MUNICIPAL AND CIRCUIT COURT COSTS: CIRCUIT CLERK: A cost judgment against a municipality for costs incurred on an appeal to the circuit court from a conviction in a municipal court in instances where upon appeal such conviction is set aside and the defendant is acquitted, may not be recovered except in the case of a city of not less than 300,000 nor more than 700,000 population. When the circuit clerk is involved in litigation in the circuit court, either as plaintiff or defendant, whether singly or jointly with others, the writ of summons and all other process shall be issued by the clerk of the county court.

March 5, 1959

Honorable Stephen R. Pratt
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

I have your letter of December 31, 1958 in which you enclose a letter to you from the circuit clerk of Clay County with a request that we render an opinion to you based upon the letter of the circuit clerk. The letter of the circuit clerk reads:

> "I request an opinion from the Attorney General on the following situations that are confronting my office and are of vital importance to the people of Clay County.
>
> 1. As you know, we have many Police Court appeals from the various villages, towns and cities of Clay County and it is getting to a point where the majority of these appeals are reversed, that is, the defendant is found to be not guilty by a jury. These cases incur costs and I would like to know if the village, town or city can have a cost judgment sentenced against them and if I could issue execution for the same.
>
> "I am well aware that the statutes formerly prohibited taxing costs against the city, town or village but I think that has been repealed and that now they are liable for costs.
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> "I would appreciate very much an early reply.
>
> 2. I would like an opinion on whom is acting clerk of circuit court in any case that the clerk of circuit court is involved as a litigant. It is my opinion that the County Clerk assumes the duty in that particular case

> or cases that the clerk is involved in, and at one time I had the County Clerk do so. However, I am not sure and if I become involved in litigation either as the plaintiff or defendant, I certainly want no error in the case or proceedings."

With respect to your first question, we direct attention to Section 98.027, RSMo Cum. Supp. 1957, which reads:

> "If on appeal from a municipal court in any city which has not less than three hundred thousand inhabitants nor more than seven hundred thousand inhabitants, any defendant is acquitted of violating any city ordinance, the city shall pay all costs which accrue on the appeal in the court having jurisdiction of the appeal."

In regard to the situation of the liability of a city not within the purview of Section 98.027, supra, for costs on appeal, which is the matter of your first inquiry, we direct attention to the 1917 case of City of Greenville v. Farmer, 195 Mo.App.Rep. 209, a case determined in the Springfield Court of Appeals. At l.c. 210, the court sets forth the fact situation as follows:

> "The defendant (respondent) was prosecuted for the alleged violation of the ordinances of the plaintiff, a city of the fourth class, and on appeal from the police court was acquitted in the circuit court, that court rendering a general judgment for costs against the plaintiff city upon which an execution was issued. The city filed a motion to quash the execution which motion was overruled and later the city filed a motion to retax the costs, which, as to the main contention on this appeal, was likewise overruled. The case here on the city's appeal from the order overruling such motion."

At l.c. 211, the court further states:

> "It is the well settled law of this State and the country at large that the right to tax costs is purely made by statute; no such right existed at common law; and unless there is a statute authorizing the taxing of costs against the plaintiff, the order of the circuit court is erroneous. It is held in the case of State

ex rel. Clarke v. Wilder, 197 Mo. 27, 94 S.W. 499, that no costs can be taxed in any court except such as the statute in terms allows. In Ring v. Chas. Vogel Paint & Glass Co., 46 Mo.App. l.c. 377, the following language is used: ' . . . It may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer or other persons claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation.' * * *"

At l.c. 213, et seq., the court states:

"Attention is called to the concluding clause in section 9344, Revised Statutes 1909, providing: 'The city shall in no event be held liable for any costs or fees to any officer of the city in any cause tried before the mayor or police judge of such city, unless the defendant be convicted and committed.' It can be seen that this provision, in the first place, is only applicable in cases arising under section 9344 where there is a finding in the verdict that the prosecution was malicious and without probable cause and there was no such finding in this case, and, in the second place, it was put in as a charter prohibition for a city of the fourth class to be held for costs and fees to any officer of the city. This provision in the statute evidently was passed with a mind as to what the city could by ordinance give or not give its officers in the form of fees growing out of prosecutions. This is the view taken in the cases of Fortner v. City of Higginsville, 106 Mo.App. 560, 565, 80 S.W. 983, and Kemp v. City of Monett, 95 Mo.App. 452, 69 S.W. 31.

"In addition to the reason that we have been unable to find any statute authorizing the taxation of costs, in a proceeding like this, against a city of the fourth class, we think it would be manifestly wrong to hold the city for attempting to enforce its ordinances in its police regulation; the city is thereby

> acting in its governmental capacity or on its governing side and if it were to be mulct in costs in cases where the proceedings are against individuals for the violation of its ordinances it might because of its limited powers to raise revenue become a bankrupt in attempting to police the city, or, on the other hand, would be slow to enforce municipal regulations for fear of becoming liable for the costs."

In view of the above, therefore, we do not believe that a cost judgment may be rendered against a municipality and execution issued for collection of the judgment, with the exception of a city coming within the purview of Section 98.027, supra.

With respect to your second question, it would be our opinion that this situation is governed by Section 483.075, V.A.M.S., which reads:

> "1. Every clerk shall record the judgments, rules, orders and other proceedings of the court, and make a complete alphabetical index thereto; issue and attest all process when required by law and affix the seal of his office thereto, or if none be provided, then his private seal; keep a perfect account of all moneys coming into his hands on account of costs or otherwise, and punctually pay over the same.
>
> "2. Provided, that where the clerk of the circuit court is a party, plaintiff or defendant, whether singly or jointly with others, to a suit or action, the writ of summons and all other process shall be issued by the clerk of the county court, the reason therefor being noted on said process, and said latter named clerk shall, on the trial of said cause, act as temporary clerk of the circuit court and otherwise perform in said cause all the duties of the circuit court clerk."

CONCLUSION

It is the opinion of this department that a cost judgment against a municipality for costs incurred on an appeal to the circuit court from a conviction in a municipal court in instances where upon appeal such conviction is set aside and the defendant is acquitted, may not be recovered except in the case of a city of not less than 300,000 nor more than 700,000 population.

Honorable Stephen R. Pratt

It is the further opinion of this department that when the circuit clerk is involved in litigation in the circuit court, either as plaintiff or defendant, whether singly or jointly with others, that the writ of summons and all other process shall be issued by the clerk of the county court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:hw