

32.

FEES—UNDER SECTION 2873 G. C.—WHERE CLERK OF COMMON PLEAS COURT OR HIS DEPUTY ADMINISTERS OATH—AFFIDAVIT OR PLEADING FILED—FEE PROVIDED BY LAW MUST BE PAID INTO COUNTY TREASURY.

*SYLLABUS:*

*When a clerk of the Common Pleas Court, or his deputy, administers an oath on an affidavit of verification to a pleading filed in his office, or any other affidavit, or performs any other service authorized by Section 2873, General Code, he must charge therefor the fee provided by law and pay the same into the county treasury.*

COLUMBUS, OHIO, January 31, 1927.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—I am in receipt of your inquiry requesting my opinion on the following:

“May a clerk of courts or his deputy, who is a notary public, administer an oath on an affidavit of verification to a pleading filed in his office, or any other affidavit, charge the fee provided by law for notary public and retain the same for his own use, or is he required to administer the oath as clerk or deputy, charge the fee provided by Section 2900 G. C., for taking an affidavit and pay such fee into the county treasury as provided by Section 2977 et seq., of the General Code?”

Section 2873 of the General Code, relative to the powers of the clerk of the Common Pleas Court, reads as follows:

“The clerk may administer oaths and take and certify affidavits, depositions and acknowledgements of deeds, mortgages, powers of attorney and other instruments of writing.”

Section 871, General Code, provides that the clerk may appoint one or more deputies; and section 9 of the General Code provides:

“A deputy, when duly qualified, may perform all and singular the duties of his principal. \* \* \*”

An examination of the statutes will disclose that the powers given to the clerk of courts and his deputy in section 2873, supra, are powers which may be exercised by a notary public. The only question, therefore, to be considered in answer to your inquiry is whether or not, notwithstanding the provisions of said section, said officer may exercise the power of a notary public and keep the legal fees for himself.

In this connection, it is well to consider Section 2899, General Code, which reads:

“The clerk of each of the courts shall exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law; and in the performance of his duties he shall be under the direction of his court.”

There are several sections of the General Code which fix the fees to be charged by these officers in the performance of their duties, and Section 2977, General Code, provides:

"All the fees \* \* \*, allowances and other perquisites collected or received by law as compensation for services by a \* \* \* clerk of courts \* \* \* 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."

The last part of the above quoted section refers to Section 2983, General Code, which provides for the payment of such moneys on the first business day of each month, and at the end of his term of office, into the county treasury. It can, therefore, readily be seen that the fees so collected can be, and are, used by the county for the purpose of paying at least part of the salaries of the officers.

An examination of these sections discloses the plain intent of the law to be, that when a clerk of the court, or his deputies perform any of the acts mentioned in Section 2873, it must be done as such officer. Even if we did not have the provisions of Section 2899, the answer would be no different. This last section is merely declaratory of the old principle of law which requires diligent service and common honesty on the part of the officer, and that his actions shall be for the interest of the public. To permit him to perform such services while holding said office under the authority of his commission of notary public, would deprive the public of the right to receive the fees provided by law for the performance thereof. It would permit him to collect fees for these services, and instead of paying them into the county treasury, as provided by law, to divert them to his own use.

In considering this question, and in interpreting the powers of such officers, the language of the Supreme Court of Ohio in the case of *State, ex rel, vs. Stone*, 92 O. S., 63, is pertinent:

"Mere technical rules of law or interpretation may be invoked to preserve the natural justice and substantial equities of a given case, but they should not be permitted to defeat or destroy the same."

To interpret the sections before us so as to permit the clerk to perform the service in question as a notary public and charge therefor, would, in effect, defeat the purposes of the sections relative to the powers and duties of such officers and their obligation to account for the fees collected for doing the same.

It is, therefore, my opinion that when a clerk of the Common Pleas Court, or his deputy, administers an oath on an affidavit of verification to a pleading in his office, or any other affidavit, or performs any other service authorized by Section 2873, General Code, he must charge therefor the fee provided by law and pay the same into the county treasury.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*