SALARIES AND FEES: Circuit clerk and ex officio recorder is not entitled to retain fees for issuance of marriage licenses if by so doing he receives in compensation more than the annual salary as defined in Sec. 11786, R. S. Mo. 1929.

11-13

November 7, 1935.

FILED
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Honorable Lee Mullins,
Prosecuting Attorney,
Atchison County,
Rock Port, Missouri.

Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

> "The County Court of my County have asked me to write to you for an opinion in regard to Recorder's Fees for issuing marriage licenses, and the recording of the marriage certificate returned to his office.
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> "It seems that formerly the Recorders were permitted to retain all such fees as thereon and did not account to the County Court for any such.
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> "Our present Recorder, who by reason of the recent consolidation act, is also the Circuit Clerk, is contending that he should be permitted to retain all fees collected connected with marriage licenses.
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> "The County Court is asking your opinion upon this proposition, which they hope to receive soon."

Section 2979, R. S. Mo. 1929, provides:

> "The recorder shall record all marriage licenses issued in a well-bound book kept for that purpose, with the return

thereon, for which he shall receive a fee of one dollar, to be paid for by the person obtaining the same."

The Legislature has passed a law consolidating the office of circuit clerk and recorder in certain counties. The section relating to fees, being Section 11786, Laws of Missouri, 1933, page 369, is as follows:

"The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. In counties having a population of less than 7,500 persons, the sum of $1000.00; in counties having a population of 7,500 and less than 10,000 persons, the sum of $1100.00; in counties having a population of 10,000 and less than 12,500 persons, the sum of $1300.00; in counties having a population of 12,500 and less than 15,000 persons, the sum of $1500.00; in counties having a population of 15,000 and less than 17,500 persons, the sum of $1700.00; in counties having a population of 17,500 and less than 20,000 persons, the sum of $1900.00; in counties having a population of 20,000 and less than 25,000 persons, the sum of $2100.00; in counties having a population of 25,000 and less than 30,000 persons, the sum of $2300.00; in counties having a population of 30,000 and less than 70,000 persons, the sum of $2500.00; in counties having a population of 70,000 and less than 80,000 persons, the sum of $3000.00; provided, that in any county wherein the clerk of the Circuit Court is ex-officio recorder of deeds, said offices shall be considered as one for the purpose of this section; provided, further, that clerks of the Circuit Court shall be allowed to retain, in addition to the fees allowed under this section, all fees

> earned by them in cases of change of venue from other counties; provided, further, that, until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

Section 11808, Laws of Missouri, 1933, page 370, provides:

> "The last previous decennial census of the United States shall be the basis for determining the population of any county in this state, for the purpose of ascertaining the salary of any county officer for any year, or the amount of fees he may retain, * * *."

Section 11804, R. S. Mo. 1929, sets out the items of charge for recorders for their services.

Section 11785, R. S. Mo. 1929, sets out the charges permitted to the clerks of circuit courts and of courts of common pleas.

The charges authorized in Sections 11785 and 11804 are permitted and required to be paid and collected by the official. However, the amount of money collected by the official is not necessarily the amount of money that shall be paid to the official as compensation.

In the case of State ex rel. Troll vs. Brown, 146 Mo. 401, l. c. 406, the Supreme Court of this State says:

> "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 vs. 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 the case of State ex rel. vs. Gordon, 245 Mo. 12, l. c. 27, the Supreme Court of this State says:

> "Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed, but is incidental to the office.
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> "Throop on Public Officers (Sec. 443) says: 'It has been often held, that an officer's right to his compensation does not grow out of a contract between him and the State. The compensation belongs to the officer, as an incident of his office, and he is entitled to it, not by force of any contract but because the law attaches it to the office.'
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> "Mechem on Public Offices and Officers says: 'Sec. 856. Unless, therefore, compensation is by law attached to the office, none can be recovered. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously, and he cannot recover anything upon the ground of an implied contract to pay what the service is worth,' * * *
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> "In Bank v. Refrigerating Co., 236 Mo. 414, Brown, J., speaking for the court says: 'When the law requires a specific service to be performed by a public officer, he must perform that service regardless of whether any provision has been made to pay him for same.'

"Not only is the right to compensation dependent upon statute, but the method or particular mode provided by statute must be accepted. On this point the Kansas City Court of Appeals says: 'It seems the general rule in this country, as announced by the decisions and text-writers, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute. And further, it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or to any different mode of securing the same.' * * *"

And at page 29 the Court says:

"As the Legislature may fix such compensation to a public office as it sees fit, or none at all, we can see no constitutional objection to its attaching such conditions as it deems proper to the payment of the compensation, such conditions to be binding upon any one who thereafter enters upon such office and performs its duties. As stated above, the compensation has no relation to the amount or value of the service. There can be no application of the doctrine of quantum meruit. The officer takes the office cum onere. Having accepted it with the conditions imposed by the Legislature, upon whose will he must depend for any compensation at all, he cannot afterwards challenge the power of the Legislature to impose such conditions. * * * *"

In the case of King vs. Riverland Levee District, 279 S. W. 195, the Court says, l. c. 196:

"It is no longer open to question but that compensation to a public officer

> is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. * * * * * Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking vs. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

It will be noted that Section 11786, supra, has the provision "that in any county wherein the clerk of the circuit court is ex officio recorder of deeds, said offices shall be considered as one, for the purpose of this section."

Section 11814, Laws of Missouri, 1933, page 372, provides as follows:

> "It shall be the duty of the clerks of all courts of record to charge and collect, in all cases, every fee accruing to their offices under the provisions of sections 11785, 11787, and 11788, or of any other statute, except such fees as are chargeable to the county, and if such fees be not paid when due by the party liable for the payment, it shall be the duty of the clerk to forthwith issue a fee bill for same and place such fee bill in the hands of the sheriff of the proper county, who shall forthwith levy same on the persons liable therefor, or their sureties, as authorized and provided by section 11776. Such clerk shall, at the end of each quarter, file with the county clerk a report of all fees paid and accruing to his office during such quarter, stating the title of the case or on what account such fees

> were charged, together with the names of the persons paying or who are liable for same, with the names of all sureties, where security for costs has been required, and which report shall also show which of such fees have been paid and the total amount thereof, and what fee bills, if any, have been issued and for what fees and when placed in the hands of the sheriff for collection, and further stating that, after due diligence, he has been unable to collect the fees reported unpaid, and which said report shall be verified by the affidavit of such clerk. And quarterly such clerk shall pay into the county treasury the amount of any fees collected in excess of the sums permitted to be retained for services and pay of deputies and assistants, and every clerk shall be liable on his official bond for all fees collected and not accounted for by him as provided by law. It shall be the duty of the county court to examine such quarterly report and to require of the prosecuting attorney to enforce payment of all fees therein shown to be unpaid in any manner now or hereafter provided by law, and, to that end, such prosecuting attorney shall have authority, at any time, to direct the issuance of any execution or fee bill for costs in any case in which any costs accruing to the county are unpaid."

It will be noted that this last section requires that the clerk shall quarterly pay into the county treasury the amount of any fees collected in excess of the sums permitted to be retained for services and pay of deputies and assistants, and that the clerk shall be liable on his official bond for all fees collected and not accounted for by him.

The fees collected for the issuance of marriage licenses and the recording of the marriage certificate are official fees and would not and could not be collected by any other person than the person who at the time is the official.

Section 11786, supra, uses definite terms in stating that the aggregate amount of fees that any clerk of the circuit court shall be allowed to retain for any one year's services shall not in any case exceed the amounts in said section set forth. This section is the yardstick and measure by which the fees of the circuit clerk and ex officio recorder are gauged.

CONCLUSION

It is our opinion that the circuit clerk and ex officio recorder is not permitted under the law to retain fees collected by him for the issuance of marriage licenses, nor for the recording of the marriage certificate, if the retention thereof would enable such official to receive a greater amount of salary for the year than is set forth in Section 11786, supra.

Very truly yours,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

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