

RECORDER OF DEEDS: Fee must be paid or tendered to recorder before instrument entitled to record; Recorder not liable on his bond for neglect unless fee is paid or tendered.

January 22, 1937. 427



Honorable Chas. E. Murrell, Jr.,  
Prosecuting Attorney  
Adair County  
Kirksville, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of January 9, 1937, in which you request the opinion of this Department. Your letter is as follows:

"The Circuit Clerk and Ex-officio Recorder of Adair County has requested this office to obtain from you an opinion as to the construction and effect of Section 11566 R. S. No. 1929, when taken in connection with Sections 11564 and 11565. The question is this: Will the Recorder acting under Section 11566 in refusing to record any instrument when the fee allowed by law is not paid or tendered be liable for damages under Section 11564 and 11565?"

We shall set forth in their entirety the sections of the statutes referred to in your letter.

Section 11564, R. S. No. 1929, pertaining to the liability of the recorder for neglect of duty, provides:

"If any recorder to whom any deed or other writing, proved or acknowledged according to law, shall be delivered for record: First, neglect or refuse to make an entry thereof, or give a receipt therefor, as required by section 11546; or, second,

neglect or refuse to record such deed or other writing within a reasonable time after receiving the same; or, third, record any deed or other instrument in writing before another first brought into his office and entitled to be recorded; or, fourth, record any deed or other instrument of writing untimely or in any other manner than as herein before directed; or, fifth, neglect or refuse to provide and keep in his office such an index as is required by this chapter, he shall pay to the party aggrieved double the damages which may be occasioned thereby, to be recovered by civil action on the official bond of the recorder."

Section 11565, R. S. Mo. 1929, provides for the prosecution of the recorder under the criminal laws for willfully neglecting or refusing to perform any of the duties as required by this chapter or in willfully performing them in any other manner than is required by law; and also provides for forfeiture to the county in a sum not exceeding \$300.00 to be recovered by civil action; which section is as follows:

"If any recorder shall willfully neglect or refuse to perform any of the duties required of him by this chapter, or shall willfully perform them in any other manner than is required by law, he shall be deemed guilty of a misdemeanor in office, and proceeded against accordingly; and shall, moreover, forfeit and pay to the use of the county a sum not exceeding three hundred dollars, to be recovered by civil action."

Section 11566, R. S. Mo. 1929, provides:

"The recorder shall not be bound to make any record for which a fee may be allowed by law, unless such fee shall have been paid or tendered by the party requiring the record to be made."

Your question is, will the recorder acting under Section 11566 in refusing to record any instrument when the fee allowed by law is not paid or tendered be liable for damages under Section 11564 and 11565?

Corpus Juris, Vol. 53, p. 1081, Sections 38 and 40, says the following:

"In the absence of contrary statutory provisions, the register may demand payment in advance of his fees for performing a given service."

"Mandamus will not lie to compel a register to perform a duty pertaining to his office without payment of his fee therefor in advance, even though the fee demanded is claimed to be excessive, where it appears that relator is able to pay the fee and can recover the alleged excess by ordinary action."

Under the last quoted section of the statute, it is therefore our opinion that one desiring to have an instrument recorded in the recorder's office which is entitled to record, the required fee must first have been paid or tendered by the person presenting same for record to the recorder of deeds, and if such payment is not made or tendered as provided by Section 11566, supra, the recorder of deeds would not be liable by civil action on his official bond under Section 11564, supra, nor to the penalties under Section 11565, supra, for failure to record such instrument so presented for record.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney-General

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