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PROBATE : Probate Judges of counties now having, or
JUDGE. : which shall hereafter have less than 19,000
: population, shall charge the fee, authorized
: by statute, for each official act performed
: by him as such officer. He shall at the
: end of each month, make and file a report
: with the County Clerk. 1. Of all fees earned
: and collected. 2. All fees earned but not
: collected. The fees collected for (a)
: Solemnization of marriages and (b) Hearing
: and determining inheritance tax matters may
: be retained by the Probate Judge and no
: accounting is required.

January 5, 1944

Honorable Jos. V. Pitts
Judge and Ex-Officio Clerk
Douglas County
Ava, Missouri



Dear Judge Pitts:

Your letter, requesting an opinion in regard to fees collectible by Probate Judges, has been handed to me for attention. Such letter, omitting caption and signature, is as follows:

"I wrote to you last week in re. Report to Co. Court & turning over fees-- No reply & I presume you are getting Atty. General's opinion.)

"Well to-day I commenced keeping account of every item of work & at 5:00 I have cared for 1 Transfer of Title .25
4 Affidavits of Draftees for deferment.

"I have been all along caring for Affidavits for Dependency Benefits-- Deferment Affidavits-- Some months I am sure I have cared for 100 items of such "Free work."

"Question- Under the new setup wherein I am on a "Salary" and my earnings are to be turned over to our County.

"Will I be permitted to do this 'Free work' or will I be charged up with it & required to account for it out of my own pocket.

"I cannot afford to account for each seal & Ctf. .50¢, when I do the work for nothing.

"Our Auditor now here (Ed Hill & Walter Back) give it as their opinion that technically I

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could be charged up with any work I do under my Probate Seal & could be required to turn the fees over to County.

"Please include answer to this question, when you answer my former questions."

A probate Judge must rely entirely upon statutory authority for the collection of his fees, and he has no common law right thereto. This thought is sustained in numerous decisions and from one we quote:

"The rule is established that the right of a public official to compensation must be founded upon a statute. It is equally established that such a statute is strictly construed against the officer."

Nodaway Co. v. Kidder, 129 S. W. (2d) 857
Ward V. Christian County, 111 S. W. (2d) 182

In looking to the Statutes which concern the fees allowed to Probate Judges we find that at Section 13398 R. S. Mo., 1939, a general provision for the levy and collection of fees in the connection with fee offices. We do not set out this portion because of the extreme length.

Turning to the next section pertaining to the fees of this office, we find that at Section 13404, R. S. Mo., 1939, that the fees of a Probate Judge are established. This section sets out in detail and with great particularity the specific fee allowed for the different services and acts of this official. The portion of the act useful to us in this instance reads as follows:

"*** Provided 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.***"

Looking now to more recent legislation, which has given some concern to those officers affected, we find that in addition to Section 13404 R. S. Mo., 1939, the 99th Chapter of Art. 2 has been enlarged.

The 62nd General Assembly of Missouri, amended Art. 2, Ch. 99, R. S. Mo., 1939, by adding a new section, which became effective Nov. 22, 1943. This is known as Sec. 13404a and it is devoted to the fees and salaries of Probate Judges in counties which now have or may hereinafter have a population of less than 19,000 inhabitants. In making provisions for the disposition of such fees and salaries the Legislature set a minimum salary to be paid by the County Treasury by a warrant drawn by the County Court.

The annual salary to be paid in monthly installments is fixed upon a population basis, ranging from \$750.00 in counties having 10,000 inhabitants or less to \$2,400.00 in counties having a population of less than 19,000. The full text of the new section, 13404a R. S. Mo., 1939, reads as follows:

"The Judges of the Probate Courts in counties which now have or may hereafter have a population of less than 19,000 inhabitants shall receive for their services annually, to be paid out of the County Treasury in equal monthly installments at the end of each month by a warrant drawn by the County Court upon the County Treasury minimum salaries as follows: In counties having 10,000 inhabitants or less, the sum of \$750.00; in counties having 10,000 inhabitants and less than 15,000, the sum of \$1200.00; in counties having more than 15,000 inhabitants and less than 17,500, the sum of \$2,000.00; and in counties having more than 17,500 inhabitants and less than 19,000, the sum of \$2,400.00; but should the yearly sum of fees earned and collected by any Probate Judge of any such county and his clerk or clerks, by virtue of the office, exceed the amount which such Judge would be entitled to receive by reason of the population of said county as aforesaid, then such judge shall be entitled to retain the excess subject to the limitations set out in Section 13404 of Article 2, Chapter 99, Revised Statutes of Missouri, 1939, and the County Court shall draw a warrant or warrants upon the County Treasurer in favor of such Judge for such excess fees. It is further provided, that all Probate Judges in such counties shall at the end of each and every month after this act shall take effect, make and file with the County Clerk a report of all fees actually collected by him or his clerk during the month, except fees earned and collected for the solemnization of marriages and the hearing and determining of inheritance tax matters, together with a report of all such fees earned during the month but not yet collected, and that he shall at the end of each month pay over to

the County Treasurer all monies collected by him or his clerk during the month which are required to be shown in the monthly report as above provided, taking duplicate receipts therefor, one of which shall be filed with the County Clerk, and every such Probate Judge shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the County Treasury as herein provided. Approved August 4, 1943."

The question as to which census will control in the determination of population upon which the salary of this officer is based becomes important at this point. In the absence of statutory provision the last decennial census would control. Nothing is indicated in the act (Sec. 13404a) as to how we are to determine population. Here is what our court has said on this point.

In State ex rel O'Connor v. Riedel, 46 S.W. (2d) 131, l. c. 35, we find:

"*** The number of any county shall, for the purpose of this section be ascertained by multiplying the whole number of votes cast at the last preceding presidential election by five, until after the population of such county shall have been ascertained by the next decennial census of the United States.***"

"How are the populations of the counties to be now ascertained? There is no express language requiring a resort to the 'next' or any other decennial census of the United States. But the implication is clear that after the occurrence of the event which puts an end to the further use of the presidential vote method the populations shall be ascertained from the official census of the United States. But which census? One which is obsolete for all except historical or statistical purposes? Manifestly the one at the time in current use for every other practical purpose-- the last one. That which is

implied in a statute is as much a part of it, as what is expressed. 2 Sutherland on Stat. Const. (2d. Ed.) Sec. 500 and cases cited. The contention of the amici curiae cannot be sustained.***"

We have previously discovered that the fees authorized by statute must be collected by the Probate Judge and accounted for by him. And a further report must be made by him for fees earned and collected; also for fees earned but not collected. there are certain fees which the Probate Judge may collect and for which he is not required to account for under the statutes and decisions. We refer to

1. Fees received for solemnizing of marriages.
2. Fees received for hearing and determining inheritance tax matters.

These fees may be retained by the Probate Judge as his own. The authority for retention of these two classes of fees is the new section 13404a which expressly excepts them.

See also Smith v. Pettis Co. 133 SW (2d) 282
State ex rel Jasper Co. v. Gass
296 SW 431.

While not specifically raised in your opinion request, certain points should be included in our discussion of the recent enactment of the 62nd General Assembly. At the outset we would point out that Sec. 13404a does not increase the maximum pay allowed a probate judge; it only fixes a minimum below which his compensation may not fall. The maximum compensation of a probate judge under section 13404, after deducting a reasonable amount for clerk hire is the same paid the Circuit Judge.

(See State ex rel Jasper Co. v. Gass 296 SW 431;
Smith v. Pettis Co. 136 SW (2d) 282.)

Thus we see, a probate judge's maximum varies from county to county, depending on the character of the judicial circuit and the volume of change of venue business in the circuit. In all circuits the annual compensation of the Circuit Judge will exceed \$2,400.00, the greatest minimum pay fixed for a probate judge under 13404a.

Under 13404a the probate judges who draw a minimum monthly salary "shall at the end of each and every month-- make and file with the County Clerk a report of all fees actually collected by him or his clerk during the month, (excepting marriage and inheritance tax fees)--- and that he shall at the end of the month pay over to the County Treasurer all monies collected by him or his clerk during the month which are required to be shown in the monthly report -----" (Emphasis ours).

If, however, the yearly fees earned and collected by the judge and his clerk exceed the minimum yearly salary under Sec. 13404a then he is entitled to a warrant on the County Treasurer for all such excess, where the excess sum, together with the minimum salary already withdrawn, does not exceed the amount paid to the Circuit Judge, together with an additional sum to "cover all reasonable and necessary expense for clerk hire." (See Sec. 13404.)

Under Sec. 2440 R. S. Mo., 1939, a probate judge is authorized to appoint a clerk "who shall be paid by said judge." The compensation of the clerk is paid out of the judge's minimum guarantee allowed under Sec. 13404a. Now, the judge, at the end of the year when he collects his fees and it is determined the amount he may retain under Sec. 13404 is permitted to retain a further sum, in addition to the maximum allowance, a sum to cover "all reasonable and necessary expenses for clerk hire."

All of the above brings us to the conclusion that the compensation the probate judge pays his clerk during the year can not be paid out of fees earned since the statute specifically provides that all fees must monthly be paid into the County Treasurer. The probate judge must pay his clerk out of his minimum salary.

Getting now to the question as to what specific fees the probate judge shall charge. Under Sec. 13404, each official act performed by the judge has been assigned a specific fee to be charged. We presume the Legislature intended a charge to be made for these acts else the particular fees would not have been set out with such exactitude under Sec. 13404a, the judge must not only make a charge for his services but he must account for same each month. He is charged with the responsibility and the statute leaves nothing to his discretion. Under the new statute he is required to perform his duty, charge the fee authorized, and account for same.

In passing we would observe that there are certain courtesies which the probate judge may extend without any thought of remuneration. No price tag has been put on these by the Legislature. Those acts for which the officer shall make a charge have been enumerated in the statutes and we conclude that the officer is under the duty imposed by his office to make a charge and account for same.

Looking now to the matter of the time for making and filing the reports required, we read that the probate judge "shall at the end of each and every month--- make and file a report." In this connection we see that section bearing on the question.

Section 655 R. S. No., 1939 provides certain rules for construction of statutes. It provides among other things "the word 'month' shall mean a calendar month." A calendar month is not at end until midnight of the last day of the month. Applying this to the requirement of new Section 13404a, we believe the filing of the report specified shall take place as soon thereafter the close of each month as is possible. The soonest possible date would be the 1st day of the succeeding month.

Without trying to become tedious, we have discussed questions not directly raised in your letter, however, the thought has come to us that in anticipating these questions, much time may be saved the Probate judges and their clerks.

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C O N C L U S I O N .

From the preceding discussion we therefore conclude, that with respect to Sec. 13404a R. S. Mo., 1939, a judge of the probate court should make a charge for any official act performed by him as such officer, which said act relates to his official duties involved in any case in his court. That the specific fee for each service performed is definitely set out and provided for by statute. That this officer must not only charge a fee for each of his official acts, but must account for all fees collected, except solemnization of marriages and inheritance tax hearing fees, and that this officer must make a report of these official fees to the county clerk. Furthermore, for fees earned but not collected, he shall also make a report. That a probate judge shall not account for fees collected for taking acknowledgments on deeds or administering oaths in situations where these documents are not involved in, or chargeable to any estate in his court.

Respectfully submitted

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APPROVED:

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