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COMMON PLEAS COURT, CLERK—WITHOUT LEGAL AUTHORITY TO REQUIRE RESIDENT OR NONRESIDENT PLAINTIFF TO ADVANCE FEES CLERK AUTHORIZED TO CHARGE AND COLLECT FOR ISSUANCE OF EXECUTION ON JUDGMENT—PROCEEDING, DAMAGES SOUGHT FOR PERSONAL INJURIES.

SYLLABUS:

The clerk of the court of common pleas is without legal authority to require either a resident or nonresident plaintiff to advance the fees that said clerk is authorized to charge and collect for issuing an execution on a judgment that was obtained in a proceeding wherein damages were sought for personal injuries.

Columbus, Ohio, May 16, 1947

Hon. Earl Henry, Prosecuting Attorney, Guernsey County
Cambridge, Ohio

Dear Sir:

Your request for my opinion reads:

"A plaintiff at the time of filing his petition in the Common Pleas Court of Guernsey County, Ohio was a resident of Guernsey County. The action was one for damages for personal injuries received by plaintiff in an automobile collision on the public highway. Plaintiff obtained a judgment against the defendant which has not been paid. An execution was issued on the judgment and returned endorsed, 'nothing found on which to levy.' No deposit or security for costs was required by

the Clerk at the time the petition was filed by the plaintiff and none was required at the time of issuing said execution. Plaintiff now desires to issue another execution to keep the judgment alive.

Can the Clerk of Courts now require plaintiff to advance the costs of this second execution as a pre-requisite to issuing it, if plaintiff remains a resident of Guernsey County, Ohio?

Can the Clerk of Courts require plaintiff to advance the costs of this second execution as a pre-requisite to issuing the same, if plaintiff has become and now is a non-resident of Guernsey County, Ohio?"

In 14 Am. Jur., Costs, Section 2, it is stated:

"'Costs' are statutory allowances to a party to an action for his expenses incurred in the action. They have reference only to the parties and the amounts paid by them, or, as otherwise defined, they are the sums prescribed by law as charges for the services enumerated in the fee bill. * * *

The terms 'fees' and 'costs' are sometimes used interchangeably, but accurately speaking the term 'fees' is applicable to the items chargeable by law between the officer or witness and the party whom he serves, while 'costs' has reference to the expenses of litigation as between the parties. The latter term strictly includes only those expenditures which are by statute taxable and to be included in the judgment."

See Williams v. Flowers, 90 Ala. 136, 7 So. 439; State, ex rel. Crutcher, v. Koeln, 332 Mo. 1229, 61 S. W. (2d) 750; Bohart v. Anderson, 24 Okla. 82, 103 P. 742; Alexander v. Harrison, 2 Ind. App. 47, 28 N. E. 119; State, ex rel. G. W. Hamilton as Attorney General, v. E. C. Ayer, as County Clerk, 194 Wash. 165, 77 P. (2d) 610; 20 C. J. S., Costs, Section 1, and 7 O. Jur. 662.

Attention is now directed to Section 2900, General Code, which provides inter alia:

"For the services hereinafter specified, *when rendered,* the clerk shall charge and collect the *fees* provided in this and the next following section and no more: For docketing each cause in appearance docket, ten cents; *for docketing each execution in execution docket,* ten cents * * *." (Emphasis added.)

There is no necessity for here enumerating the many further services referred to in this and the next following section for which the clerk is

entitled to charge and collect fees. It would appear, however, that in addition to the fee fixed by statute for docketing each execution there are other fees that result in connection with the issuance of an execution.

Attention might also be called to Section 2845, General Code, which provides in part as follows:

> "For the services hereinafter specified *when rendered,* the sheriff shall charge the following fees, and no more, which the court or clerk thereof shall tax in the bill of costs against the judgment debtor or those legally liable therefor: For the service and return of the following writs and orders, namely: Execution when money is made without levy or when no property is found, seventy-five cents * * *." (Emphasis added.)

It is to be observed that the words "when rendered" are found in the aforementioned sections. The significance thereof has been the subject of judicial interpretation. See State, ex rel. Bennett, v. McCafferty, 6 O. N. P. (N. S.), 558, 15 O. D. (N. P.) 415. This case was decided by the Court of Common Pleas of Franklin County on January 4, 1905. The court therein referred to the language of Section 1260, Revised Statutes, which was the general statute fixing fees for the clerk. It read in part as follows:

> "The clerk in counties which, by the last preceding federal census, had a population less than twenty-two thousand five hundred, shall, for services hereinafter specified, when rendered, receive the fees herein provided, and no more."

After quoting that portion of the statute above set forth the court said:

> "The language 'when rendered' it seems to me can not be construed to mean before rendered. It certainly means that after the services have been rendered he shall receive the fees therein provided. *The clerk is given the right to an execution for the collection of his costs and this is the only means provided by law for the collection of his costs.* It is true this may result in loss to the clerk. But where the duty is imposed upon a public officer by law, and no compensation is provided whatever, he is required to perform such services gratuitously. This may seem like a harsh rule, but it is the law; and it is the duty of the court to declare the law as he finds it. If the law does not make proper provisions for the clerks of the courts then the Legislature must be appealed to, and not the courts." (Emphasis added.)

No reason is apparent why the words "when rendered" as used in Sections 2900 and 2845 should not be given the same interpretation as used in said Section 1260, Revised Statutes.

It will be noted from the above quoted statement of the court that reference is made to the right of the clerk to an execution for the collection of his costs. The court undoubtedly had in mind the provisions of then Revised Section 1266, Revised Statutes of 1880. In 1910 this section became Section 2906, General Code, which reads:

> "In every case immediately on the rendition of judgment, the clerk shall make out and file with the papers in the cause, an itemized bill of his costs therein, including the judgment. He shall not issue an execution in any cause for the costs of himself or of any other officer, or receive any costs for himself or any other officer, unless an itemized statement has been rendered as required by law."

The minor particulars in which the wording of the present section differs from that of the predecessor section are of no particular consequence.

Touching on the matter of the right of the clerk to secure prepayment of his fees is the following statement in 7 O. Jur. 669, to-wit:

> "The right of a person, who is entitled to the official services of a clerk and the duty of the clerk do not rest upon contract, but arise by operation of law. It must follow therefore, that if there is a right to demand prepayment of fees, such a right must arise ex lege and cannot rest upon the principles that govern the contract relation. *Therefore, a clerk has no right to collect his fees in advance in the absence of a statutory provision authorizing him to do so.*" (Emphasis added.)

State, ex rel. Bennett, v. McCafferty, supra, is cited in support of the statement above emphasized.

It may be suggested that, in view of your second question, consideration should be given to certain sections of the General Code which deal with the giving of security for costs. Section 11614, General Code, provides in part as follows:

> "If not a resident of the county in which the action is brought, or a partnership suing by its company name, or an insolvent corporation, the plaintiff must furnish sufficient security for costs. The surety must be a resident of the county and

approved by the clerk. His obligation shall be complete by indorsing the summons, or signing his name on the petition as surety for costs."

Section 11615, General Code, provides:

"The plaintiff may deposit with the clerk of the court such sum of money as security for costs in the case, as in the opinion of the clerk, will be sufficient for the purpose. On motion of the defendant, and if satisfied that such deposit is insufficient, the court may require it to be increased from time to time, so as to secure all costs that may accrue in the cause, or personal security to be given."

Section 11617, General Code, provides:

"If security for costs be not given in a case mentioned in the preceding section of this chapter, at any time before the commencement of the trial, on motion of the defendant, and notice to the plaintiff, the court shall dismiss the action, unless in a reasonable time, which it may allow, security be given."

Particular attention is directed to Section 11618, General Code, which provides:

"If the plaintiff becomes a non-resident of the county in which the suit is brought, *during its pendency,* he may be compelled, in the manner stated in the four preceding sections, to give such security." (Emphasis added.)

It will be observed that in each instance said sections refer to "costs." But as has been pointed out earlier herein there is a distinction between costs and fees. It appears that the reason for enactment of these aforementioned sections is discussed in Devine v. Detroit Trust Co., Recr., 52 O. App. 446, wherein it is stated:

"* * * By Section 11614, General Code, a non-resident of the county is required to give security for costs. This requirement is primarily for the protection of the public, and is not jurisdictional. * * * It certainly is too late to ask security when the court has already decided that the defendant should pay the costs. Security is against the contingency that the plaintiff's claim is without merit, and because thereof there would be no one within the jurisdiction to whom to look for payment; and perhaps no property."

I am unable to attach any particular significance to these just mentioned sections since, as I view it, they have no particular application to

the factual situation set forth in your inquiry. Again it is to be borne in mind that said sections deal with the matter of costs.

In specific answer to your questions it is therefore my opinion that the clerk of the court of common pleas is without legal authority to require either a resident or nonresident plaintiff to advance the fees that said clerk is authorized to charge and collect for issuing an execution on a judgment that was obtained in a proceeding wherein damages were sought for personal injuries.

Respectfully,

HUGH S. JENKINS,
Attorney General.