



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable Clyde B. Kennelly  
County Attorney  
Fort Bend County  
Richmond, Texas

Dear Sir:

Opinion No. 0-4547  
Re: Fee of a sheriff or his deputy  
under the facts stated and an-  
other matter.

Your letter of recent date requesting the opinion of this department on the matters stated therein reads as follows:

"Your opinion on the matters which follow will be sincerely appreciated.

"Where the local Sheriff's department stands ready and is duty-bound to assist in any possible way and the local jail and law enforcement facilities are available, is it permissible for a Justice of the Peace to assess as 'Sheriff's Costs' a fee for making the arrest and other fees allowed to the Sheriff's Department in a case where a State Patrolman makes the arrest and files the case, the Sheriff's department having nothing to do with the case up to the time that a judgment of a certain fine plus costs is assessed against the defendant? As stated above, the Sheriff's department of the County stands in readiness to assist in any possible and naturally, in the event the fine is not paid, the defendant will be turned over to the local officers, to be kept in custody until such fine is paid or sufficient time is spent in the County jail to care for the fine.

"Under our statutes, a County has no right to acquire land, right-of-way or easement in land by Eminent Domain where the land is used

Honorable Clyde B. Kennelly, Page 2

for cemetery purposes. Fort Bend County has been acquiring right-of-way for the State on State Highway No. 288. The desired right-of-way will run across one end of a cemetery. All interested parties and relatives of the known dead are willing for the County to acquire the right-of-way but there are a number of unknown dead in the strip of land involved. Your opinion will be appreciated as to the proper method of removing these graves and handling this situation so that the County will not be liable in any possible future damage suit as a result of the removal of the graves. Could the County make the removals for highway purposes through permission of the County Court under Art. 928b, Revised Civil Statutes?

"The County proposes to have a cemetery association organized and is assured of the cooperation of any and all known interested parties. The removals, if made, will be made by competent parties and every effort will be made by the County to put the cemetery in much better condition than it is in at the present time."

With reference to your first question concerning the amount of fees, if any, which a sheriff or his deputy is entitled to, in misdemeanor cases filed in the justice court, where the sheriff or his deputies have nothing to do whatsoever with the case, this matter has been determined by this department on numerous occasions. This department has repeatedly ruled that a constable or other peace officer is not entitled to charge, collect or accept fees unless he actually performs the services set out in the statutes. If the constable or sheriff or their deputies do not make the arrest, or the commitment or the release, they certainly cannot charge, collect or accept a fee for doing so.

Therefore, it is our opinion where a sheriff or his deputies, or any other peace officer performs no service or services in connection with a misdemeanor case filed in the justice court, such officer is not entitled to any fee.

In support of our conclusion stated above, we refer you to our opinions No. 0-901, No. 0-1180, No. 0-963, 0-359, 0-106, 0-693 (Conference Opinion No. 3058) and 0-768, copies of which are enclosed for your convenience.

Honorable Clyde B. Kennelly, Page 3

We now consider your second proposition. As stated in your letter, under our statutes, a county has no right to acquire land, right-of-way or easement in land by eminent domain where the land is used for cemetery purposes.

Article 3264a, Vernon's Annotated Civil Statutes, provides in part:

"The right of Eminent Domain is hereby conferred upon counties of the State of Texas for the purpose of condemning and acquiring land, right-of-way or easement in land, private or public, except property used for cemetery purposes, where said land, right of way or easement is necessary in the construction of jails, court-houses, hospitals, delinquent and dependent schools, poor farms, libraries or for other public purposes, where such purpose is now or may hereafter be authorized by the Constitution or Statutes of this State.

". . ."

In this connection it is to be noted that Articles 6729, 6674a, and other statutes regarding the right of eminent domain by the counties or the State for materials, right-of-way, etc., with reference to the construction of highways and public roads, do not authorize the condemning and acquiring land used for cemetery purposes, for the purposes above indicated.

It is stated in Texas Jurisprudence, Vol. 16, p. 666:

"In accordance with the principles . . . governing the condemnation of property already appropriated to an existing public use, the legislature has recognized certain uses as controlling, and has in effect exempted lands devoted to them from condemnation for any other purpose. We have already seen that the use of land for cemetery purposes is a public use. This fact, together with the universal sentiment that the ashes of the dead should not be disturbed and that the soil in which they are buried should not be exposed to the vicissitudes of business affairs, has frequently induced the legislature, when delegating the power of eminent domain, to make express provision that it shall

Honorable Clyde B. Keahely, Page 4

not be exercised in respect of land that is in use for cemetery purposes. Thus the statutes conferring the right of condemnation upon drainage districts, oil and gas companies, water improvement districts, etc., as has been pointed out, expressly except cemeteries from operation of the power. On the other hand, however, numerous grants contain no such provisions and some even authorize the taking of cemetery property upon a showing of necessity."

It is stated in Texas Jurisprudence, Vol. 9, p. 3:

"A cemetery is a parcel of land which is devoted to the burial or interment of the bodies of the dead; and the term 'cemetery' includes not only lots for the sepulture of bodies, but also avenues, walks and grounds for shrubbery and ornamental purposes. The place does not change character because further interments in it become impossible; it ceases to be a cemetery only when the sepultured bodies have been exhumed and removed."

The Supreme Court of Texas in the case of Oakland Cemetery Company v. Peoples Cemetery Association, 57 S. W. 27, among other things, held that where the land has been laid out into lots and a plat has been made and recorded in the office of county clerk, the land is irrevocably dedicated to the use as a place of burial. The legal title remains in the corporation only for the purpose of conveying the lots to those who desire to use them for the purposes of burying the dead; no power is given by the statutes to the corporation to convey the property for any other purpose. You state in your letter that the county proposes to have a cemetery association organized but do not state whether or not this association is to be incorporated. However, we think, if the association is unincorporated, it would have no more power than an incorporated association, and that such association would have no power to convey the property for any other purpose than for the purpose of burying the dead. However, such portion of the cemetery when the sepultured bodies have been exhumed and removed would cease to be a part of the cemetery, and by virtue of article 928b, Vernon's Annotated Civil Statutes, which provides as follows:

"The remains of a deceased person interred in a plot in a cemetery may be removed therefrom

Honorable Clyde B. Kennelly, Page 5

with the consent of the cemetery association and the written consent of the surviving wife or husband, or if there is no surviving husband or wife, (then of the children, or if there is no surviving husband or wife) nor children, then of the parents of the deceased, or should there be no surviving husband or wife or children or parent, then of the brothers and/or sisters of the deceased. If the consent of any such person or of the association cannot be obtained, permission by the County Court of the county where the cemetery is situated shall be sufficient. Notice of application to the Court for such permission must be given, at least ten (10) days prior thereto, personally, or at least fifteen (15) days prior thereto if by mail, to the cemetery association, and to the persons not consenting, and to every other person or association on whom service of notice may be required by the Court. This provision shall not apply to or prohibit the removal of any remains from one plot to another in the same cemetery; neither shall this provision apply to the disinterment of remains upon order of Court or coroner."

the remains of deceased persons interred in the cemetery may be removed therefrom, when the provisions of said statute are complied with.

It is our opinion that when the remains of the deceased persons interred in that portion of the cemetery have been removed in compliance with Article 928b, supra, such portion of the cemetery ceases to be a cemetery and that portion of the same can legally be used for ~~right-of-way~~ or other purposes in connection therewith.

Yours very truly

APPROVED FEB 2, 1942

ATTORNEY GENERAL OF TEXAS

*Robert Allen*

By *Ardell Williams*

ATTORNEY GENERAL

Ardell Williams  
Assistant

AW:GO

