

INSANITY INQUESTITION: Cost of same may be paid by county court if a person is declared insane and his estate is insufficient to pay cost.

PAUPER OATH: It is within discretion of court to allow a person to twice file and prosecute same suit as a poor person when first suit was dismissed.

June 14, 1937.

6-15



Honorable George H. Miller
Prosecuting Attorney
Hickory County
Hermitage, Missouri.

Dear Sir:

This Department is in receipt of your letter of May 3, 1937, in which you request an opinion as follows:

"We have a Spanish American War Veteran in our county who draws \$60.00 a month veteran's compensation. He is an habitual drunkard and refuses to provide for his family, spending practically all his money for liquor and beer. His check is turned over each month to a beer parlor operator. He doesn't live with his family, refuses to provide for them.

"Suit was instituted by the lady in Probate Court to have her husband declared an habitual drunkard. The lady is insolvent and has no folk who would go her bond for costs in case of suit. She was permitted to sue as a poor person, but the suit was dismissed because the Veterans' Bureau had not been notified with the required ten days' notice. She has one son who is in the CCC. When this boy comes home, the family of four will be practically dependent upon the county.

"Would it be proper for the Probate Judge to allow her to sue again as

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a poor person, or is there any way by which the county could pay the costs of the suit?"

Your request contains two questions, as we understand it:

First: May the Probate Court after having permitted a person to file an action as a poor person, again permit that person to file and prosecute said action as a poor person, where the first action was dismissed for failure to notify a necessary party thereto.

Second: May the County Court pay the costs of such a proceeding as is contemplated in the instant case.

We shall take up these questions in the order set forth.

Section 1240 R. S. Missouri, 1929, in part 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 and proceedings as in other cases, without fees, tax or

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charge; * * * , 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."

In Fox v. Dold Packing Company, 70 S. W. 164, 96 Mo. App. 180, the court had before it the question of whether the trial court abused its discretion in not sustaining a motion to stay the proceedings until plaintiff had paid the costs of a former suit upon the same cause of action, where the former action had been dismissed. The court said: (S.W. 166).

"It is contended that the court in overruling defendant's motion to stay plaintiff's case until he had paid the costs of the former suit upon the same cause of action, did not exercise a sound discretion. We think it did. It was shown that on account of his poverty he was allowed to sue as a poor person in the Federal Court. Our statute provides that he may also sue in the State courts on account of his poverty and it would be a contradiction to deny his right to proceed with his case because he had failed to pay the costs in a case wherein he was allowed to sue as a poor person, and when it was reasonable to suppose, nothing to the contrary appearing, that his financial condition was unchanged."

In Carrier v. Missouri Pacific Ry. Co., 74 S.W. 1002, 1004, the Court, with a similar question before it, said:

"The action of the trial court in overruling defendant's motion to restrain plaintiff from prosecuting this action until the costs

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in the former suit upon the same cause of action were paid, and in making an order requiring plaintiff to give security for costs in the case at bar, and then permitting her to prosecute it as a poor person, is assigned for error. With respect to the first proposition, it seems to be a matter resting in the sound discretion of the court and not appealable."

These citations necessarily lead us to the conclusion, that the action of any court, in permitting a person to file and prosecute an action as a poor person, where that same action has formerly been instituted and prosecuted as a poor person, but dismissed, is wholly within the sound discretion of said court.

The second question which we have set out above is whether the county may pay the costs of such proceedings?

The action heretofore brought by the informant in the instant case and dismissed for failure to notify a necessary party thereto, evidently was brought under Chapter 1, Article 19, R. S. Missouri, 1929, relating to guardians of drunkards and confinement of drug addicts. Section 508 of this Chapter provides, among other things, that if an action is brought under this Chapter that the Court shall proceed therein in all respects as herein provided in respect to an idiot, lunatic or person of unsound mind. Chapter 1, Article 18, R. S. Missouri, 1929, relates to the appointment of guardians and curators of insane persons, and would govern the proceedings of an action brought under Chapter 1, Article 19, R. S. Missouri, 1929.

Section 513 of Chapter 1, Article 19, R. S. Missouri, 1929, is in part as follows:

"All fees of the Probate Court and fees and mileage of the sheriff shall be the same as in like proceedings in the inquisition and care of insane patients, and shall

also be paid out of the county treasury by order of the county court; but all such expenses, fees and mileage shall be a charge upon any estate of the patient subject to appropriation as hereinabove provided, and for the payment of which by the curator into the county treasury, said probate may and shall, from time to time upon application of the county court, make order for the sale and transfer of title of such estate as in the case of estates of insane persons under guardianship, and for payment into such county treasury."

Section 454, Chapter 1, Article 18, R. S. Missouri, 1929, is as follows:

"When any person shall be found to be insane according to the preceding provisions, the costs of the proceedings shall be paid out of his estate, or, if that be insufficient, by the county."

The two sections quoted supra are clear and have but one meaning and as such are not open for construction. *Cummings v. Kansas City Public Service Company*, 66 S. W. (2d) 920. Under the provisions of Sections 513 and 514, R. S. Missouri, 1929, the county may pay the costs of an insanity proceeding if said person alleged to be insane is so declared to be, and then only if the estate of said insane person is insufficient to pay that cost.

Therefore, it is the opinion of this Department that it is within the sound discretion of the Probate Court to permit a person if all the facts and circumstances justify doing so, to recommence and prosecute an action as a poor person, where the first suit so authorized and instituted was dismissed for failure to serve notice upon a necessary party thereto.

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It is further our opinion that the county may pay the costs of an insanity inquisition, if the person alleged to be insane is so declared to be, and then only if the estate of the insane person is insufficient to pay the costs of said inquisition. If the person so alleged to be incapacitated is discharged, then the costs will fall upon the informant unless said informant is an officer acting officially, then in such case the county may pay the costs as provided in Sections 454 and 513, R. S. Missouri, 1929.

In the instant case it appears from the facts before us, that the person alleged to be incapacitated, if declared to be so, will have an estate which will probably be sufficient to cover the necessary costs of this inquisition, and further that if the court in the exercise of its sound discretion permits the informant, who is not an officer acting officially, to recommence and prosecute this action and the person alleged to be incapacitated is discharged upon a hearing, then the costs of the inquisition will not be paid by anyone.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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