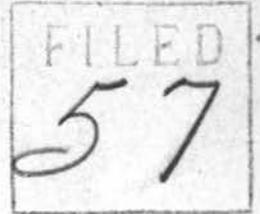


MAGISTRATE COURTS : No fee is allowed the magistrate in a
JUDGMENTS : proceeding to revive judgment of the
JUSTICE OF THE PEACE : justice of the peace court the record
of which was delivered to the magistrate.

December 21, 1948



12-22

Honorable Aubrey R. Marshall
Judge of the Magistrate Court
Randolph County
Moberly, Missouri

Dear Judge Marshall:

This is in reply to your request for the
opinion of this department, which is as follows:

"In the matter of Scire Facias to
Revive Judgment of Justice of the
Peace will you please inform us
what fee the Magistrate Court should
collect.

"Thanking you, "

At the outset it is well to note that a justice
of the peace judgment which is delivered to a magistrate
has the force and effect of a judgment rendered by said
magistrate, and may be revived to the same extent and in
like manner as if it had been originally rendered by such
magistrate. Laws of Missouri, 1947, Volume I, page 246,
Section 7a provides:

"That Section 7 of An Act of the 63rd
General Assembly, known as Senate Bill
No. 207, approved by the Governor on
March 11, 1946, relating to the resig-
nations of magistrates and to the de-
livery of records of justices of the
peace to magistrates, be and the same
is hereby repealed and to enact in lieu
thereof two new sections relating to
the same subject matter, to be known
as Sections 7 and 7a, and to read as
follows: "

Thus, we must consider the justice of the peace judgments in question as if they had been rendered by the magistrate. The provisions by which a judgment of the magistrate court may be revived are found in the Laws of Missouri, 1945, page 765, Sections 118 to 127, inclusive.

We now arrive at the question presented concerning the fee allowed the magistrate for the revival of such judgments. There are no provisions in the statutes comprising the magistrate law which allow the magistrate a specific fee in proceedings for the revival of judgments. The Laws of Missouri, 1947, Volume I, page 240, Section 23, sets out the only fee which is allowed the magistrate in civil proceedings. That section is, in part, as follows:

"A fee of five (\$5.00) dollars shall be allowed the magistrate in each civil proceeding, general or special, instituted in his court. Upon the commencement of any such proceedings in the magistrate court except in cases instituted by the state, county or other political subdivision the party commencing the same shall pay to the clerk of said court such magistrate fee of five dollars (\$5.00). * * * ."

The magistrate fee is allowed the magistrate upon the commencement of any civil proceeding instituted in his court. It is well settled in Missouri that a proceeding to revive a judgment is not a new proceeding but is a continuation of the original cause of action. The nature of the proceeding itself makes this conclusion clear. In *Beattie Mfg. Co. vs. Gerardi, (Mo.) 214 S.W. 189*, the Supreme Court made the following statement at page 191:

"* * * It has been said so often as to be trite that a scire facias to revive a judgment is not an original action but a continuation of a former proceeding and ancillary thereto; that it is in effect but the application by the plaintiff to the court for an execution on a judgment about to become dormant. * * * ."

It was also said in the case of *In re Jackman's Estate, 344 Mo. 49, 124 S.W. (2d) 1189*, at page 1191, that:

"* * * it must not be overlooked that the suing out of the scire facias was not a new proceeding, but was a continuation of the cause in which it was issued (Peak v. Peak et al., Mo. Sup., 181 S.W. 394, loc. cit. 395, and cases there cited), * * * ."

Further language to this effect is found in City of St. Louis, et al. vs. Miller, et al., 145 S.W. (2d) 504, 235 Mo. App. 897, at page 506 (S.W.):

"* * * The application for the writ, whether it be in the form of a petition, motion, or praecipe, does not initiate an original suit. It does, however, initiate the proceeding for the revival of the judgment. In that respect it serves an essential function. It serves no essential function as a pleading. That function is served by the writ. Defendant contends that since the writ serves the double purpose of pleading and process, the proceeding for revival of the judgment is not commenced until the writ is issued, and thus draws a distinction between an original suit and scire facias. We regard the distinction as unsubstantial. * * * ."

See also: Peak vs. Peak, et al., 181 S.W. 394, l.c. 395, and State ex rel. Buder vs. Hughes, et al., 166 S.W. (2d) 516, l.c. 519.

In view of the fact that the further proceeding to revive a judgment of the magistrate court is ancillary and a continuation of the original cause of action, it is evident that the magistrate fee allowed upon the commencement of said original proceeding is the only fee that can be allowed the magistrate.

CONCLUSION.

Therefore, it is the opinion of this department that no fee is allowed the magistrate in a proceeding to

Honorable Aubrey R. Marshall -4-

revive a judgment of the justice of the peace court the
record of which has been delivered to the magistrate.

Respectfully submitted,

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APPROVED:

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