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CASH DEPOSIT — SECURITY FOR COSTS — BENEFIT, THOSE ENTITLED TO COSTS TAXED AGAINST PLAINTIFF — COSTS WHICH EXCEED CASH DEPOSIT, OR ARE UNCOLLECTIBLE — THOSE EARNED IN PERFORMANCE OF SERVICES FOR PLAINTIFF, PAID FIRST IN ORDER INCURRED — SECTION 11615 GENERAL CODE.

SYLLABUS:

A cash deposit given as security for costs under the provisions of Section 11615, General Code, is for the benefit of those entitled to the costs which have been taxed or adjudged against the plaintiff. When such costs exceed the cash deposit and are otherwise uncollectible, those earned in performance of services for the plaintiff shall be paid first in the order in which they were incurred.

Columbus, Ohio, February 5, 1942.

Hon. Paul J. Reagen, Prosecuting Attorney,  
Warren, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“In those cases in which a deposit for costs has been made,

and costs in excess of the deposit are incurred, and the excess costs being uncollectible from either party, in what manner should the deposit be distributed?

For example, in Case No. 32822, Emma Weil vs. Luigi Perratto, et al., the costs total \$65.70. The Clerk has a deposit of \$25.00. Publication costs amount to \$41.25. Should the deposit be pro-rated, or should the Clerk's costs first be paid and the balance, if any, distributed to the newspaper.

Our Clerk of Courts has a number of similar cases, and your ruling in respect to this matter will be very much appreciated."

Security for costs is governed by Section 11614, General Code, which reads as follows:

"If not a resident of the county in which the action is brought, or a partnership suing by its company name, or an insolvent corporation, the plaintiff must furnish sufficient security for costs. The surety must be a resident of the county and approved by the clerk. His obligation shall be complete by indorsing the summons, or signing his name on the petition as surety for costs. He shall be bound for the payment of the costs which may be adjudged against the plaintiff in the court in which the action is brought, or in any other court to which it may be carried, and for all costs taxed against the plaintiff in such action, whether he obtain judgment or not."

In lieu of a surety, plaintiff may furnish a cash deposit as security as provided in Section 11615, General Code, which reads as follows:

"The plaintiff may deposit with the clerk of the court such sum of money as security for costs in the case, as in the opinion of the clerk, will be sufficient for the purpose. On motion of the defendant, and if satisfied that such deposit is insufficient, the court may require it to be increased from time to time, so as to secure all costs that may accrue in the cause, or personal security to be given."

Section 11614, *supra*, in providing that the surety shall be bound for all costs taxed against the plaintiff whether he obtain judgment or not renders the surety primarily liable for all costs incurred by the plaintiff regardless of the judgment of the court.

In the case of *Abbey v. Fish*, 23 O.S. 403, at page 413, Judge McIlvaine, in speaking of the effect of a judgment for costs, said:

"In my opinion, the right to recover a judgment for costs

is not given to the successful party, because he has paid the taxable fees which were earned at his instance, or because he is supposed to have paid them, but because he is liable to pay them at the suit of those who earned them, if he has not in fact done so. The judgment is given for the purpose of reimbursement to the extent he may have paid fees, and for the purpose of indemnity to the extent he may be liable to pay them in the future."

And in the case of *state, ex rel. v. Coates*, 8 O.N.P. 682, it was held to be the policy of the law that each and every litigant shall be primarily liable for all costs made by him.

This principle which renders the plaintiff or his surety primarily liable for the costs incurred by him, regardless of the possibility that his adversary may ultimately be compelled to pay by the judgment of the court, applies in instances where a cash deposit is furnished in lieu of a surety. Such cash deposit is, therefore, security for the costs incurred by the plaintiff even in the event the costs may be adjudged against the defendant.

In 5 Ency. Pl. and Pr. 253, it is stated that in contemplation of law the parties to a suit pay their own costs as they are incurred during the progress of a case, and judgment for costs is rendered in favor of the prevailing party, upon the theory that he has paid, or is liable for, the costs incurred by him, and to reimburse him therefor.

Also in the case of *Camp v. Morgan*, 21 Ill. 255, 256, the third paragraph of the syllabus provides:

"The costs made by a defendant are presumed to be paid as the case proceeds \* \* \*."

And in *Morgan v. Griffin*, 6 Ill. 565, 566, it is said:

"In contemplation of law, the parties respectively advance such costs as they make during the progress of the cause."

In view of this legal contemplation and the theory expressed, it would follow that as the plaintiff incurs costs the cash deposit would similarly, in contemplation of law and theory, be reduced and diminish as the services are rendered. As the plaintiff's costs accrue, that is, upon the rendition of services, his equity in the cash deposit decreases in the same ratio. In such case the clerk of courts, upon final disbursement,

would be required to distribute the deposit on a chronological basis, with due regard as to the time that the services were rendered and for whom; those rendering services to the plaintiff prior in time would have a prior right to the proceeds of the fund in law.

In so far as I have been able to ascertain, the courts of Ohio have not directly passed upon the question under consideration. In the case of *Devine v. Detroit Trust Company, Receiver*, 52 O.App. 446, 452, the court alluded to the problem with which we are now concerned in the following manner:

“By Section 11614, General Code, a non-resident of the county is required to give security for costs. This requirement is primarily for the protection of the public; and is not jurisdictional. \* \* \* Security is against the contingency that the plaintiff's claim is without merit, and because thereof there would be no one within the jurisdiction to whom to look for payment; and perhaps no property.”

By the use of the term “public” I assume that the court had in mind persons who might be beneficiaries, that is, persons who might render services properly taxable as costs. Needless to say, the case does not establish authority for the proposition that there shall be a pro-rata distribution among the beneficiaries. Neither does it serve as authority for the proposition that certain officers, such as clerks and sheriffs, shall have prior rights because of their official capacities.

It is my opinion, therefore, that a cash deposit given as security for costs under the provisions of Section 11615, General Code, is for the benefit of those entitled to the costs which have been taxed or adjudged against the plaintiff. When such costs exceed the cash deposit and are otherwise uncollectible, those earned in performance of services for the plaintiff shall be paid first in the order in which they were incurred.

Respectfully,

THOMAS J. HERBERT  
Attorney General.