

83.

ADVANCE DEPOSIT, TWO DOLLARS, ACTION OR PROCEEDING IN MUNICIPAL COURT CALENDAR—NOT REQUIRED OF STATE OF OHIO OR ANY OFFICER THEREOF—SEE SECTIONS 1558-36, 348 G. C.

*SYLLABUS:*

*Section 1558-36, General Code, can have no application to the state of Ohio or any officer thereof, and therefore the payment of the advance deposit of two dollars (2) as provided for in section 1558-36 upon the institution of any action or proceeding in the municipal court of Cincinnati, Hamilton County, Ohio, is not required of the state of Ohio or any officer thereof.*

COLUMBUS, OHIO, February 4, 1939.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN: This will acknowledge receipt of your recent communication, which reads as follows:

“Section 1558-36 of the General Code, provides in effect that costs in civil cases in the Municipal Court of the City of Cincinnati, shall include an advance payment of two dollars (2) to be deposited ‘upon the institution of any proceeding unless the party instituting same shall be allowed for good cause shown by one of the judges to institute his action without any payment of such costs.’

Section 348 of the General Code provides:

‘No undertaking or security shall be required on behalf of the state or an officer thereof, in the prosecution or defense of any action, writ or proceeding. \* \* \*

It has also been held by the Attorney General in Opinion No. 1576 of 1928:

‘There is no authority to require the payment of advance costs in an action instituted by the State of Ohio in the Common Pleas Court of Hamilton County.’

Question. In view of the section last above quoted and the Attorney General’s Opinion cited, may we inquire if a state department, or officer thereof, is required to make an advance deposit of Two Dollars (2) when instituting an action in the Municipal Court of Cincinnati?”

In answering the above question, the first matter for consideration is whether the state of Ohio is bound by the terms of a general statute.

Section 1558-36 of the General Code, referred to above, reads as follows:

“The costs in said court shall be two dollars in each case, exclusive of witness fees and the costs of summoning jurors and jurors’ fees in civil cases, the costs of appraisers in attachment and replevin actions, and the costs of the removal of property seized, in any civil action or proceeding. Such fees and costs of summoning witnesses shall be fixed in the same manner as is now, or may hereafter be, provided for in the court of common pleas, for witness fees and the costs of summoning them. Said cost of two dollars shall be payable in advance upon the institution of any proceeding unless the party instituting the same shall be allowed, for good cause shown, by one of the judges to institute his action without any payment of such costs, and such costs shall entitle a judgment creditor in such proceeding to one examination of his judgment debtor and one proceeding in aid of execution on his judgment. For each further examination of judgment debtors or proceeding in aid of execution there shall be paid additional costs of fifty cents upon the application therefor, which costs shall be taxed in the same manner as all other costs. There shall be no advance costs in any criminal proceeding or prosecution but no warrant or order of arrest shall issue without the consent of the city solicitor, one of his assistants, one of the judges of the court, or clerk, or his chief deputy.”

The authorities concur in the doctrine that a sovereign state is not bound by the terms of a general statute, for the reason that said sovereign state “which can make and unmake laws, in prescribing general laws, generally intends thereby to regulate, not its own conduct, but that of its subjects.” (37 O. Jur. 804.)

In the case of *State of Ohio, ex rel., etc. v. Board of Public Works*, 36 O. S. 409, it was held in the fourth branch of the syllabus as follows:

“In the absence of a statute requiring it, or a promise to pay it, interest cannot be adjudged against the State for delay in the payment of money.”

In this case there was a statute requiring debtors to pay interest, but the court held that this statute did not apply to a sovereign state since it was not expressly enacted to apply to the state.

Likewise in the case of *State, ex rel. v. Cappeller*, 39 O. S. 207, it was held in the court’s opinion at page 213:

“The State can, no doubt, through its legislature, subject itself to the provisions of a general law, but it must be by *express enactment*.” (Italics the writer’s.)

Further, in the case of *State, ex rel. v. Brown*, 112 O. S. 590, the holdings in *State, ex rel. v. Board of Public Works*, *supra*, and *State, ex rel. v. Cappeller*, *supra*, were cited and followed.

In the case of *State, ex rel. v. Merrell*, 126 O. S. 239, the contention is further supported that the state as a sovereignty is not bound by the terms of a general statute unless the statute expressly applies to the state.

It is readily apparent that Section 1558-36, General Code, is a general statute in the scope of its application, and in the light of the above cited authorities, the doctrine is well established that the state of Ohio cannot be bound by this general statute since there is no express enactment binding the state.

Further, in conclusive authority for the contention that the state of Ohio, or any officer thereof, is not required to advance costs in any action or proceeding in the municipal court of Cincinnati, Hamilton County, Ohio, is Section 348 of the General Code, referred to in your request, which reads as follows:

“No undertaking or security shall be required on behalf of the state or an officer thereof, in the prosecution or defense of any action, writ or proceeding. In an action, writ or proceeding it shall not be necessary to verify the pleadings on the part of the state or any officer thereof.”

This section specifically exempts the state or any officer thereof from the requirements set forth in Section 1558-36, *supra*, so that instead of a provision expressly placing the state of Ohio under the requirements of Section 1558-36, General Code, there is an express provision exempting the state from such statute.

The word “security” used in Section 348, *supra*, certainly would cover the requirement of the deposit of money upon the institution of any proceeding.

As noted in your letter, a similar question was determined by one of my predecessors in office in Opinions of the Attorney General for the year 1928, Volume 1, page 104, the only basis of distinction being that the request contained therein referred to the Common Pleas Court of Hamilton County, rather than the Municipal Court of Cincinnati, Hamilton County, Ohio. That opinion was also in accord with the above cited authorities.

Therefore, in view of the sound authority of the cases cited herein, and more specifically in view of the express provisions of Section 348 of the General Code, it is my opinion that Section 1558-36, General Code,

can have no application to the state of Ohio or any officer thereof, and that therefore the payment of the advance deposit of two dollars as provided for in Section 1558-36 upon the institution of any action or proceeding in the Municipal Court of Cincinnati, Hamilton County, Ohio, is not required of the state of Ohio or any officer thereof.

Respectfully,

THOMAS J. HERBERT,  
*Attorney General.*