

RELATING TO QUESTION, WHETHER PRESENT CIRCUIT CLERKS  
MAY RETAIN FEES EARNED IN OFFICE AND APPLY TO SALARY.

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May 23, 1934

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Hon. Sol Hobbs  
Circuit Clerk  
Stoddard County  
Bloomfield, Missouri

Dear Sir:

Your letter addressed to this department of date of May 9th, 1934 in which you state and inquire as follows:

"We are writing your office for an opinion upon the following state of facts:

The Circuit Clerk of Stoddard County together with his deputy, are paid upon a salary basis, and all fees earned by virtue of his office are by law required to be turned over to the County General Revenue account, and he, together with his deputy, are in turn paid in warrants drawn upon the General Revenue account of the County.

Stoddard County is in a very bad financial condition, and as a result thereof, the warrants of Stoddard County come at large discounts when they can be sold at all, and they have just about reached the point where it is practically impossible to sell them, except at a very ruinous rate of discount in the neighborhood of 40 to 50% or more.

We desire to know, whether my deputy and I may apply the fees earned by my office in payment of our salaries, and to accept warrants for that part of our salaries over and above the amount of fees earned by this office.

We will appreciate an early reply."

Circuit clerks may retain fees earned and collected, to pay deputies and assistants but not for their own salaries, until end of their present terms.

Hon. Sol Hobbs

May 23, 1934

Section 11813 R. S. 1929 provides as follows:

"The salary of the clerk, and that of his deputies and assistants, shall be paid out of the county treasury, in monthly installments, at the end of each month. The accounts of all deputies and assistants shall be stated in their names, respectively, and the correctness thereof shall be certified by the officers, respectively, in whose employment they are. The clerk and his deputies and assistants shall present their accounts to the county court, and said court shall draw its warrant therefor upon the county treasurer, to be paid out of any money available in the treasury."

Section 11814 R. S. 1929 provides in part as follows:

"It shall be the duty of the clerk of the circuit court to charge and collect for the county in all cases, every fee accruing to his office and to which he may be entitled, under the provisions of sections 11785, 11787 and 11788 or any other statute except, .....: that he shall file with the county clerk a report of the fees accruing to his office, and that it shall be his duty upon the filing of said report to forthwith pay over to the county treasurer all moneys collected by him during the month and required to be shown in such monthly report....."

Section 11816, R.S. 1929, provides as follows:

"It shall be the duty of such clerk within fifteen days (referring to the order provided in section 11810) has been made to pay over to the county treasury the amount of money so ordered paid, and to take duplicate receipts therefor, one to be by him filed in the office of the clerk of the county court, who shall thereupon charge the treasurer with the amount thereof, and if the clerk should fail to pay the money so ordered into the county treasury, the county court shall cause suit to be filed upon his official bond."

Section 11817, R.S. 1929, provides as follows:

Hon. Sol Hobbs

May 23, 1934

"If any clerk shall fail or neglect to file such statement, so verified, within the time in this article specified, he shall be deemed guilty of a misdemeanor, and shall be subject to be indicted and tried in any court having criminal jurisdiction in such county, and, upon conviction, shall be fined in any sum not less than two hundred and fifty dollars."

Section 11830 R.S. 1929, provides as follows:

"Every person violating the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined for each offense in any sum not less than fifty dollars nor more than one thousand dollars, and conviction thereunder shall work a forfeiture of his office."

The above statutory provisions while repealed in session of 1933, they are still effective as to circuit clerks until the expiration of their present term of office.

Section 11786 Laws 1933, page 369, provides in part as follows:

"Provided further, that, until the expiration of their present terms of office, the persons holding the office of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

Section 11814 Laws 1933, page 372, provides in part as follows:

"It shall be the duty of the clerks of all courts of record to collect, in all cases, every fee accruing to their office.....and quarterly such clerk shall pay into the county treasury the amount of any fees collected in excess of the sums permitted to be retained for services and pay of deputies and assistants....."

It will be observed that the work "shall" used in the sections R. S. 1929 Supra. is a word of command, imperative, and leaves no discretion in the matter. The word "shall" will be presumed

Hon. Sol Hobbs

May 23, 1934

to be used in the sense as indicated unless something in the character of the statutes or the subject to which it relates, or in the contents, show that such could not have been the intention of the legislature.

In State ex rel Stevens v. Wurdeman, 295 Mo. 1. c. 586, the court in construing the word "shall" said:

"Usually the use of the word "shall" indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute. Especially is this true in a statute calling for strict construction."

From the above quoted statutes of 1929 relating to circuit clerks, we find that they employ the word "shall" with reference to their duties as to fees collected. It is therefore our opinion that circuit clerks can not retain any part or portion of fees earned and collected by them in their respective offices, in payment of their respective salaries, until the expiration of their present terms of office, but shall be paid in the same manner and to the same extent as provided in the said statutes of 1929, however, after the expiration of their present terms, then they may retain fees, up to amount of their respective salaries, and pay of deputies and assistants.

It is also the opinion of this department that the Laws 1933 are now effective as they relate to deputy circuit clerks, and that the respective circuit clerks may retain out of fees collected, not to exceed the salaries of their deputies and assistants, and apply the same to the salaries of said deputies and assistants, and pay the excess if any into the county treasury.

Respectfully submitted,

W. W. Barnes

Assistant Attorney-General

APPROVED:

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Attorney General