



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable Fred Blundell  
District Attorney  
San Marcos, Texas

Dear Sir:

Attention: Hon. Tom G. Oliver, Jr.

Opinion No. 0-4034

Re: County Clerks - ex-officio compensation - excess fees

Your request for opinion has been received and carefully considered by this department. We quote from said request as follows:

"Hon. L. N. Hopkins, County Clerk of Hays County, has requested me to secure from you a ruling with reference to excess fees of his office, which question is, and arises, as follows:

"Hays County is on the fee basis; the county clerk receives an ex officio compensation, which is paid to him quarterly, by warrant on the general fund, and also receives fees of office. The general fund of Hays County has been on a deficit basis for several years, and in order for the county clerk, and other officers, who receive salary payable out of the general fund, to cash said warrants, it becomes necessary to take a substantial discount, such as, say, 10%. Under article 3883, the county clerk of Hays County, receives and retains ex officio and fees until his compensation for the year, in addition to salaries of deputies and expenses of conduct of the office, has amounted to \$2400.00, and then, under article 3891, he retains 1/3d of the excess until his total compensation amounts to \$3,000.00

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"Article 3891 provides: 'All current fees earned and collected- - - in excess of the maximum and excess allowed by this Act - - - shall be paid into the County Treasurer in the county where the excess accrued.'

"Does this mean that such county clerk must pay said excess fees to the treasurer in the form of cash, or may he pay same in the form in which he received the pay from the county, namely, the uncashed general fund warrant issued to him, and endorsed by him back to the county?

"Of course, by the time the last quarterly payment is due him by the county, he has completed the year and then knows whether or not he will have an excess and how much, and, as to this last payment he can refrain from taking same from the county, and hence show that much less income to the office, and that much less excess fee to be paid by him back to the county. No trouble is had with this last payment, since each he and the county has a claim against the other, and the accounts are simply balanced by his refraining from accepting his salary for the last quarter. It is believed that the principle of this sort of adjustment or settlement is sanctioned by the Supreme Court in the case of Felts vs. Bell County, 132 S. W. 123.

"But the annual fee report, apart from the foregoing paragraph, yet shows an excess of fees to be paid back to the county, and the clerk has in possession the county warrant on the general fund covering his salary for the third quarter, the months of July, August and September, which warrant he has not discounted and cashed - can he tender said warrant to the county and require the county to accept same, as payment upon the claim the county has against him for excess fees of office? From the standpoint of common sense, reason, and natural justice, it occurs to the writer that the clerk should be legally

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authorized to pay the county in the same medium in which the county pays him, and hence I am inclined to answer the foregoing question in the affirmative. However I have not found any authority precisely on the point, although the reasoning of the above case supports this conclusion."

The population of Hays County, Texas, is less than 20,000 inhabitants according to the 1940 Federal Census, and its county officials are compensated on a fee basis.

Article 3895, Vernon's Annotated Texas Civil Statutes, reads as follows:

"The Commissioners' Court is hereby debarred from allowing compensation for ex-officio services to county officials when the compensation and excess fees which they are allowed to retain shall reach the maximum provided for in this chapter. In cases where the compensation and excess fees which the officers are allowed to retain shall not reach the maximum provided for in this chapter, the Commissioners' Court shall allow compensation for ex officio services when, in their judgment, such compensation is necessary, provided, such compensation for ex officio services allowed shall not increase the compensation of the official beyond the maximum of compensation and excess fees allowed to be retained by him under this chapter. Provided, however, the ex officio herein authorized shall be allowed only after an opportunity for a public hearing and only upon the affirmative vote of at least three members of the Commissioners' Court."

Section 1 of Article 3883, V. A. T. C. S., reads as follows:

"Except as otherwise provided in this Act, the annual fees that may be retained by precinct, county and district officers mentioned in this Article shall be as follows:

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"1. In counties containing twenty five (25,000) thousand or less inhabitants: County Judge, District or Criminal District Attorney, Sheriff, County Clerk, County Attorney, District Clerk, Tax Collector, Tax Assessor, or the Assessor and Collector of Taxes, Twenty-four Hundred (\$2400.00) Dollars each; Justice of the Peace and Constable, Twelve Hundred (\$1200.00) Dollars each."

Article 3891, V. A. T. C. S., reads in part as follows:

"Each officer named in this Chapter shall first out of the current fees of his office pay or be paid the amount allowed him under the provisions of Article 3883, together with the salaries of his assistants and deputies, and authorized expenses under Article 3899, and the amount necessary to cover costs of premium on whatever surety bond may be required by law. If the current fees of such office collected in any year be more than the amount needed to pay the amounts above specified, same shall be deemed excess fees, and shall be disposed of in the manner hereinafter provided.

"In counties containing twenty-five thousand (25,000) or less inhabitants, District and County officers named herein shall retain one-third of such excess fees until such one-third, together with the amounts specified in Article 3883, amounts to Three Thousand Dollars (\$3,000). . . ."

Opinion No. O-3896 of this department contains a pertinent discussion relative to excess fees and ex-officio compensation. We quote from said opinion as follows:

"In answer to your inquiry, you are advised that it is the opinion of this department that the ex-officio compensation of the county clerk must be considered and accounted for in arriving at the maximum annual compensation of said clerk. The clerk shall first out of the current fees of his office pay or be paid the

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amount allowed him under the provisions of Article 3883, together with the salaries of his assistants and deputies, and authorized expenses under Article 3899, and the amount necessary to cover the cost of premium on whatever surety bond may be required by law. If the current fees of such office collected in any year be more than the amount needed to pay the amounts above specified the same shall be deemed excess fees and the clerk is permitted to retain one-third of such excess fees until such one-third, together with the amounts specified in Article 3883, amounts to \$3,000.00. In other words, the county clerk is entitled to retain all the compensation allowed by Article 3883, together with the one-third excess fees allowed by Article 3891, until such one-third, together with the amount specified in Article 3883, amounts to \$3,000.00 per annum. If the compensation allowed under Article 3883 and the excess fees allowed under Article 3891 do not reach the maximum of \$3,000.00 per annum, the Commissioners' Court is authorized to pay the clerk an ex-officio compensation, provided such compensation, together with the fees retained by him under Articles 3883 and 3891, does not amount to more than \$3,000.00. There can be no excess fees until the amount of \$2,400.00 is reached and the deductions which are allowed by law are made. To illustrate, the county clerk cannot take \$1,400.00 as fees under Article 3883 and then add the \$1,000.00 ex-officio compensation to make a total of \$2,400.00 and then say all fees coming into the office as are authorized by law are excess fees, and that he is entitled to one-third of the same. In short, before the clerk is entitled to any excess fees under Article 3891, he must first receive as fees the amount of \$2,400.00 not including any part of the ex-officio compensation after making the legal deductions as allowed by law and after this amount has been reached then the clerk is entitled to one-third

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of such excess fees as provided by Article 3891 and as above stated if this does not reach the total maximum of \$3,000.00 per annum, the Commissioners' Court may in its discretion legally allow an ex officio compensation provided such compensation, together with the fees retained under the above mentioned articles, does not exceed \$3,000.00 per annum."

We enclose herewith a copy of said opinion for your information.

There can be no excess fees for the county clerk of Hays County until the amount of \$2,400.00 is reached and the deductions which are allowed by law are made. And using the illustration given in opinion No. 0-3896, supra, the county clerk cannot take \$1,400.00 as fees under Article 3883 and then add a \$1,000.00 ex-officio compensation to make a total of \$2,400.00 and then say that all fees coming into the office are excess fees and say that he is entitled to one-third of the same. As pointed out in said opinion, before the clerk is entitled to any excess fees under Article 3891, he must first receive as fees the amount of \$2,400.00 after making the legal deductions allowed by law and not including any part of his ex-officio compensation, and after this amount has been reached, then the clerk is entitled to one-third of such excess fees as provided by Article 3891 and that if this does not reach \$3,000.00 per annum, the Commissioners' Court may in its discretion legally allow an ex-officio compensation provided such compensation together with the fees retained do not exceed \$3,000.00.

The case of Felts, et al v. Bell County, 132 S. W. 123, (Supreme Court of Texas), cited by you, holds that where a county judge, by purchasing property at a sheriff's sale, was accountable to the county for the purchase price, the county's crediting itself on a debt owing him to the extent of the purchase had the same effect as if the money was paid him, and that the settlement was a valid one. We quote from said case as follows:

"The evidence shows that the county declined to accept a conveyance from Felts (the

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County Judge), but elected to receive from him the price of the land which he paid in settlement by which the county got credit on a debt due to Felts for the sum bid for the land. A credit on the county's debt was a payment and had the same effect as if the money had been paid by Felts." (Bracket insertion ours)

"... The Commissioners' Court had jurisdiction over the financial affairs of the county and had the authority to make an adjustment between it and any person where there were mutual claims; it is the same thing as if Felts had paid the amount of his bid to Bell County and the county had then paid the same money to Felts. We therefore hold that the settlement between Bell County and Felts was valid and binding upon the county. It is not sought in this action to set the settlement aside, nor is there any evidence to justify such action."

You do not state the amount of fees earned and collected by the clerk. If, for example, the clerk earned and collected fees amounting to \$4,200.00 after deducting the expenses allowed by law and exclusive of any ex-officio compensation, he would be entitled to retain \$3,000.00 and would have to pay the county \$1,200.00 excess fees. If he had been paid any ex-officio compensation he would have to return all of it to the county. If he had cashed or sold his warrants for said ex-officio compensation, he would have to pay the county in money, but if he had not cashed or sold his warrants he would be authorized to return them to the county in settlement of his obligation under the authority of Felts, et al v. Bell County, supra.

If the clerk earned and collected \$2,700.00 in fees after deducting his legal expenses he would be entitled to retain \$2,500.00 and would owe the county \$200.00 excess fees. If the county had allowed him, say \$200.00 ex-officio compensation and paid him with general fund warrants we think that he could return the warrants (if

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he still had them) to the county in settlement of the \$200.00 he owed the county for excess fees under the authority of Felts, et al v. Bell County, supra.

Trusting that this satisfactorily answers your inquiry, and with best regards, we are

Very truly yours

ATTORNEY GENERAL OF TEXAS

By

*Wm. J. Fanning*  
Wm. J. Fanning  
Assistant

APPROVED OCT 6, 1941

*Fred Blundell*  
FIRST ASSISTANT  
ATTORNEY GENERAL

WJF:GO

ENCLOSURE

