

OFFICIAL OPINION NO. 51

June 15, 1945.

Hon. Kenneth A. Weddle,
Corporation Counsel,
Office of Secretary of State,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter of March 19th in which you ask my official opinion upon the following question:

“May I, therefore, respectfully request your opinion as to whether or not, under the Acts of 1929, Chapter 215, or any other Act applicable, (1) in the absence of an express provision for the collection of fees by the county recorders within the State of Indiana said county recorders are legally entitled to a fee for the filing of said certificate of revocation; (2) whether or not, under the provisions of said Indiana Foreign Corporation Act, it would be construed as mandatory that the county recorders accept and file said certificate of revocation without collecting a fee therefor.”

1. It appears to me that an answer to your first question will necessarily conclude any problems raised in the second inquiry and I will consequently consider the legal problems raised by the initial question first.

Section 66, Chapter 215, p. 725, of the Acts of 1929 (25-311 Burns' 1933 Statutes) provides for the revocation of admission of a foreign corporation admitted to do business in the State of Indiana. The next to the last paragraph of that section, and the one with which we are concerned, provides as follows:

“Upon revoking any such certificate of admission, the secretary of state shall (1) issue triplicate copies of a certificate of revocation, (2) file one (1) copy in his office, (3) file one (1) copy with the county recorder of the county in which the principal office of the corporation in this state is located, and (4) mail to such corporation at its principal office in this state a

notice of such revocation, accompanied by one (1) of the copies of the certificate of revocation."

We may safely assume from the reading of that section that the secretary of state is required to file a copy of the certificate of revocation in the county in which the principal office of the corporation in this state is located. In so doing he is performing one of the mandatory duties of his office and not a discretionary act involving any benefits to himself either as an individual or as a public officer. The question remains, then, is he obligated to pay to the county recorder any fee for such filing?

Fees are taxed by county recorders under Section 117 of Chapter 145 of the Acts of 1895 (49-1308 Burns' 1933 Statutes), which provides in part as follows:

"The recorders of the various counties in this state shall, on behalf of their respective counties, tax and collect, upon proper books to be kept in their offices for that purpose, the fees and amounts provided for by law on account of services rendered by said recorders. The fees and amounts so taxed and collected shall be designated as 'recorder's costs,' but they shall in no sense belong to or be the property of the recorder, but shall belong to and be the property of the county. The fees so taxed and collected shall be as follows:

"* * *

"For entering on entry books, indexing and recording all other instruments, ten cents (10c) per hundred (100) words, but no charge to be less than fifty cents (50c)."

Under that provision it is noted the fees charged become the property of the county and no specific provision is made that the state pay fees for recording. Of course, under Section 9 of Chapter 21 of the Acts of 1933, as amended in 1937 and 1943 (49-1009 Burns' 1933 Statutes, Pocket Supplement), the recorder is now entitled to 30% upon fees in counties less than 200,000, but under the Opinions of the Attorney General for 1937, p. 317, all fees recovered by the recorder are first remitted to the proper county official as funds belonging to the county. I find nothing in the 1895 Act or later Acts specifi-

cally providing for payment of recording fees by the state. The only implication either way to be found in the statutes is in Section 118 of Chapter 145 of the Acts of 1895 (49-1310 Burns' 1933 Statutes), which reads as follows:

“When the recorder is by law required to perform any service not specifically mentioned in this act, for which service he would be entitled, *under the law existing before the taking effect of this act, to tax, charge or receive any fee or compensation in his own behalf for such service from any person other than the county or township*, he shall hereafter tax and collect in behalf of the county the same amount for such service, which shall be paid into the county treasury as elsewhere provided for in this act. When the recorder performs any service in the way of taking acknowledgments for instruments which he is authorized under the law to take, but which no other officer authorized to take acknowledgments might perform, then such recorder shall not be required to account to the county for any fee for any service.” (Our emphasis.)

The specific mention of the county or township under that section should not necessarily imply that the state should pay fees since the section applies only to fees for services under the law existing before 1895. The provision for revocation of certificates of admission is a 1929 Act.

As bearing on the question it seems appropriate also to quote Section 2 of Chapter 42 of the Acts of 1883 (49-1414 Burns' 1933 Statutes), which, although a prior Act, gives some indication of the legislative attitude upon taxing and collection of fees, as follows:

“No county or township officer in this state shall, under color of his office, charge, tax up or receive, or permit to be taxed up or received, in relation to any service in or about his office, any fee or sum of money except such fee or sum of money as is plainly specified in the acts to which this is supplemental, without resort to implication.”

Section 36 of Chapter 51 of the Acts of 1879, (Spec. Sess.), (49-1432 Burns' 1933 Statutes), provides as follows:

“Any officer being in doubt of the proper charge to be made for any service rendered shall, in no case, charge any constructive fee, but he shall bring the question before the circuit judge of his county, in writing, and said judge shall decide the same, which decision shall be entered of record as other orders of court are entered. A note thereof, showing the page of the order book, shall be entered in the list of fees kept in the office of such officer, which order shall authorize such charge to be made as found by the court. For such submission, proceedings and orders, the officer shall make no charge, and shall have no fees therefor.”

It would also seem that this section is inapplicable as decisive of your question since it seems to have been designed for cases where a charge was to be made but the amount of the charge was undetermined.

In the absence of legislative provision that the state should pay recording fees, we have recourse only to the common law and cases decided in Indiana. It has long been decided both at common law and under our statutes that the state is not liable for costs.

Henderson v. State, *ex rel.*, Baldwin (1884), 96 Ind. 437, at 444;
Ex Parte Fitzpatrick (1909), 171 Ind. 557 at 559,

where the court says:

“The policy of the law and the express provision of the statute are against the taxation of costs to the State.”

Those Indiana decisions exemplify the common law rule that the public pays no costs.

See: 34 American Jurisprudence, p. 22.

The policy of the law which does not permit assessment of costs against the sovereign in the absence of express statutory provisions therefor would seem to apply equally to the taxation

of fees, particularly where those fees become the property of the state or a subdivision thereof. As stated in 42 L. R. A. at p. 44:

“Fees cannot be taxed against the state except where authorized by statute, * * *.”

It is, consequently, my opinion that the secretary of state, while acting for and on behalf of the state, is not liable for any fee for the filing of a certificate of revocation of admission to do business in Indiana. That conclusion, however, I desire to limit to the particular statute involved, since there may be instances where fees are authorized by statute or where the public official is not carrying out a mandatory duty in behalf of the state.

See: *Ex parte Fitzpatrick, supra.*

2. In answer to your second question, upon the authorities above cited and discussed, it is my opinion that it is the mandatory duty of the county recorder to accept and file certificates of revocation without collecting any fee therefor.

OFFICIAL OPINION NO. 52

June 18, 1945.

Mr. James M. Knapp, Director
Indiana State Personnel Division,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Mr. Knapp:

I have your letter of recent date in which you ask for an official opinion upon the following questions:

“I should like your official opinion as to whether or not all the provisions of Section 35 and 36 of the Indiana Personnel Act apply to directors of county departments of public welfare, and, if not all of the provisions, which provisions of Sections 35 and 36 do apply? Also, if Sections 35 and 36 do not apply to