

**CIRCUIT CLERK:**  
**Compensation:**

Not authorized to charge and retain fee  
for acting as custodian of funds paid into  
court.

December 16, 1943



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Honorable W. R. Tilson  
Clerk, Circuit Court  
Maryville, Missouri

Dear Mr. Tilson:

Under date of November 27, 1943, you wrote this of-  
fice requesting an opinion, as follows:

"Are the Circuit Clerks allowed to re-  
tain any commission on funds impounded  
in their hands by order of court, await-  
ing final disposition and order for the  
distribution of said fund to the parties  
entitled to same."

The question you ask is one which is difficult to  
answer and a more complete statement of facts would have  
been of great value in preparing a reply.

The compensation of the clerk of the circuit court  
is fixed by Section 13408, R. S. Missouri, 1939, and con-  
sists of an annual salary and the fees earned on cases  
brought to the county on change of venue from other coun-  
ties.

The Constitution of Missouri, Section 8, Article XIV,  
prohibits increasing the compensation of any officer dur-  
ing the term for which he shall have been elected. This  
applies to the duties of the office and those duties which  
are incident to the performance of the official duties.  
Little River Drainage Dist. v. Lassater, 325 Mo. 493, 1. c.  
502:

"Appellant contends that Section 4575 authorizes an increase in the compensation of township collectors during their terms of office and, hence, violates Section 8, of Article XIV, of the Missouri Constitution, which provides that 'the compensation or fees of no state, county or municipal officer shall be increased during his term of office; . . .'. As neither county collectors nor township collectors, in respect to their services, in collecting the taxes of drainage districts, perform any of the duties of state, county or municipal officers, it would seem that the fixing of their compensation for rendering such services to drainage districts is not controlled by Section 8, Article XIV, of the Constitution.

"The constitutional inhibition only applies to compensation or fees of officers for performing duties incident to their offices and has no application to additional duties imposed upon such officers not ordinarily incident to their offices. (State ex rel. McGrath v. Walker, 97 Mo. 162, 10 S. W. 473; State ex rel. Hickory County v. Dent, 121 Mo. 162, 25 S. W. 924; State ex rel. Linn County v. Adams, 172 Mo. 1, 72 S. W. 655; State ex rel. Harvey v. Sheehan, 269 Mo. 421, 190 S. W. 864; State ex rel. Zevely v. Hackmann, 300 Mo. 59, 254 S. W. 53; State ex rel. Barrett v. Boeckler Lumber Company, 302 Mo. 187, 257 S. W. 453."

It would appear that if the care and custody of funds which are the subject of litigation is one of the duties of the clerk or is incident to the duties of the clerk, no compensation could be allowed for this service as it would conflict with the provisions of Section 8, Article XIV, of the Constitution. However, if that service would not be one of the duties of the clerk, it might be possible that an additional fee could be allowed. No Missouri cases have been

found touching upon this subject. However, in Vol. 11 of Corpus Juris, at page 871, par. 40, is found the following:

"If there is a statute authorizing it, the clerk is entitled to a commission on funds handled; \* \* \*."

In support of this statement is cited the Tennessee case of Louisville & Nashville R. Co. v. Boswell, 104 Tenn. 529, 58 S. W. 117. This was a condemnation case in which the value fixed for the condemned land was paid into court and held by the circuit clerk. The judge awarded the clerk a fee for his services in connection with the fund. On a motion to retax the costs the Supreme Court of Tennessee ruled that the clerk was not authorized to charge a fee for a service of this kind. From this case we quote at length:

"It is said the court allowed the commission under section 6391, Shannon's Code, viz.: 'The court may make allowances to the clerk, or other person acting as trustee, receiver or commissioner under the appointment of the court, when no fees are fixed by law.' In this case the clerk was not acting in the capacity of trustee, receiver, or commissioner, under the appointment of the court, when he received this money, but he received it as clerk. Section 1859, Id., under the head of 'Condemnation Proceedings,' provides, viz.: 'If no objection is made to the report it is confirmed by the court and the land decreed to the petitioner upon payment to the defendants or to the clerk for their use of the damages assessed.' So that it is obvious that this money was received by the defendant in error in his capacity as clerk. The contention of defendant in error that the payment to him of the money for the use of the defendant makes him trustee or receiver, without formal appointment by the court so as to entitle him to the commission,

is unsound. But it is insisted that, independent of the foregoing statute, the allowance of said commission was within the discretion of the court, under section 4962, Id., viz.: 'And if any case shall occur not directly or by fair implication embraced in the express provisions of the law the court may make such disposition of the costs as in its sound discretion may seem right.' It will be observed that this section has reference to the disposition of costs. In construing this section in Perkins v. State, 9 Baxt. 2, this court said, viz.: 'This section only authorizes the court to exercise its discretion in adjudging costs, as between the parties, which have already accrued, if any case should occur where the law has not directed how they shall be adjudged, but confers no power to allow costs to officers, which the law has not allowed.' The law has nowhere allowed the clerk a commission in such a case, as part of the costs; and the court, under this section, has no discretion to allow it. As said by this court in Mooneys v. State, 2 Yerg. 578: 'Costs are created by statute. Unless there be some law to authorize it, the court cannot ex officio give costs against any one.' The motion to retax is sustained, and the commission is disallowed."

From the statement in Corpus Juris and from the Boswell case, supra, it is the conclusion of the writer that the custody by the circuit clerk of money which is the subject of litigation and to be disbursed upon the order of the circuit court would be one of the duties incident to his office, and for which no fee could be retained by the clerk, because any such retention of fees would be in conflict with the provisions of Section 8, Article XIV, of the Constitution and Section 13408, R. S. Missouri, 1939.

Continuing the discussion further, by the provisions of Section 13436, R. S. Missouri, 1939, the clerk of the circuit court is required to charge, collect and turn in all fees which may be properly chargeable for his services. The follow-

ing brief excerpt is taken from Section 13436:

" \* \* \* And monthly, such clerks shall pay into the county treasury the amount of all fees collected by virtue of his office and every clerk shall be liable on his official bond for all fees collected by law. \* \* \* "

Sections 13407, 13409 and 13410, R. S. Missouri, 1939, prescribe the fees which the clerk must charge, collect and account for. A careful examination of these sections reveals that there is no charge authorized to be made by the clerk for his services as custodian of funds.

The law is well settled that unless compensation is provided by statute, no compensation may be allowed. *Nodaway County v. Kidder*, 129 S. W. (2d) 857, 1. c. 860:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. *State ex rel. Evans v. Gordon*, 245 Mo. 12, 28, 149 S. W. 638; *King v. Riverland Levee Dist.*, 218 Mo. App. 490, 493, 279 S. W. 195, 196; *State ex rel. Wedeking v. McCracken*, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. *State ex rel. Buder v. Hackmann*, 305 Mo. 342, 265 S. W. 532, 534; *State ex rel. Linn County v. Adams*, 172 Mo. 1, 7, 72 S. W. 655; *Williams v. Chariton County*, 85 Mo. 645."

Honorable W. R. Tilson

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CONCLUSION

It is the opinion of the writer that no fee may be charged or retained by the clerk of the circuit court for the handling of funds impounded in his hands by order of court, awaiting order of distribution by the court.

Respectfully submitted

W. O. JACKSON  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

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