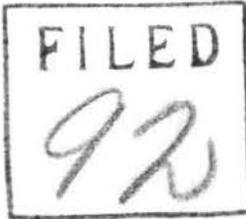


RECORDER:

The county is entitled to money collected by the recorder under color of office and authority.



August 4, 1953

Honorable Raymond H. Vogel
Prosecuting Attorney of
Cape Girardeau County
Cape Girardeau, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office which request reads as follows:

"I desire an opinion of your office with regard to the matters set out below.

"The Recorder of Cape Girardeau County was indicted in several courts for (1) violation of Section 59.200, RSMo, (2) failing to keep a full account of all fees received by him, particularly fees received from the preparation, sale and distribution of periodic lists of chattel mortgages and Deeds of Trusts, and failure to turn over to the county such fees; and (3) receiving fees from abstracters for permitting them to work in the Recorder's office. I believe you have copies of the indictment and you may want to refer to it for greater detail.

"Is the county entitled to be reimbursed by the recorder and his sureties for any monies received by the Recorder in violation of Section 59.200? Is the Recorder

Honorable Raymond H. Vogel

entitled to keep fees received from publishing lists of chattel mortgages, which lists were not issued in violation of Section 59.200? If he is not entitled to keep such fees, is the county entitled to be reimbursed for any such fees received and not accounted for by the Recorder?

"Is the county entitled to be reimbursed by the Recorder and his sureties for money paid to the Recorder by the abstracters, if such payments were illegal? If so, do the abstracters also have a cause of action against the Recorder for money illegally demanded and received from them? In other words, does Section 59.250 mean that the county is entitled to every kind of payment received by the Recorder, above the stated amount, whether it is a legally-established fee or not?

"If the county has a cause of action with regard to any of the matters stated in the above paragraphs, does the County Court have any discretion in compromising or settling such claims?"

You inquire broadly whether under the provisions of Section 59.250, RSMo 1949, a recorder is required to report all fees received by him to the county court and to pay such amounts as may exceed the sums allowed for compensation and deputy and clerical hire into the county treasury, irrespective of whether such fees are authorized or unauthorized. Related to the principal question is the question as to whether, as between the county and the officer, the county is entitled to fees collected although not under authority of law.

The particular fees about which you inquire are; (1) moneys received from persons for the privilege of examining and making memoranda or records on file in the recorder's office, (2) for the preparation, sale and distribution of chattel mortgage lists, (3) for the preparation, sale and distribution of lists of deeds of trust.

Prior to entering into a discussion of the issue presented, we wish to direct your attention to the case of Yuma County v. Wisener, 46 P. (2d) 115, in order that we may make reference to

Honorable Raymond H. Vogel

it later. Defendant was clerk of Superior Court in Yuma County and among his duties was that of issuing licenses to marry. For this duty said clerk was allowed a fee of \$2.00. When a non-resident of the state appeared before him to apply for a license to marry, he required them to fill out another document which had no sanction in law and was not a prerequisite to the issuance of the statutory marriage license. The defendant led the applicants to believe that the latter document was required and received a fee of \$2.50, making the total fee of \$4.50. Defendant, in rendering his accounts to the county would account only for the \$2.00 required by law for the marriage license and would retain for his own personal use the \$2.50. The County of Yuma brought suit against the clerk to recover the \$2.50 not reported, on the theory that; (a) it was a court "fee" within the meaning of the Constitution and statutes and that all fees collected by a public officer must be paid to the county; and (b) that the money so collected, even though it was not strictly "fee" within the purview of the Constitution and statutes, was nevertheless obtained by defendant under color of office as a "fee" and that he was therefore estopped from denying that it was such. In disposing of these opinions, the court in its opinion stated:

"So far as the first contention of plaintiff is concerned, we think it cannot be sustained. There is no authority whatever to be found in our law authorizing or permitting the clerk of the superior court to collect from applicants for a marriage license the \$2.50 which it is alleged defendant did collect from many nonresidents of Arizona, under the circumstances above set forth. Such being the case, the county cannot recover the money on the theory that it is a legal fee which defendant has collected by authority of law, and which he has not accounted for.

"But when it comes to the second contention the situation is very different. Color of office is defined as follows: ' . . . Acts done virtute officii are where they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done colore

Honorable Raymond H. Vogel

officii are where they are of such a nature that his office gives him no authority to do them . . . ' State v. Fowler, 88 Md. 601, 42 A. 201, 203, 42 L.R.A. 849, 71 Am. St. Rep. 452.

"There can be no question that if defendant by word or deed caused applicants for a marriage license to believe that in order to obtain such license the law required that the \$2.50 in question be collected by him as clerk of the court, that he was securing such money under color of office, as the words are generally understood, and it is the usual rule that where a public officer obtains money under color of office, which he had no legal right to collect, that he is not permitted in a suit to recover such sums, either from himself or his bondsmen, to contend that the state has no right to recover the money from him because it had not authorized him to collect it from the citizens whom he had deceived in regard to the law. City of Phillipsburg v. Degenhart et al., 30 Mont. 299, 76 P. 694; State v. Porter, 69 Neb. 203, 95 N.W. 769, 771; Kern County v. Fay et al., 131 Cal. 547, 63 P. 857; People v. Hamilton, 103 Cal. 488, 37 P. 627; People v. Van Ness et al. 79 Cal. 84, 21 P. 554, 12 Am. St. Rep. 134."

Section 59.250, RSMo 1949, provides as follows:

"The recorder in counties of the third class, wherein there shall be a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all fees received by him, over and above the sum of four thousand dollars except those set out in section 59.490, for each year of his official term, after paying out of such fees and

Honorable Raymond H. Vogel

emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury."

We have no hesitancy in stating that it is our opinion that this section only requires the recorder to account to the county court those fees which the office is by law authorized to collect. There exists no authority under our laws for the recorder in his official capacity to make the charges to which you refer and which are noted supra. You will likewise note that that is the holding in the Yuma County case.

As to whether or not the county may successfully maintain an action against the recorder to recover moneys received from persons for the privilege of examining and making memoranda of records on file, presents somewhat of a different question not connected with the duties of the recorder to account for such charges. The instruments on file in the recorder's office are public records and in the absence of a statute authorizing the official occupying the office to charge fees for the view of records, persons are entitled to inspect and make copies thereof without the payment of a fee. 76 C.J.S., Records, page 146. The recorder is under a duty (negative in character), not to interfere with this right of public inspection, subject only to the exception of the power to make reasonable rules and regulations governing the time and manner of inspection. As to the exceptions, see Upton v. Catlin, 17 Colo. 546. For the added work or inconvenience that may be incident to this inspection, the law allows no added fee or compensation. It is our opinion that charges which the recorder in the instant case made for the right to inspect the records was made under color of office and authority and he could be estopped to deny that such are legal or authorized fees. Certainly, in a suit brought by the county, the defendant should not be permitted to successfully offer a defense which would entitle him to profit for his unlawful acts.

We turn next to the charges made by the recorder for the preparation, sale and distribution of chattel mortgage lists and lists of deeds of trust. The recorder is under no duty to prepare, sell and distribute said lists. No statutory fees or charges are allowed for the work involved. Such is totally disconnected from any of the duties of the office. In fact, the recorder is specifically prohibited from making for profit or hire abstracts of instruments of records in his office, affecting title to lands, subject to a penalty for a misdemeanor. See Section 59.200, RSMo 1949. As has already been pointed out, the county is not entitled to be reimbursed for such moneys on the theory that these were fees which the recorder is required to account under Section 59.250, RSMo 1949, nor do we see how

Honorable Raymond H. Vogel

it can be logically contended that such moneys were collected under color of office so as to permit recovery by the county as was allowed in the Yuma County case.

You have inquired whether the abstracters who have paid fees to examine records on file have a cause of action against the recorder for money illegally demanded and received from them; however, since such question does not appear to involve the county or the official duties of the office of the prosecuting attorney, we must therefore decline to answer same. Section 27.040, RSMo 1949.

You next inquire whether the county court has any discretion in compromising or settling any claims that the county may have against the recorder as above discussed. The rule in regard to the authority of the county court to compromise claims owing to the county is stated in 20 C.J.S., Counties, Section 233, page 1114, as follows:

"* * *Also compromises and settlements of claims owing to the county, or litigation based on such claims, are generally upheld by the courts in the absence of a showing of fraud or collusion, * * * and provided the jurisdiction is not one in which the compromise of the indebtedness of an individual or corporation to a county is prohibited by constitution or by statute."

It is our opinion that the county court may, in their discretion, compromise claims against the recorder for moneys to which the county is entitled, subject only to the limitation that such compromise shall not be without consideration. (Section 39, Article III, Par. (5), Constitution of Missouri 1945).

CONCLUSION

Therefore it is the opinion of this office that a recorder in counties of the third class wherein there shall be a separate circuit clerk and recorder, is not required to account to the county "fees" which the office is not authorized to collect; however, we are of the opinion that the county in a proper proceeding may recover from the recorder moneys which was collected

Honorable Raymond H. Vogel

by said officer under color of office and authority, although not legally authorized.

We are further of the opinion that the county court may, in their discretion, compromise claims for moneys received under color of office.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON
Attorney General

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