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RECORDER, COUNTY — DUTY TO CHARGE FEES, RECORDING NOTICE OF LIEN FILED BY BUREAU OF UNEMPLOYMENT COMPENSATION AS PRESCRIBED BY SECTION 2778 GENERAL CODE PURSUANT TO SECTION 1345-4 (a) (4) GENERAL CODE, AMENDED SUBSTITUTE SENATE BILL 187, 94 GENERAL ASSEMBLY.

SYLLABUS:

It is the duty of a county recorder to charge the fees prescribed by Section 2778, *General Code, for recording a notice of lien filed by the Bureau of Unemployment Compensation pursuant to the provisions of sub-paragraph* (4), *paragraph (a) of Section* 1345-4, *General Code, as enacted by the* 94*th General Assembly, effective October* 1, 1941.

Columbus, Ohio, October 23, 1941.

Hon. H. C. Atkinson, Administrator,
Bureau of Unemployment Compensation,
Columbus, Ohio.

Dear Sir:

Your letter of recent date, requesting my opinion, duly received. Your communication reads:

> "The 1941 amendment to the unemployment compensation act contains a provision creating a lien for unpaid contributions and provides for the recording of such lien with the county recorder. There is no provision for a fee for recording this lien but the act does provide that when such delinquent contribution has been paid, the employer may file a notice of such payment and for recording such a notice the act provides a fee of $1.00 to be paid by the employer. These provisions are contained in Sec. 1345-(a)-(4), General Code.
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> We understand that the legislative committee considering the unemployment compensation act was of the opinion that there should be no charge for the filing of the lien but that the employer should pay the charge for the release thereof.

We understand that the Bureau of Inspection has advised recorders that they should charge a fee for recording this lien. We do not believe this is in accordance with the intention of the Legislature.

I therefore desire your opinion as to whether a recorder has a right to charge a fee for recording the lien notice provided for by the above section, or is he required to record it without a fee."

Properly to determine your question requires a consideration of subparagraph (4), paragraph (a), of Section 1345-4, General Code, as enacted by the 94th General Assembly and to which you refer in your letter, as well as Sections 2778, 2977 and 2983, General Code. These sections provide in part as follows:

Section 1345-4:

" * * * (4) Any contribution required to be paid under this act by any employer shall, if not paid when due, become a lien upon the real and personal property of such employer.

Upon failure of such employer to pay the contributions required to be paid under this act, the administrator of the bureau of unemployment compensation of Ohio shall file notice of such lien in the office of the recorder of the county in which it is ascertained that such employer owns real estate and personal property or either, and such lien shall not be valid as against the claim of any mortgagee, pledgee, purchaser, judgment creditor or other lien holder of record at the time such notice is filed. *Such notice shall be recorded in a book kept by the county recorder called the unemployment compensation lien record and indexed therein in an alphabetical index under the name of such employer.* When such unpaid contributions have been paid, the employer may record with the recorder of the county in which such notice of lien has been filed and recorded, notice of such payment, for which recording of notice of payment *the recorder shall charge and receive from the employer a fee of one* ($1.00) *dollar.*" (Emphasis mine.)

Section 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, typewritten 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 upon the application for any certified copy of the record.

Section 2977:

"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 monies belonging to such county and accounted for and paid over as such as hereinafter provided."

Section 2983:

"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; * * * "

Sections 2977 and 2983, General Code, are a part of what is commonly called the "salary law," which was passed upon by the Supreme Court of Ohio in the case of State, ex rel. Lyne, v. Kennedy, et al., 90 O.S., 75, 106 N.E. 773 (1914). At page 79, Judge Wilkins now Judge of the Federal District Court for the Northern District of Ohio, said: "Now let us examine the so-called 'salary law'," and proceeded to quote Sections *2977*, 2989, 2995, 2996 and *2983* of the General Code. He then laid down the law at pages 84 and 85 in the following language:

" * * * And they contend that it is absurd to say that the one statute allows him to draw the money out and the other requires him immediately to pay it back into the treasury. The simple answer to this contention is that the later statute commands that all the fees, allowances and other perquisites of the office granted by the former statute as the recompense of service in that office shall be collected by the officer as formerly, without remission or diminution, and by him paid into the treasury, and *in lieu thereof he shall receive an annual salary. This accumulation of fees, allowances, perquisites, etc., in the treasury, becomes a fund for the payment for such assistants in his office as may be needful to the proper discharge of its duties.*

This rational scheme was adopted as a convenient method

> of transition from the fee system to the salary system, without disturbing or diminishing the revenues of the office, which now go to the public treasury. The criticism which the defendants make upon the new system is essentially an animadversion upon the legislative policy of these statutes and nothing more. We have naught to do with that policy but to declare and enforce it. We cannot modify and cripple it, under the guise of interpretation, to appease the defendants' notions of its unreason or unfairness, however wise or otherwise the defendants may be in such matters. Statutes may be cut and shuffled and rearranged so as to appear incongruous. But this is not the proper method of legal construction. We must read them as they are phrased and arranged by the legislature. * * * " (Emphasis mine.)

I am informed that for many years it has been the administrative policy of the State and its departments and divisions, including the department of highways, the department of public welfare, the department of public works, the division of aid for the aged, etc., to pay the fees fixed by statute for the recordation of instruments entitled to record. In interpreting or construing a statute, it is a well settled rule that resort may be had, under proper circumstances, to the interpretation and construction given thereto by those charged with its application and execution. As stated at pages 698 and 699 of 37 Ohio Jurisprudence:

> "The construction placed upon a statute by executive departments or bureaus is not only persuasive, but is entitled to great respect, and should, perhaps, be regarded as decisive in a case of doubt or where the obligation imposed or the duty enjoined is not plain and specific. This is especially true in so far as that interpretation affects vested rights preserved or acquired under the act as so interpreted. Ordinarily, however, the construction of executive or administrative officers is not conclusive, either upon the courts or upon the state, particularly where there has not been uniform usage in regard to such interpretation."

Emphasis was placed upon this rule in an opinion of one of my predecessors in office, viz., Opinion No. 1215, Opinions, Attorney General, 1927, Vol. III, p. 1215. And of course it should be borne in mind that the administrative interpretation and construction here under discussion had to do with Section 2778 and cognate sections of the General Code, with which Section 1345-4, supra, is in pari materia. That is to say, it is the practical interpretation and construction for many years placed upon Section 2778 and other related and pertinent sections of the General Code, with which we are here primarily concerned.

The first branch of the syllabus of Opinion No. 1215 (1927) reads as follows:

"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."

In the body of the opinion it was said at page 2147 as follows:

"It is mandatory on the part of the state to record right of way deeds or easements in the proper county recorder's office, and the question is presented as to whether or not the state is required to pay the filing fees for said recording as is provided for in Section 2778, supra.

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 specifically 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 vs. Shane's Lessee, 16 Ohio, 599, 607.

As was said by Chief Justice Nichols in Industrial Commission vs. 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 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.
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> 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."

I am not unmindful of the holding in Opinion No. 5136, Opinions, Attorney General, 1936, Vol. I, p. 121, to the effect that 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." However, the conclusion of this opinion was grounded upon the provisions of Section 2983, supra, and the manifest absurdity of requiring the prosecuting attorney, who receives his expense money from the general fund of the county (Secs. 3004 and 3004-1, G.C.), to pay any portion thereof to the county recorder, who is required to pay into the county treasury all moneys collected by him by way of fees, percentages, allowances and perquisites of "whatever kind collected by his office," thus engendering additional and useless bookkeeping by the county prosecutor, the county recorder, the county auditor and the county treasurer. Indeed, in Opinion No. 5136 (1936) the then Attorney General extensively quoted with approval from Opinion No. 1215 (1927) and expressly distinguished the two opinions in these words:

> "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 distinguished, because, as pointed out therein, the money for paying for the filing of the right of way deeds comes from the state treasury."

It has been suggested that since that part of Section 1345-4, General Code, above quoted, fixes a fee of one dollar, to be charged and received from the employer for recording the "notice of payment" of the monies secured by the lien and prescribes no fee for recording such lien, it was

not intended that your Bureau should pay any recording fee. This suggestion is untenable, however, for the reason that while the general section (Sec. 2778, G.C.), relating to recordation fees, fixes a fee of twelve cents for each hundred words actually written for "recording mortgage, deed of conveyance, power of attorney *or other instrument of writing,*" nothing in Section 2778, supra, or any other section of the General Code, makes any provision for a fee for the recording of a "notice of payment" of the kind here involved other than the recently enacted Section 1345-4, Gneral Code, above quoted in part. See in this connection Opinion No. 168, Opinions, Attorney General, 1933, Vol. I, p. 196.

Moreover, you will observe that, as held in Opinion No. 900, Opinions, Attorney General, 1939, Vol. II, pages 1229, 1235, "it is specifically and expressly provided in Section 1345-2, supra, that the unemployment compensation fund, designated by the Legislature as the 'unemployment fund' is created 'to be administered by the state of Ohio without liability on the part of the state beyond the amounts paid into the fund and earned by the fund.' " As you shall have seen, it is required by Section 1345-4, supra, that the notice of any lien filed by your Bureau "shall be recorded in a book kept by the county recorder, called the unemployment compensation lien record and indexed therein in an alphabetical index under the name of such employer". Any such book must of course be provided by the county from county funds raised by taxation from the taxpayers of such county, just as the salaries of the recorder, his assistants and stenographers, the cost of maintaining a proper office with the necessary heat, light and other facilities, the cost of typewriters and office equipment, are also paid by the county; and it may well be that it was with these facts in mind that the 94th General Assembly did not see fit *expressly* to relieve the Bureau of Unemployment Compensation from paying fees to the various counties for the recording of notices of liens filed by such bureau, as provided in Section 2778, General Code.

For all of which reasons, and especially in view of the long administrative practice in this state, and the fact that a contrary conclusion would require the overruling of the opinions of two of my predecessors, I am constrained to hold that:

It is the duty of a county recorder to charge the fees prescribed by Section 2778, General Code, for recording a notice of lien filed by the Bureau of Unemployment Compensation pursuant to the provisions of

sub-paragraph (4), paragraph (a) of Section 1345-4, General Code, as enacted by the 94th General Assembly, effective October 1, 1941.

Respectfully,

THOMAS J. HERBERT,

Attorney General.