section 1940 should be construed to cover such claims."

We assume that your inquiry is confined to costs formally assessed against executors or other fiduciaries in charge of estates under the jurisdiction of this probate court, and we shall consider costs assessed by the court against such fiduciaries in adversary proceedings between such fiduciaries on the one hand and other persons interested in the estate on the other in which the fiduciaries were unsuccessful, as well as probate proceedings of an ex parte nature, such as the filing of settlements or motions by the fiduciaries, in which the costs would be assessed against them whether they were successful or not.

I.

COSTS IN ADVERSARY PROCEEDINGS

As an illustration let us consider the case of an application by a legatee under a will for partial dis-

tribution, which is resisted by the executor, where the court orders the distribution and assesses the costs in favor of the legatee and against the executor. In order to answer your question for a situation of this kind, it will be necessary to consider the meaning and consequences of this award of costs by the court.

> "At the common law no costs were recoverable. (City of St. Louis v. Meintz, 107 Mo. 611.) Costs in Missouri being, therefore, purely creatures of the statute, enactments in relation thereto must be strictly construed. (State ex rel. v. Seibert, 130 Mo. l.c. 217; St. Louis & Gulf Railway Co. v. Cape Girardeau, etc. Railway Co., 126 Mo.App. 272; Lucas v. Brown, 127 Mo.App. 645.)"
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> Ex parte Nelson, 253 Mo. 627, 628, 162 S.W. 167 (1913).

The way in which court costs were handled at common law is explained in the case of State ex rel Dale v. Ashbrook, 40 Mo.App. 64, 66 (1890) as follows:

> "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.
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> "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 * * *."

The Missouri statute relating to the award of costs in the probate court, which abrogates the common law rule, is R. S. Mo. 1929, Section 204, which provides as follows:

> "In all suits and other proceedings in said court, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law. In all cases in which costs shall be given against executors and administrators, the estate shall pay the costs: Provided, that parties presenting demands against estates may, for the same causes and in the same manner, be ruled to give security for costs, as is now provided in practice in civil cases."

A comparison of the language of this section with R. S. Mo. 1929, Section 1242, which governs the awarding of costs in civil cases, shows that the essential language is identical, so that in adversary proceedings in the probate court, decisions involving costs in civil cases will be controlling.

> "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.
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> "This court, in the case of Beedle v. Mead, 81 Mo. 306, in treating of this subject, said: 'He (the circuit clerk) was under a misapprehension, too, of the law, if he supposed he could, sua sponte, issue this execution merely to collect fees due the court officers. For such fees the remedy of the officers is by fee bill, as provided in Wagner's Statutes, section 1, page 618; Revised Statutes, section 5595 (now section 4980, Revised Statutes, 1889). The judgment of

> costs is in favor of the litigant to reimburse him for what he has paid out and expended, and he is entitled to have execution therefor. Over that judgment the party in whose favor it is rendered has absolute control. It is his property. He may enforce or forgive it at his pleasure. * * *."
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> Hoover v. The Mo.Pac.Ry.Co., 115 Mo. 77, 83, 12 S.W. 1076 (1893).

Nor does it make any difference whether the party in whose favor costs are adjudged has paid the costs or not, as will be seen from the case of Cranor v. School District No. 2, 151 Mo. 119, 52 S.W. 232 (1899), in which it was held that in a suit on a judgment for costs obtained in another county, it was no defense to show that the costs had not been paid by the plaintiff.

From the foregoing it will be seen that in an adversary proceeding in the probate court such as the example above given, where costs are awarded against the executor, the person in whose favor these costs are awarded controls them entirely, and the officer of the court whose fees are represented by these costs is confined to the remedy of a fee bill against the fiduciary. The county has nothing to do with the case, is not a party to the administration proceedings, and the only connection of the county with the litigation is that the litigation is being conducted in a court sitting in that county, and, therefore, in the absence of statutory authorization, the county could not properly be liable for or pay these costs.

II.

COSTS IN EX PARTE PROCEEDINGS

Suppose an executor files a motion for authority to sell personal property. Whether it is granted or denied, the court would assess the costs against the executor. This situation differs from the situation considered above in that although the award of costs in both situations is against the executor, here it is not in favor of any party to the litigation. It is plain from Section 204 that if there is money in the estate, it should be used for the payment of these costs, but your inquiry presupposes that there is no money in the

estate. The statutes are silent as to what shall be done in such a case and there are no adjudicated cases on the point. The closest analogy which we have found is a criminal case where the defendant has been acquitted and the question arises as to the payment of fees. This situation arose in the case of State ex rel Howser v. Oliver, 116 Mo. 188, 22 S.W. 637 (1893), involving disputed witness fees which were treated by the court as in the same category as the fees of court officers, as the case was decided on the authority of Hoover v. The Mo. Pac. Ry Co., supra, which involved officers' fees. The court said:

> "No witness has a right, independent of the statute, to enforce a claim against the state for fees for attendance upon the trial of a criminal case. The question of justice or injustice to the witness is not a matter for consideration. If he is given no right to look to the state, for compensation, then he has no right except it be against the party at whose instance he attended."
> 113 Mo. 195.

The court also explained the difference between fees and costs in adversary civil proceedings and in other cases where they might be payable out of public funds, as follows:

> "In civil actions the parties to the suit are present, at every step in the proceeding, watching its progress and guarding against unnecessary cost and expense, not knowing upon whom it may fall. A plaintiff may be required to give security for the payment of costs, or, if unable to do so, may be allowed, in the discretion of the court, to prosecute his suit 'without fees, tax or charge.' Sec. 2918. It is manifest that these provisions under which litigants are able to protect themselves against improper and unjust allowance of cost would afford no safeguard against extravagance, impositions and frauds in case the costs should be payable out of the public treasury.
> 116 Mo. 192.

If, as the court says in this case, a witness cannot collect his fees from the public treasury in the absence of a statute,

and if witness fees are on a parity with officers' fees, how then can an officer of court collect his fees from the public treasury when the party against whom they are assessed proves to be not good for them, and in the absence of a statute which would authorize this payment from public funds and provide adequate safeguards against excessive fees?

One more case shows the attitude of strict construction of the Supreme Court in connection with costs statutes. In the case of Ex parte Nelson, 253 Mo. 627, 162 S.W. 167 (1913), the point involved was the payment of costs in a successful habeas corpus proceeding. The Supreme Court set aside an order taxing the costs against the petitioner, and said:

> "There being a casus omissus in this State in regard to the taxation of costs in habeas corpus proceedings, this court cannot, except by the usurpation of power, tax the costs herein against the petitioner or make any order in regard thereto. In the absence of such power we cannot and should not concern ourselves with payments of costs heretofore made by the parties to this proceeding or recognize any agreements entered into by them in regard to same."
> 253 Mo. 629.

III.

SCOPE AND EFFECT OF REVISED STATUTES OF MISSOURI, 1929, SECTION 1940

R. S. Mo. 1929, Section 1940, provides as follows:

> "All expenditures accruing in the circuit courts, county courts and probate courts shall be paid out of the treasury of the county in which the court is held, in the same manner as other demands."

We believe that the choice of the word "expenditures" in this section is the key to its meaning. We have only found one case construing this section, this being the case of State ex rel Hensick v. Smith, 5 Mo.App. 427 (1878). Apparently, in 1878, the statute which is now Section 1940 was in the

same form as at present, and the court held that the expense of furnishing meals to jurors who were kept together during the progress of criminal trials must be audited under this section, and that this section furnishes the authority to our courts to make the expenditure necessary to their proper functioning as courts. R.S. Mo. 1929, Section 2057, providing that the office of the probate court shall be furnished at the expense of the county is, in our opinion, related to Section 1940, and we believe that it is expenditures of this type for the general maintenance and functioning of the courts, as distinguished from costs assessed in cases pending in such courts, which are not strictly or even loosely "expenditures" of such courts, which are properly contemplated in and referred to by Section 1940. Expenditures accruing in a court are not, in our opinion, the same thing as court costs assessed in that court.

In conclusion, it is our opinion that R. S. Mo. 1929, Section 1940, does not authorize the payment out of county revenue of costs assessed in the probate court of that county which are not collectible out of the estate because of insufficient assets in the estate.

Very truly yours,

EDWARD H. MILLER,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.