

2190

1. HIGHWAYS, DIRECTOR OF—ORIGINAL DEPOSIT MADE IN APPROPRIATION CASE—NOT PAID TO CLERK OF COURTS “IN PURSUANCE OF AN ORDER OF COURT OR ON JUDGMENTS”—CLERK OF COURTS NOT ENTITLED TO COMMISSION BASED ON PERCENTAGE OF MONIES DEPOSITED AND LATER RETURNED TO DIRECTOR—SECTIONS 1178-37, 1178-38, 2901 G. C.
2. COMMISSION OF CLERK OF COURTS—COMPUTED UPON TOTAL AMOUNT OF MONIES PAID TO CLERK OF COURTS BY DIRECTOR OF HIGHWAYS—APPROPRIATION CASE—STATUS OF DEPOSIT MADE—FINAL ORDER OR JUDGMENT OF COURT—TOTAL PAYMENT—COMPUTATION OF COMMISSION.

## SYLLABUS:

1. The original deposit made by the Director of Highways in an appropriation case, under authority of Section 1178-37, General Code, is not paid to a clerk of courts “in pursuance of an order of court or on judgments” within the purview of Section 2901, General Code, and the clerk of courts is not entitled to a commission based on a percentage of the monies so deposited and later returned to the Director as provided in Section 1178-38, General Code.

2. The commission of the clerk of courts, authorized by Section 2901, General Code, is computed upon the total amount of monies paid to a clerk of courts by the Director of Highways in an appropriation case in pursuance of an order of such court. Where a deposit has been made under Section 1178-37, General Code, and not returned to the Director as provided in Section 1178-38, General Code, but, instead is applied on the final order or judgment of the court, such deposit, in legal effect, is paid to the clerk of courts in pursuance of such order or judgment and is to be included in the total payment for the purpose of computing such commission.

Columbus, Ohio, December 30, 1952

Hon. S. O. Linzell, Director of Highways  
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The Director of Highways is required, in the appropriation of property for highway purposes, by Section 1178-37 of the General Code

‘\* \* \* to fix what he may deem to be the value of such property appropriated, together with damages to the residue, if any, and *deposit* the value thereof, together with such damages, if any, with the probate court or the court of common pleas of the county within which such property, or a part thereof, is situated \* \* \*’

“Section 2901 of the Ohio General Code provides for the payment of percentage fees on monies paid to the Clerk of Courts in pursuance of an order of court or on judgment. This section reads, in part, as follows :

‘County Clerk’s fees \* \* \* for receiving and disbursing money, other than costs and fees, paid to such clerks in pursuance of an order of court or on judgment and which has not been collected by the sheriff or other proper officer or 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 and one fourth of one per centum on all exceeding one thousand dollars.’

“Under the Code Section first quoted herein, the Director has made deposits in appropriation cases in C. County. These cases were then either settled or tried and in every case an additional amount of money was deposited. The Clerk of the Common Pleas Court of C. County has billed the Department of Highways for costs and included therein amounts which were computed by taking one per cent of the first one thousand dollars of the deposit and one fourth per cent of the rest of the deposit and also one per cent of the first one thousand dollars of the additional amount and one fourth per cent of the rest of the deposit.

“Because the amounts involved are considerable and because these questions arise in most of our appropriation cases, the Department of Highways would like your opinion on the following two questions :

“1. Is the original deposit paid to the Clerk of Court on order of the Director of Highways within the purview of General Code Sec. 2901 requiring the payment of fees on money deposited with the Clerk in pursuance of an order of court or on judgments?

“2. If fees are required to be paid on the original deposit by General Code Sec. 2901, may a clerk of courts collect the above quoted one percent of one thousand dollars of the original deposit plus one percent on one thousand dollars of the additional or may he collect only one percent of one thousand dollars of the total money deposited in each case?”

The Director of Highways is required by statute, Section 1178-37, General Code, to fix what he may deem to be the value of the property

to be appropriated and the damages to the residue, if any. This resolution and finding is entered on the journal of the Director of Highways and thereafter a certified copy of the resolution and finding, together with the amount of money that he has fixed for the value of the property and the damages, if any, to the residue is filed and deposited with the Clerk of the Court of Common Pleas in the county in which the property is situated. The amount fixed by the Director of Highways is called "the deposit." This fixing of an amount of money by the Director of Highways is a resolution and finding by a public official in the executive branch of the state government and not an order of a court.

Section 2901, General Code, enables a Clerk of Courts to collect a commission on money, other than costs and fees, paid to the clerk in pursuance of an order of court or on judgments.

The deposit, as fixed by the Director of Highways and deposited by him, is not paid "in pursuance of an order of court or on judgments" but is an amount of money determined according to statute. It is therefore my opinion that such an original deposit made under authority of Section 1178-37, General Code, is not within the purview of Section 2901, General Code, and the Clerk of Courts is without authority to take a commission on such an original deposit.

Subsequent to the filing of the deposit, as provided by Section 1178-37, the statutes authorize any property owner not satisfied with such amount to file a petition in court setting forth an intention to appeal from the amount so fixed by the Director. Such right of appeal is provided by Section 1178-38. This statute provides a preliminary hearing in order to dispose of all preliminary motions and questions arising on the appeal and provides that, at such time, the court shall dismiss the appeal if it is not perfected according to law. It further provides:

"\* \* \* If the court finds that said appeal has been properly perfected, and that said proceedings are substantially regular, the court shall forthwith transmit to the director of Highways the money deposited in the court for the use and benefit of the appellant. \* \* \*"

It should be noted that Section 2901 authorizes the commission only when money has been *paid* to the clerk in pursuance of order of court or on judgments. I have previously pointed out that such is not true as to the deposit made by authority of Section 1178-37. It is also my

opinion that no commission is authorized upon the return to the director of such sum as required by Section 1178-38, for the reason that such *return* is not in pursuance of an order of court or on a judgment. It is returned pursuant to a statutory directive which requires no order or judgment of the court.

When the case is settled or a verdict rendered, and thereafter an *order* of court is made requiring the Director of Highways to deposit the amount of the settlement or verdict, this total amount under order of court is subject by a clerk of courts to a commission of one percent of the first thousand dollars of the total amount and one fourth of one percent on the balance exceeding one thousand dollars. This is true for the reason that such sum is *paid* to the clerk in pursuance of an *order* of court.

Where for any reason the original deposit has not been returned, as directed by Section 1178-38, and the case is then settled or a final verdict rendered, and thereafter an *order* of court is made requiring the Director of Highways to deposit an additional amount, which with the original deposit, not returned, would make the total amount due the landowner, this *total* amount is, in legal effect, paid to the clerk in pursuance of an order of court and is subject to a commission by the clerk of courts in the same manner as set forth where the total amount is actually deposited after the original deposit has been returned.

It is my opinion that the *total* amount paid to the clerk pursuant to an order of court, made after settlement or final verdict, is subject to the commission provided by Section 2901. Whether the amount of the original deposit has or has not been returned to the director as provided by Section 1178-38, will not affect the amount of the commission. If it has not been returned, it merely is credited on such total amount.

Respectfully,

C. WILLIAM O'NEILL

Attorney General