



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

*Superseded By Act 29d  
V.C.S.*

Honorable B. F. McKee  
County Auditor  
Hidalgo County  
Edinburg, Texas

Dear Sir:

Opinion No. 0-3351  
Re: The legal date from which  
to calculate refunds due for  
unauthorized payments under  
Acts of 1937, 45th Legisla-  
ture, Ch. 194.

Your letter of March 26, 1941, requesting an  
opinion of this department reads in part as follows:

"Did the Act (Acts 1937, 45th Leg. P. 392,  
ch. 194) under which the County Commissioners  
of Hidalgo County drew \$50.00 per month for car  
expense cease to affect this County on April 1,  
1940, or June 22, 1940? or Jan. 1, 1941. Some  
of the Commissioners have signified a willing-  
ness to refund payment received subsequent to  
January 1st, 1941, that being the beginning of  
a new term of office as well as the beginning  
of a new calendar year. Which of the three dates  
mentioned (April 1, 1940, June 22, 1940 or Jan-  
uary 1, 1941) is the legal date upon which to  
calculate refunds due for unauthorized payments?"

In connection with your request, we acknowledge  
receipt of your letter of March 27th relative thereto, and  
have given the authority cited therein our full consideration.

House Bill No. 843, Ch. 194, page 392, Acts of the  
Forty-fifth Legislature, 1937, Regular Session, reads in  
part as follows:

"Section 1. In any county in this State  
having a population of not less than seventeen  
thousand, six hundred (17,600) and not more than

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seventeen thousand, seven hundred (17,700) and in any county in this State having a population of not less than seventy-seven thousand (77,000) and not more than seventy-seven thousand, one hundred (77,100) and in any county in this State having a population of not less than seventy-seven thousand, five hundred (77,500) and not more than seventy-seven thousand, six hundred (77,600), according to the last preceding Federal Census, the Commissioners Court is hereby authorized to allow each Commissioner the sum of Fifty Dollars (\$50) per month for traveling expenses and depreciation on his automobile while on official business. Each such Commissioner shall pay all expenses in the operation of such automobile and keep same in repair free of any other charge to the county.

". . ."

Article 2340, Revised Civil Statutes, 1925, provides as follows:

"Before entering upon the duties of their office, the county judge and each commissioner shall take the official oath, and shall also take a written oath that he will not be directly or indirectly interested in any contract with, or claim against, the county in which he resides, except such warrants as may issue to him as fees of office. Each commissioner shall execute a bond to be approved by the county judge in the sum of three thousand dollars, payable to the county treasurer, conditioned for the faithful performance of the duties of his office, that he will pay over to his county all moneys illegally paid to him out of county funds, as voluntary payments or otherwise, and that he will not vote or give his consent to pay out county funds except for lawful purposes."

It is assumed in your request that one or other of the three dates mentioned by you is the correct date from which to calculate refunds due to the county under the Act in question. Your request raises the point as to whether

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a county commissioner who votes for and receives county funds as traveling expense under an unconstitutional statute is liable therefor.

We intend to deal principally with this point, although under our opinion No. 0-3144, addressed to you and approved April 9, 1941, it is clear that such commissioners would be liable for a refund of all payments received from and after the date of the official preliminary announcement of the 1940 Federal Census, which according to your letter, was June 22, 1940.

In our opinion No. 0-2811, approved October 16, 1940, this department held House Bill No. 848, Ch. 194, Acts 1937, Forty-fifth Legislature, unconstitutional and void as it applied to Cameron County. As applied to Hidalgo County, you were similarly advised by our opinion No. 3276 approved March 21, 1941. The first above mentioned opinion is found in the monthly reports of the Attorney General, Volume 2, Book 10, page 312.

Judge Cooley, in his works on constitutional limitations, Volume 1, Eighth Edition, at page 382, says:

"When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force."

The Supreme Court of Texas in *Sessums v. Botts*, 34 Tex. 335-50, did not construe the above authority as announcing a doctrine that an unconstitutional law could be no protection to officers or citizens, before the same had been passed upon and adjudged invalid. The court in its opinion said:

"We are not willing to endorse the proposition, in its broadest sense, that a ministerial

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officer has the right and power to decide upon the constitutionality or unconstitutionality of an act passed with all the formality of law. It is the duty of such officers to execute and not to pass judgment upon the law, and we are of the opinion that the clerk of the district court should have refused to have issued execution in violation of what appeared to be a valid and binding law, until the same had been declared void by the tribunal properly constituted for that purpose."

The courts of Texas have never directly passed upon the question raised by your request, to-wit, whether a county commissioner, voting for and receiving funds under an Act of the Legislature, passed with all appearance of a valid law with beneficial interests inuring solely to such officers as provided in Section 1, House Bill 848, 45th Legislature, is liable.

Article 2540, supra, appears to raise a very strong inference of liability under such an act, however, by setting forth as a condition of each commissioner's bond, "that he will pay over to his county all moneys illegally paid to him out of county funds, as voluntary payments or otherwise, and that he will not vote or give his consent to pay out county funds except for lawful purposes." (Undersecoring ours) That such payments received under an unconstitutional or void law are illegal and for no lawful purpose, cannot be questioned. Such condition of the commissioner's bond, however, applies with equal force and dignity to all illegal payments, whether to the commissioners themselves or made to other officers.

The Supreme Court of Oklahoma in the case of Wade v. Board of Commissioners of Harmon County, 17 Pac. 2nd 690, held that the Board of County Commissioners of a county will not be penalized under certain acts of the Legislature for payment of salaries to county officers under an unconstitutional local act where such payments were made in good faith and before the law is declared unconstitutional, or before they are advised by the proper official as to its unconstitutionality.

Supported by later decisions in that state, the Supreme Court of Oklahoma recognizes and views the question of "good faith" in the light of a legal duty imposed upon ministerial officers under certain acts passed in which they

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have a direct personal interest distinguishable from those requiring them to perform ministerial acts beneficial to the public.

It is the duty of the county and district attorneys, upon request, to give an opinion or advice in writing to any county or precinct officer of their district or county, touching their official duties (Article 332, Revised Civil Statutes, 1925), and it has been the policy of the Attorney General of Texas to so advise said officers upon such questions touching the public interest, or concerning their official duty. (Article 4399, Revised Civil Statutes) The Oklahoma authorities appear to recognize and be inclined to follow the Supreme Court of Missouri in the case of *Wiles v. Williams*, 133 S. W. 1, from which opinion, on page 6, we quote:

"In the case at bar, it appears from the record that the Attorney General of the State was called upon and gave a written opinion to the county court of Nowaday county, which was the fiscal agent thereof, to the effect that the act in question was unconstitutional, null and void, and that said court informed respondent of said opinion, and notified him not to pay the warrant mentioned in the pleadings, and that if he did so, he would be held liable upon his bond for the amount so paid thereon.

"In the light of those disclosures, the respondent not only had the legal right to raise the constitutionality of the act, but under those facts it became his legal duty to do so; otherwise he would have paid the warrant at his peril. We therefore hold that in the case at bar the respondent had the right to raise the constitutionality of the act of 1907."

We are not here declaring that a legal duty was imposed upon the county commissioners to raise any question as to the constitutionality of the act at the time they voted to pay themselves under its provisions. Moreover, there is a presumption that they in good faith, acted under the belief same was constitutional.

As pointed out in *Wiles v. Williams*, supra, such officers were not appointed or elected to pass upon consti-

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tutional questions and it is common knowledge that county commissioners are not learned in the law, consequently, not qualified to intelligently pass upon such questions.

The condition of the commissioner's bond, however, leads us to believe that the Supreme Court of Oklahoma announced what would be the correct rule following *Wiles v. Williams*, supra, to the effect that under such an act of the Legislature whose provisions are solely to the personal and beneficial interests of the officer, knowledge on the part of the officer of its unconstitutionality, received through advice given him by his county or district attorney or indirectly from the Attorney General of Texas, is sufficient to deprive such officer of any equities and fix liability from that time on for illegal payments voted for and received under said unconstitutional law.

In answering the above question, therefore, it is the opinion of this department that the time from which to calculate refunds due for illegal payments under the Acts of 1937, 45th Legislature, Ch. 194, is the date on which the county commissioner received authoritative advice that such Act was unconstitutional. Were the above Act constitutional, it would no longer apply to Hidalgo County after the official preliminary publication of the 1940 Federal Census, hence payments made thereafter were clearly illegal and should be refunded to the county.

Yours very truly

APPROVED MAY 8, 1941

ATTORNEY GENERAL OF TEXAS

*Boyer Reeves*  
FIRST ASSISTANT  
ATTORNEY GENERAL

By

*Wm. J. E. King*  
Wm. J. E. King  
Assistant

WMK:LM

