

PROBATE JUDGES: Probate Judges' compensation limited to  
LIMITATION ON annual compensation of Circuit Judge for  
COMPENSATION : same county for judicial services.

January 16, 1943

Hon. W. C. McDonald  
Judge of the Probate Court  
Warrensburg, Missouri



Honorable Sir:

We acknowledge receipt of your letter of January 8th, last, requesting an opinion as follows:

"May I ask an opinion of you? Under the law the Probate judge may retain fees in an amount equal to compensation of Circuit Judge from all sources for each particular year Sec 13404-----less \$1200.00 expenses.

"Judge of this District from all sources in the aggregate \$6000.00--less the \$1200.00--leaving \$4800.00 which we figure the probate judge is entitled too.

"We feel we are right in our construction of the law but would like to have your opinion or O K in the matter."

Section 13398 of R. S. Mo., 1939 contains general provision for the collection and levy of fees in connection with the operation of fee offices.

The fees of probate judges are established by Section 13404 of R. S. Mo., 1939, and this section, after setting out in detail the specific fees for different services and acts, provides further:

" \* \* \* \* that whenever, after deducting all reasonable and necessary expenses for clerk hire, the amount of fees collected in any one calendar year by or for any one probate judge in any county in this state, during his term of office, and irrespective of

the date of accrual of such fees, shall exceed a sum equal to the annual compensation in the aggregate from all sources and for all duties by virtue of the office, except the \$1,200.00 allowed for expenses when holding circuit court in other counties, provided by law for a judge of the circuit court having jurisdiction in such county, then it shall be the duty of such probate judge to pay such excess less ten per cent thereof, within thirty days after the expiration of such year, into the treasury of the county in which such probate judge holds office, for the benefit of the school fund of such county; and whenever at any time after the expiration of the term of office of any probate judge the amount of fees collected by or for him, irrespective of the date of accrual, shall exceed the sum equal to the aforesaid annual compensation provided for a judge of the circuit court having jurisdiction in such county, it shall be the duty of such probate judge to pay such excess, and all fees thereafter collected by or for him on account of fees accrued to him as such probate judge less ten per cent thereof, within thirty days from the time of collection, into the county treasury for the benefit of the school fund. \* \* \* \* \*

The probate judge must rely entirely upon statutory authority for the collection of his fees, and has no common law rights thereto.

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup., 129 S. W. 2d 857; Ward v. Christian County, 341 Mo. 1115, 111 S. W. 2d 182 \* \* \* \* \*

" \* \* \* \* \*

"After some litigation and resulting amendment of the statute it is now established that the annual compensation of a circuit judge received 'from all sources and for all duties by virtue of (his) office,' which is made the basis of the amount of fees to be retained by a probate judge includes such compensation as a circuit judge may receive as a jury commissioner. State ex rel. and to Use of Jasper County v. Gass, 317 Mo. 744, 296 S. W. 431. Consequently the stipulation of the parties is proper as it conforms with this ruling. There can be no dispute that in addition a probate judge is entitled to ten per cent of the excess funds collected under the plain wording of the statute."

Smith, Judge v. Pettis County, 136 S. W. (2d) 282.

It must be borne in mind, however, that the amount retained by the judge for any one year must have been collected during that year.

" \* \* \* \* The limitation is only on the fees collected and not on the fees earned during the year. For example, if the amounts collected for the first and second years of the term each were less than the limit and then the amount collected for the third year was in excess of the limit, the excess could not be applied to extinguish the deficits of the two previous years. Under the plain and unambiguous meaning of the proviso such excess must be paid to the county and this is so even though the excess was created by fees earned during the previous years of the term. The condition 'irrespective of the date of accrual' as applied to the annual collections determines this. There is no basis for the contention that an average yearly amount equal to the salary of a circuit judge should be maintained. The amount collected in one year has no bearing on amounts collected in other years.

\* \* \*"

Smith, Judge v. Pettis County, supra.

The court, in the above case, held that fees for solemnizing marriages are not fees assessed for judicial services and, therefore, do not come within the limitations imposed by statute and do not have to be accounted for as other fees.

" \* \* \* \* There is included under Section 11782, which specifies the fees of probate judges, an item: 'For solemnizing a marriage . . . . \$2.00.' But this must be considered with Section 11776, which allows fees for services rendered in discharging the duties imposed by law and requires the clerk of the court to keep account of fees accruing in matters 'pending in their said courts.' This is the only item in the entire list which does not pertain to a judicial matter. It is our opinion that the duty imposed by this section to account for fees means the fees assessed for judicial services. Our decision in *City of St. Louis v. Sommers*, 148 Mo. 398, 50 S. W. 102, involving such similar facts and statutes is peculiarly apposite here. \* \* \* \*"  
Smith, judge v. Pettis County, supra.

Allowances to a circuit judge for expenses may not be considered in determining the amount of his compensation, for the purpose of determining the amount of fees to be retained by a probate judge as his compensation.

"The trial court, in determining how much compensation the circuit judges received, added to the \$2,000 paid by the state the \$1,200 allowed for expenses, making a total of \$3,200, which, deducted from the \$4,500 referred to in section 6640, fixed the compensation of the jury commissioner at \$1,300. The exception of the \$1,200 allowed for expenses in the amendment to section 10991, R. S. 1919 (Laws of 1921, p. 599), does not apply to the probate judge of Jasper County, for it is an allowance to the circuit judges for expenses when holding court in counties other than in the county in which the judge

January 16, 1943

resides. The circuit judges of said county do not hold court in other counties. However, the \$1,200 allowed for expenses is not an allowance for services of any kind."

State ex rel. and to Use of Jasper  
County v. Gass et al., 296 S. W. 431,  
432.

#### CONCLUSION

It is our opinion that probate judges of the state may retain as compensation for their services, after deducting all reasonable and necessary expenses for clerk hire, the amount of fees collected in any one calendar year, by or for any one probate judge, and irrespective of the date of accrual of such fees, an amount equal to the annual compensation provided by law for judge of the circuit court having jurisdiction in such county, except allowances to said circuit judge for expenses, and in addition thereto, the probate judge may retain all fees lawfully collected by him for solemnizing marriages, assuming, of course, that there is an excess of fees collected.

We have not attempted to determine the compensation received by the judge of the circuit court having jurisdiction in your county, because such compensation varies according to the population of the different counties.

Respectfully submitted

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APPROVED:

ROY MCKITTRICK  
Attorney General

LAP:wb