

MARRIAGES - Four questions in regard to who issues
the license.

March 2, 1942

Hon. Paul E. Bradley
Prosecuting Attorney
Jasper County
Joplin, Missouri



Dear Sir:

This will acknowledge receipt of your request for
an opinion upon four questions based upon the following
facts:

"In this and surrounding counties we have a rather loose method of issuing marriage licenses. In this county the Recorder has designated a girl in Joplin as Deputy Recorder, but as I understand, she never does any work in the Recorder's office and receives no salary. The Recorder's office is at the county seat in Carthage. The Recorder signs marriage licenses in blank and leaves them with her, and then when couples appear before a Justice of the Peace for a marriage license, the Justice makes out the application and has it signed by the contracting parties and then presents the application to this so-called Deputy Recorder, who then fills out one of the blank marriage licenses then in her possession, which has already been signed by the Recorder.

"In some instances, I understand, in surrounding counties, a Justice of the Peace will call up a Recorder on the telephone and give him the

March 2, 1942

names of the parties who desire to be married, and say that the application has been signed, and then the Recorder says 'license issued', and the Justice then proceeds with the ceremony without having a license issued by the Recorder before him at the time the ceremony is performed.

"Growing out of this practice we have a lot of drunken Saturday night marriages, and it does not appear to me that this procedure conforms to the statute. I, therefore, would like your opinion as to the following questions: * * "

I

Your first question reads as follows:

"Must at least one of the contracting parties personally appear before the Recorder before the Recorder can issue a license?"

In answer to your question, we are herein enclosing an opinion rendered by this office to the Hon. B. D. Hardesty, Circuit Clerk, Lincoln County, Troy, Missouri, in which we held that it was discretionary with the Recorder of Deeds whether or not applicants for license are required to appear personally.

II

Your second question reads as follows:

"Can the Recorder appoint a person as Deputy, who in fact does not act as Deputy Recorder and is never present in the Recorder's office?"

In answering this question we are assuming that the person appointed is not a legally appointed deputy recorder, but is merely designated as a deputy.

Section 3365 R. S. Missouri, 1939, specifically states:

"The recorders of the several counties of this state, and the recorder of the city of St. Louis, shall, when applied to by any person legally entitled to a marriage license, issue the same,
* * * ."

There is no provision for the recorder to perform that duty by the designation of a person to issue licenses who is not a deputy recorder of deeds.

Since the above sections provide that only the recorder can issue the marriage license it cannot be issued in any other manner. This rule of law was set out in State ex rel. Kansas City Power & Light Co. v. Smith, State Auditor, 111 S. W. (2d) 513, l. c. 514, where the court said:

" * * * To uphold appellant in his contention would 'violate the well-known canon of statutory construction, viz. that the expression of one thing is the exclusion of another.' State ex inf. Conkling ex rel. Hendricks v. Sweaney, 270 Mo. 685, loc. cit. 692, 195 S. W. 714, 716."

Of course, a deputy recorder performs the same duties as the recorder.

CONCLUSION

It is, therefore, the opinion of this department that the recorder of deeds cannot appoint a person as deputy who is not a deputy recorder to issue marriage licenses.

III

The third question in your request reads as follows:

"Can a person who has been designated as Deputy Recorder charge a fee of more than \$1.00 for the issuance of a license?"

In answering this question, we are presuming that the person designated as deputy recorder, has been legally appointed to issue marriage licenses.

Section 3366 R. S. Missouri, 1939, reads as follows:

"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."

Under the above section the recorder of deeds receives a fee of one dollar to be paid by the person obtain-

ing the marriage license, for the purpose of the recording of such license. Some recorders of deeds require an application first to be signed, which is an affidavit giving them the general information as to age of parties, etc., before the marriage license is issued. There is no provision in the law for this application, but the recorder of deeds may require such an affidavit in order to protect him from the penal statutes concerning prohibited marriages as are set out in Sections 3370 and 3361 R. S. Missouri, 1939. This so-called "written application" for a marriage license is not a certificate under seal by the recorder of deeds, but is merely an affidavit.

Section 13181 R. S. Missouri, 1939, 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."

Under the above section the recorder shall receive a compensation for taking the affidavit of persons, the same as clerks of other courts of record. The clerks of courts of record are the county clerk and the circuit clerk. Under Section 13403 R. S. Missouri, 1939, the fee of the clerk of the county court for oath and certificate to an affidavit is twenty-five cents.

Section 13407 R. S. Missouri, 1939, provides that the clerks of the circuit court shall receive twenty-five cents for orders and certificates of affidavits. We are also aware of Section 13426 R. S. Missouri, 1939, which allows a recorder of deeds fifty cents for every certificate and seal, but the distinction between the two amounts is that a certificate certifies in the body of the certificate to facts given by the recorder of deeds, where the affidavit merely acknowledges the signature of a person swearing to the facts in the body of the affidavit. An affidavit is a declaration in writing, sworn to and affirmed by party making it before some person who has authority to administer oath, or an oath reduced to writing signed by party deposing and sworn before and attested by him, who has authority to administer same. (Guaranty Finance Corp. v. Ten Eyck, 74 S. W. (2d) 484.)

It has been held that an affidavit made by a father for the consent to issue a marriage license is not a certificate, but is merely an affidavit. It was so held in the case of State v. Rhine, 50 N. W. 676, 84 Ia. 169, where the court held when a person delivers to the officer whose duty it is to issue marriage licenses a paper purporting to be a request from the father of the girl to issue a license to marry her, such paper is not a "certificate," within Code 1873, secs. 3917, 3918, inflicting penalties for falsely making, altering, forging, etc., or uttering and publishing, any attestation or certificate of any public officer or other person in relation to any matter wherein such attestation or certificate is required by law, or may be received or be taken as legal proof, as section 2191 provides that, if either party is a minor, the consent of the parent or guardian must be filed in the clerk's office after being acknowledged by the said parent or guardian or proved to be genuine; and the writing contemplated by the section is not mere proof of a fact. It is the act or deed itself constituting the consent of the parent or guardian which must be filed with the clerk, and the proof of that consent is the acknowledgment of the person who gave it or other competent evidence.

In order that the recorder of deeds be allowed compensation for the issuing of a marriage license, or for

the payment of acknowledgments to affidavits, in reference to the marriage license, such as the application used for protection and affidavits as to age, etc., he must point out the law entitling him to that compensation. It was so held in *Smith v. Pettis County*, 136 S. W. (2d) 282, 1. c. 285, where the court said:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. *Nodaway County v. Kidder*, Mo. Sup., 129 S. W. 2d 857; *Ward v. Christian County*, 341 Mo. 1115, 111 S. W. 2d 182. * * * * *"

Also, in the case of *Nodaway County v. Kidder*, 129 S. W. (2d) 857, 1. c. 860, the court said:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. *State ex rel. Buder v. Hackmann*, 305 Mo. 342, 265 S. W. 532, 534; *State ex rel. Linn County v. Adams*, 172 Mo. 1, 7, 72 S. W. 655; *Williams v. Chariton County*, 85 Mo. 645."

CONCLUSION

It is, therefore, the opinion of this department that the recorder of deeds can only charge one dollar for the issuing of the marriage license and twenty-five cents for each acknowledgment of an affidavit in reference to the

information given the recorder of deeds for his protection in the issuance of the marriage license.

IV

Your fourth question reads as follows:

"Can a Recorder issue a license when the Justice of the Peace calls him up over the telephone and says application has been signed, and can the Justice of the Peace or any other authorized person marry a couple without having the license before him, duly issued by the Recorder, at the time the ceremony is performed?"

Most of this question has been answered by your first three questions.

Section 3371 R. S. Missouri, 1939, reads as follows:

"Any person who shall solemnize any marriage wherein the parties have not obtained a license, as provided by this chapter, or shall fail to keep a record of the solemnization of any marriage, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding five hundred dollars, and in addition shall be subject to a civil action by the parent, guardian or other person having care or custody of the person so married, to whom services are due wherein the recovery shall not exceed the sum of five hundred dollars;

and any recorder who shall issue a license contrary to the provisions of this chapter shall be subject to a like punishment."

Under this section any one who solemnizes a marriage, where the parties have not obtained a license as provided by this chapter, is guilty of a misdemeanor and subject to a civil action by the parents, guardian or other persons having care and custody of the persons so married. It also provides that the recorder of deeds shall be subject to like punishment.

CONCLUSION

It is, therefore, the conclusion of this department that a recorder cannot issue a license when the justice of the peace calls him up over the telephone and says the application has been signed.

It is further the opinion of this department that a justice of the peace is not authorized to marry persons without having before him the license duly issued by the recorder, at the time the ceremony is performed.

Respectfully submitted

APPROVED:

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