



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

*Considered in
R-114-1 B-71*

Honorable Alex Jung
County Attorney
Gillespie County
Fredericksburg, Texas

Dear Sir:

Opinion No. O-4228

Re: Are all of the mentioned county and city officers disqualified from acting as Notaries Public and charging the statutory fees therefor, and related questions?

Your letter of November 22, 1941, requesting an opinion of this department on the questions stated therein reads as follows:

"It has been the practice in the many years past for numerous County Officials to obtain Commissions as Notaries Public and to take affidavits and acknowledgements as such, as well as to charge therefor. Among such officers so engaging in such practice are: County Clerk; County Treasurer; Deputy Assessor & Collector; etc. It is a known fact that practically all lawyers have commissions as Notaries Public, and similarly, this practice has been indulged in on the part of every County Attorney who served Gillespie County within my knowledge. Any thought that the office of Notary Public as one of profit which would be incompatible with the holding of any one of the other named offices never entered my mind heretofore; however, the question was raised by a Kerrville citizen the other day relative to taking of an acknowledgment by our County Clerk as such Notary Public to a deed, hence the importance. The matter has therefore become important to each such officer, as well as to myself, as County Attorney,

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and the City Attorney, so acting as such Notary Public.

"The party so calling my attention to this incompatibility was a deputy from the County Clerk's office at Kerrville, my friend, Mr. Hartmann. He stated that a Kerrville lawyer, whose name he mentioned but which I do not recall, raised the question in passing upon a title, and that as a consequence, the County Attorney of Kerr County wrote for an opinion from the Attorney General, who held that the County Clerk was disqualified from acting as Notary Public and charging therefor as such. If such an opinion was rendered, please mail me a copy. I am inclined to the view that there is some merit to this contention. I investigated the matter relative to my continuing to hold the office of County Trustee following my election as County Attorney and resigned as such trustee prior to qualifying as County Attorney because of the results of my then investigation and my conclusion that the office of County Trustee was one of profit. I had earned some \$10. or \$12. during the year, representing \$3.00 per meeting.

"I consider the matter of holding but one office of profit a settled one; however, I am in doubt as to the question of whether or not the earnings out of taking of affidavits and acknowledgements may be considered sufficiently substantial to hold the office of Notary Public to be one of profit. I made a fair search of the authorities relative to the office of County Trustee, recall that it was held that one might serve as Trustee of an Independent School District (where no salary or per diem was paid or allowed by law) at time of holding another office of profit, but I do not recall any authorities discussing the question of the meagre earnings as Notary Public.

"QUESTIONS

"Are all of such herein mentioned County and City Officers disqualified from acting as

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Notaries Public and charging the statutory fees therefor? If not, which of them are so disqualified, if any?

"Is the County Attorney disqualified from taking acknowledgements and affidavits as a Notary Public in the practice of civil law where he makes no charge therefor?"

"Is the City Attorney disqualified from taking acknowledgements and affidavits as a Notary Public in the practice of civil law where he makes no charge therefor?"

It is stated in Texas Jurisprudence, Volume 31, page 345, "under the constitutional inhibition against the holding of two incompatible offices by one person, a notary is disqualified upon accepting the office of county clerk, although it has been held that a county attorney may be a notary also."

On April 27, 1931, this department held, in an opinion by Honorable Everett F. Johnson, Assistant Attorney General, that the office of county clerk is incompatible with the office of notary public and that a person holding the office of county clerk could not at the same time hold the office of a notary public. (See the case of *Siencourt v. Parker*, 27 Tex. 558.)

This department held in Opinion No. 0-814 ". . . it is the opinion of this department that the offices of deputy county clerk and notary public are incompatible. Therefore, one could not serve as deputy county clerk and notary public at the same time." We are enclosing a copy of this opinion for your information.

On February 12, 1935, this department held in an opinion written by Honorable Joe F. Alsop, Assistant Attorney General, that "It is the further opinion of the writer that the office of notary public and tax assessor and collector are not incompatible."

"You are therefore advised that it is optional with the deputies of the collector and assessor to charge or not to charge for notarizing registration instruments providing at the time they do so they are acting as notaries and not as collectors."

In Opinion No. 0-33 this department held ". . .

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You are respectfully advised that it is the opinion of this department that the Tax Assessor-Collector and his deputies are not prohibited by law from holding the office of Notary Public while holding their offices of Tax Assessor-Collector or as deputies of such office. We are enclosing copies of the two above-mentioned opinions.

We quote from the case of *Figueras, et al v. State*, 99 Tex. 412, as follows:

"Appellants complain of the action of the court in admitting in evidence the copy of the delinquent tax record, because the printers' affidavit was not made before an officer who was authorized to administer oaths in the capacity in which he attempted to act, that of notary public, said officer being the county attorney of said county. The contention is that the county attorney, under the law, could not hold two offices, that of county attorney and notary public, at the same time, and his attempted act as notary public of taking the oath of the printer was of no force or effect. We are of the opinion that this contention is not sound. Section 40, art. 16, of the Constitution, provides: 'No person shall hold or exercise at the same time more than one civil office of emolument, except that of justice of the peace, county commissioner, notary public and postmaster, unless otherwise specially provided.' This provision does not prohibit a county attorney from holding at the same time the office of notary public, therefore the affidavit was legally administered. *Geal v. Townsend*, 77 Tex. 464, 14 S. W. 365."

We quote from the case of *Geal v. Townsend, et al*, supra, (Supreme Court of Texas) as follows:

". . . In view of the fact that the disposition of the case in the court below and in this court does not preclude the appellant from bringing another suit, we deem it proper to express an opinion upon another question discussed in the brief. Whether appellant vacated his office or not by accepting the office of mayor

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of Ysleta depends upon the proper construction of section 40 of article 16 of the present constitution. That section is as follows: 'No person shall hold or exercise at the same time more than one civil office of emolument, except the justice of the peace, county commissioner, notary public, and post master, unless otherwise specially provided.' Does this mean that an incumbent can hold either of the offices named, and at the same time any other office, or that he can only hold two offices when both are among those specially designated? We think the former is the proper construction. The language is copied mainly from section 26 of article 7 of the constitutions of 1845, of 1861, and of 1866, which is the same in each of those instruments, and reads as follows: 'No person shall hold or exercise at the same time more than one civil office of emolument, except that of justice of the peace.' It is clear that under this section any justice of the peace might hold another office. *Fowell v. Wilson*, 16 Tex. 59. The office of justice of the peace was made an exception to the general rule, and the inference from the use of the same language in the present constitution, with the mere addition of other offices, is strong that it was not meant in any manner to change the general rule, but merely to make additional exceptions. The other construction would materially modify the general effect of the provision. It would prevent even a justice of the peace from holding any other office except one of those specially named, and would be a radical departure from the provisions of all previous constitutions on the same subject. Const. 1869, art 5, § 30. If the language of the provision in question had been 'except those of justice of peace, & etc.', there may have been more doubt about the construction; but the words are 'except that,' etc., and they indicate that it was intended that a person might lawfully hold any office, and in addition thereto either of the offices enumerated. The use of the word 'those' would have suggested the construction that an incumbent could only lawfully hold two offices at the same time, when both were offices specially named in the section.

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If the allegations of the petition are true, we are clearly of the opinion that the appellant did not vacate his office of county commissioner by accepting that of mayor. Such we understand to have been the ruling of the court below. But, because the appellant did not make all the members of the commissioners' court parties to his suit, the judgment is affirmed."

In view of the foregoing authorities you are respectfully advised that it is the opinion of this department that the office of county clerk and/or deputy county clerk are incompatible with the office of notary public and that a person holding the office of county clerk and/or deputy county clerk cannot at the same time hold the office of notary public.

You are further advised that the tax assessor-collector and his deputies are not prohibited by law from holding the office of notary public while holding their offices of tax assessor-collector or as deputies of such office.

It is our further opinion that the office of notary public and county treasury are not incompatible and that the county treasurer is not prohibited by law from holding the office of notary public while holding the office of county treasurer.

You are further advised that the county attorney and the city attorney are not prohibited by law from holding the office notary public while holding their offices of county attorney and city attorney. The office of notary public and county attorney and/or city attorney are not incompatible. All of the above mentioned officials who are duly qualified notaries public may legally charge the fees provided by law for their services as such when acting in the capacity of a notary public.

Trusting that the foregoing fully answers your inquiry, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Ardell Williams*
Ardell Williams
Assistant

APPROVED DEC 5, 1947

George Diller
ATTORNEY GENERAL

AG:LM
ENCLOSURES

