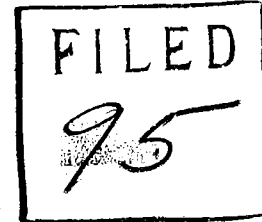


MAGISTRATE COURT: Defendant must pay magistrate fee even though
COURT COSTS: county not required to deposit said fee at
commencement of suit.

November 24, 1947



Honorable Joe C. Welborn
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

Dear Mr. Welborn:

This is in reply to your letter of recent date, requesting an opinion from this department, which reads as follows:

"The Magistrate of this County has requested me to request an official opinion from your department on the question of whether or not the Magistrate is to include a \$5.00 filing fee as costs in a judgment for personal taxes. I understand that the fee is not to be paid by the County upon filing such a suit."

In order to rule on the question submitted in your letter, we must first determine whether or not the county is required by Section 23, page 776, Laws of Missouri, 1945, to pay a magistrate fee of \$5.00 upon the commencement of a proceeding to collect personal taxes.

This question has not been presented before, however in an opinion rendered to Honorable G. Logan Marr, Prosecuting Attorney of Morgan County, dated March 26, 1947, this department held that the State of Missouri is not required to deposit said magistrate fee upon commencement of a proceeding in a magistrate court. The conclusion reached in said opinion is based, first, on the fact that the payment of such a fee by the state would amount to an absurd procedure since said fee is paid into the state treasury, and, second, on the rule that costs are not recovered from the state in its own courts unless the state is specifically named in the statute allowing the costs. The same rule, of course, applies in the matter of

security for costs. Since said fee is taxed as costs at the termination of a proceeding, it is, in effect, a deposit for costs. It would be useless to require a deposit from the state for costs for which the state is not liable. Thus, the state and its agencies are not liable for said magistrate fee.

We believe that a county, as a political subdivision of the state, should not be required to pay said magistrate fee. The same reasoning and rules of law should apply with equal force to the counties of the state. "In the absence of express statute, security for costs cannot be required of a state in hereown courts, nor of a county suing as a state agency." 20 C.J.S., Sec. 127, page 368. This is especially true when the county is commencing a proceeding in a magistrate court before a magistrate who has been selected as an additional magistrate and will be maintained by the county under the provisions of Section 1, page 767, Laws of Missouri, 1945. In such a case said magistrate fee is paid into the county treasury. In Walker v. Turner (Ky.), 122 S.W.(2d) 804, the court said at pages 805 and 806:

"A county is not required to give bond for costs in litigation growing out of the exercise of its functions as an arm or agency of the state, such as suits for condemnation of a right of way for a public highway. State Highway Department v. Mitchell's Heirs, 142 Tenn. 58, 69, 216 S.W. 336.

"In acquiring a right of way for highway purposes, the county acts as an arm or agency of the state. Department of Highways and Public Works v. Gamble, 18 Tenn. App. 95, 101, 73 S.W.2d 175.

"And the county is none the less acting as an arm of the Sovereign if it obtains possession of a right of way without instituting a condemnation suit. Carroll County v. Matlock, 7 Tenn. App. 564, 566.

"The Code sections upon which appellee relies (9043, 9044, 9045) do not, in express terms, either include or exclude the state or counties; but such statutes,

couched in general terms, though unqualified, will not apply to the state, nor to counties when acting as an arm or agency of the state. *Henley v. State*, 98 Tenn. 665, 689, 41 S.W. 352, 1104, 39 L.R.A. 126.

"The Arkansas case of *State v. Blackburn*, 61 Ark. 407, 33 S.W. 529, 530, is cited with approval in *Henley v. State*, supra; and in the Arkansas case it is said:

"In the construction of statutes declaring or affecting rights and interests, general words do not include the state, or affect its rights, unless it be especially named, or it be clear, by necessary implication, that the state was intended to be included." and counties have the benefit of the same strict construction of statutes affecting them as has the state in like circumstances."

A proceeding by a county for the collection of delinquent personal taxes contemplates the collection of both county and state taxes. The county is, in a sense, bringing suit on behalf of the state. This is another reason why the county should not be required to pay said magistrate fee in this case. In *Commonwealth v. Allen (Ky.)*, 32 S.W. (2d) 42, the court made this statement at page 43:

"Breathitt county is an integral part of the state of Kentucky. The taxes levied by its fiscal court are in legal effect the taxes of the state of Kentucky levied by its authorities. The duty of levying the local taxes is committed to a local tribunal, but they are still state taxes no less than the taxes levied by the Kentucky Legislature, and there is no more authority for making the fiscal court pay in advance for filing a suit to recover these taxes than there would be to require the commonwealth to pay out of the treasury without any statute authorizing the payment. The fiscal court is just as much without obligation to make such a payment as the auditor would be. *Com. v. Hazel*, 155 Ky. 30, 159 S.W. 673, 47 L.R.A. (N.S.) 1078. The actions in question to

recover possession of the land are simply proceedings provided by law to secure the collection of the taxes and impose no liability on the state or the county."

The fact that neither the state nor the county is required to pay said magistrate fee upon commencement of a proceeding for the collection of delinquent personal taxes does not relieve the defendant from paying said fee as taxed as costs when judgment is rendered against him. The magistrate court expense is still present. The defendant is in no different position than in a case where judgment is rendered against him in a suit brought by a private individual. Whether or not the magistrate court fee is deposited at the commencement of the proceeding cannot affect in any way defendant's liability for the payment of said fee if judgment is rendered against him. The court, a tribunal of the state, is entitled to said fee for its services when judgment is rendered against a party other than the state or its political subdivisions.

Conclusion

Therefore, it is the opinion of this department that the magistrate fee of \$5.00 as provided by Section 23, page 776, Laws of Missouri, 1945, should be taxed as costs against a defendant when a judgment for personal taxes is rendered against him, even though the county was not required to deposit said fee upon commencement of the proceedings.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General