

DEPOSITS IN COURT: The circuit clerk of a first class county has  
CIRCUIT COURT: the discretionary power and authority to invest  
CIRCUIT CLERKS: funds deposited in the registry of the court in  
the manner provided for in Section 483.310, RSMo  
1959, and to use the income derived therefrom as  
provided therein.

September 8, 1966

OPINION NO. 120 (1966)  
OPINION NO. 148 (1965)

The Honorable Louise Grant Smith  
Circuit Clerk of St. Louis County  
County Court House  
Clayton, Missouri 63105



Dear Mrs. Smith:

This is in answer to your request for an opinion on two ques-  
tions concerning Section 483.310, RSMo 1959.

Your first question is whether a circuit clerk can invest funds  
deposited in the registry of the court in other investments than that  
set out by Section 483.310, RSMo 1959. This section reads as follows:

"The circuit clerk in counties of the first class are hereby authorized and empowered to invest funds placed in the registry of the circuit court in savings deposits in banks carrying federal deposit insurance to the extent of the insurance and the income derived therefrom shall be used by the circuit clerk for paying the premiums on bonds of employees of the circuit clerk, rent on safety deposit boxes, printing of pamphlets or booklets of the rules adopted by the circuit court, circuit clerk and forms used in the circuit court which comply with the statutes of the state of Missouri and the rules of the supreme court, copies of which shall be distributed to litigants and members of the bar practicing in said court, and the balance, if any, shall be paid into the general revenue fund of the county."

The Honorable Louise Grant Smith

C. J. S., Deposits in Court, Section 1, says that:

"A deposit in court arises where property or funds are placed in charge of an officer of the court for safekeeping pending litigation, as, for example, until the question as to who is entitled to the possession is determined, or when money is paid into court as security or for some other purpose."

The duty of the clerk regarding such funds is set out in Section 483.075 (1), RSMo 1959, where it says that every clerk shall:

"\* \* \* keep a perfect account of all moneys coming into his hands on account of costs or otherwise, and punctually pay over the same."

Subsection 1 of Section 483.025, RSMo 1959, requires every clerk to enter into bond and Subsection 2 says that the Bond shall be conditioned that the clerk will:

"\* \* \* faithfully perform the duties of his office, and pay over all moneys which may come to his hands by virtue of his office, \* \* \*."

The Supreme Court has said concerning money deposited in court from condemnation proceedings that the clerk held the money in trust. Snyder v. Cowan, 120 Mo. 389, 25 S.W. 382, 383; State ex rel. Scott v. Trimble, 308 Mo. 123, 272 S.W. 66, 71. The Kansas City Court of Appeals has also said that if the clerk received the money in his official capacity then he is an insurer of the fund. State ex rel. Courtney v. Calloway, 208 Mo. App. 447, 237 S.W. 173, 176. And, in another case concerning money from a condemnation proceeding the same court said that the clerk received the money by virtue of his office, and it was the clerk's duty to pay the money out under decree of the court. State ex rel. and to Use of Clinkscapes v. Scott, 216 Mo. App. 114, 261 S.W. 680, 682.

The clerk, then, must pay out the funds when ordered to do so by the court. This necessitates keeping the funds safe and having them readily available.

Section 558.220, RSMo 1959, originally enacted in 1853, prohibits public officials from "loaning" money which comes to them in their official capacity and reads as follows:

The Honorable Louise Grant Smith

"No officer appointed or elected by virtue of the constitution of this state, or any law thereof, and no officer, agent or servant of any incorporated city or town, or of any municipal township or school or road district, shall loan out, with or without interest, any money or valuable security received by him, or which may be in his possession or keeping, or over which he may have supervision, care or control, by virtue of his office, agency or service, or under color or pretense thereof; and any such officer, agent or servant so loaning such money or valuable security, on conviction thereof, shall be punished by imprisonment in the penitentiary not less than two years or by fine of not less than five hundred dollars."

However, under this statute, there is case law permitting "loaning" of money deposited in the registry of the court in two instances.

In *State v. Rubey*, 77 Mo. 610 (1883), it was held that a demand deposit in a bank is not a loan as prohibited by Section 558.220, supra. The court, l.c. 620, said that the legislature meant to "discriminate between a deposit in bank for safety and convenience, and an ordinary loan."

In *State ex rel. Ridge v. Shoemaker*, 278 Mo. 138, 212 S.W. 1, an action was brought against the circuit court of Jackson County for interest on a fund deposited in the registry of the court. The fund was deposited as a condition precedent to the relief of specific performance and the clerk merely kept the fund on demand deposit and did not receive any interest on the fund. The court in speaking of Section 558.220, supra, said l.c. S.W.3, that:

"If the parties to said action had desired said funds loaned, pending said litigation, they should have applied to the court for an order authorizing the loaning of same. They were bound to know, as a matter of law, that the clerk, without such authority, was not authorized to loan said fund."

The court also, l.c. S.W.4, cited *State v. Rubey*, supra, in saying the clerk had the right to put funds in a bank on demand deposit.

The Honorable Louise Grant Smith

The clerk, then, prior to the enactment in 1947 of Section 483.310, supra, could "loan" funds only in two instances, by putting the funds in demand deposit for safekeeping, or depositing, investing, or otherwise handling the funds pursuant to a court order. The clerk had no duty to do either, unless ordered by the court, but neither one of these "loanings" waived or diminished the clerk's duty to pay out the funds when ordered to do so by the court.

Then Section 483.310, supra, was enacted authorizing certain circuit clerks to invest funds in savings deposits in certain banks. The applicable part of Section 483.310 reads as follows:

"The circuit clerks in counties of the first class are hereby authorized and empowered to invest funds placed in the registry of the circuit court in savings deposits in banks carrying federal deposit insurance to the extent of the insurance \* \* \*."

The legislature did not say that the circuit clerk shall so invest but permitted the clerk to so invest.

The use of the words "authorized" and "empowered" permitting the clerk to invest is analogous to statutes using the word "may" as opposed to the word "shall". Generally, when the word "shall" is used the statute is mandatory but when "may" is used the statute is permissive. State ex inf. McKittrick v. Wymore, 343 Mo. 98, 119 S.W.2d 941, 944. A statute purely enabling in character, making legal and possible that which otherwise there is no authority to do, and where there are no public interests in private rights involved, will be construed as permissive, and permissive words regarding officers, where a new public obligation is created, will not be construed as mandatory. State ex rel. Harlon v. City of Maplewood, 231 Mo. App. 739, 99 S.W.2d 138, 142. The primary object is to ascertain the intent of the legislature in view of all related statutory provisions and the general objective to be accomplished. Ellis v. Brown, 326 Mo. 627, 33 S.W.2d 104, 107.

It is our opinion that Section 483.310, supra, is such an enabling statute making it legal and possible for the clerk to invest funds for interest in savings deposits without the necessity of a court order. The statute being permissive the clerk can still put money on demand deposit in order to fulfill the duty of paying out the funds when so ordered by the court provided such amounts do not prevent sufficient funds being available on demand. The clerk can

The Honorable Louise Grant Smith

also invest funds other than as provided in Section 483.310, supra, if done pursuant to a court order.

Your second question is whether the provision directing that interest earned on monies invested under Section 483.310, supra, be used for certain county purposes is unconstitutional.

The applicable part of Section 483.310, supra, reads as follows:

"\* \* \* and the income derived therefrom shall be used by the circuit clerk for paying the premiums on bonds of employees of the circuit clerk, rent on safety deposit boxes, printing of pamphlets or booklets of the rules adopted by the circuit court, circuit clerk and forms used in the circuit court which comply with the statutes of the state of Missouri and the rules of the supreme court, copies of which shall be distributed to litigants and members of the bar practicing in said court, and the balance, if any, shall be paid into the general revenue fund of the county."

While it is true that money deposited in court by private parties is not public money but is considered to be held in trust by the circuit clerk and the money deposited along with any interest earned on the money while deposited in court belongs to the prevailing party of the lawsuit or to whomever the court directs should receive it, *Cruce v. Cruce*, 81 Mo. 676; *Bent v. Priest*, 86 Mo. 475; *Bassett v. Kinney*, 24 Conn. 267; *Railroad Co. v. Clark*, 121 Mo. 169, 25 S.W. 192; *Snyder v. Cowan*, supra, we can find no reason why the legislature cannot enact such a statute. We have been directed to no section of the Constitution by which Section 483.310, supra, is on its face unconstitutional.

It is our opinion that the constitutionality of Section 483.310, supra, must be presumed in the absence of court decisions holding otherwise (*State v. Addington*, 12 Mo. App. 214, affirmed 77 Mo. 110).

#### CONCLUSION

It is the opinion of this office that the circuit clerk of a first class county has the discretionary power and authority to invest funds deposited in the registry of the court in the manner provided

The Honorable Louise Grant Smith

for in Section 483.310, RSMo 1959, and to use the income derived therefrom as provided therein.

The foregoing opinion which I hereby approve was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Norman H. Anderson".

NORMAN H. ANDERSON  
Attorney General