NOTARIES PUBLIC: Deputy Circuit Clerks may take acknowledgmens of affidavits of age for marriage licenses.

May 12, 1933

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Honorable H. M. Saxberry
Prosecuting Attorney
Schuyler County
Queen City, Missouri

Dear Sir:

This is to acknowledge your letter of April 27th, 1933, which reads as follows:

> "Please inform me as to the law governing a case of this nature.
>
> A deputy Circuit Clerk being a Notary Public prepares and takes acknowledgments to affidavits, such as affidavits of age in granting marriage license and does not remit same to the clerks office."

Your request does not give us sufficient facts from which to render an opinion and for that reason it is necessary to assume certain premises. If we have assumed too much, advise us of the facts and we will render an opinion upon same.

We assume that the circuit clerk in your county is ex officio recorder; That the deputy in the circuit clerk's office is a qualified notary public; That such deputy prepares and takes acknowledgments as notary public affidavits of age for marriage licenses as required by statute; That the fee for taking such acknowledgments is paid to the deputy and he keeps it as a fee rendered for notary services. You wish to know if such deputy has to account to the circuit clerk for such fees.

The circuit clerk has the right to hire his deputies, and Section 11680 R. S. Mo. 1929 provides that such deputy or deputies shall have

> "All other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk."

The deputy possesses no greater power than the clerk.

Springer vs. McSpadden, 49 Mo. 209.

In the present case the circuit clerk is ex officio recorder and the recorder issues the marriage licenses. We now proceed to the duties of the circuit clerk as ex officio recorder, relative to the issuing of marriage licenses.

Section 2977 R. S. Mo. 1929, provides that a license shall be obtained before a marriage shall be valid.

Section 2978 R. S. Mo. 1929, makes it the duty of the recorder to issue the license.

Section 2974 R. S. Mo. 1929, prohibits certain marriages.

Section 2983 R. S. Mo. 1929, requires the consent of parents or guardians in cases of parties applying being under age. This section reads in part as follows:

> "No recorder shall in any event except as herein provided issue a license etc.*** which consent shall be given at the time, in writing, stating the residence of the person giving such consent, signed and sworn to before <u>an officer authorized to administer oaths.</u>****"

Hence, in reading the above sections, it will be observed that the issuing of marriage licenses is the duty of the recorder, and the statute limits him as to whom he shall issue same to and provides an inquiry to be made by him before such licenses are issued. One matter of inquiry being, the age of the parties applying for a license, and an affidavit setting that fact forth with that fact embodied therein, protects the recorder in the event he issues a license and the parties are not of the age as set out in the affidavit.

A recorder is required under Section 2983, supra, to have the consent in writing, sworn to before any officer authorized to administer oaths. And Section 2978, supra, requires the recorder to certify to the age of the contracting parties, Thus, the statute requires a sworn paper (or affidavit), and no where does it provide that such paper be sworn to by the recorder or for that matter any other particular officer who may take oaths

or acknowledgments, but requires such papers to be sworn to before an officer authorized to administer oaths.

Section 11562 R. S. Mo. 1929 reads as follows:

> "Hereafter whenever, under any law of this state relating to the duties of the recorder of deeds in any county of this state, it becomes necessary for any person to be sworn to any statement, affidavit or other papers of any kind, the recorder of deeds shall be authorized to administer an oath to any person in matters relating to the duties of his office, with like effect as clerks of courts of record: Provided, he use his seal of office to the jurat, as clerks of courts of record do. He shall receive the same compensation allowed by law for like service as clerks of courts are now allowed."

Section 11739 R. S. Mo. 1929, being part of Chapter 80, designated as Notaries Public, provides in part the following:

> "They (notaries public) may administer oaths and affirmations in all matters incident or belonging to the exercise of their notarial offices." * * "the proof or acknowledgment of deeds, conveyances, powers of attorney and other instruments of writing in like cases and in the same manner and with like effect as clerks of record are authorized by law. * * * *"

The question now presents itself as to whether or not a person may perform the duty of a notary public while holding the position of deputy circuit clerk. Each office entitling him to administer oaths. We find no constitutional or statutory provision prohibiting same. Some States prohibit by their law a clerk from holding a notary public commission while a clerk. Texas has such a prohibition.

In the case of Biencourt v. Parker, 27 Texas 558, the court held that the offices of notary public and county clerk were incompatible, and when a notary became a county clerk his office as notary would be thereby terminated.

We are of the opinion from the foregoing that the law permits a notary public to take acknowledgments of persons for supporting affidavits or statements showing age to obtain a marriage license, and such notary is entitled to the fee for such service as provided by the statute.

It is our further opinion that a deputy circuit clerk may hold a notary commission. And it is our further opinion that if a deputy circuit clerk holding a notary commission, takes such acknowledgments, herein considered, as a notary public, then he would not have to account to the circuit clerk for the fees which are obtained for such notary services.

Wood vs. Kansas City, 162 Mo. 303.

Bear in mind, however, that this opinion is limited solely to your inquiry and the facts assumed, and if a deputy circuit clerk notarizes papers that the statute provides should be acknowledged by the circuit clerk, then in that event such deputy should acknowledge same as provided by law and account for the fees.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General.

APPROVED_____
Attorney General.

JLH:MM