

RECORDER OF
DEEDS:

Recorder may appoint deputies with consent of the County Court and may set a reasonable salary without consent of the County Court. Recorder should account for and turn into the County Treasurer all surplus fees at the end of each year.

March 4, 1940

Mr. Marvin S. Carmichael
Associate Judge, County Court
Nodaway County
Maryville, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated February 24th, 1940, which reads as follows:

"I would appreciate your opinion in regard to excess fees of the County Recorder and the Recorder's deputies' salary.

"The Recorder in our County collected for the year 1939, \$9,680.05. Out of this amount \$4,000.00 was retained as the Recorder's salary and \$2,721.00 was paid out for deputy hire, leaving excess fees in the amount of \$2,959.05 to be turned over to the county. However, to date, only \$200.00 has been turned over to the County Treasurer, leaving \$2,759.05 unpaid. When should these excess fees be turned over to the county, each year when settlement is made with the County Court or at the end of the four year term?

"The Recorder's first deputy's salary was increased from \$100.00 to \$150.00 for the year 1939 without the consent of the County Court. Does the County

Court have the authority to set the deputy's salary and would it be possible to collect this excess deputy salary in the amount of \$600.00?"

Section 13, Article 9, Constitution of the State of Missouri, reads as follows:

"The fees of no executive or ministerial officer of any county or municipality, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of ten thousand dollars for any one year. Every such officer shall make return, quarterly, to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail, and verifying the same by his affidavit; and for any statement or omission in such return, contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

Under the above section, it will be noticed that every officer, which includes the Recorder of Deeds, shall make a return quarterly to the county court of all fees by him received. This section does not state that the Recorder of Deeds turn in the fees quarterly, but only states making return quarterly.

Section 11568 R. S. Missouri, 1929, reads as follows:

"The recorder of each county in which the offices of recorder of deeds and

clerk of the circuit court are separate 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 the fees received by him, over and above the sum of four thousand dollars, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury, to form a part of the jury fund of the county."

Under the above section the Recorder of Deeds of each county shall pay in to the county treasury every year surplus fees. This section is not ambiguous and the plain english language means that it is mandatory for the Recorder of Deeds to pay in to the county treasury all surplus fees to form a part of the jury fund of the county.

In view of the above section it is the opinion of this department that the Recorder of Deeds of Nodaway County shall, at the end of each year, pay in to the county treasury all surplus fees which have accrued after he has deducted his own salary of \$4,000.00, and for salaries of deputies and assistants in his office.

Section 11542 R. S. Missouri, 1929, reads as follows:

"In all counties wherein the offices of clerk of the circuit court and recorder of deeds have been or may be separated, the recorder of deeds may appoint in writing one or

more deputies, to be approved by the county court of their respective counties, which appointment, with the like oath of office as their principals, to be taken by them and indorsed thereon, shall be filed in the office of the county clerk. Such deputy recorders shall possess the qualifications of clerks of courts of record, and may, in the name of their principals, perform the duties of recorder of deeds, but all recorders of deeds and their sureties shall be responsible for the official conduct of their deputies. But no recorder now holding office shall appoint such deputy or deputies until he shall have entered into a new bond to the state in such sum, manner and form as is now required by law."

Under the above section the recorder of deeds may appoint in writing one or more deputies to be approved by the county court of the county. The above section does not say that the county court in its discretion may set the salary of the deputy. It has been held that the recorder of deeds may set a reasonable salary for deputies appointed by him.

In the case of *State ex rel v. King*, 136 Mo. 309, 1.c. 318, the court said:

"The constitution, while placing a limit upon the amount of fees ministerial officers of a county are allowed to retain, makes such amount 'exclusive of the salaries actually paid to his necessary deputies.' Section 13, article 9. The statute which was in force when the constitution was adopted limits the fees a recorder is entitled to retain to \$4,000 per year, and provides that all fees received by him over and above that amount 'for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants

in his office as the county court may deem necessary, shall be paid into the county treasury.'

"Under these provisions, is a recorder entitled, as a matter of right, to retain out of the fees of his office an amount sufficient to pay reasonable compensation to necessary assistants, or is the allowance left entirely to the discretion of the county court?

"The constitution is positive in its terms, and contains no words from which a discretionary power can be implied. The statute can not be given such construction as will cause a conflict with the constitution. The statute existing when the constitution was adopted would be repealed by such a construction. To give the statute effect, then, the word 'may' can not be given a meaning which could deprive the recorder of his right to an allowance for assistants if they were necessary to secure the proper and expeditious performance of the duties of the office. It is also a well recognized rule of construction that the word 'may' should be interpreted to mean 'shall' when referring to a 'power given to public officers, and (which) concerns the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner.' Such an interpretation is demanded 'for the sake of justice and the public good.' *Steines v. Franklin Co.*, 48 Mo. 178, quoting from *Newburgh Turnpike Co. v. Miller*, 5 Johns. Chy. 113.

"There can be no doubt that the public interest demands that the work required of a recorder should be done promptly, carefully, and well. A public officer is, by right, entitled to compensation for the labor performed, and it should also be measured to some extent by the responsibilities assumed. The statute regulates the amount of the fees the recorder is entitled to collect, and the presumption is that he fairly earns what he is allowed to charge. Four thousand dollars was fixed as the amount the recorder was capable of earning at the established charges; and, when the fees for work required to be done exceed that sum, it is a fair presumption that assistance would be necessary. If necessary, the constitution and statute clearly intend that assistants should be employed and paid.

"In construing a statute which provided that when a county officer receiving a salary is compelled, by pressure of business to employ a deputy, 'the county court may make a reasonable allowance to the deputy,' the court held that the county must pay a reasonable compensation for the necessary service rendered, and that payment was not discretionary with the county court. Bradley v. Jefferson Co., 4 G. Greene, 300. See, also, Washington Co v. Jones, 45 Iowa, 261.

"We are of the opinion, therefore, that the allowance to the recorder of reasonable compensation for necessary hire of assistants was not a matter of mere discretion with the county court.

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Mr. Marvin S. Carmichael

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In view of the holding in the above case, it is the opinion of this department that the recorder of deeds may set the salary of his deputy, if within reason, without the consent of the county court, and it is the opinion of this department that, unless it would be considered unreasonable, the county court cannot collect the \$600.00 which it considers an overpayment of the first deputy's salary.

Respectfully submitted

W. J. BURKE
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APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

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