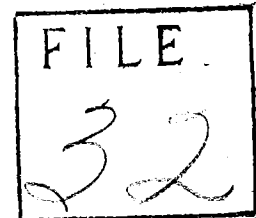


CIRCUIT CLERK: Fees earned by a circuit clerk and collected
by his successor should be paid to the prior
OFFICERS: circuit clerk.

December 3, 1941

Hon. A. L. Gates
Prosecuting Attorney
Moniteau County
California, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of November 28th, 1941, which is as follows:

"As Prosecuting Attorney of Moniteau County I would like to have an official written opinion from your office concerning the construction and legal effect of Sec. 13408 R. S., 1939, pertaining to 'Salaries of Circuit Clerks in Certain Counties', with special reference to the proviso 'Providing further, that the clerks of circuit courts shall be allowed to retain in addition to the sums allowed in the section, all fees earned by him in cases of change of venue from other counties.'

"1. Do fees to the circuit clerk under this proviso go to the circuit clerk who was in office at the time the fees accrued, or do the fees go to the circuit clerk who is in office at the time the costs are paid?

"2. Are these fees on change of venue from other counties accountable by the circuit clerk to the counties?

"3. If change of venue fees are unaccountable fees and they go to the circuit clerk at the time they accrue will these costs be pro-rated between the two circuit clerks if the part of the costs accrued during the term of one official and part during the term of his successor?"

Section 13408, R. S. Mo. 1939, partially reads as follows:

"* * * Provided, it shall be the duty of the circuit clerk, who is ex officio recorder of deeds, to charge and collect for the county in all cases every fee accruing to his office as such recorder of deeds and to which he may be entitled under the provisions of section 13426 or any other statute, such clerk and ex officio recorder shall, at the end of each month, file with the county clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of such circuit clerk and ex officio recorder of deeds, upon the filing of said report, to forthwith pay over to the county treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the county clerk, and every such circuit clerk and ex officio recorder of deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the county trea-

sury as herein provided: Provided further, that the clerks of the circuit courts shall be allowed to retain in addition to the sums allowed in this section, all fees earned by him in cases of change of venue from other counties: Provided further, that until the expiration of their present term of office, the persons holding the office of circuit clerk shall be paid the maximum amount as now provided by law, in the manner provided by this chapter."

Under the above provision it becomes the duty of the circuit clerk to charge all fees accruing to his office. He also charges all fees accruing to his office coming to the county on change of venue, but when ordered by the county court to pay all fees into the county treasury the amount ordered by the county court, who have examined his monthly report, which he should file with the county clerk in pursuance to Section 13436, R. S. Mo. 1939, should not contain the fees to be retained on change of venue cases.

Section 13446, R. S. Mo. 1939, reads as follows:

"It shall be the duty of each sheriff, marshal, coroner, clerk of the courts of record, and other officers, on the first day of January and the first day of July in each year, to pay over all fees in their hands belonging to others to the treasurer of the county, with the name and amount belonging to each person, date when collected and in what case, taking from the treasurer duplicate receipts therefor, one of which the officer shall file with the clerk of the county court, who shall immediately charge the treasurer with the same."

Under the above section it is the duty of the circuit clerk to pay over all fees in his hands belonging to others to the county treasurer. This payment must be made on the first day of January and the first day of July in each year. According to your request you state to the effect that a change of venue case has been tried in California, Missouri, wherein a circuit clerk has performed some of the duties and his successor has performed some of the duties, in which the fees are to be retained by the respective clerks. You also ask if the fees should be pro-rated between the two circuit clerks. Under Section 13446, R. S. Mo. 1939, it is the duty of the successor to pay into the treasury fees earned and due the former circuit clerk.

In the case of *Smith v. Pettis County*, 136 S. W. (2d) 282, Para. 15, the court in passing upon this question stated:

"* * * 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."

Also, in the case of *Corbin v. Adair Co.*, 171 Mo. 385, 1. c. 389, the court said:

"* * * To the amount of the difference between the fees collected by him which he had earned in 1898 and retained, and the amount earned and not collected for that year, not exceeding \$1,600, he can demand and recover the uncollected fees

from his successor, and his own evidence shows they will be more than sufficient. * * * * *

Also, in the case of *Lycett v. Wolff*, 45 Mo. App. 489, the court in passing upon the following statement of facts,

"This case is here on the defendant's appeal. The plaintiff was elected to the office of circuit clerk of St. Louis county, at the November election, 1878. He was inducted into office on the first day of January, 1879, and performed the duties pertaining to such position for the term of four years. In the petition it was alleged that the plaintiff, as such clerk, was entitled under the law to receive out of the fees earned by him during his term of office the sum of \$9,000, that is a yearly salary of \$2,250; that, during the time he held the office, he only received of the fees collected by him, on account of his salary, the sum of \$8,070, leaving a balance of \$930 due on his salary for the four years; that, at the expiration of his term, he had earned as clerk a large amount of fees which had not been collected; that the defendant was his successor in office, and had collected the sum of \$930 of the fees so earned, and had refused to pay them to the plaintiff."

said:

"* * * 'In *Thornton v. Thomas*, 65 Mo. 272, it was held that the fees of the office constituted a trust fund, to be applied in the payment of deputies and

assistants, and the salary of the clerk fixed by law, and the surplus, if any, after such payments, to be paid into the treasury of the county. The question, as to whether one of these trusts would be to supply any deficiency in the receipts of a former year to cover expenses and salaries, was neither before the court nor decided in that case. If the annual fees earned by a clerk, as is held in the case above cited, are chargeable with a trust in favor of such clerk to the extent of his salary, and the compensation allowed his deputies, it logically follows, that, whenever collected, they should be applied to the discharge of that trust."

In the above cases both the appellate and Supreme courts have held that a circuit clerk can demand and recover his uncollected fees from his successor. Of course, these cases applied when the salary of the circuit clerk was obtained by the retaining of fees and not paid a regular salary as under the present law. But the same theory would apply on fees earned by a circuit clerk on change of venue cases and collected by his successor.

CONCLUSION.

In view of the above authorities it is the opinion of this department that fees due the circuit clerk on change of venue cases should be paid to the circuit clerk who was in office at the time the fees occurred and not to the circuit clerk who is in office at the time the costs are paid.

It is further the opinion of this department that change of venue fees should be reported to the county clerk, but that the order of the county court requiring him to pay fees into

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the county treasury should not contain change of venue fees which are allowed to the circuit clerk.

It is further the opinion of this department that the present circuit clerk under Section 13446, supra, should pay the fees earned by the prior circuit clerk into the office of the treasurer in the amount of fees that was earned by the prior circuit clerk before the present circuit clerk took office.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

WJB:CP