

2 J. Smith
PROBATE COURT: Probate judge entitled to fees which accrued last year of term, but not collected until 1947.

June 18, 1946
6-24



Honorable Hugh P. Williamson
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"The Probate Judge of Callaway County has inquired of me concerning the construction of a portion of the New Constitution which bears upon his office as Probate Judge and Magistrate. The New Constitution states that all fees collected by the Probate Judge and Judge of the Magistrate Court after January 1, 1947, shall go to the State Department of Revenue. The Probate Judge of Callaway County wants to know whether fees that are earned by him prior to January 1, 1947, but which are not collected until after January 1, 1947, go to him or whether they too must be turned in to the State Department of Revenue.

"I would greatly appreciate your consideration and opinion of this matter."

Section 2438, R.S. Mo. 1939, provides, in part, as follows:

"At the general election in the year 1878, and every four years thereafter, except as hereinafter provided, a judge of probate shall be elected by the qualified voters in every county.
* * * "

In view of the above provision we may take judicial notice that the term of office of every judge of a probate court in this State will terminate on December 31, 1946. State ex rel. Donnell vs. Searcy, 152 S.W. (2d) 8, 347 Mo. 1052.

The Constitution of Missouri, 1945, recently adopted, provides in Section 24, Article V, as follows:

"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 fee of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries. "

At the time that the above Constitution was adopted (February 27, 1945) probate judges of counties of the size of Callaway County were paid upon a fee basis. (Callaway County is shown by the last Federal census to have a population of more than 19,000, and, therefore, is not affected by the Bill passed by the 1943 Legislature affecting counties with less than 19,000 population.)(Laws of Missouri, 1943, page 868.) Such fees are fixed by Section 13404, R.S. Mo. 1939, which reads, in part, as follows:

"* * * * 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. * * * * *

It will be seen, therefore, that under said Section 13404, such judge was allowed to retain annually out of fees collected (except non-accountable fees) an amount equal to the pay of the circuit judge, exclusive of the circuit judge's traveling allowance. He was entitled to receive out of fees collected after the end of his term but which had been charged for services rendered by him during his term, an amount equal to the compensation of the circuit judge. In addition to this, if the fees collected after his term of office ended, exceeded the amount of compensation he was allowed to retain, he was entitled to an additional 10% of any such surplus. All other fees were required to be turned into the county treasury.

The principal case in Missouri relating to the fees of probate judges is Smith vs. Pettis County, 136 S.W. (2d) 282, in which the history of the probate judge's

fee statute is reviewed and said statute construed. The Supreme Court of Missouri, through Judge Douglas, l.c. 287, said:

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

"No doubt because of such delays the fees permitted to be retained were not restricted to those collected during the term. However, by this second proviso the amount to be retained after the expiration of the term was also limited. Under its terms read in their

ordinary meaning a probate judge is entitled to all his fees collected after his term until in the aggregate the amount of such fees reaches the amount of the annual compensation of the circuit judge--in this case \$4,700. After he has once collected such an amount then all excess (less ten per cent thereof) is to be turned over to the county. But, it is argued, this construction would give a probate judge salary for five years although his term is limited by the constitution to only four years. This contention is not tenable because, as we have pointed out, these provisos in no way increase the grant of fees already made but merely impose a limitation.
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"* * * * *
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."

It will be seen that the court holds that, after the expiration of the term, a probate judge is entitled to all accrued fees up to the amount of the salary of a circuit judge, and he receives such fees even if they are collected after the term has expired. This reasoning is in line with that advanced in Givens vs. Daviess Co., 107 Mo. 603, in which the court said, l.c. 610:

"* * * Every day he held the office the law vested in him a right to a due proportion of the salary, as at that time fixed, and, consequently,

an order changing the compensation could not have a retrospective operation and divest from him what was his already. * * * ".

The case of State ex rel. McKittrick vs. Bair, 333 Mo. 1, which holds that a tax attorney employed by a county is not entitled to any fees until they are collected, may be differentiated from the instant situation, because in that case the statute under which the attorney was employed specifically provided that the fee was to be taxed and collected as cost, and that said attorney was to receive no fee or compensation except as therein provided. As the court pointed out:

"* * * 'It is clear, then, that unless the proceeding result in collecting a sum of money belonging to the public revenue, neither the collector nor his attorneys can claim any costs in the cause.' * * * ".

Applying the above holdings to the facts as presented in your request, it will be seen that Section 24, Article V, provides that: "Until the end of their present terms probate judges shall continue to receive compensation and clerk hire as now provided by law." And, further, "no judge's salary shall be diminished during his term of office." Under the holding in Smith vs. Pettis County, supra, the probate judge is entitled, as a part of his compensation, to all fees that have accrued during his term but which have not been collected until the expiration of his term up to the amount of the pay of a circuit judge. Therefore, even though under the new Constitution all fees of probate judges after January 1, 1947, are to be turned into the treasury such provision does not apply to the accrued fees, because it is part of the compensation of the probate judges during "their present terms" and to hold otherwise would be to diminish their salary during their term of office.

CONCLUSION.

It is, therefore, the opinion of this Department that the Probate Judge of Callaway County is entitled to

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collect and retain for his own use, after his present term of office has terminated, any fees which were earned or accrued prior to the termination of his present term of office up to the amount of the Circuit Judge's salary, less the traveling allowance of said Circuit Judge.

Respectfully submitted,

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APPROVED:

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