and in reference to the right of this state to enforce its fish and game laws on the Ohio River, it is said in Opinions of the Attorney General for 1920, Vol. II, page 1055:

> "The waters of the Ohio river bordering the state of Ohio are within the jurisdiction of the state of Ohio, and persons may not, in view of the provisions of section 1431 G. C., hunt wild birds or wild animals on said river, without first having applied for and received a hunter's and trapper's license."

The court in the case of *State* vs. *Pyles,* 38 O. A. 380, by way of obiter dictum, made the observation that it has not been determined whether Ohio and the states across the Ohio River can legislate concerning fishing on its waters beyond the territorial limits of such states, and then said that the probable answer is in the negative, but this conclusion is not supported by the weight of authority and was not necessary to the decision of the questions involved in that case.

It seems clear, by the great weight of authority, that this state does have jurisdiction to enforce its fish and game laws on the Ohio River beyond the southern boundary of the state where the acts prohibited by this state are not permitted or authorized by the states across the river within whose territory it is committed; however, if the act is authorized or permitted by the state within whose territory it is committed, it would probably be held, in view of the holding of the United States Supreme Court in the case of *Nielson* vs. *Oregon, supra,* that this state would have no jurisdiction beyond its own territorial limits.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4204.

MUNICIPAL COURT—CLEVELAND—MAY REQUIRE SECURITY FOR COSTS IN FORCIBLE ENTRY AND DETAINER, COGNOVIT AND EJECTMENT ACTIONS.

SYLLABUS:

The Municipal Court of Cleveland has the power by rule of court, to require security for costs in forcible entry and detainer actions, actions on cognovit instruments, and ejectment actions.

COLUMBUS, OHIO, March 29, 1932.

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

GENTLEMEN:—I am in receipt of your recent letter in which you set forth the following inquiry:

> "Question: Has the Municipal Court of Cleveland power by rule of court, or otherwise, to require a deposit as security for costs in forcible entry and detainer actions, cognovit actions and ejectment actions?"

The sections of the General Code governing the Municipal Court of Cleveland pertinent to the question presented read in part as follows:

> "Section 1579-19. To expedite the business and promote the ends of justice the judges may from time to time adopt, publish, and revise rules relating to matters of practice and procedure, service and return of writs or process, classify the causes of action in the court and prescribe with reference to each class the degree of particularity with which a cause of action, set-off, counter-claim, or defense shall be set up.
>
> Where no special provision is made in this act, or by rule of court, the provisions of title four, part third, of the General Code shall apply to the practice and procedure of the municipal court; but this section shall not be construed to abridge the powers of the judges in respect thereto granted by this act."
>
> "Section 1579-21. The judges of the court may sit separately or otherwise; shall meet at least once in each month and at such other times as the chief justice may determine; shall prescribe forms; establish a system for the docketing of causes, motions and demurrers; adopt and publish rules governing practice and procedure not otherwise provided for in this act; and designate the mode of keeping and authenticating the records of proceedings had before them.
>
> The judges or a judge of the court may summons (summon) and impanel jurors; tax costs; compel the attendance of witnesses, jurors and parties; issue process; preserve order; punish for contempt; and may exercise all powers which are now or may hereafter be conferred upon the court of common pleas or the judges thereof, or upon justices of the peace, or upon police courts of cities or the judges thereof necessary for the exercise of the jurisdiction herein conferred and for the enforcement of the judgments and the orders of the court."
>
> "Section 1579-40. Where no special provision is made in this act (G. C. §§ 1579-2 to 1579-54), the laws governing the court of common pleas as to security for costs, bills of exceptions, motions for new trials, vacation or modification of judgment before and after terms, the referring of matters to a referee or special master commissioner, the issuing of executions and orders for stay of execution, and the taking of depositions, shall be held to apply to the municipal court."

Section 1579-41, General Code, setting forth the powers and duties of the clerk, provides that money deposited as security for costs shall be retained by him pending the litigation.

It will be seen that the municipal court in the absence of other statutory authority is to be governed by the same rules by which the courts of common pleas are governed. As there is no statutory authority for requiring security for costs in the classes of cases covered by your inquiry, the question presents itself whether a court of record has the inherent power to adopt and enforce a rule of court making this requirement.

It is well known that in the classes of cases referred to, it is, in most instances, difficult, if not impossible, to enforce the collection of court costs where their payment has not been secured, and the Municipal Court of Cleveland, in October, 1931, adopted a rule authorizing and directing the clerk to require such security in those cases. It is also well known that numerous courts for many years have adopted similar rules.

In 11 O. Jur. 768 it is said:

> "A practice of the courts for nearly forty years is very strong argument that it is founded upon a correct interpretation of the law, where no adjudication can be shown against the practice. The practice on a matter of procedure is regarded as full evidence of the law."

The inherent right of courts to make rules for their own government has always been recognized. In the case of *State, ex rel. Hawke,* vs. *LeBlond,* 108 O. S. 126, at page 135, it was held:

> "We are of the opinion, however, that courts have the inherent right to formulate rules for their government, so long as such rules are reasonable and not in conflict with general laws. The right to make rules must be held to come within the implied powers of courts of justice."

In the case of *State, ex rel., Judson,* vs. *Coates, Clerk,* 8 N. P. 682, a motion for security for costs was overruled but, in spite of the courts action, the clerk refused to accept the precipe for summons until his fees were first paid. The court held that the clerk had no right to refuse to accept the precipe. There was no rule of court involved in that case.

To the same effect is the case of *State, ex rel. Bennett,* vs. *McCafferty,* 6 N. P. (N. S.) 558.

In the case of *State, ex rel. White,* vs. *Bates, Judge,* 5 C. C. 18, which case was decided before security for costs was required in divorce cases, it was held that where a court has found a person clearly entitled to a divorce and has approved a decree granting it, such court has no right, as a condition precedent to the entry thereof, to require that the costs be paid by the plaintiff. No rule of court was involved in this case.

In the case of *Heffner* vs. *Scranton,* 27 O. S. 579, the trial court had found that the verdict of the jury was against the manifest weight of the evidence and granted a new trial on condition that the plaintiffs pay the costs. As plaintiffs did not pay the costs, judgment was entered on the verdict. The Supreme Court held that when the trial court had found that the verdict was against the manifest weight of the evidence, the statute made it mandatory to grant a new trial, and that the payment of costs could not be demanded as a condition precedent to the plaintiffs' right to a new trial. Clearly this case does not apply.

In the case entitled *In re Admission to Record of the Will of Robert Barr,* 30 Bull. 386, it was held that the court had inherent power to require security for costs of nonresidents. The court, citing several cases in other jurisdictions, said:

> "It might fairly be said that the civil code provisions as to costs would not apply to these proceedings at bar. It is not necessary, however, to look to the statutes for the power of the Court to require a security for costs. An examination of the authorities, both at common law and in equity, leads to the conclusion that the right to demand security for costs of nonresidents, is inherent in the court, in the furtherance of justice and administration of the law, and lies largely in its discretion, depending upon the exigencies of the various cases as they appear before the Court."

The Supreme Court of the United States has held that the courts have the inherent power to require security for costs in the case of *Henderson* vs. *Griffin,* 5 Peters 151.

It was held in the case of *People, ex rel. Fuller,* vs. *Oneida Common Pleas,* 18 Wend. 652, that:

> "The power of staying proceedings until security for costs shall be filed is incidental, and was long exercised independent of statute, and may still be so exercised."

In *Knoch* vs. *Funke,* 19 N. Y. Supp. 242, it was held:

> "Civil Code procedure, section 757, providing that the court must, upon motion, allow an action to be continued against the executor of a deceased party, does not affect the inherent power of the court to require security for costs as a condition for allowing such continuance."

In *Carran* vs. *U. S. Fidelity and Guaranty Co.,* 92 Pac. 424 (Wash.), it was held:

> "And we are of the opinion that the power of the court to require security for costs is an incident to its power to render judgment for costs, rather than an incident to its jurisdiction over the subject matter of the action. If it be conceded that the circuit court had jurisdiction to render judgment for costs against the complainants, after the costs were incurred, we think it necessarily follows that it had jurisdiction to require security for such costs before they were incurred."

I do not find that the Supreme Court of this state has squarely passed upon the right of a court to adopt a rule requiring security for costs, but in the case of *Sterwerf* vs. *Smith,* 73 O. S. 62, in which it was held that sections 5340-1 and 5340-2 R. S. requiring security for costs of nonresidents was broad enough to cover proceedings in error, the court said:

> "Without determining whether or not the courts have inherent power to require security for costs, as has been held sometimes, we are of the opinion that within the language of R. S. sections 5340-1 and 5340-2 the judgment of the circuit court was right."

The Supreme Court, however, has long recognized this power in the adoption and enforcement of rule II, section 13c of its rules of practice, which rule reads as follows:

> "At the time of filing the petition in an original action in this court the plaintiff shall deposit with the clerk the sum of $10.00 as security for the payment of costs, in addition to the general docket fee of $20.00."

Section 1512, General Code, provides that the clerk shall charge and collect the twenty dollar ($20.00) docket fee in an original action, but the court, by its rule making power, requires an additional deposit.

It might be claimed that as the statutes require security for costs in some cases the courts would be limited to such cases expressly provided for under the

rule of *expression unius est exclusio alterius.* For instance, sections 2292 and 4314, General Code, require security for costs in taxpayers' suits; section 4785-167, General Code, applies to contests of elections; section 11248, General Code, to suits by insolvent next friends; section 11614, General Code, to nonresidents, certain partnerships and insolvent corporations; section 11981, General Code, to divorce cases; and section 12306, General Code, applies to certain proceedings in *quo warranto.*

This maxim is applied only as a means of discovering the legislative intent when it is not otherwise manifest; and when there is some reason for mentioning one thing and none for mentioning the other, the absence of any mention of the latter will not operate as an exclusion. 36 Cyc. 1122, Lewis' Sutherland Statutory Construction, page 924.

The maxim might apply if the legislature were granting to the court new rights, powers or duties, but I do not think that the fact that the statutes dealing with certain subjects require security for costs in those cases shows any intention to take away from the courts the right that they had to require such security in other cases.

It might also be claimed that such a rule as adopted by the municipal court of Cleveland violates article I, section 16 of the Ohio Constitution, which provides as follows:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay * * *."

This question seems to be settled by the case of *Miller, Receiver,* vs. *Eagle,* 96 O. S. 106, wherein it was claimed that section 1579-61, General Code, with reference to the municipal court of Dayton, providing that the costs of summoning jurors and their fees shall be taxed as part of the costs, and that such costs must be secured in advance by the party demanding the jury, violated the provision of the constitution providing that the right of a trial by jury shall be inviolate. The court held that the statute is but a moderate and reasonable restriction upon the enjoyment of the right of a trial by jury and is not an impairment of that right. By like reasoning the rule of court in question is but a moderate and reasonable restriction upon the right to bring suit in that court and is not an impairment of that right.

I am of the view that courts of record have the right to adopt rules requiring security for costs to be given in certain cases, in the absence of abuse of discretion.

Answering your inquiry, I am of the opinion therefore that the Municipal Court of Cleveland has the power, by rule of court, to require security for costs in forcible entry and detainer actions, actions on cognovit instruments, and ejectment actions.

Respectfully,
GILBERT BETTMAN,
Attorney General.