

EXCESS FEES:  
PROBATE JUDGES:

Disposition of excess fees earned by probate judges prior to January 1, 1947.

March 4, 1947

Honorable A. B. Hoy  
Judge of the Probate Court  
Saline County  
Marshall, Missouri

FILED  
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Dear Sir:

This is in response to your letter of recent date wherein you submitted a request for an official opinion upon the following statement of facts:

"I have been somewhat in doubt as to what disposition to make of Probate fees earned during my preceding term which expired December 31, 1946. The maximum which I was allowed to retain has been paid me and I turned over about \$500.00 less 10% to the County Treasurer of fees collected during the year of 1946. I made the check payable to Saline County for the benefit of the School Fund, under the old Section 13404.

"The County Clerk had asked the State Auditor what fund that would go to and he told him that it would go to some fund in the budget, but did not cite him any statute for that purpose. The Clerk put it in Class 4 of the budget.

"I believe that the Auditor should be put right on that proposition, as the old statute is very clear that it should be paid to the county for the benefit of the School Fund.

"The question on which I would like to have your opinion is the disposition of fees earned by the Probate Judge's office in 1946 but not collected until after the first of January, 1947. My judgment from reading S. B. 200 fixing the fees of Probate Judges and providing for the disposition of such fees would include

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fees earned in 1946 but not collected until 1947; of such fees I will probably collect \$500 or \$1000 during 1947."

Your question, in substance, is: What disposition should be made of the excess fees of probate judges which were earned prior to January 1, 1947, and collected after January 1, 1947?

Section 13404, R. S. Mo. 1939, which was repealed by Senate Committee Substitute for Senate Bill No. 200 of the 63rd General Assembly, contained the following provisions with respect to excess fees of probate judges:

"\* \* \* 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. \* \* \*"

It will be noted that this statute provided that such fees be turned into the county treasury for the benefit of the county school fund. By S.C.S.S.B. No. 200, which was approved on July 6, 1946, and which became effective on January 1, 1947, said Section 13404, R. S. Mo. 1939, was repealed and re-enacted in a new section with the same number. Said Section 13404 of S.C.S.S.B. No. 200, in part, contains the following provisions with respect to the collection and disposition of fees by the probate judge:

"It shall be the duty of the judge and clerk of the probate court to charge upon behalf of the state or county as the case may be every fee that accrues for the services of such judge, clerk or court; except that in counties now or hereafter having more than 250,000 inhabitants the duty to charge such fees shall be imposed on the clerk of the probate court.

"In counties now or hereafter having 30,000 inhabitants or less, the judge shall, at the end

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of each month, pay over to the director of revenue to be deposited by him with the state treasurer in the 'magistrate fund', all moneys collected by him or his clerk as fees, taking two receipts therefor, one of which he shall immediately file with the state treasurer. Each judge shall, within thirty days after the expiration of each calendar year file with such director of revenue a written report, verified by his affidavit specifying the name and court number of each estate in which fees were paid in such calendar year, the amount of such fees paid in each such estate and the amount of fees unpaid and due in each estate at the end of such year. Such judge shall also, within such thirty day period after such calendar year make a written report to such director of revenue of all fees which have been due and unpaid for more than one year, the amounts thereof and the name of the estate in which the same are due, which report shall be verified by affidavit of the judge that he has been unable after the exercise of diligence, to collect the same; and it shall thereupon be the duty of the director of revenue to cause the same to be collected by law and turned over to the state treasurer.

"In all counties which now or may hereafter have more than 30,000 inhabitants such fees shall be charged on behalf of the county and paid over to the county treasurer, who shall issue two receipts therefor, one of which shall be filed with the clerk of the circuit court having jurisdiction in such county. The reports herein above required to be made to the director of revenue shall be made to the county treasurer."

It will be noted in the provisions of the new act that all the fees, which accrue to the office of probate judge in counties of 30,000 inhabitants or less, are paid over to the Director of Revenue, and in counties of more than 30,000 inhabitants, they are paid over to the county treasurer. Said S.C.S.S.B. No. 200 is silent as to the disposition of fees which were earned by a probate judge prior to January 1, 1947, and which were collected after that date. Before the enactment of said S.C.S.S.B. No. 200, these excess fees were paid into the county treasury for the benefit of the school fund of such county (Section 13404, R. S. Mo. 1939).

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In construing a statute, it should be given a prospective construction rather than a retrospective construction. This principle was announced in the case of *Cranor v. School District*, 151 Mo. 119.

This principle is based on the provisions of Section 13 of Article I of the Constitution of 1945, prohibiting the enactment of any law which is retrospective in its operation.

The fees of the probate judges which were earned prior to January 1, 1947, belonged either to the probate judge or to the county school fund. Under that law, the probate judge was authorized to retain out of the fees collected an amount equal to the salary of the circuit judge. In addition to the amount retained by the probate judge as his salary, he was allowed to expend from the fees collected amounts necessary for the payment of clerk hire. Then, whatever amount of fees there was in excess of the aforesaid expenditures was turned into the treasurer of the county for the benefit of the school fund of the county. At the time these fees were earned and accrued to the office of the probate judge, then such amounts of them that exceeded the probate judge's salary and clerk hire salaries belonged to the county school fund. At that time, the school fund had a vested interest in these fees.

We think the reason for these fees now going to the Director of Revenue in counties under 30,000 inhabitants and to the county treasurer in counties over 30,000 inhabitants is that the salaries of the probate judges are paid out of state funds and county funds respectively. There would be no such reason for applying the excess fees earned by probate judges prior to January 1, 1947, to the fund from which the salaries of probate judges is paid. Since the school funds have an apparent vested interest in these excess fees, we think a reasonable construction of these statutes would be that such fees should be turned into the county treasury for the benefit of the county school fund. This also would be in harmony with the constitutional provision against retrospective laws.

#### CONCLUSION

Therefore, it is the opinion of this department that fees earned by a probate judge prior to January 1, 1947, and which are in excess of his compensation and clerk hire, should be paid into the county treasury for the benefit of the county school fund.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General