

OPINION
69-99

April 21, 1969 (OPINION)

Judge W. J. Austin

County Judge

Burleigh County Court

RE: Counties - County Court - Fees

This is in response to your letter in which you refer to House Bill No. 322 as passed by the last Legislative Assembly which amends section 27-08-08 of the North Dakota Century Code. You also quote a portion of the Act as follows:

'All fees collected for official acts as judge of the county court shall be deposited by the court into the county treasury of the county in which the court is located.'

You then note that the quoted provision applies only to official acts performed by the judge, and in support thereon you mention the case of Dickey County v. Austin, 61 N.D. 309, 237 N.W. 831, which held that the furnishing of certified copies in a probate case is not an official act of the judge.

In construing this bill (H.B. 322) we must take into account all of the pertinent language. The Act sets forth the salaries of the county judges of county courts of increased jurisdiction based upon population. The salaries were increased in all of the brackets set up according to population. The significant portion of the Bill which becomes effective July 1, 1969, provides as follows:

* * * Such salary shall be payable by the county in equal monthly installments and shall be full remuneration for all official duties including all fees collected for official acts as judge of the county court except fees charged for performing marriage ceremonies. 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 North Dakota Supreme Court in Sargent County v. Sweetman, 29 N.D. 256, 159 N.W. 876, had under consideration the question of salary for county judge, and which fees must be turned over to the county. The court observed and held as following:

* * * It is not contended that there is any statute requiring such county judge to make and certify copies of such records, nor is there any statute prescribing any fee for such service. This being true, the act of furnishing such certified copies is not an official act exacted of him by law, but is a mere voluntary labor performed outside of his official duties and for the accommodation merely of persons desiring such copies. In other words, in furnishing such copies he acts in his

individual rather than his official capacity. It is true he makes the certificate by virtue of his official position, but he does nothing more than any other official might do who has power to certify to the correctness of copies made by him.

* * *."

A similar question came before the North Dakota Supreme Court in *Dickey County v. Austin*, 61 N.D. 309, 237 N.W. 831. Court in effect reiterated what it said in the *Sweetman* case. The court in this instance had under consideration the statute relating to salary of the county judges and the statute which required all fees to be paid into the county treasury (11-10-14). The court was concerned with the language of the Act relating to the salary of the county judges and other officials of the county, whether or not such Act in any manner repealed the statutory provision requiring the officials to pay over monthly to the county treasurer all fees collected in their official capacity. The court in effect held that the salary Act did not repeal the other provision of the Act requiring the turning over of fees collected in their official capacity. Nevertheless, the court concluded that the making of certified copies was not an official act of the county judge.

It is, however, significant to note that the court did make the following observation:

* * * If this question was here for the first time the decision might be the other way, but it is not here for the first time.
* * *."

The legislature in section 11-10-14 had already provided that fees for official acts be deposited in the county treasury so there would have been no reason for repeating this in the present Act unless there was a definite purpose for so doing. We believe the legislature had a purpose in so doing and was not performing a mere idle act.

In this respect the quoted portion of House Bill No. 322 is under consideration for the first time. The legislature has specifically provided that all fees collected for official acts except fees charged for performing marriage ceremonies shall be deposited into the county treasury. It is significant to note that only fees for performing a marriage ceremony were excluded from the funds required to be deposited. This is clearly an instance where the rule of including one is to the exclusion of all others would be applicable. By placing emphasis on the exclusion of fees for performing marriage ceremonies it would compel the construction that all other fees must be deposited. However, because of the court's holding on certified copies in the *Austin* and *Sweetman* cases this provision of House Bill No. 322 becomes subject to construction. We are therefore required to examine the intent and purpose of the amendments.

The official committee reports of the judiciary committee disclose the following statement with reference to the discussion had on the Bill on February the thirteenth:

The intention of this bill is to cut out all fees except marriage fees and give him decent salary. * * *. This would be

good till 1971. This would amount to something like 3 percent a year. In some cases their salary will be less than they were getting with fees. Legislature has to set salaries. Escalator clause was mentioned. * * *."

In reviewing the provisions of law relating to county judges, we do not find that any duty has been imposed upon a county judge to furnish certified copies. Consequently there is no provision for any fees to be collected for making such certified copy. As to making certified copies, we find that the legislature has provided a fee schedule for the clerks of district court. The same are set out in section 11-17-04. Subsection 6 thereof provides as follows:

6. For making a certified abstract of a judgment or a certified copy of judgment, order, or other paper filed or recorded in his office, for the first four folios, fifty cents, and for each additional folio, ten cents;"

While this provision relates to the clerk of district court, it has application as will be shown. Section 27-08-12 provides that the county judge may appoint a clerk of county court in certain instances. Section 27-08-13 relates to county courts having increased jurisdiction and the clerk for such court, and provides that the clerk of such court shall perform substantially the same duties in the same manner as the clerk of district court is required to perform his duties so far as the provisions of this code relate to the clerk of district court which are applicable. Of course the clerk would be required to deposit such fees in the county treasury.

The question which has never been considered or discussed by the North Dakota Supreme Court is one relating to the necessity of a certified copy of orders, or who may make certified copies. It becomes eminently clear when the purpose of a certified paper is examined that the certification would not be of any value unless it was certified by a person having an official position. The certification obviously has value only because the person making the certification has an official position. It is not the name of the individual that gives legality and credence to the certified matter but rather the official position. It would further appear that the making of certified copies of legal papers in the file of the county court of increased jurisdiction is a function that can be performed by the clerk of court, and provision is made for charging a fee. It further appears that where the legislature has provided for the collection of a fee for performing a certain Act that that constitutes direction and authority to perform the act on the payment of the fee.

Taking into account the provisions of House Bill No. 322 and being guided specifically by the inclusion of all fees except fees charged for performing marriage ceremonies and the legislative intent as evidenced by the committee report, it is our opinion that House Bill No. 322 requires that all fees collected except fees charged for performing marriage ceremonies must be deposited with the county treasurer. It is our further opinion that a county judge is not required to furnish certified copies of legal documents on record with his court and that such copies can be furnished by the clerk of court in the same manner as the clerks of district court do in

respect to matters where certified copies are needed and are on file with the district clerk of court. Where exemplification copies are required we see no reason why the practice should not be substantially the same as those employed in district court.

HELGI JOHANNESON

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