

County Clerk, Office of, Transcribing Records. Comparing Records of New County, Fees For. New Counties, Comparing of Records of, Compensation For. Fees of County Clerk, When Belongs to County in Comparing Records.

Fees and compensation received by county clerk for comparing records of new county should be accounted for to county treasury.

December 8, 1915.

Hon. Stanley E. Felt,
County Attorney,
Glendive, Montana.

Dear Sir:

I am in receipt of your letter submitting the question relating to the method of procedure to be observed in collecting from the county clerk moneys received by him for comparing records for a new county?

This office, as stated in your letter, has heretofore held that such moneys should be paid into the county treasury. (Opinions Attorney General, 1912-14, p. 14). This opinion is based upon the general proposition that although it is within the power of the legislature to grant extra compensation to a salaried official, when extra duties are imposed upon him, yet, in view of the positive mandates of Section 3139 Revised Codes, 1907, such official is not entitled to such extra compensation unless that right is conferred upon him by specific enactment, or by necessary intendment. No such fact exists with reference to either Section 1864, Revised Codes, or Chapter 139, Laws of 1915; nor can a

salaries officer be permitted to claim exemption by reason of the alleged fact that he "worked overtime," or that he did the work "after office hours," for as to a public official, there is no such thing as "over time," or "after office hours." His official capacity and character continues throughout the entire day and night, and he cannot hold this official character in abeyance for any part of the twenty-four hours. The duty enjoined upon him in the comparison of these records is strictly an official act as county clerk. His labor in this regard is performed in the discharge of an official duty enjoined upon him by law, and his salary is fixed by law. Hence the provisions of Section 3139 and Section 3112, Revised Codes, in the absence of any positive or necessarily implied authority to demand or receive extra compensation, appear to be conclusive. It is true this department has heretofore held that a clerk of the court may retain fees received by him when taking proof in land cases to be transmitted to the Federal Land Department, but there is not any such duty enjoined upon the clerk of the court by state law, and it is optional with him whether he acts at all or not; and even in that case, I am inclined to think that this department has reached the limit in holding that the clerk may even retain such fees. The following cases have some bearing on the question here considered:

Barron Co. vs. Beckwith, 142 Wis. 519, 124 N. W. 1030;

Franklin Co. vs. Barnes, 68 Wash. 488, 123 Pac. 779;

Freeholders of Passaic vs. Slater, 90 Atl. (N. J.) 377;

San Francisco vs. Mulcrevy, 15 Cal. App. 11; 113 Pac. 339.

The Mulcrevy case, *supra*, was taken to the Supreme Court of the United States, and decided by that court on January 5th, 1914, in which, under a statute very similar to the provisions of Section 3112, Revised Codes of Montana, it was held:

"That the portion of fees retained under the act of Congress of June 29, 1906, Sec. 3592, 34 Stat. 596, by * * * clerk in naturalization proceedings should be accounted for by him to the county as public moneys."

Mulcrevy v. San Francisco, 231 U. S. 669.

Section 2864 prescribes and fixes the fee or compensation, which shall be collected by the county clerk for comparing such records, and this provision of the statute is not changed by the provisions of Chapter 139, Laws of 1913, relating to the creation, organization, etc., of new counties, for in Section 11 of this Chapter, it is provided:

"The said county commissioners shall have full power and authority to contract for transcribing records as now provided by law."

Nothing is said in this Chapter concerning the compensation to be paid the county clerk for comparing records. The statement contained in said Section 11, relates only to the authority of the Board to contract for transcribing the records, but is wholly silent as to the proposition for comparing those records after they have been transcribed.

We are, therefore, bound by the provisions of Section 2864, and in as much as the fees or compensation is there fixed, neither the county clerk, nor anyone else, has any authority to contract for either a greater or lesser compensation. In this connection, therefore, I would

suggest that the claim be made against the county clerk for the full amount claimed to be due the county, estimated at six dollars a day for the time actually employed by him and by his regular deputies acting in his name, place and stead in comparing such records, and if he adopted as his own act the comparison made by the agents of his own selection, that time also should be included. Your county, of course, can make no claim for the time spent by those who are acting as the agents of the other county and under pay from the other county. You can only claim that which is due the county by reason of the time spent by the county clerks office in making such comparison. Hence, your action should be for the full amount, and if the clerk thinks he is entitled to a set off, or to any reduction, in the amount from any cause whatsoever, he can make the claim in his answer, and the court may then determine it.

Yours very truly,

J. B. POINDEXTER,

Attorney General.