

**Clerk of District Court, Fees in Land Matters. Land Cases Before Clerk, Fees for. Fees in Land Matters, Before Clerk of Court.**

The Clerk of District Court has a right to retain fees received by him in transacting land business under the laws of the United States.

April 12, 1915.

Hon. Chairman Board County Commissioners,  
Blaine County,  
Chinook, Montana.

Dear Sir:

The question relating to the liability to the county of a clerk of the district court for fees received by him in the transaction of land business under the laws of the United States, has been heretofore considered by this department, and a holding made to the effect that the clerk is not under the provisions of our statute, required to account to the county for such fees.

Opinions Atty. Gen. 1912-14, p. 316.

The Act of Congress of March 11, 1902 (32 Stat. 63) amendatory of Section 2294, Revised Statutes of the U. S., confers authority upon clerks and judges to take proof in land matters. Undoubtedly the purpose of this law was to permit persons desiring to initiate or complete proceedings for the acquisition of title to public lands, and as a matter of convenience, to make their proof before the clerk or judge of the court. Section 3112 of the Revised Codes, requires all officers to account to the treasurer for all fees, penalties or emoluments received by him "for any official service rendered by him." Under a somewhat similar statute, the Supreme Court of Idaho in *Rhea v. Board of Commissioners*, 88 Pac. 89, held that it was the duty of the clerk to account for fees received in land office proceedings. However, this decision of the Idaho court was based upon the principle announced in the case of *Finley v. Territory, (Okla.)* 73 Pac. 273, but this latter decision was declared in a later decision by the same court to have no application to officers of a state as distinguished from officers of a territory.

*Gardiner vs. State*, 110 Pac. 749.

Other decisions bearing upon the subject, such as *Claister vs. Board (Colo.)* 123 Pac. 955; *Keeling vs. Searcy Co. (Ark.)*, 114 S. W. 925, appear to be based wholly upon the overruled Oklahoma case, and upon the particular wording of the state statutes. The wording of our statute is "for any official service rendered by him." The question is then, whether the duties performed by the clerk is an official duty rendered by him as clerk, or whether it is labor performed by him in matters wholly independent of his official character as a county official. The rule for determining questions of this kind, has been heretofore established by the Supreme Court of the United States in *U. S. v. Hill*, 120 U. S. 169. The court following the language of an instruction theretofore given by Attorney General Devans of the United States, said:

"Whatever is done by you that you could not do if out of office, has an official color and significance that brings it within the compass of the language of the statute."

In other words, if in the discharge of the duty, it is necessary for the clerk to call into requisition any of the powers or authority possessed by him as a clerk of the court, then he must account for the fees, but the duties performed by the clerk in such matters might as well be performed by any individual not holding any office whatsoever. The authority conferred upon the clerk by the Act of Congress could just as well be conferred upon a private individual, as indeed is the case, for a United States Commissioner has the same authority, although he holds no state or county office whatsoever. The clerk in the discharge of these duties, acts wholly upon his own initiative as an individual. He is not required to preserve any record in his office as clerk, neither is he required to make any report to any state officer, board or department, but simply takes the proof, forwards them as taken to the United States Land Department. This case is very distinguishable from that of naturalization proceedings, for strictly speaking, the clerk has no authority to naturalize anyone. The naturalization is done by the court, and the clerk is the clerk of the court during naturalization proceedings, the same as he is during any other proceedings had by the court. He is required to keep a record of such proceedings in his office as clerk of the court. Hence, in all such matters, he is acting strictly within his power and duty, and calling into requisition the authority vested in him as clerk of the court, and could be compelled by an order of the court to discharge these duties.

While I am aware that there is some difference of opinion on this question, I am not prepared to say at this time that the former holding of this department should be reversed.

Yours very truly,

D. M. KELLY,

Attorney General.