

former opinion of this office set out above, should be overruled and the judgment of the Court of Appeals uniformly followed. You are advised therefore, that the dead body of a person who was a resident of a village within the township, and who was not an inmate of a penal, reformatory, benevolent or charitable institution in this state, and whose body is not claimed by any person for private interment at his own expense, or delivered for the purpose of medical or surgical study or dissection in accordance with the provisions of Section 9984, General Code, should be buried at the expense of the township in which the village is located.

Respectfully,

JOHN W. BRICKER,
Attorney General.

5136.

PROSECUTING ATTORNEY—NOT REQUIRED TO PAY FEES
SET FORTH IN SECTION 2778, G. C., TO COUNTY RE-
CORORDER, WHEN.

SYLLABUS:

A county recorder may not require the prosecuting attorney or his assistant to pay the fees set forth in Section 2778, General Code, at the time of application for certified copies of deeds and mortgages recorded in the recorder's office, when such copies are to be used as evidence by the State in the trial of a criminal case in such county.

COLUMBUS, OHIO, February 3, 1936.

HON. GEORGE L. LAFFERTY, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR: This will acknowledge receipt of your communication as follows:

“In the course of a criminal trial our office was required to procure from our County Recorder certified copies of deeds and mortgages to be used as evidence. The Recorder billed us for these certified copies, and the amount was paid out of the money coming to us through Section 3004 of the General Code. The Recorder wanted his money right during the course of the trial before he delivered the copies. His reason for so doing I do not know except that he wanted to have his records of receipts and expenditures checked for that day with the work actually done, so in order not to cause any friction we issued a check in payment for the same.

Since then we have been thinking about the matter, and felt that there surely must be some provision whereby a service like this could be rendered to the prosecutor in a criminal prosecution and the Recorder required to give the service gratis. We are wondering whether or not the provisions of Section 2983 wherein it provides for the various officers, which includes the Recorder, making certain reports of fees, and which states as follows: 'Provided that none of such officers shall collect any fees from the county', are broad enough to enable us to receive certified copies of records gratis in connection with our work in the prosecutor's office.

I presume that your office has already answered this question, and we will appreciate having a copy of any opinion thereon, and your unofficial opinion at least as to what you think about the matter, and if it is something that should be decided we would like to have your official opinion.

We are asking this because we have some criminal trials coming up in the near future where we will need quite a good many certified copies of records from the Recorder's office."

Sections 2772 and 2778, General Code, provide as follows:

"Sec. 2772. On demand and tendering the fees therefor, the county recorder shall furnish to any person a fair and accurate certified copy of any record in his office and affix his official seal thereto."

"Sec. 2778. For the services hereinafter specified the recorder shall charge and collect the fees provided in this and the next following section. For recording mortgage, deed of conveyance, power of attorney or other instrument of writing, twelve cents for each hundred words actually written, type-written or printed on the records and for indexing it, five cents for each grantor and each grantee therein; for certifying copy from the record, twelve cents for each hundred words. The fees in this section provided shall be paid upon the presentation of the respective instruments for record or upon the application for any certified copy of the record."

It will be noted that Section 2772, General Code, specifically provides that "on tendering the fees therefor", the county recorder shall furnish to "any person" a certified copy of "any record" in the office.

Also Section 2778, General Code, states that "for the services hereinafter specified, the recorder shall charge and collect the fees provided in this * * * section." The latter portion of such section, after provid-

ing a fee of twelve cents for each hundred words "for certifying copy from the record", recites that "the fees in this section provided shall be paid *upon the * * * application for any certified copy of the record.*"

It is to be observed that the fees for a certified copy of any record must be paid when application for such record is made. Also the statutes make no exceptions in favor of county or other officials who apply for certified copies of any record for use in connection with their official functions.

In 3 Corpus Juris, 249, the words "any person" are defined as

"All persons; anybody; any human being; every human being; every person."

In the case of *Radway v. Selectmen of Dennis, et al.*, 266 Mass., 329, 165 N. E., 410, decided by the Supreme Judicial Court of Massachusetts on February 28, 1929, it was held, as disclosed by the first paragraph of the syllabus (165 N. E., 410):

"1. G. L. c. 262, Section 38, requiring payment of fees of register of deeds when instrument is left for recording, applies to municipal officers with reference to instruments required to be recorded by city."

An examination of Section 38 of Chapter 262 of Annotated Laws of Massachusetts, shows that it provides:

"The fees of registers of deeds except as otherwise provided, to be paid when the instrument is left for recording, filing or deposit, shall be as follows:"

(Then follows setting out fees for described services.)

The court stated at page 411:

"By G. L. c. 262, Section 28, the fees of registers of deeds must be paid when the instrument is left for recording. The statutes make no exceptions in favor of municipal officers. They, as well as others, must comply with the mandate of the statute as to fees."

In Opinions of the Attorney General for 1927, Vol. III, page 2146, one of my predecessors had before him for consideration a somewhat analogous question. The syllabus of such opinion holds:

"1. When right of way deeds are executed and delivered to the state and are filed with a county recorder by a state department for recording, as provided for in Section 267, General Code, it is the duty of such department to pay to the county recorder the proper recording fees.

2. When right of way deeds are executed and are delivered to the state and filed by the Board of County Commissioners, as provided for in Section 267, General Code, it is the duty of such Board to pay to the county recorder the proper recording fees."

At page 2147, it is stated:

"Section 2778, *supra*, is a general statute and it is a well settled rule of statutory construction 'that the general words of a statute do not include the state or affect her rights unless she be specially named, or it be clear and indisputable from the act that it was intended to include the state.' (Sedgwick on Statutory Construction, page 337.) Again it is said 'a government, making laws for its subjects, will not be presumed to be binding itself by them, unless this intent affirmatively appears.' (Bishop on Written Laws, Par. 102.)

The above rule of statutory construction would be determinative of the instant question were it not subject to certain exceptions. One well established exception is 'the usage of the departments and officers of the government under a statute within their special cognizance, especially when long, and uniformly acquiesced in, has almost controlling force with the courts.' (Bishop on Written Laws, Par. 104.)

It has long been the policy of the courts in construing old statutes, that contemporaneous construction, as evidenced by usage, will not be departed from without most cogent reasons. If the construction is doubtful, usage will control. See *Chestnut v. Shane's Lessee*, 16 Ohio, 599, 607.

As was said by Chief Justice Nichols in *Industrial Commission v. Brown*, 92 O. S. 309 on page 311:

'Administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative so to do.'

Statutes similar to Section 2778, *supra*, providing for fees to be paid to county recorders upon the filing of deeds have been

on the statute books of Ohio for over seventy-five years. Prior to the enactment of the salary law (98 v. 89), these and other fees constituted the sole compensation of county recorders. During that period under the fee system county recorders were paid only for work actually done and they were paid for work done for the state as well as for other work. It is unnecessary to consider the reasons why county recorders under the fee system were entitled to be paid for work done for the state. Suffice it to say, subsequent to the enactment of the salary law the practice has continued.

Upon investigation I find that it has been the uniform practice for county recorders to charge the state the prescribed recording fees and it has been the custom for the state to pay the same. For example, the Department of Highways and Public Works has a fund out of which it pays for the recording of right of way deeds which it acquires for the state."

It is to be kept in mind in considering your question that the *State* is undoubtedly the party benefited by the obtaining of the copies of the deeds and mortgages to be used in the prosecution of a criminal case. The prosecuting attorney is acting for the State in prosecuting a criminal case, even though he is a county officer and is performing a duty placed upon his office by the statutes. See Section 2916, General Code.

Hence, the analogy of the foregoing opinion seems quite clear. If the county recorder shall charge for the service of filing a right of way deed for the State, it would certainly seem to follow that he should charge for the service of furnishing a certified copy of the records of his office, i. e., deeds and mortgages for the State, when such are to be used as evidence in a criminal case upon behalf of the State.

However, as you intimate in your letter, it would seem that the provisions of Section 2983, General Code, are to be read in connection with the provisions of other sections of the General Code, including Sections 2772 and 2778, *supra*.

Section 2983, General Code, was last amended in 1919 (108 O. L., Pt. 2, p. 1217). Such section reads as follows:

"On the first business day of each month, and at the end of his term of office, each of such officers shall pay into the county treasury, to the credit of the general county fund, on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office during the preceding month or part thereof for official services, provided that none of such officers shall collect any fees from the county; and he shall also at the end of each calendar

year, make and file a sworn statement with the county commissioners of all fees, costs, penalties, percentages, allowances and perquisites of whatever kind which have been due in his office, and unpaid for more than one year prior to the date of such statement is required to be made.”

The clause you quote in your communication was inserted therein at that time.

At least two former attorneys general have commented upon the meaning to be placed upon this phrase of the just quoted section. In the first of these two opinions, to be found in Opinions of the Attorney General for 1921, Vol. I, page 320, it was held, as disclosed by the syllabus :

“Section 2983, G. C., as amended in 108 O. L., Part II, page 1217, impliedly repeals Section 5372-4, G. C., in so far as the latter section provides for the collection of fees by county officers from the county.”

Section 5372-4, General Code (since amended), provided at that time that the probate judge of a county, as well as some other officials, shall annually deliver to the county auditor a written statement showing names of all administrators, etc., in control of an estate in his court, together with the aggregate value of all classes of property in their hands, and for this service, such judge shall receive ten cents for each certified estate payable out of the county treasury. It was held, as disclosed by the syllabus, that the provision of Section 2983, General Code, quoted in your communication, repealed by implication the fee provision of the then Section 5372-4, General Code.

In the opinion at page 320, after setting forth in quotation the phrase of Section 2983, referred to, it was stated :

“the later section (2983) says that no fees of any kind shall be paid such officers (which includes a county recorder, see Section 2977, General Code, amended in the same act that amended G. C. 2983) from the county.” (Words in parentheses mine.)

After setting forth the history of the statutes in *pari materia* with Section 2983, General Code, before its last amendment, it is further stated :

“Considering the history of these sections, it is concluded that in this later negative statute, 2983, the legislature had in mind the special object of charging off, if it may be so expressed, the fees theretofore collected, under special fee statutes, as well as

general fee statutes from the county, and to thus dispense with such unnecessary bookkeeping transactions which under the new policy would have no practical effect.”

It was then concluded that the question asked therein should be answered in the negative, i. e., the officials enumerated in the then Section 5372-4, General Code, were no longer entitled to the fee provided by the section. In other words, the intention of the legislature, as interpreted by such opinion, seemed to be to eliminate the necessity for the payment of a fee to a county officer for a statutory service in instances where remuneration for such service was to come from the county treasury and in turn to be paid into the county treasury by the officer performing the service.

In the other opinion, Opinions of the Attorney General for 1929, Vol. II, page 1259, Section 13435-7, General Code, was being considered. Such section provides in short for the county recorder to file the notices of liens and notices of discharge as provided by the immediately preceding sections and stipulates that for such services he shall receive from the county treasurer such fees as are provided by law for such filing, etc., on the certificate of the clerk, approved by the court.

In such opinion, it was held as disclosed by the syllabus:

“The phrase ‘such liens’, as used in Section 13435-5, 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.”

At page 1261, it was stated:

“Another angle that gives rise to some difficulty in connection with your inquiry is as to the purpose of requiring a fee under such circumstances. Section 2983 of the General Code requires each county officer to pay into the county treasury all fees, costs and penalties collected by his office and further expressly provides that no such officer shall collect any fees from the county. The Legislature in the enactment of the provision under consideration certainly did not intend that any fees to be charged were to be retained by the recorder. The fact that the same are authorized to be collected would seem to be inconsistent with the provisions of said section in so far as it authorizes the payment out of the county treasury. In any event, if the statute under consideration can be said to provide for a fee, which the recorder is authorized to collect from the county treasurer, it

follows that he would have to again return it to the county treasury in pursuance of the provisions of Section 2983.

While the question as hereinbefore indicated is not free from doubt, I am of the opinion that in the language used the Legislature has failed to provide for the collection of fees from the county treasurer for the recording, filing, indexing and canceling of the lien provided for under Section 13435-5 of the General Code. As hereinbefore pointed out, in the final analysis the results are the same in so far as the financial status of the county is concerned, because if said fees were collected they would have to be returned to the county treasury."

As suggested in the foregoing opinions, it would seem that no good purpose would be served if the county recorder were to collect fees for such services as are set forth in your communication. While, as stated in a preceding paragraph, the prosecuting attorney is acting for the State, in prosecuting a criminal case, yet the source of the money with which payment is made, for the evidence to make a case, comes from the general fund of the county. Even though the 3004 fund is turned over in a lump sum to the prosecuting attorney, to be spent by him personally, subject to an accounting at the end of the year, it indirectly comes out of the county treasury. There is no question but that the prosecuting attorney is legally performing his official function of prosecuting criminals for the State, and is properly acting in the county's interests when obtaining necessary evidence.

Section 3004, General Code, states that the amount allowed the prosecuting attorney is "for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for", and is payable out of "the general fund of the county." Section 2983, General Code, quoted, *supra*, states that the fees collected by county officers (including the county recorder) shall go into the county treasury to the credit of the general county fund. Hence, if a fee were to be collected by the county recorder for such a service as described by your communication, the effect would be that it would come from the general fund only to be returned therein, as pointed out in the two former opinions of the Attorney General, which certainly the legislature could not have intended by the language of Section 2983, General Code, in question.

Thus the provision of Section 2983, General Code, under discussion, operates as an exception to the provisions of Sections 2772 and 2778, heretofore quoted, in so far as your question is concerned. The 1927 opinion is distinguishable, because, as pointed out therein, the money for paying for the filing of the right of way deeds comes from the state treasury.

I am therefore of the opinion that a county recorder may not require the prosecuting attorney or his assistant to pay the fee set forth in Section 2778, General Code, at the time of application for certified copies of deeds and mortgages recorded in the recorder's office, when such copies are to be used as evidence by the State in the trial of a criminal case in such county.

Respectfully,

JOHN W. BRICKER,
Attorney General.

5137.

SALES TAX—DISTRIBUTION OF COUNTY'S SHARE OF
"LOCAL GOVERNMENT FUND" ALLOCATED TO COUNTY
FROM SALES TAX REVENUE.

SYLLABUS:

Under the provisions of section 5546-20, General Code, as this section is amended in House Bill 572, 116 O. L., Part II, first special session, ten percent of that part of the "local government fund" allocated out of the proceeds of the sales tax to a county having a population of less than one hundred thousand, is to be set aside for distribution to the townships in the county in the aggregate, and this amount of money is to be distributed to the several townships in proportion to their several needs as determined by the Budget Commission.

Inasmuch as the statute expressly states the percentage of the amount of the local government fund allocated to the county that is to be distributed to the townships therein, the amount of money fixed by this percentage is at once the maximum and minimum amount that may be distributed to such townships or to any of them.

COLUMBUS, OHIO, February 4, 1936.

HON. HOWARD S. LUTZ, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR: This is to acknowledge the receipt of your recent communication in which you refer to section 5546-20, General Code, as the same was amended in House Bill 572 recently enacted by the 91st General Assembly, and in which communication you request my opinion upon certain questions therein stated which arise with respect to the construction to be placed upon certain provisions of this section which, among other things, provides for the distribution of the county's share of the "local government fund" allocated to such county from the proceeds of the