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FEEES — COUNTY RECORDER — NO AUTHORITY TO CHARGE AND RECEIVE ANY FEES TO RECORD, FILE, INDEX AND CANCEL LIENS ARISING WITH EXECUTION OF CRIMINAL RECOGNIZANCE BY SURETY AS PROVIDED IN SECTION 13435-7 G.C. — LEGISLATURE FAILED TO MAKE SUCH PROVISION — COUNTY RECORDER NOT RELIEVED OF MANDATORY DUTIES IMPOSED BY SAID SECTION.

SYLLABUS:

1. *A county recorder is without authority to charge and receive any fees for recording, filing, indexing and cancelling liens arising with the execution of a criminal recognizance by a surety as provided in Section 13435-7, General Code, by reason of the failure of the Legislature to make provision therefor.*

2. *The failure so to provide does not relieve the county recorder of the mandatory duties imposed upon his office by the provisions of Section 13435-7, General Code.*

Columbus, Ohio, March 27, 1941.

Hon. John W. Howell, Prosecuting Attorney,
Gallipolis, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion on the following questions:

“Will you kindly advise me as to whether or not Section G.C. 2983 prohibits the payment of the recording and cancellation fees of such bonds as provided for in Section G.C. 13435-7.

In the event the treasurer is prohibited from paying the recorder for such fees is the clerk of courts authorized to add such fees in the criminal cost bill.

And in the event Section 2983 prohibits the collection of such fees by the recorder from the treasurer and the clerk of courts can not add such fees in his cost bill, who should such fees be collected from.”

Your inquiry is concerned with the collection by the county recorder of the fees referred to in Section 13435-7, General Code, for the recording, filing, indexing and cancellation of liens attaching to real property by reason of the execution of a criminal recognizance.

Section 13435-5, General Code, provides for the filing of a notice of lien as follows:

“ * * * Upon the acceptance by said judge or magistrate of such recognizance, containing such affidavit of justification, the said recognizance shall be immediately filed with the clerk of said court, if there be a clerk, or with the magistrate. The clerk of the court or the magistrate, as the case may be, shall forthwith, upon the filing with him of such recognizance, file with the recorder of the county in which such real property is located, a notice or (of) lien, in writing, in substance as follows:
* * *”

Provision for the cancellation of such lien is contained in Section 13435-6, General Code, which reads in part as follows:

“Whenever, by the order of such court, a recognizance as provided in the two next preceding sections shall have been cancelled, discharged or set aside, or the cause in which such recognizance is taken shall have been dismissed or otherwise terminated, according to law, the clerk of such court shall forthwith file with the recorder of the county in which the real property is located, a notice of discharge in writing, in substance as follows: * * *”

The duties of the county recorder with respect to the notice of lien and notice of discharge above referred to are outlined in Section 13435-7, General Code, which provides as follows:

“The recorder of the county in which the property of the surety is located, shall properly keep and file all such notices of lien and notices of discharge as hereinbefore provided, as may be filed with him, and shall keep in addition thereto, a book or record in which he shall properly index such notice of liens and notice of discharges, as they may be filed with him. Such recorder shall receive from the county treasurer such fees as are provided by law for such recording, filing, indexing and cancelling such liens to be paid on the certificate of the clerk approved by the court.”

It will be noted that this section authorizes the county treasurer to pay the county recorder “such fees as are provided by law for such recording, filing, indexing and cancelling” such liens. The statute itself

does not contain a schedule of fees and to my knowledge no such schedule exists in law. This statement is supported by two opinions of this office as follows: Opinion No. 817, Opinions of the Attorney General for 1929, Vol. II, page 1259, the syllabus of which reads as follows:

“The phrase ‘such liens,’ as used in Section 13435-7, General Code, refers to the lien described with particularity in the former part of the section and therefore the Legislature, by its language employed, failed to provide a fee for recording, filing, indexing and canceling the same.”

Opinion No. 168, Opinions of the Attorney General for 1933, Vol. I, page 196, the second syllabus of which reads as follows:

“2. The legislature by its language has failed to provide a fee for filing, indexing and canceling such liens. Opinions of the Attorney General for 1929, Vol. II, page 1259, approved and followed.”

The 1929 opinion, which was approved and followed in the 1933 opinion, was rendered within two months after the effective date (July 21, 1929) of Section 13435-7, supra. There have been several sessions of the Legislature since the rendition of the 1929 opinion and apparently the Legislature has not seen fit to express a disapproval of the holding in said opinion by amending the statute. The inaction in this regard on the part of the General Assembly may be considered as bolstering the opinions above referred to. In this connection it is said in Sutherland on Statutory Construction, page 391, as follows:

“The aid of contemporaneous construction is invoked where the language of a statute is of doubtful import and cannot be made plain by the help of any other part of the same statute, nor by the assistance of any act *in pari materia* which may be read with it, nor of the course of the common law up to the time of its enactment. Under such circumstances the court may consider what was the construction put upon the act when it first came into operation. Where this has been given by enactment it is conclusive. A contemporaneous construction is that which it receives soon after its enactment. This after the lapse of time, without change of that construction by legislation or judicial decision, has been declared to be generally the best construction. It gives the sense of the community as to the terms made use of by the legislature. If there is ambiguity in the language, the understanding of the application of it when the statute first goes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence

that it has been rightly explained in practice. A construction under such circumstances becomes established law."

It is an elementary principle of law that public officers possess only such powers as are expressly conferred by the Legislature or which may be implied from the express grants. It follows, therefore, that a county treasurer may pay and the county recorder may receive only those fees for "recording, filing, indexing and cancelling" which have been provided by law.

A situation similar to the one at hand was considered by one of my predecessors in Opinion No. 1199, Opinions of the Attorney General for 1920, Vol. I, page 517, the second syllabus of which holds:

"2. The fees chargeable by the clerk of courts are fixed by statute, and the legislature in the language used in Section 1295-29 relating to the fee, for such registry, failed to provide any fee for such purpose. However, the failure of the fee does not excuse the said clerk of courts from making said registry."

In support of his holding, the then Attorney General cited the cases of Clark vs. Commissioners, 58 O.S. 107 and Commissioners of Butler County vs. Welliver, 12 O.C.C. 440, wherein the courts held that statutory authority must exist for the payment of any fees or compensation to an officer out of public funds. He then went on to say, at page 519, as follows:

"While in the cases above cited the question involved the fees of the clerk of courts, which fees the clerk at that time received as a part of his compensation and the statute has been changed giving the clerk of courts a salary in lieu of all fees, it is believed that the principle is the same in so far as collecting the fees for services rendered to the public is concerned."

As stated above, the fees which may be charged and collected by a county recorder are statutory. Therefore, since it has been shown that the Legislature has failed to make provision for any fees to be charged by the recorder for recording, etc. liens arising out of criminal recognizances, I am of the view that such duties must be performed gratuitously.

Your request makes reference to Section 2983, General Code, which, after providing for a monthly accounting of fees, etc. collected by county officers, reads as follows:

“ * * * provided that none of such officers shall collect any fees from the county; * * *.”

By reason of the conclusion I have reached above, there is no need to consider the apparent conflict between Section 2983, General Code, and Section 13435-7, supra, in the matter of payment and collection of fees as between county officers.

It is accordingly my opinion that: (1) A county recorder is without authority to charge and receive any fees for recording, filing, indexing and cancelling liens arising with the execution of a criminal recognizance by a surety as provided in Section 13435-7, General Code, by reason of the failure of the Legislature to make provision therefor; (2) The failure so to provide does not relieve the county recorder of the mandatory duties imposed upon his office by the provisions of Section 13435-7, General Code.

Respectfully,

THOMAS J. HERBERT,

Attorney General.