



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Joab Campbell
County Attorney
Schleicher County
El Dorado, Texas

Dear Sir:

Opinion No. O-4436
Re: County clerks - Fees of office - commissioners' courts.

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

"The County Clerk of this county, pursuant to his contract with the Commissioners Court, and at his own cost and expense, for the past year or more, has been preparing a new set of corrected and improved indexes of all the records kept in his office, for a compensation specified in such contract, to be paid to him quarterly out of county funds, as the work progressed.

"About one third of the work was completed during the year, 1941, for which the court paid him about one third of such agreed compensation. It being understood that the clerk was to prepare such indexes along at his spare time and not to interfere with the performance of his official duties.

"This county is on the fee basis system and the County Clerk is paid a ex-officio salary.

"The County Clerk contends, as does his attorney, that such compensation was paid him for services rendered the county out side of his official duties, was not a proper fee of office and should not be accounted for in arriving at the maximum fees allowed him under the law.

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"Should the County Clerk of this county account for such compensation paid him, in arriving at the maximum fees allowed him under the law? Was said Commissioners Court authorized to make such contract?"

Articles 1941, 1942, 1945, 3931 and 3932, Vernon's Annotated Texas Civil Statutes, read as follows:

"Art. 1941. Recorders

"They shall be ex-officio recorders for their several counties, and as such shall record in suitable books to be procured for that purpose all deeds, mortgages and other instruments required or permitted by law to be recorded; they shall be the keepers of such record books, and shall keep the same properly indexed, arranged and preserved."

"Art. 1942. Custody of records

"They shall be keepers of the records, books, papers and proceedings of their respective courts in civil and criminal cases and in matters of probate, and see that the same are properly indexed, arranged and preserved, and shall perform such other duties and in that behalf as may be by law imposed on them."

"Art. 1945. Other dockets, indexes, etc.

"The clerk shall keep such other dockets, books and indexes as may be required by law; and all books, records and filed papers belonging to the office of county clerks shall at all reasonable times be open to the inspection and examination of any citizen, who shall have the right to make copies of the same."

"Art. 3931. County clerk: preserving records

"At each term of his court the county judge shall inquire into and examine the amount of labor actually and necessarily performed by the

clerk of his court in the care and preservation of the records of his office, in making and keeping necessary indexes thereto, and other labor of a like class, and allow said clerk a reasonable compensation therefor, not to exceed the fees allowed him by law for like services, and not to exceed one hundred dollars annually, to be paid out of the county treasury upon the sworn account of such clerk, approved in writing thereon by the county judge."

"Art. 3932. County clerk: ex-officio services

"For all ex-officio services in relation to roads, bridges and ferries, issuing jury script, county warrants, and taking receipts therefor, services in habeas corpus cases, making out bar dockets, keeping records of trust funds, filing and docketing all papers for Commissioners' Court, keeping road overseers' books and list of hands, recording all collection returns of delinquent insolvents, recording county treasurer's reports, recording reports of justices of the peace, recording reports of animals slaughtered, and services in connection with all elections, and all other public services not otherwise provided for to be paid upon the order of the Commissioners' Court out of the treasury, the county clerk shall receive such sum as the Commissioners' Court may determine under the provisions of Article 3895, to be paid quarterly. No county clerk shall be compelled to file or record any instrument of writing permitted or required by law to be recorded until the payment or tender of payment of all legal fees for such filing or recording has been made. Nothing herein shall be held to include papers or instruments filed or recorded in suits pending in the county court."

Article 3930, Vernon's Annotated Civil Statutes, reads in part as follows:

"Clerks of the county court shall receive the following fees:

". . .

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"Transcribing, comparing and verifying record books of his office, payable out of the county treasury upon warrant issued under the order of the Commissioners' Court, for each 100 words. . . .10."

The case of Tarrant County vs. Rogers, 125 S.W. 592 (Sup. Ct. 135 S. W. 110) held that the Commissioners' Court had no authority to pay the county clerk a certain sum for work in indexing records, and hence the county was not bound by said agreement and could recover from the clerk the amount paid him for doing the work in excess of what it actually cost. We quote from the court's opinion in said case as follows:

"The court in its main charge, with reference to extra work done on the indexes, instructed the jury as follows: 'You will charge him (meaning Rogers) with three-fourths of \$7,576.75, the amount paid Rogers by Tarrant County for reindexing deeds, over and above the expenses paid out by Rogers for that work.' The extra work referred to by this charge meant the work that was done by Rogers under the direction of the commissioners' court upon the indexes. This work consisted in placing on the margin of the reports opposite the deeds so recorded a brief description of the property conveyed by the instrument, so that a person examining the record could tell by looking at this notation whether the instrument to which it referred conveyed the property for which he was searching. Relative to this work, Rogers testified that he was instructed to do it by the commissioners' court; that he had never seen any order directing him to do the work; that Butler, his predecessor, had commenced the work; that when he went into the office the commissioners directed him to go on with it; that he finished it up as directed by them, and paid out for clerical aid in doing the work the sum of \$6,023; that he kept the difference between that amount and the amount allowed him by the commissioners' court for the same, which amount so kept by him was \$7,564.75, which he retained as his compensation therefor; that there was an understanding between

himself and the commissioners that he was to have five cents for the entry of each description that was made on this index, and, at five cents for each description, said work amounted to the sum of \$13,587.75; that the amounts paid him by the county for putting these descriptions on the index were paid by warrant on the county, drawn by the commissioners' court; that he declined to do the work when first requested by the commissioners, on the ground that it was going to mix up the office work considerably, as it took about 20 men to do this extra work; and, further, that he did not care to do it, if they were going to regard it as a part of the duties of the office, and as a part of the office fees; whereupon the commissioners told him that they did not expect anything of that kind, but to go ahead and finish it up as Butler had commenced it, as they did not want it left incomplete.

"Appellant contends that the charge above referred to was erroneous, in that the work so done by Rogers upon said indexes was not fees of office, and hence the county was entitled to recover of him the entire amount, to wit, \$7,562, remaining after paying for the actual expense of doing the work. This charge was evidently given by the court upon the theory that the clerk was entitled to one-fourth of said sum as official fees.

"After a careful examination of the statutes relative to the duties of clerks as to preservation and keeping of the records and indexing the same, we fail to find any provision therein requiring them to make marginal notations of the description of the land conveyed by the instruments recorded, such as was done in this instance, and hence conclude that the work done by said clerk, while it may have been a great convenience to the public, still was not such work as the commissioners could require him to do. It therefore did not fall within this category. Nor do we think that appellee could rely, as he undertakes to do, upon the contract made with the commissioners'

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court, and recover the whole or any portion of the balance remaining after deducting the expenses for having the work done, because the commissioners' court had no authority, in our judgment, to make any such contract with him; and, if without authority to do so, the county was not bound by their action in undertaking to make a contract with him for such service. See Tarrant County v. Butler, 35 Tex. Civ. App. 421, 80 S.W. 656; also Bell County v. Felts et al, 120 S. W. 1065. Nor is the county estopped in any manner from asserting that said contract was unlawful, and recovering the amount so paid out, based thereon. See Baldwin v. Travis County, 40 Tex. Civ. App. 149, 88 S. W. 480, and Delta County v. Blackburn, 100 Tex. 51, 93 S.W. 419."

We quote from the case of Tarrant County v. Butler, 80 S.W. 656:

"If the \$8,000 allowed appellee Butler for making indexes, etc., during the last fiscal year of his term, constituted fees of office, within the meaning of the fee bill, then, of course, the county was entitled to have this item considered in determining the amount of excess due it. The fee bill requires 'all fees collected during the fiscal year' etc., to be accounted for, and fixes a maximum amount of fees of 'all kinds' which may be retained. It is insisted, however, that the extra services thus compensated were not official; that compensation for making the indexes was a matter purely of contractual right. We do not think so. As we have observed, the Constitution confers general powers upon the Legislature to prescribe the duties of county clerks, and by reference to Rev. St. art. 1143, and following, it is apparent that the Legislature has made it the duty of the county clerks to keep and preserve the records of their offices, and to keep proper indexes of all records thereof. The duty to safely keep and preserve the records necessarily confers the right to exclude all nonofficials from interference therewith. The commissioners' court would be without power, without consent of the

clerk, to authorize a stranger to take possession of the records and perform the services contemplated in the work to which the contract of the commissioners' court related. The duty to keep and preserve the indexes also necessarily implies the duty to transcribe, renew, or make proper indexes when necessary, as was alleged in appellant's petition; and the compensation therefor seems to have been expressly provided, as will be seen from the following quotation from article 2457, Rev. St. 1895, viz., 'transcribing, comparing and verifying record books of his office, payable out of the county treasury upon warrants issued under the order of the commissioners' court, for each 100 words ten cents', which seems not to have been affected by the fee bill, as will be evident by an inspection of the twenty-sixth section thereof, providing that laws not in conflict with the act are not affected. For aught that appears, the \$8,000 allowed appellee Butler for making new indexes was but the sum total of fees to which he was entitled therefor under existing law, and the settlement indicated by the order hereinbefore referred to amounted only to the ascertainment of this fact. But however this was, we think the \$8,000 was official fees, within the meaning of the fee bill, for which Butler should be required to account."

You are respectfully advised that it is the opinion of this department:

1. The commissioners' court has no authority to contract to pay the county clerk a certain sum for "preparing a new set of corrected and improved indexes of all the records kept in his office." (See *Tarrant County v. Rogers*, 125 S. W. 595)

2. The commissioners' court has authority to allow the county clerk fees of 10 cents per 100 words for "transcribing, comparing and verifying record books of his office" as provided for by Article 2930, V.A.C.S. Such fees must be accounted for by the clerk as fees of office. (See *Tarrant County v. Butler*, 80 S. W. 659)

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3. The county judge has authority to allow the county clerk for his labor actually and necessarily performed in the care and preservation of the records of his office, in making and keeping necessary indexes thereto, and other labor of a like class, a reasonable compensation therefor, not to exceed the fees allowed him by law for like services, and not to exceed one hundred dollars annually. (See Article 3931, V.A.C.S.) Such compensation is ex-officio compensation and should be accounted for by the clerk in the determination of his compensation under Articles 3883 and 3891, V.A.C.S. Also in this connection see the case of Anderson County vs. Hopkins, 187 S. W. 1019.

4. The commissioners' court has authority to allow ex-officio compensation to county clerks under the provisions of and within the limitations prescribed by Articles 3895 and 3932, V.A.C.S.

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

Very truly yours

ATTORNEY GENERAL OF TEXAS

APPROVED FEB 24 1942
Joab Campbell
JOAB CAMPBELL
COUNTY CLERK

By

Wm. J. Fanning
Wm. J. Fanning
Assistant

WJF:LM

