OPINION
69-246

August 21, 1969 (OPINION)

Honorable D. E. McCullagh

Judge

Cass County

RE: Officers - County Judge - Fees for Acknowledgments

This is in response to your letter in which you refer to previous correspondence and then state the following:

> The procedure followed here is as follows: The applicant makes application in this office by signing an application blank under oath and the Clerk or Judge acknowledges the signature thereon. The applicant and prospective spouse are then required to obtain a certificate for each from a physician. They are also advised to each obtain an affidavit of a disinterested party and the consent of the parent as required by age limitations. When the above is completed the license is issued and a charge of $1.00 is made for the application with the acknowledgment thereon and the $1.00 is turned over to the County. An additional charge of $.25 is made for each acknowledgment by the Judge, as Notary Public, on the affidavit of the disinterested party or parties and on the acknowledgments of the parent or parents consent forms and these fees are retained by the Judge as notary fees. Of course, if the affidavit of disinterested party or consent forms are taken from the office and signed and acknowledged elsewhere there are no charges made except the $1.00 for the application which is turned over to the County.
>
> It appears to me that it is your opinion that the above procedures relative to fees are in compliance with the laws but in the last paragraph of your June thirtieth letter you create doubt in stating 'the instrument acknowledged by the Judge, as a Notary Public may find its way back to the court over which the Judge is presiding' and next to the last paragraph of your letter of July eleventh wherein you refer to the additional cost of issuing a license and the exception from Section 37-08-08, which brings us back to the specific question: Is it contrary to law for the Judge of the County Court, acting as Notary Public, to acknowledge signatures on affidavits of disinterested parties and signatures of parents on consent to marriage forms, both connected with the application for a Marriage License, and retain the fee of $.25 for each acknowledgment?"

Your letter indicates to us that there was a lack of communication in our previous correspondence and in some instances additional facts were presented. Because of the nature of the question, it is necessary to review briefly all of the basic statutes and pertinent concepts that come into play. Section 44-05-01, subsections 1 and 2,

provide as follows, respectively:

> 44-05-01. OFFICERS AUTHORIZED TO ADMINISTER OATHS. The following officers are authorized to administer oaths:
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> 1. Each judge of the supreme court, each judge of the district court, the clerk of the supreme court, and his deputy;
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> 2. Judge of the county court, clerk of the district court, clerk of the county court, county auditor, register of deeds, and the deputy of each such officer within his county;
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> * * *."

The authority to administer oath is given to the judge by virtue of his office. The net legal effect is that the judge by virtue of being a judge of a county court is, by law, authorized to administer oaths and take acknowledgments. This necessarily includes the administration of an oath of the taking of an acknowledgment on marriage license applications.

Section 44-05-03 sets forth the fees which may be charged for performing such act and permits a charge of twenty-five cents for acknowledgments and ten cents for administering an oath.

There is considerable doubt in our minds that legal justification exists to qualify as a notary public merely to charge a fee as notary public where the same act may be performed in one's official capacity. The judge is, by law, authorized to administer oaths, therefore, no necessity or justification exists to also become qualified as a notary public so as to charge a fee for his services. In this respect, see also Section 44-04-17, which provides as follows:

> 44-04-17. VARIOUS OFFICERS' RESTRICTIONS - PENALTY. No public officer, member of any board, bureau or commission, nor any employee or appointee thereof, shall use his office or position for the purpose effecting the sale or purchase of any equipment, merchandise or service for which he will benefit financially. Any person violating the provisions of this section is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, and removal from office."

To our knowledge, the Supreme Court has not construed this provision.

In previous correspondence we indicated that we find nothing in the law which would prohibit a judge from also being a notary public. This statement, we believe, is valid but this statement was not intended to sanction a method whereby a judge would perform the same act as notary public instead of as county judge, simply for the purpose of permitting the charging of a fee. The statement that a county judge may also act as notary public was primarily meant to indicate that there was no incompatibility in holding the two offices and performing the respective functions under each.

Section 27-08-08, as amended by Chapter 282 of the 1969 Session Laws and as is material here in part provides as follows:

> * * * All fees collected for official acts as judge of the county court except fees charged for performing marriage ceremonies shall be deposited by the court into the county treasury of the county in which the court is located."

The foregoing quotation clearly indicates that the exception of one is to the inclusion of all other fees.

The administration of an oath and the taking of an acknowledgment is an official act of the county judge.

A similar question was under consideration in an opinion issued to the Honorable Judge, W. J. Austin, on April 21, 1969, relating to certified copies. In that opinion we recognized the holding of the North Dakota Supreme Court in Sargent County v. Sweetman, 29 N.D. 256, 159 N.W. 876, and Dickey County v. Austin, 61 N.D. 309, 237 N.W. 831, which, in effect, held that the making of certified copies was not an official act of the county judge. We also took note that the Court in the latter case said that the county judge was not entitled to fees for marriage licenses. We construe this to mean all fees connected or related to marriage licenses.

As pertaining to the amendments to Section 27-08-08, we must observe that the Legislature had already provided that fees for official acts be deposited in the county treasury under the provisions of Section 11-10-14. We must, therefore, recognize that there must have been a purpose in amending Section 27-08-08 as was done by the last Legislature, because it is presumed that the Legislature does not perform mere idle acts. In the opinion to Judge Austin we also took into account the official committee reports. The committee report for February 13, 1969, contained the following statement: "The intention of this bill is to cut out all fees except marriage fees and give him a decent salary. * * * This would be good until 1971. This would amount to something like three per cent per year. In some cases their salary will be less than they are getting with fees. The legislature has to set salaries. Escalator clause also mentioned. * * *."

As to the marriage license and fees, Section 14-03-17, as amended, provides as follows:

> 14-03-17. APPLICATION FOR LICENSE. When application is made to any county judge of this state for a marriage license, he shall inquire of the applicant upon oath relative to the legality of the contemplated marriage. He may examine other witnesses upon oath. The facts relative to the legality of the marriage may be submitted to the county judge by affidavit. The county judge also shall require each applicant to submit the following facts upon blanks provided by the county:
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> 1. An affidavit on some disinterested, credible person showing that the female is over the age of eighteen years and the male is over the age of twenty-one years. If the female is under the age of eighteen years or the male is under the

age of twenty-one years, the county judge shall require the consent of the parents or guardian, if any, to be given personally, or by a certificate of consent signed by such parents or guardian under oath, and sworn to before a notary public or other officer qualified by law to administer oaths;

2. An affidavit showing whether or not either or both of the parties have been divorced. If a decree of divorce has been granted to either or both of the parties a certified copy of the decree must be filed with the application. A license shall not be issued if it contravenes any provisions of the decree of divorce;

3. A certificate of a duly licensed physician other than the person seeking the license, showing that neither of the contracting parties is a person afflicted with any contagious venereal disease; and

4. An affidavit of a disinterested, credible person that the applicants are not habitual criminals.

All affidavits shall be subscribed and sworn to before a person authorized to administer oaths. The county judge shall retain on file in his office all papers and records pertaining to all marriage licenses. Anyone knowingly swearing falsely to the statements contained in any affidavit mentioned in this section shall be punished as provided in Section 14-03-28."

It is noted that under the first unnumbered paragraph rather an affirmative duty is imposed upon the judge when application is made for a marriage license. We recognize a distinction between the affirmative duty pertaining to the application and the information which may be submitted by an affidavit, particularly those matters outlined in subsections 1, 2, 3 and 4 of the above quoted section. The affidavits outlined in subsections 1, 2, 3 and 4 may be completed before some person authorized by law to take acknowledgments or administer oaths, but as to the duty imposed in the first sentence, it is one which must be performed by the judge and cannot be delegated to some other party. It becomes immaterial whether the judge will provide forms which must be sworn to or accept affidavits prepared elsewhere and submitted to him which cover the same material. The judge must still inquire upon oath relative to the legality of the contemplated marriage. The statute is silent as to how such inquiry shall be accomplished.

Because of this provision it appears to us that basic application as distinguished from the other items mentioned in subsections 1, 2, 3 and 4 is deemed an integral part of the process of issuing a marriage license and is included in the fee of one dollar pursuant to the provisions of Section 14-03-22 which, as is material here, provides as follows:

> * * For each license and the record herein required, the county judge shall be entitled to a fee of one dollar to be paid by the party applying for the license."

Under this concept the judge could not collect one dollar for the license and twenty-five cents for taking the acknowledgment on the basic application for a license.

The items referred to in subsections 1, 2, 3 and 4 of Section 14-03-17 which require the administration of an oath are not necessarily matters which must be performed by the judge and can be performed by any notary public and, as such, if performed by a notary public, a fee may be collected as permitted by the statutory provisions.

However, in accordance with the observations made herein, no legal justification exists for a county judge to act as a notary public in matters he is already authorized by law to act. Consequently, any fee collected by the judge relating to a marriage license would be required to be deposited in the county treasury.

It is, therefore, our opinion that where the judge of a county court of increased jurisdiction is authorized to act in such matters as administering oaths and taking acknowledgments, no legal justification exists to act as a notary public, and any fees collected for such service, in accordance with the provisions of Section 27-08-08, as amended, must be deposited into the county treasury.

We are enclosing a copy of the opinion referred to herein.

HELGI JOHANNESON

Attorney General