

SHERIFFS: Entitled to commission on notice of garnishment;
FEES: entitled to fees on each case for serving writs
on more than one case for the same trip.

July 16, 1941

Mr. Amos Lee, Sheriff
Jefferson County
Hillsboro, Missouri



Dear Sir:

In answer to your letter of July 14, 1941, asking for an opinion in reference to your commission on garnishments, we submit the following:

I.

Your first query is--

"I am writing you for an opinion in regard to Sheriff's Commission on executions where a Summons to garnishee is served on a Corporation. In our case I serve five or six hundred summons to Garnishee on Pittsburg Plate Glass Co. at Crystal City, Mo. The Company answers in Circuit Court on the return day of the execution and pays the money they are holding to the Circuit Clerk, who, in turn distributes same. Am I entitled to a commission on the money paid the Circuit Clerk the same as if it were paid to me?"

In the case of Ring v. The Chas. Vogel Paint & Glass Co., 46 Mo. App. 374, 1. c. 377, the court, in construing cost statutes, said:

"Preliminary to the discussion of the items of cost here in controversy, it may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer or other persons claiming costs, which are contested, must be able to

put his finger on the statute authorizing their taxation. Miller v. Muegge, 27 Mo. App. 670; Shed v. Railroad, 67 Mo. 687; Gordons v. Maupin, 10 Mo. 352; Ford v. Railroad, 29 Mo. App. 616."

Section 1560, R. S. Missouri 1939, reads as follows:

"All persons shall be subject to garnishment, on attachment or execution, who are named as garnishees in the writ, or have in their possession goods, moneys or effects of the defendant not actually seized by the officer, and all debtors of the defendant, and such others as the plaintiff or his attorney shall direct to be summoned as garnishees."

Under the above section it provides that a garnishment may be issued either on attachment before judgment or on execution after judgment.

Section 1561, R. S. Missouri 1939, reads as follows:

"When a fieri facias shall be issued and placed in the hands of an officer for collection, it shall be the duty of the officer, when directed by the plaintiff, his agent or attorney, to summon garnishees, and with like effect as in case of an original attachment. The service of garnishment in such case, and the subsequent proceedings against and in behalf of the garnishee, shall be the same as in the case of garnishment under an attachment."

The above section applies only to garnishments after judgment but the garnishment procedure is the same as if it were an attachment before judgment.

Section 1564, R. S. Missouri 1939, partially reads as follows:

"Notice of garnishment shall be served on a corporation, in writing, by de-

livering such notice, or a copy thereof, to the president, secretary, treasurer, cashier or other chief or managing officer of such corporation;
 * * * * *

Section 1565, R. S. Missouri 1939, provides the manner of serving the writ of attachment by way of garnishment and describes the procedure of an officer's writ.

Section 1566, R. S. Missouri 1939, provides that the garnishee may discharge himself before final judgment by paying and delivering the property to the sheriff.

Section 1567, R. S. Missouri 1939, provides the method of a garnishee holding the property upon his executing a bond to the plaintiff in the case.

After the garnishee has answered or has paid the money or has turned the property into court in compliance with Section 1566, supra, then a judgment can be obtained in the same manner as judgment on an attachment and execution be issued thereon. It was so held in the case of Frohoff v. Casualty Reciprocal Exchange, 113 S. W. (2d) 1026, l. c. 1029, par. 2, where the court said:

"Conceding that a garnishment proceeding in aid of an execution is technically not the institution of a new suit but only an incidental means of obtaining satisfaction of the judgment upon which the execution has been issued, the nature of the proceeding is nevertheless such as to require that the issues made up by the pleadings 'shall be tried as ordinary issues between plaintiff and defendant,' and not only is the ultimate judgment a 'final judgment' in the sense that it finally disposes of all the issues and parties, but it is one upon which execution 'such as is allowed by law on general judgment' may issue to enforce such judgment. * * * "

In the case of Ring v. The Chas. Vogel Paint & Glass Co., 46 Mo. App. 374, l. c. 379, which case came to

the court on appeal on a motion to retax the costs, the court said:

"The court allowed the respondent one-half commissions on the amount realized from the sale of the goods. This item is also challenged. Under the peculiar facts, a novel question is presented. The day on which the goods were attached, the defendant corporation made a general assignment for the benefit of its creditors. The assignee was let in to defend the suit, and he gave a forthcoming bond for the property. The property was afterwards sold by the assignee under an order of court, with instructions to hold the proceeds until the attachment suit was determined. This action was decided in the plaintiff's favor, and the assignee was ordered by the court to pay to the respondent's successor in office the amount of plaintiff's judgment, and a sufficient amount to cover costs, in which were included half commissions for the respondent. This charge must be sustained, if at all, under the following clause of section 4989 of the statutes in reference to the commissions of sheriffs. The clause reads: 'For commissions for receiving and paying moneys on execution or other process, where lands or goods have been levied on, advertised and sold, three per cent. on \$500, and two per cent. on all sums above \$500, and half of these sums when the money is paid to the sheriff without a levy, or where the lands or goods levied on shall not be sold, and the money is paid to the sheriff or person entitled thereto, his agent or attorney.' A proper construction of this clause does not authorize this item of costs. The commissions (if any) would go to the respondent's successor who

collected and disbursed the money.
* * * * *

This case is the only case in Missouri construing the commission allowed an officer as set out in Section 13411, R. S. Missouri 1939. This section, referring to commissions, partially reads as follows:

"* * * * *
For commission for receiving and paying moneys on execution or other process, where lands or goods have been levied and advertised and sold, three per cent on five hundred dollars and two per cent on all sums above five hundred dollars, and half of these sums, when the money is paid to the sheriff without a levy, or where the lands or goods levied on shall not be sold and the money is paid to the sheriff or person entitled thereto, his agent or attorney. * * * * *

The above partial section describes the procedure and allowance of costs under two different statement of facts. The first statement of facts provides specifically for the receiving and paying moneys on execution or other process, where the lands or other goods have been advertised and sold. Under this statement of facts the officer is entitled to three per cent on the first five hundred dollars and two per cent on all sums above five hundred dollars. The second statement of facts allows one-half of that amount when the money is paid to the sheriff without a levy and no sale has occurred on the other goods and also where the money is paid to the person entitled to the money, his agent or attorney.

Where the money is paid in to the circuit clerk the circuit clerk is acting as agent for the plaintiff and all other persons, including the sheriff, who are entitled to their costs.

In the case of Ring v. The Chas. Vogel Paint & Glass Co., 46 Mo. App. 374, l. c. 379, the court construed the above set out partial Section 13411, supra, to the ef-

fect that the commission is only due to the one that distributes the money involved in the case who is the then sheriff and did not pass upon the point whether the sheriff at that time is allowed a commission as set out in the above section. Section 13411, supra, which is in the disjunctive, should be construed that the last statement of facts in this section does not refer to the first statement of facts which contains the words "collected and paid out." In the case of State ex rel. v. Brown, 146 Mo. 401, 1. c. 406, 47 S. W. 504, the court said:

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

In view of the above holding and under the facts in your request, the law, as set out in Section 13411, supra, permits the sheriff to point to the law which entitles him to the commission.

CONCLUSION

In view of the above authorities it is the opinion of this department that a sheriff is entitled to a commission on all moneys paid in by a garnishee under a writ of attachment and notice of garnishment upon final judgment to one and one-half per cent commission on the first five hundred dollars and one per cent on all other sums above

five hundred dollars. He is entitled to this commission even if the garnishee pays the money into the circuit clerk before final judgment and afterwards a final judgment is obtained.

II.

Your second query is--

"I would like also to have an opinion in regard to the mileage fee on said Summons to garnishee served on Pittsburg Plate Glass Co. I serve as many as twenty-five Summons to garnishee at one time where each case is a separate one. Am I entitled to a mileage fee on each case?"

Section 13411, supra, specifically states as follows:

"* * * * *

"For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip
..... \$0.10"

The sheriff can point to this section which entitles him to mileage of ten cents in the serving of a writ or other order of court when served more than five miles from the place where the court is held. In the case of State v. Thatcher, 92 S. W. (2d) 640, l. c. 643, par. 10, 11, the court said:

"* * * * * First, because the language of the enactment is perfectly clear and unambiguous. In such case there is nothing to construe, and no intent contrary to the evident intent can rationally or permissibly be implied. * * * * *

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In view of the above authority, and since the above section is unambiguous, it needs no construction. The only restriction placed in the above partial section provides that the sheriff shall not charge mileage for more than one witness subpoenaed or other writ served in the same cause on the same trip.

Under the statement in your request all are separate actions and in the same cause. Since the section mentions a specific restriction, it is presumed that no further restriction is placed upon the sheriff in claiming his fees for mileage. In the case of State ex rel. Buerk v. Calhoun, 52 S. W. (2d) 742, 330 Mo. 1172, 83 A. L. R. 1393, the court stated:

"* * * But it is a sound rule of construction that the general intent of a statute cannot be overthrown by subsidiary provisions of particular or limited application. * * * * *"

CONCLUSION

In view of the above authorities it is the opinion of this department that a sheriff is entitled to mileage fee on each summons in each separate case where he serves a notice of garnishment on a garnishee. He is entitled to mileage on each case even though he serves more than one summons on the same trip.

Respectfully submitted

APPROVED:

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