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OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

February 25, 1939

Mr. Carlos C. Ashley
District Attorney
Llano, Texas

Dear Sir:

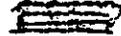
Opinion No. O-336
Re: Is county entitled to recover from sheriff money allowed for deputy hire but paid to deputies other than those applied for?

Your letter of February 9th, addressed to Attorney General Gerald C. Lann, has been referred to the writer. You request an opinion as to whether or not Menard County may recover from its sheriff-assessor-collector money allowed for deputy hire, but paid to deputies other than those applied for.

Your letter states that the sheriff-assessor-collector employed three deputies under authority of the Commissioners' Court order and later hired additional deputies, and paid the additional deputies out of the authorized funds for the original three deputies.

Your question is worthy of careful consideration in that its determination has not yet been made by the courts in construing Article 3902 R.C.S., of Texas as follows:

"Whenever any district, county or precinct officer shall require the services of deputies, assistants or clerks in the performance of his duties he shall apply to the County Commissioners' Court of his county for authority to appoint such deputies, assistants or clerks, stating by sworn application the number needed, the position to be filled and the amount to be paid. Said



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application shall be accompanied by a statement showing the probable receipts from fees, commissions and compensation to be collected by said office during the fiscal year and the probable disbursements which shall include all salaries and expenses of said office; and said court shall make its order authorizing the appointment of such deputies, assistants and clerks and fix the compensation to be paid them within the limitations herein prescribed and determine the number to be appointed as in the discretion of said court may be proper; provided that in no case shall the Commissioners' Court or any member thereof attempt to influence the appointment of any person as deputy, assistant or clerk in any office. Upon the entry of such order the officers applying for such assistants, deputies or clerks shall be authorized to appoint them; provided that said compensation shall not exceed the maximum amount hereinafter set out * * * "

In this instance, the Commissioners' Court did authorize the expenditure of the amount paid, but did not authorize the payment as made. You have not stated in your letter whether or not the Commissioners' Court has taken any action on the annual report of the officer, which may be of controlling importance in effecting the rights of the county. The sheriff-assessor-collector had no authority to appoint deputies, except by the procedure as outlined in the above Article 3902. Further, he had no authority to agree upon or to pay a less amount to the original three deputies than as authorized by the Commissioners' Court order. Maryland Casualty Company vs. The State, 107 S.M. (2d) 865.

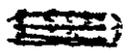
The Commissioners' Court may subsequently certify that which it may have authorized originally. 3, where the Commissioners' Court approves the

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the expenditures in the annual report of the officer as to paying deputies not authorized to have been appointed, the county is bound as having authorized the deduction. The State of Texas vs. Carnes, 106 S.W. (2d) 397; Cameron County vs. Fox, 61 S.W. (2d) 483. However, where more than three years had elapsed after the appointment and payment of an unauthorized deputy, where there was no action of approval taken by the Commissioners' Court, and though the County Auditor had allowed the payment, the county was not estopped, but could recover. Tarrant County vs. Smith, 81 S.W. (2d) 539.

We believe that the procedure in Article 3902 above is properly construed as a condition precedent to a county officer's right of appointment of deputies and his right to deduct the amount of deputy salaries. We recognize that any expenditure for deputy hire not an authorized expenditure gives the county a right to recover. However, in this instance, it appears that the expenditure was authorized, though the appointments were not authorized. We do not believe that the county will have suffered an injury for the payment of the amount of money it authorized to be expended. The situation would have been different had the officer appropriated the money to his own use or other use than deputy hire. There would not be any question as to the county having lost its right to assert the claim, in this instance, where the Commissioners' Court has approved the auditing and settling of the officer's account; and if the Commissioners' Court has made no approval of expenditures to the additional deputies, we believe that the violation of Article 3902 would give rise to the basis for a suit in the violation of a legal right, but the theory of *damnum absque injuria* would preclude a recovery. In other words, Renard County has not been out more than the \$2600.00 approved expenditure, all of which was expended for deputy hire.

We are not called upon to determine the liability as between the officer and original deputies. Further, the State of Texas not being a party to this



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proposed suit and in lieu of this particular situation not having been previously determined in the courts, our opinion can only be an abstract statement of the applicable law and should constitute no authority for any action.

Believing this to answer your inquiry, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Pat Coon*

Pat Coon
Assistant

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APPROVED:

Gerrit E. Mann
ATTORNEY GENERAL OF TEXAS

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