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1. CLERK OF COURTS—ALIMONY PAYMENTS—REQUIRED TO COLLECT COMMISSION OF ONE PERCENTUM ON FIRST THOUSAND DOLLARS AND ONE FOURTH OF ONE PERCENTUM ON ALL SUMS EXCEEDING ONE THOUSAND DOLLARS—RECEIPT AND DISBURSEMENT—SECTION 2901 G. C.—WHEN COMMISSIONS COLLECTED FROM OTHER THAN PROPER PARTY THEY ARE “PUBLIC MONEY.”
2. SHOULD CLERK OF COURTS COLLECT COMMISSION FROM RECIPIENT OF ALIMONY, NOT FROM PARTY CHARGED WITH PAYMENTS, BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES SHOULD MAKE FINDING TO RECOVER FEE IN FAVOR OF SPECIAL TRUST FUND IN COUNTY TREASURY—MUST BE RETURNED TO PERSON FROM WHOM ERRONEOUSLY COLLECTED—SECTION 274 ET SEQ., G. C.
3. WHERE COMMISSION DUE AND UNPAID—PROSECUTING ATTORNEY SHOULD COLLECT BY ANY MEANS PROVIDED BY LAW—SECTIONS 2978, 2979 G. C.

## SYLLABUS:

1. A clerk of courts is required under Section 2901, General Code, to collect a commission of one percentum on the first one thousand dollars, and one-fourth of one percentum on all sums exceeding one thousand dollars, from the party charged with the payment of such money, when he receives and disburses alimony payments. Commissions when collected from other than the proper party are “public money” as that term is defined in Section 286, General Code.

2. Should a clerk of courts collect the commission from the recipient of the alimony rather than from the party charged with the payment thereof, the Bureau of Inspection and Supervision of Public Offices should make a finding for recovery of such fee in favor of a special trust fund in the county treasury to be returned to the person from whom it was erroneously collected, under Section 274 et seq., General Code.

3. The commission still being due and unpaid, the prosecuting attorney should, pursuant to Sections 2978 and 2979, General Code, proceed to collect the same by any means provided by law.

Columbus, Ohio, January 16, 1950

Bureau of Inspection and Supervision of Public Offices  
Columbus, Ohio

Gentlemen:

Your request for my opinion is as follows:

“Opinion No. 1249, Opinions of 1916, on page 231, following reference to Section 2901, General Code, we find the following:

‘Alimony is clearly not within the exception of fees and costs and, therefore, when not collected by the sheriff or other proper officer on order of execution, but paid pursuant to an order or on a judgment of the court to the clerk in the discharge of such order or judgment for distribution by the clerk, such payments seem to come clearly within the requirement that the clerk shall charge and collect the prescribed commission, *to be taxed against the party charged with the payment of such money.* \* \* \*’

“In many counties this department has found that the poundage on alimony is collected from the recipient of the alimony, and not from the person charged with payment, and every effort has been made by our examiners to correct this procedure.

“Reference is hereby made to your Opinion No. 519, rendered May 17, 1949, the second branch of the syllabus of which reads:

‘Where fees and costs have been taxed for services not actually performed, the Bureau of Inspection and Supervision of Public Offices may make findings for recovery of such fees in favor of the “Defendants’ Trust Fund” to be returned to the respective persons from whom they were erroneously collected, under Section 274 et seq., General Code of Ohio.’

“Where alimony poundage has been wrongfully collected by the clerk of courts from the recipient, would examiners from this department make findings (1) against the clerk of courts, (2) against the county treasury (if the clerk’s fees have already been paid into the treasury under Section 2983), or (3) make no finding at all?”

The statement in the 1916 opinion, that the fees to be paid the clerk for receiving and disbursing alimony payments shall be taxed against the

party charged with the payment of such money, is in my opinion still a correct statement of the law. Thus, Section 2901, General Code, as amended in 122 O. L. 253 (254) reads in part, as follows:

(the clerk shall charge) \* \* \*” for receiving and disbursing money, other than costs and fees, paid to such clerks in pursuance of an order of court or on judgments, and which has not been collected by the sheriff or other proper officer on order of execution, *to be taxed against the party charged with the payment of such money*, a commission of one per centum on the first one thousand dollars \* \* \*”

(Parenthetical matter and underscoring, the writer's.)

It is a familiar principal of law that fees cannot be collected by a public officer unless they are specifically allowed by statute. See *Gebolt v. Trustees*, 7 O. S. 237. The alimony poundage referred to in your letter, while a fee allowed by law, was collected from the wrong party. It must therefore be deemed to be money that was due but not from the particular party who paid it. It was paid under a misapprehension of fact and is public money, as that term is used in Section 286, General Code. Since it was collected from the wrong party it must be returned and pursuant to the provisions of Section 286, credited to a trust fund in the county treasury, there to be retained until claimed by the lawful owner. Section 286, General Code, reads in part, as follows:

“\* \* \* The term ‘public money’ as used herein shall include all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials shall be liable therefor. All money received under color of office and not otherwise paid out according to law, shall be due to the political subdivision or taxing district with which the officer is connected and shall be by him paid into the treasury thereof to the credit of a trust fund, there to be retained until claimed by the lawful owner; if not claimed within a period of five years after having been so credited to said special trust fund, such money shall revert to the general fund of the political subdivision where collected. \* \* \*”

The Bureau of Inspection and Supervision of Public Offices may make findings for recovery of such fees in favor of said trust fund since the money was received under color of office, and under the terms of Section 286 this money is to be credited to such trust fund in the county treasury.

Your next question is whether your Bureau may make a finding against the clerk. It is true that the clerk should not have accepted this money from the recipients of alimony payments and as a result thereof has collected money wrongfully, yet the law provides for a situation such as this. The commissions having never been paid by the proper party who is charged with their payment, they must still be due from said party. In regard thereto, your attention is directed to Sections 2978 and 2979, General Code, which read as follows:

“Section 2978: Each probate judge, auditor, treasurer, clerk of courts, sheriff, surveyor and recorder, shall charge and collect the fees, costs, percentages, allowances and compensation allowed by law, and shall give to the person making payment thereof an official receipt in manner and form as may be prescribed by the bureau of inspection and supervision of public offices.”

“Section 2979: On or before January 15th annually, each of said officers shall file with the prosecuting attorney of his county, a report in writing showing the amount of fees, percentages, penalties, allowances and other prerequisites due his office from each person or corporation which has remained due and unpaid for more than one year prior to January 1st, next preceding, and it shall be the duty of the prosecuting attorney to immediately proceed to collect the same by any of the means provided by law, and to pay the amount so collected into the county treasury to the credit of the general county fund. The county auditor shall not issue his warrant to either of said officers for his salary for the month of January in any year, until said report has been filed with the prosecuting attorney as herein required.”

Therefore, since Sections 2978 and 2979, General Code, provide the legal procedure for the collection of these fees, it is unnecessary to make a finding against the clerk, as the prosecuting attorney may institute suit against the proper person. A discussion of this particular phase of collection is found in a 1942 Opinion of the Attorney General, being No. 4723, at page 25.

In conclusion, it is my opinion:

1. A clerk of courts is required under Section 2901, General Code, to collect a commission of one percentum on the first one thousand dollars, and one-fourth of one percentum on all sums exceeding one thousand dollars, from the party charged with the payment of such money, when he receives and disburses alimony payments. Commissions when collected

from other than the proper party, are "public money", as that term is defined in Section 286, General Code.

2. Should the clerk of courts collect the commission referred to in paragraph one of the syllabus, from the recipient of the alimony rather than from the party charged with the payment thereof, the Bureau of Inspection and Supervision of Public Offices should make a finding for recovery of such fee in favor of a special trust fund in the county treasury, to be returned to the person from whom it was erroneously collected under Section 274 et seq., General Code.

3. The Commission referred to in paragraph one of the syllabus, still being due and unpaid, the prosecuting attorney should, pursuant to Sections 2978 and 2979, General Code, proceed to collect the same by any means provided by law.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.