California Judges Association
OPINION NO. 5

(Originally issued: March 1951)

GRATUITIES FOR SOLEMNIZING MARRIAGE

AUTHORITY: Canon 2A

I. Background

The Judicial Ethics Committee has been asked whether the acceptance by a judge of a gratuity for the performance of a marriage ceremony constitutes a violation of any constitutional provision or any statute of this State.

II. Question

Does the acceptance by a judge of a gratuity constitute a violation of the California Constitution or any California statute?

III. Answer

No.[1]

IV. Discussion

For obvious reasons it is not ordinarily within the province of this Committee to advise as to what acts constitute a violation of law. However, since the act of a judge in transgressing the law in any respect would be a violation of Canon 2A of the California Code of Judicial Ethics, we deem it proper to give consideration to this question which has been submitted to us.

In its consideration, certain provisions of our Constitution and statutes present themselves as pertinent. Section 15, Article VI provides that: "No judicial officer, except court commissioners, shall receive to his own use any fees or perquisites of office..."

Sections 11 and 17 of Article VI of the Constitution, which have been called to our attention in this connection, merely require the legislature to provide for payment to judges of compensation for their judicial services.

The Penal Code contains a provision which is proper for consideration in this connection. Section 94 of that Code provides, in part, that:

> Every judicial officer who asks or receives any emolument, gratuity, or reward, of any promise thereof, except such as may be authorized by law, for doing any official act, is guilty of a misdemeanor...

This provision may be disposed of by the citation of a well-considered opinion of the California

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[1] A judge should carefully note the provisions of Penal Code Section 94.5 which states that every Judicial Officer of a court of this state, who accepts any money or thing of value for performing any marriage is guilty of a misdemeanor unless the fee is imposed by law or the marriage is performed on Saturday, Sunday or a legal holiday.

Attorney General, rendered in 1943. The question there considered was whether a judicial officer who accepts money for performing a marriage ceremony is guilty of a misdemeanor under the provision quoted. The answer, following a thorough review of the authorities of this State and elsewhere, was in the negative. (2 Op. Att. Gen., 209. Also see 13 Op. Att. Gen., 84.) In this opinion we concur.

In considering whether or not any of the constitutional provisions above quoted constitutes a ban on the acceptance by a judge of a gratuity or offering for performing a marriage ceremony, certain circumstances must be taken into consideration. In the first place, the authority to solemnize a marriage is conferred upon judges, among other classes of persons, by Section 400 of the Family Code. That section provides that marriages "may" be solemnized by the various classes of persons therein enumerated. The authority being merely permissive, no duty is imposed upon the persons named to perform such ceremonies. As a matter of practice, and by long-established custom, some judges never exercise this privilege. Other judges will perform the service when requested, but refuse gratuities for so doing.

Another circumstance to which weight must be given is that the performance of a marriage ceremony is not the performance of a judicial act. A judicial act, unlike a ministerial act, is one requiring the exercise of some judicial discretion. (Reclamation Dist. vs. Hamilton, 112 Cal. 603, 611.)

Although the question does not appear to have been passed on in this state, it has been held in at least one other state that the solemnization of a marriage is in no sense a judicial act. (St. Louis vs. Sommers, 148 No. 398; 50 S.W., 102.) Judges are authorized to perform marriage ceremonies not by reason of the judicial power incident to their office, but merely as persons holding certain positions. (Matthes vs. Matthes, 198 Ill. App., 515.)

Inasmuch as the solemnization of a marriage is merely the performance of a voluntary act, non-judicial in character, it has been held in a number of cases that a judge, in the absence of statute, is not required to account for any gratuity that he or she may receive therefore. (Cummings vs. Smith, 368 Ill., 94; 13 N.E., 2d, 69; Smith vs. Pettis Co., 345 Mo., 839; 136 S.W., 282. Also see Sargent Co. vs. Sweetman, 29 N.D., 256; 150 N.W., 876, and City of New York vs. McCormick, 258 N.Y. Supp., affirmed in 261 N.Y. 529).

In our opinion it necessarily follows that the acceptance by a judge of a gratuity for the performance of a marriage ceremony does not constitute the violation of any constitutional provision or of any statute of this State.

On this same general subject, see Opinions 4 and 6.

This opinion is advisory only. This Committee acts on specific questions submitted, and its opinion is based on facts as set forth in the questions submitted.

COMMITTEE ON JUDICIAL ETHICS
March 1951