

1089.

COUNTY RECORDER—DUTY TO KEEP UP GENERAL AND SECTIONAL INDEXES—NO ADDITIONAL COMPENSATION.

SYLLABUS:

In counties where general indexes or sectional indexes of the records of the real estate in the county have been provided it is the duty of the county recorder to keep up such sectional indexes and he is not entitled to any compensation therefor, in addition to his regular salary.

COLUMBUS, OHIO, September 30, 1927.

HON. OTTO J. BOESEL, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication requesting my opinion, as follows:

“Many years ago the commissioners of this county had prepared for the county recorder’s office, a sectional index or rather an abstract of all conveyances affecting the real estate in the county, as well as the incumbrances thereon, said sectional indexes being prepared under the provisions of General Code Section 2766.

The county recorder of this county submits to me this question at this time: Is he entitled to compensation for the keeping up of this sectional index or abstract, or does his salary fixed by Sections 2995 and 2996 of the General Code, prevent him from receiving compensation for the continuation of this general abstract, from time to time?

The provisions of law relating to the sectional indexes or abstracts, to which I refer, may be found at Section 2766 of the General Code, and the law pertaining to the salary of the county recorder and the limitations thereto are found at Sections 2995 and 2996 of the General Code of Ohio.

In looking up the matter I find that the Supreme Court of Ohio, in the case of *State, ex rel. vs. Wickham*, 77 O. S., Page 1, in construing Section 2766 of the General Code, held that unless the county commissioners provided for the payment of a continuation of this abstract, the recorder was not obliged to continue the same without compensation.

However, I note that this case was decided prior to the enactment of the salary law, and I desire your opinion.

1. Do the provisions of General Code Sections 2995 and 2996 prevent the recorder from securing compensation for continuation of this general abstract?
2. Is it the duty of the county recorder to continue this abstract in the event you should conclude that he is not entitled to compensation therefor, or in other words, is it a part of his official duties as recorder of the county, to continue this general abstract?
3. If he is entitled to compensation for the continuance of this abstract, is it necessary that he make a contract with the county commissioners therefor?

4. If in your opinion he is entitled to compensation, are the county commissioners compelled to pay compensation therefor?"

Provision is made by Section 2995, General Code, for the payment of the salary of county recorders. Section 2996, General Code, reads as follows:

"Such salaries and compensation shall be instead of all fees, costs, penalties, percentages, allowances and all other perquisites of whatever kind which any of such officials may collect and receive, provided that in no case shall the annual salary and compensation paid to any such officer exceed six thousand dollars, except in the case of the probate judge whose annual salary shall not exceed nine thousand dollars."

Section 2995, General Code, was enacted in 1906 to become effective January 1, 1907. At the same time Section 2996, General Code, was enacted in the same form as it now stands, with the exception of the provision with reference to the limitation of the salary of the probate judge which was inserted in the amendment of 1921.

Prior to the enactment of the so-called salary law, as contained in Section 2995 and cognate sections of the General Code, a county recorder was compensated under what was commonly called the fee system. That is, the county recorder was permitted to charge, and keep for his own use, certain stipulated fees for the performance of the duties of his office. At that time provision was made by Section 2766, General Code, for the making of what was known as "general indexes" to the records of all real estate in the county, in addition to the "alphabetical indexes."

The statute provided in substance that when in the opinion of the county commissioners of any county, such "general indexes" were needed, and the county commissioners so directed, it became the duty of the county recorder to make such indexes for which he was allowed for each tract of land described the sum of five cents. At that time Section 2767, General Code, provided as follows:

"When brought up and completed, the recorder shall keep up the general indexes described in the next preceding section or any other indexes authorized by the county commissioners. He shall receive for indexing any lot or parcel of land 10c to be paid from the county treasury."

In 1911, Section 2766, General Code, was amended to read as it now reads, the important change in the statute being that when the commissioners in any county deemed it necessary to have prepared these "general indexes" or "sectional indexes" as they are called in the amended statute, instead of requiring the recorder to prepare them, bids should be received and a contract let therefor, to the lowest and best bidder. At the time of the amendment of Section 2766, General Code, in 1911, Section 2767, General Code, was amended to read as it now reads, to-wit:

"When brought up and completed, the recorder shall keep up the general indexes described in the next preceding section."

At the time of the enactment of the so-called salary law in 1906, provision was made to the effect that all county officers were required to pay into the county treasury all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office. This provision of law is now in effect and is incorporated within the provisions of Section 2983, General Code.

In the case of *State, ex rel. Lyne vs. Kennedy, et al.*, 90 O. S. 75, suit was brought by the prosecuting attorney of Morgan County for, and on behalf of the county, to

recover from the defendant, Kennedy, recorder of said county, the allowances made by the county commissioners to the said recorder for services rendered during the years 1908 and 1909 under favor of Section 2780, General Code, then Revised Statutes, Section 1158, which provided then, as now, for the payment of certain fees to a county recorder for transcribing records of other counties and defaced or injured records. The court held as stated in the syllabus :

1. "The salary law, Sections 1296-11 to 1298, Revised Statutes (now Sections 2977 to 3004, General Code), which commands that the county recorder shall receive as public money for the sole use of the county, and pay into the county treasury quarterly, all fees, costs, percentages, penalties, allowances and perquisites of whatever kind collected by his office as compensation for services, and that such officer shall receive out of the general county fund, a designated annual salary, which shall be instead of all such fees, etc., and all other perquisites which such officer may collect, forbids the recorder to retain for his own use and benefit any compensation awarded him by the county commissioners for making general indexes under favor of Sections 1154 and 1158, Revised Statutes (modified in Sections 2766 and 2780, General Code).

2. A county recorder who fails to pay over to the county treasurer, and appropriates to his own use, any money so collected and received by him, is liable jointly with his official sureties, to a suit upon his bond for the recovery of the money so retained, with interest from the end of the quarter in which such funds were collected."

In the course of the opinion the court said :

"It is true that in *State, ex rel., vs. Wickham*, 77 Ohio St., 1, Judge Davis states that 'These "general indexes" are to be made only when in the opinion of the county commissioners they are needed * * * ; but the power to direct and the obligation to pay are reciprocal ; for, while the recorder shall make the indexes when directed by the commissioners, the statute is just as imperative that he shall receive compensation.' This was true in 1907 when it was pronounced ; and it is true that this recorder, Kennedy, has received the allowed compensation. But the salary law has been enacted since Wickham's case arose in 1905, and the question before us is, May Kennedy keep the allowance or must he pay it into the county treasury, for he was under the salary law when he received it?

In view of the decision in *Thorniley, et al., vs. State, ex rel.*, 81 Ohio St., 108, he can not now retain for himself the perquisites and allowances which he could claim prior to the enactment of the salary law. As is said in that case, the former law, being incompatible with the later legislation, must yield to it because of the impracticability of harmonizing the earlier and later legislation so that they may be enforced together."

The terms of Section 2767, *supra*, are mandatory, and it is my opinion that in counties where general indexes or sectional indexes of the records of the real estate in the county have been provided it is the duty of the county recorder to keep up such sectional indexes and he is not entitled to any compensation therefor, in addition to his regular salary.

Respectfully,
EDWARD C. TURNER,
Attorney General.