

Note from the Attorney General's Office:

1934 Op. Att'y Gen. No. 34-2596 was overruled
by 1982 Op. Att'y Gen. No. 82-022.

2596.

PROBATE JUDGE—FEE COLLECTED FOR SELLING MARRIAGE CERTIFICATES PERSONAL NOT OFFICIAL ACT—SUCH SALE NOT PROHIBITED BY STATUTE—COUNTY MAY NOT RECOVER FUNDS SO COLLECTED WHEN.

SYLLABUS:

1. *Any fee or money collected by the person filling the office of Probate Judge for selling so-called marriage certificates, is a fee collected for a personal and not an official act, and there is no statutory inhibition against the sale of such marriage certificates.*

2. *In the event that such marriage certificates are sold to the public by the person filling the office of Probate Judge, and are purchased voluntarily, the remuneration received could not be recovered for the use of the county treasury.*

COLUMBUS, OHIO, April 28, 1934.

HON. FRAZIER REAMS, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion which reads as follows:

“Section 10501-42 of the General Code of Ohio provides for a fee of \$1.00 to be charged by the probate court for services rendered ‘for administering oath to application for marriage, and granting marriage licenses under seal, recording the certificate of marriage, filing and indexing.’

In 1906 the legislature, for the purpose of abolishing the fee system of compensation, passed the salary act which (as amended in 1909), requires public officials to pay all fees into the county treasury and to receive certain salaries in lieu of such fees.

G. C. 2977 provides that all fees etc. ‘collected or received by law as compensation for services by a * * * probate judge’, shall be held as public money.

G. C. 2978 provides that the probate judge ‘shall charge and collect the fees * * * allowed by law’.

G. C. 2983 provides that each county officer shall pay into the county treasury all fees of whatever kind collected by his office ‘for official services’.

G. C. 2996 provides that the salaries received by county officials shall be instead of all fees, etc. ‘which any such official may collect and receive’.

Question:

(1) Under the above code sections can the Probate Judge legally charge an additional fee for selling lithographed or printed marriage certificate and retain this fee himself? (It is assumed that the purchase of this certificate by one procuring a license is entirely optional.)

(2) In the event that this additional service by way of a marriage certificate is demanded by the public and it is legal for the Probate Court to furnish this service, can the revenue so obtained be recovered for the use of the county treasury?

(3) Have the County Commissioners, under their general right of control over the building, or otherwise, the right to prohibit the use of the building for the sale by the Probate Judge of these certificates?"

The so-called "marriage certificate" to which you refer in your inquiry is, as I understand it, a printed or lithographed ornamental paper which is usually signed by the officiating minister and also by the witnesses to the marriage ceremony. There are no statutes providing for the issuance of any such marriage certificates, provision being made only for a fee of one dollar to be charged by the Probate Court for services rendered for administering oath to applicants for marriage, granting the marriage license under seal, and for the filing and indexing of the same. This is prescribed by Section 10501-42, General Code, and reads in part as follows:

"The fees enumerated in this section shall be charged and collected, if possible, by the probate judge and shall be in full for all services rendered in the respective proceedings.

* * * * *

23. For administering oath to application for marriage license, and granting marriage licenses under seal, recording the certificate of marriage, filing and indexing.....\$1.00

* * * * *

For a number of years, these so-called marriage certificates were furnished by the officiating ministers, the cost of the certificate being included in the fee charged for performing the marriage rites. At present many of them are sold by Probate Judges contemporaneously with the issuance of the marriage license. The only document or paper which the law requires the Probate Judge to issue or give to the parties to be married is the license and after the marriage the law neither provides for nor requires a Probate Judge to issue or give to them any document or paper whatsoever. In the sale of such certificates the Probate Judge is acting in a private capacity and not in his official capacity, as there is no provision made by the General Code of Ohio for the issuance of such certificates, and public boards and officers have only those powers and duties as are imposed by law. *Elder vs. Smith*, 103 O. S. 369, 370; *State, ex rel. Copeland vs. State Medical Board*, 107 O. S. 20.

The Probate Judge could not be compelled to furnish such marriage certificates, and if the person who fills the office of Probate Judge does furnish such, it is not his official act but a personal act and the charge for such certificate is not an official charge; nor are these marriage certificates "certified copies" of the records of the Probate Court or official documents which may be admitted in evidence.

It is not within the province of my office to judge or pass upon the propriety of the sale of such marriage certificates. Suffice to say that in some instances there is a demand for these certificates inasmuch as some persons are desirous of having a more elaborate document evidencing the fact of their marriage, either for display or sentimental reasons, while other persons purchase such certificates under the erroneous impression that such are required by law. Thus, the sales practice may be either pernicious or beneficial, depending upon the facts of each particular case. However, if there were a fraudulent representation made by the vendor, the law makes provision for the recovery of the money so paid by

the applicant by rescission of such contract of sale. Your request, however, states that it may be assumed that the purchase of this certificate by one procuring a marriage license is entirely optional, the payment being, in the legal sense, voluntarily made without duress or actual fraudulent representation, so I shall not treat further this aspect of the case. The General Assembly has passed no express statutory inhibition against the sale of these so-called marriage certificates by the Probate Judge and if social policy is inimical to such practice, it is their province so to do.

In Opinion No. 149, rendered under date of February 18, 1933, to the Prosecuting Attorney of Henry County, I held that a county recorder is not prohibited by the statutes of Ohio from obtaining or disseminating among business men information concerning the filing of chattel mortgages and liens and any remuneration so received is not required to be paid into the county treasury. The reasoning of that opinion is applicable to the present inquiry, it reading in part:

"I find in the statutes with reference to the duties of the county recorder, no legislative inhibition against his right to engage in other occupations than that of County Recorder."

My examination of the statutes with respect to Probate Judges fails to disclose any inhibition against the right of a Probate Judge to engage in other occupations than that of Probate Judge except Section 1706, 12854 and 12856, General Code, prohibiting him from practicing law. See Annual Report of the Attorney General for 1913, Vol. II, page 1142.

The question narrows itself down to whether or not the county is entitled to the money received from this salesmanship practice of one of its officers acting in a purely private capacity. This question has already been decided by court decision in the case of *State of Ohio, on relation of Thomas L. Pogue, Prosecuting Attorney of Hamilton County, Ohio vs. Leuders, Judge of the Probate Court of Hamilton County*, being case No. 152667, Common Pleas Court of Hamilton County, decided February 10, 1913. The right of the Probate Judge to sell these marriage certificates in his personal capacity was necessarily involved in that case and was assumed in the opinion. Judge Cushing in the course of his opinion interpreted Section 2977, General Code, to which you refer in your request. This section provides:

"All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, surveyor or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

Concerning the interpretation of this section, the court stated:

"The language of the section clearly indicates that the fees, costs, percentages, penalties and other perquisites are those *provided by law*. The sole power to fix what fee shall be charged by officials and the amount that such officials shall collect for a specified service, is vested in the legislature." Italics the writer's.)

The court further states:

"The only document or paper therefore which the law requires the Probate Judge to issue or give to the parties to be married is the license, and after the marriage the law neither provides for nor requires the Probate Judge to issue or give to them any document or paper whatever.

The ornamental paper (referring to the so-called marriage certificates) in question which has been given in some cases at the request of the parties, is an unofficial paper. It is not provided for by law. The Probate Judge could not be compelled to furnish it, and if the person who happens to be filling the office of the Probate Judge does furnish it, it is his personal and not his official act." (Parenthesis the writer's.)

The conclusion of the court is as follows:

"(1) The law does not provide for issuing an ornamental paper such as the one under examination.

(2) The Probate Judge could not be compelled by law to furnish such a paper.

(3) The statute provides for no fees for furnishing such a paper.

(4) Any fee or money therefore collected by the person filling the office of Probate Judge for furnishing such a paper is a fee or money collected for a personal and not an official act.

(5) The law requires only fees, charges, etc., provided by law to be turned into the public treasury, *and as the fees for this ornamental paper are not provided by law, it necessarily follows that the money collected therefrom is not to be turned into the public treasury, but is the property of the person receiving the same.*" (Italics the writer's.)

A careful examination of the cases in Ohio fails to disclose any other case on the subject, nor am I able to find any decision on the particular subject matter outside the state, so consequently my opinion is based upon the above court decision, although I do find substantiating cases in other states. For example, it is stated in *State vs. Holm*, 70 Neb. 606:

"A county officer is not required to account for and pay over to his county money received by him in payment for services performed for another, by private agreement, which are no part of the duties of his office, and which are not incompatible with, and are not included within, his official duties."

Also see *Bell vs. Martin, County Auditor*, 64 Ore. 519, 130 Pac. 1126.

I come now to a consideration of your third question with respect to whether or not the county commissioners, under the general right of control over county buildings, or otherwise, have the right to prohibit the use of the building for the sale by the Probate Judge of these marriage certificates. I assume that the sale of these certificates is in the courthouse in the rooms designated by the building commission to the Probate Judge. The board of county commissioners has, under the law, the general control and custody of public buildings of the county, and is charged with the care and maintenance thereof. *Dittrick vs. Barr*, 22 O. L. Rep. 289, motion to certify record overruled in 22 O. L. Rep. 241.

However, in Vol. 11 of Ohio Jurisprudence, pages 505 and 506, it is stated:

"There is a distinction, in respect to the question of control, between

*courthouses and other public buildings. (See State, ex rel. Bittikofer vs. Babst, 97 O. S. 64, 119 N. E. 136.) The county commissioners have full control over offices provided by them for the other county officers, but the judicial power is a separate and independent department of government, and when a building is erected, and the whole or a part thereof is provided or assigned by the building commission to the use of this independent department of government, such building, or such part as may be so assigned, naturally and necessarily comes within the control of that department; * * *. But they (referring to the county commissioners) have no discretion or authority to deprive the court of the use of any part of the building provided by the building commission for the administration of justice. (Dittrick vs. Barr, supra) And where courts for the purpose of administering justice, assert a claim of necessity for the use and occupation of certain rooms, this right of the courts is supreme, and must prevail." (Italics and parenthesis the writer's.)*

There is no question in my mind but that the county commissioners may not interfere with the portion of the courthouse assigned to the use of the judicial branch of the government as long as such space is devoted to the administration of justice. The basis upon which this principle is predicated was clearly recognized by the Supreme Court in its per curiam opinion in the case of *State, ex rel. vs. Babst*, cited by Ohio Jurisprudence, supra. At page 66, the court said:

"The judicial power is a separate and independent department of government, and when a building is erected, and the whole or a part thereof is provided or assigned by the building commission to the use of this independent department of government, such building, or such part as may be so assigned, naturally and necessarily comes within the control of that department, otherwise a conflict of authority might seriously impede the administration of justice."

It does not follow, however, that if a portion of the space assigned to the judicial branch of the government for the administration of justice were to cease to be used for that purpose, if such portion of space were not necessary for that purpose, and used for some purpose entirely foreign to the purposes of the judicial branch of the government, the commissioners would have no control whatsoever over that space.

In the instant case if the sale of these so-called marriage certificates is incidental and conducted in the probate court rooms or a portion thereof primarily used for carrying on the official work of the probate court, it is very probable that the courts would hold that the commissioners are powerless to interfere therewith. On the other hand if a portion of the space allotted to the probate court were to be definitely set off and used entirely for the business of selling these so-called marriage certificates, in my judgment it could be very validly contended that that space so set off ceased to be space allocated to the probate court for the administration of justice and had accordingly become space under the jurisdiction of the county commissioners. It is believed that a more specific answer to your third question may not be given.

Summarizing, it is my opinion that:

1. Any fee or money collected by the person filling the office of Probate Judge for selling so-called marriage certificates, is a fee collected for a personal

and not an official act, and there is no statutory inhibition against the sale of such marriage certificates.

2. In the event that such marriage certificates are sold to the public by the person filling the office of Probate Judge, and are purchased voluntarily, the remuneration received could not be recovered for the use of the county treasury.

Respectfully,

JOHN W. BRICKER,
Attorney General.

2597.

DEPOSITS—TAXABLE IN BANK UNDER CONSERVATORSHIP WHEN
—CONSERVATOR AUTHORIZED TO PAY SUCH TAXES AND DE-
DUCT SAME FROM DEPOSITOR'S RESTRICTED ACCOUNT.

SYLLABUS:

When there are deposits in a banking institution, which has been placed in the custody of a conservator, pursuant to the authority of Section 710-88a, General Code, on the day fixed by the Tax Commission of Ohio for listing deposits, at which time such deposits were restricted by order of the Superintendent of Banks, pursuant to the authority contained in Section 710-107a, General Code, such conservator is authorized by reason of the provisions of Section 5673-1 and 5673-2 General Code to pay such taxes and charge or deduct from the restricted account of each such depositor an amount equal to the tax paid by him thereon.

COLUMBUS, OHIO, April 30, 1934.

HON. I. J. FULTON, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads:

"With especial reference to Sections 5673-1, 5673-2, 5406 and 5324, each of the General Code of Ohio, I would appreciate your opinion as to whether or not deposits in banks under conservatorship on the day fixed by the Tax Commission of Ohio for the listing of deposits, and the payment of which said deposits was restricted by order of the Superintendent of Banks, are subject to taxation. If so, am I correct in the assumption that the Conservator should charge the restricted account of each such depositor with an amount equal to the tax thereon?"

Section 5324 General Code defines deposits as follows:

"The term "deposits" as so used, includes every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money, whether on demand or not, and whether evidenced by commercial or checking account, certificate of deposit, savings account or certificates of running or other withdrawable stock, or otherwise, excepting (1) unearned premiums and surrender values under policies of insurance, and (2) such deposits in financial institutions out-