



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

WALD C. MANN  
ATTORNEY GENERAL

February 4, 1939

Hon. R.S. Wyche, County Auditor  
Gregg County  
Longview, Texas

Dear Mr. Wyche:

Opinion No. 0-140  
Re: De Facto Officer.

Your request for an opinion on the following question:

"Whether a man is a de facto officer when he has been deputized by the constable of a precinct but whose appointment has not been approved by the Commissioners' Court?"

"Whether Commissioners' Court has authority to pay for his services after county auditor's approval?"

has been received by this office.

Article 6879a, Revised Civil Statutes reads as follows:

Section I. "The duly elected Constable in each Justice Precinct having a city or town of less than eight thousand (8,000) population according to the preceding Federal Census may appoint one (1) Deputy and no more; and each Justice Precinct having a city or town of eight thousand (8,000) and less than forty thousand (40,000) population according to the preceding Federal Census may appoint two (2) Deputies and no more; and in each Justice Precinct having a town or city

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Hon. R.S. Wyche, February 4, 1939, Page 2

of forty thousand (40,000) population or more according to the preceding Federal Census may appoint five (5) Deputies and no more, and each and every instance said Deputy Constables shall qualify as required of Deputy Sheriffs.

Section 2. "When the Constable in each and every instance named and described in the preceding section of this Act shall desire to make appointment of a Deputy or Deputies, as to case may be, said Constable shall first make written application to the Commissioners' Court of his County showing that it is necessary for such Constable to have the Deputy or Deputies requested in order to properly handle the business of his office originating in the Precinct in which such Constable has been elected, giving the name of each proposed appointee; and if the Commissioners' Court shall find that the Constable is in need of the Deputy or Deputies requested to handle the business originating in his Precinct, then and in that event, and in that event only, the Commissioners' Court shall approve and confirm the appointment of the Deputy or Deputies provided by this Act.

Section 3. "Any person who serves as a Deputy Constable without the provisions hereof having been complied with relative to his appointment or any Constable who issues a Deputyship without the consent and approval of the Commissioners' Court shall be fined not less than Fifty Dollars (\$50.00) nor more than One Thousand Dollars (\$1,000.00)."

that: American Law Reports, Vol. 93, p. 269, states

"Some authorities have expressly held

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Hon. R.S. Wyche, February 4, 1939, Page 3

that the fact there is no de jure officer does not change the general rule that a de facto officer cannot recover the emoluments of the office so as to enable him to recover for his services, at least where he knows that his right to office is disputed."

Citing *Beams vs West Frankfust*, 233 Ill. 479; *Eubanks vs Montgomery County*, 105 S.W. 418. Also citing many other authorities which we do not deem necessary to mention here.

"The mere assumption of the office by performance of one of even several acts appropriate to it without any recognition by the appointive power may not be sufficient to constitute one a de facto officer and it has been held that a person whose only claim to office is under appointment which is void and not merely irregular and informal is not a de facto officer, but a mere intruder."

Tex. Jur., Vol. 34, p. 617, Sec. 163. *Bincount vs Parker*, 27 Tex. 558; *Murray vs State*, 48 Crim. Reports, 219, 87 S.W. 349.

In view of the foregoing authorities, you are respectfully advised that it is the opinion of this department that the evident purpose of Article 6879a is to prohibit any person from claiming to be a de facto deputy constable. The Legislature must have had in mind an existing evil when this law, containing penal features, was passed. Therefore, facts, which might ordinarily constitute one a de facto officer, have no application here and the deputy mentioned in your letter is not a de facto officer and the Commissioners' Court has no authority to pay him for his service upon approval of his claim by the auditor.

Trusting that the foregoing answers your in-

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Hon. R.S. Wyché, February 4, 1939, Page 4

quiry, I remain

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Ardeell Williams*  
Assistant

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APPROVED:

*Samuel B. Mason*  
ATTORNEY GENERAL OF TEXAS. *mfr*