

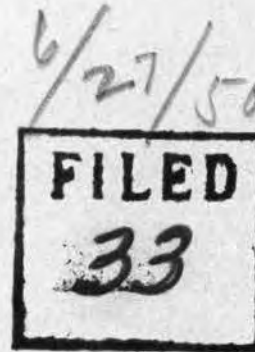
CIRCUIT COURTS:
SALARIES AND FEES:

Circuit Judge of the Second Judicial Circuit entitled to receive the change of venue fees in cases which were tried and finally disposed of by said judge prior to July 1, 1946.

June 26, 1950

Honorable James Glenn
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Sir:



I.

This will acknowledge receipt of your letter of June 15, 1950, requesting an opinion of this department. This request reads as follows:

"I am in receipt of the two opinions enclosed in your letter of June 13. Our Circuit Judge is of the opinion that the questions presented in my prior letter to you are not sufficiently answered by the opinions enclosed by yourself.

"I think the only question remaining is whether the Circuit Judge is entitled to change of venue fees in those cases which were tried and disposed of prior to January 1, 1946, but which the Circuit Clerk failed to remit to him prior to that date."

II.

Section 1074, R. S. Mo. 1939, provides as follows:

"The clerk of any circuit court receiving with any transcript said sum of ten dollars shall pay said sum to the judge of the circuit court, or to any special judge trying such case, after a trial had or upon the final disposition of such cause in said court: Provided, that if no change of venue is granted, the money paid under this and the preceding section shall be returned to the party or parties paying the same: Provided, however, that all moneys received by the clerk of the circuit court of the city of St. Louis, under and by virtue

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of the provisions of this and the preceding section, shall be paid by him into the city treasury, and used for the payment of the salaries of the circuit judges and court stenographers of the said city."

This section has been repealed by House Revision Bill No. 2118 of the 65th General Assembly. The committee on legislative research stated in regard to Section 1074:

"Since by Laws 1945, page 1522, s. 6, judges are given a stated salary as total compensation, the above provision allowing the ten dollars to a judge of the circuit court is impliedly repealed. Therefore it is suggested that section 1074 be repealed and reenacted only allowing the ten dollars to go to special judges. This necessitates a further change in the section so that whenever a regular judge serves the sum will go into the county treasury."

Our office on August 20, 1946, in an opinion to Honorable O. O. Brown, Judge of the 26th Judicial Circuit, held that said section 1074 was repealed by reason of the irreconcilable conflict with S.C.S.S.B. 442, now Laws 1945, page 1522. This law was approved July 13, 1946, and became effective October 6, 1946.

Section 24 of Article V of the Missouri Constitution of 1945 provides as follows:

"Salaries and Compensation of Judges--Provision against Other Special Compensation and Practice of Law--Travel and Other Expenses--Fees.-- All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. Until the end of their present terms probate judges shall continue to receive compensation and clerk hire as now provided by law. The salaries of magistrates shall be fixed by law. No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except probate judges during their present terms. Judges may receive reasonable traveling and other expenses allowed by law. The fee of all courts, judges and

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magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

Section 2 of the Schedule of the Missouri Constitution of 1945 provides as follows:

"Sec. 2. Effect on Existing Laws.-- All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Section 5 of the Schedule of the Missouri Constitution of 1945 provides as follows:

"Sec. 5. Effect on Existing Rights, Claims, Etc.-- All rights, claims, causes of action and obligations existing and all contracts, prosecutions, recognizances and other instruments executed or entered into and all indictments which shall have been found and informations which shall have been filed and all actions which shall have been instituted and all fines, taxes, penalties and forfeitures assessed, levied, due or owing prior to the adoption of this Constitution shall continue to be as valid as if this Constitution had not been adopted."

The Supreme Court of Missouri has held in the case of Cunningham v. Current River R.R. Co., 165 Mo. 270, l.c. 277, 65 S.W. 556, as follows:

"* * *The ten dollars whose payment is required to be made on the presentation of an application for a change of venue from the circuit where the cause is at the time pending, is not intended and is in fact in no sense an increase in the salary of the judge to whom it is to be paid, but compensation for extra labor imposed upon him by the person on whose application the venue is changed by reason of the cause being sent to him from another circuit.

"The compensation mentioned in the Constitution means compensation paid by the State, or some

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subdivision thereof, in the way of an increase of salary or compensation, which can not be increased by legislation during the period for which the judge is elected, but does not mean that he may not be paid for extra services and expenses incurred in the performance thereof, even out of the State treasury."

The Supreme Court of Missouri in the case of State vs. Farmer, 196 S.W. 1106, 271 Mo. 306, said:

"The facts are few and simple, and touching them there is no dispute; they run substantially thus: Relator is now, and has been since the 1st day of January, 1911, clerk of the circuit court of Callaway county. He is now serving his second term as such clerk; the term for which he was first elected having expired on the 31st day of December, 1914. On the 1st day of January, 1915, having been re-elected, relator duly entered upon his second term as such circuit clerk.

"It is conceded by the pleadings that pursuant to the method pointed out by statute for ascertaining the population of Callaway county, said county contains between 25,000 and 30,000 population. At the September term of the county court of Callaway county, relator, in all things following the provisions of an act of the Legislature, passed in 1915, and approved March 22, 1915, and which act pursuant to the express provisions thereof took effect July 1, 1915, presented to the county court his account for salary as circuit clerk for the month of August, 1915, accompanied by reports in proper form. Defendants refused to order, or to issue and sign a warrant for relator for such salary, on the ground that the act of 1915 which had put all circuit clerks of this state upon a salary basis of compensation, was unconstitutional. * * *"

The court held, l.c. 1109:

"For since all of us have been lawyers in active practice, we judicially notice the delays incident under our practice, statutes, and system of appellate review between the earning of fees by a circuit clerk and his actual collection thereof. Payments

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of costs, which include the fees of circuit clerks, are delayed in a large number of cases till an appellate court has passed finally upon the case. Hence it is (and the annually increasing collections of relator above set forth clearly illustrate this fact) that the yearly sums collected by a circuit clerk increase annually till a maximum is reached; such increase being due to the belated coming in of fees earned, but not collected, till after the determination of appeals. Sometimes we know fees are not actually collected by a circuit clerk till years after he has gone out of office, though actually earned by him when he was an officer. We have held that he could apply an excess collected over the statutory limit in one year to a deficiency under that limit for another year (Allen v. Cowan 96 Mo. 193, 9 S.W. 587), which holding accentuates the thought that the Legislature was not far wrong in denominating as salary the annual statutory stipend of a circuit clerk."

The Supreme Court in the case of Smith v. Pettis County, 136 S.W.2d 282, 345 Mo. 839, held:

"The fees collected by probate judges are of public record. We must assume that the legislature was familiar with them when they adopted these provisos. We may also assume that the legislature was familiar with probate practice in a general way. For instance, that estates could not be finally settled until after a lapse first of two years and now of one year. Where there is litigation estates remain open for indefinite periods. Estate of minors under guardianship may remain open for almost twenty-one years; estates of insane persons much longer. Therefore, the collection of fees previously earned may be long postponed. It would be and is unlikely that sufficient fees could be collected in the first years or perhaps during the entire four years of the term to reach the amount allowed. Moreover, a probate judge is specifically prohibited by this same section from collecting fees in advance. Before the limitation of these provisos was imposed probate judges would continue to collect fees long after the expiration of their terms. These matters all must have been considered. This court itself has judicially noticed the delays which ensue between the time a circuit clerk earns his fees

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and his actual collection of them in State ex
rel. Emmons v. Farmer, 271 Mo. 306, 196 S.W. 1106."

* * * * *

"* * * A probate judge may only collect fees for
services which he has already performed. These
services may be performed only while he is in
office. His fees can accrue only while he is in
office. These provisos only limit what he may
keep. We said in Corbin v. Adair County, 171
Mo. 385, 71 S.W. 674, that a circuit clerk can
demand and recover his uncollected fees from his
successor. A suit for fees against a clerk's
successor was upheld in Lycett v. Wolff, 45
Mo. App. 489.


"* * * The fact that Judge Smith succeeded
himself in office in no way affects our
conclusions * * *."

From the above and foregoing cases it is clear to us that the
circuit judge of Macon county, Missouri, is entitled to recover
his uncollected change of venue fees from the circuit clerk in
those cases which were tried and disposed of by said circuit judge
prior to July 1, 1946.

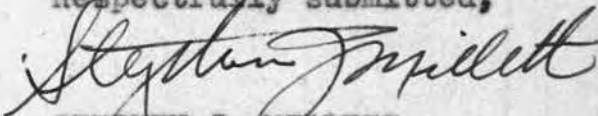
CONCLUSION

It is the opinion of this department that the Circuit Judge
of the Second Judicial Circuit is entitled to receive the change
of venue fees in cases which were tried and finally disposed of
by said judge prior to July 1, 1946.

APPROVED:


J. E. TAYLOR
Attorney General
SJM:mw

Respectfully submitted,


STEPHEN J. MILLETT
Assistant Attorney General