

SHERIFF: Entitled to a fee of five cents for "calling any action" only when there is a cause actually pending before a court of record in which there is a party plaintiff and party defendant.

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Honorable Elvin S. Douglas  
Prosecuting Attorney  
Polk County  
Bolivar, Missouri

Dear Sir:

This Department is in receipt of your letter of February 27, requesting an opinion on the construction of Section 11789, Revised Statutes Missouri 1929. Your letter is as follows:

"Section 11789, R. S. Mo. 1929 provides that the sheriff shall be allowed 'For every action called at each term.....\$.05.'

"I understand that some counties have construed this provision to mean that for every order entered of record in a court of record, including the County Courts and Probate Courts, that the sheriff is entitled to five cents. This office has been asked by the sheriff of this county whether this section is to be so construed. I would appreciate your opinion on this matter."

Section 11789, Revised Statutes Missouri 1929, relates to the fees of the sheriff and relates mainly to his duties and fees in connection with circuit courts. As to the provision "For every action called at each term. . . \$.05" it will be necessary to determine the meaning of the word "action."

Section 2822, Revised Statutes Missouri 1929, being the definition of certain terms as used in the statute, defines "action" to include "counterclaim and

set-off."

It is further defined in the case of Smith v. St. Louis Beef Canning Company 14 Mo. App. 1. c. 526,

"Our present statute on the subject is so plain and unequivocal, that its interpretation needs not the least aid from the ancient distinctions between forms of action, or the origin and development of the trial by jury. 'An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived or a reference ordered, as hereinafter provided.' Rev. Stats. sect. 3600. The word action does not mean the defence set up, nor the issue developed in a cause. It means, according to the books, 'the legal demand of one's just rights,' in other words, the plaintiff's suit."

The word "action" is defined in 1 Corpus Juris page 924, as follows:

"An assertion in a court of justice of a right given by law; a demand or legal proceeding in a court of justice to secure one's rights; the prosecution of some demand in a court of justice; the means by which men litigate with each other; the means that the law has provided to put the cause of action into effect; the formal means or method of pursuing and recovering one's right in a court of justice; the rightful method of obtaining in court what is due to any one; the prescribed mode of enforcing a

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right in the proper tribunal; a remedial instrument of justice whereby redress is obtained for any wrong committed or right withheld; a proceeding in court, whether of equity or law; a suit or process by which a demand is made of a right, in a court of justice; a proceeding at law to enforce a private right or to redress a private wrong; a civil proceeding taken in a court of law to enforce a right; a judicial proceeding for the prevention of redress of a wrong; a proceeding by one party against another to try their mutual rights; an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense; a judicial proceeding which will, if prosecuted effectually, result in a judgment."

By statute the sheriff is compelled to perform duties for the county court and probate court, for which he receives a stipulated amount per diem. Construing the word "action" in its use and legal meaning, we are of the opinion that the sheriff is entitled to a fee of five cents in any court only in the event that a case or an action is called wherein there is a cause of action pending in the court in which there is a party plaintiff prosecuting an action against a defendant.

Respectfully submitted,

OLLIVER W. NOLEN  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney General

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