



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Charles H. Theobald
County Attorney
Galveston County
Galveston, Texas

Dear Sir:

Opinion No. 9-5016
Re: Justice of the Peace may
not appoint "Assistant
Justice of the Peace" to
serve for him while he is
in the Navy and related
matters

Your request for opinion has been received and
carefully considered by this department. The facts related
by you are briefly as follows:

Galveston County has two Justice Courts in Pre-
cinct 1, denominated "A" and "B". The precinct officers of
the county are compensated on a fee basis. Justice Piperi,
the present Justice of Court "B" was re-elected in the Novem-
ber election. You stated that Justice Piperi volunteered in
the United States Navy and we assume from your letter that
he is not a commissioned officer and we base this opinion up-
on that assumption. You state further that Justice Piperi
will again qualify after January 1, 1943, as Justice of Court
1 "B". You also state that the Justice of Court 1 "A" is
temporarily performing the duties of the Justice of Court
1 "B" under the provisions of Article 2377, V. A. C. S. Your
questions (quoting from your request) are as follows:

"
"Now, the question is whether the Justice
of the Peace, of Court 1-A shall continue to per-
form the duties as justice of the peace of Court
1-B; and, if so, will the absent justice of the
peace be entitled to the fees earned during his
absence or will the fees earned in Court 1-B by
the justice of the peace of Court 1-A be accounted
for by him in his annual report and all in excess

of his legal compensation be considered excess fees to be paid over to the County as is required of any official operating under the fee system is required to do should he have excess fees.

". . . .

"Therefore, from the explanation of the situation which confronts us, will you kindly advise me if, in the event a justice of the peace was re-elected at the last general election to his office as justice of the peace, may he appoint someone to serve for him until he is discharged from the military service; and, if so, how are the fees to be disposed of, that is: compensation earned by fees; and, in the event he has authority to appoint someone to act for him, is there any provision in the law by which a valid bond could be taken to protect the county as to excess fees, or would it be necessary for such assistant, if authorized to be appointed by the justice of the peace, to give an indemnity bond to the absent justice of the peace to protect his official bond when he qualifies.

". . . .

"You will note that Art. 2377, R.C.S., is rather permissive, that is: that the nearest justice of the peace MAY temporarily perform the duties of office. What would be the situation in the event the justice of the peace of Court 1-A should decline to perform the duties of the justice of the peace of Court 1-B?

". . . ."

Article 2377, Vernon's Annotated Texas Civil Statutes, provides:

"Whenever there is a vacancy or the justice in any precinct shall be absent, or unable or unwilling to perform the duties of his office, the nearest justice in the county may temporarily perform the duties of the office."

Honorable Charles H. Theobald, page 3

Opinion No. 0-3743 of this department holds, among other things, that there can be no "assistant county judge." We quote from said opinion as follows:

"It is our opinion that Article 3902, R.C.S., does not authorize the county judge to appoint a deputy or assistant to act as county judge during the period of his absence.

"It is a familiar rule that judicial authority cannot be delegated. The office of county judge is created by the Constitution, and the manner by which it is to be filled is provided in that document. The duties of the county judge require for their execution the exercise of judgment and discretion. The people, by electing a county judge, repose special confidence in the judgment and discretion of the person thus elected to fill the office. It may be doubted whether the Legislature in such circumstances, may create the office of deputy or assistant county judge and permit the county judge to delegate the exercise of his judicial power to such deputy or assistant. Parenthetically, it is significant that the office of 'deputy' or 'assistant' judge is, so far as we can determine, unknown to our system of jurisprudence.

"Whatever the scope of the legislative power may be, however, we think it clear that the authority to delegate the exercise of judicial power, or the authority directly conferred by the Legislature upon the 'deputy' to exercise it, must be express. It is not to be inferred from the mere permission to appoint deputies, assistants, and clerks, for the nature of the authority to be exercised by such subordinates is not prescribed by law. In such instance, it is rather to be assumed that the Legislature contemplates the delegation to the deputy or assistants of the authority to discharge ministerial or administrative functions of the principal office.

Honorable Charles H. Theobald, page 4

"No statute creates or defines the powers and duties of the office of 'deputy' or 'assistant' county judge. For the reason stated above, we hold that Article 3902 does not authorize the appointment by the county judge of a deputy or assistant vested with authority to act as the county judge himself might with respect to matters involving the exercise of judgment and discretion, or the exercise of the judicial power."

Article 1011, Vernon's Annotated Texas Code of Criminal Procedure, provides:

"No item of costs shall be taxed for a purported service which was not performed, or for a service for which no fee is expressly provided by law."

Answering your questions it is our opinion under the facts stated and assumed:

1. There is no such office as "assistant Justice of the Peace" as judicial authority can not be delegated and no such purported "assistant" can be appointed to act for the Justice of the Peace.

2. The Justice of Court 1 "A" will be entitled to receive the fees he earns while temporarily serving in Court 1 "B" which he of course must account for under the pertinent maximum and excess fee statutes.

3. Justice Piperi would not be entitled to fees he does not earn. For example, Article 1052, Vernon's Annotated Texas Code of Criminal Procedure, provides certain trial fees to justices for finally disposing of criminal cases, if the justice of Court 1 "A" accepted a plea of guilty in a misdemeanor case in Court 1 "B" THEN THE Justice of Court 1 "A" would be entitled to the trial fee and certainly not the justice of Court 1 "B" who did not perform any service.

4. We agree with you that Article 2377, V.A.C.S., supra, is a directory statute and is not mandatory. However, if the Justice of Court 1 "A" declined to serve in Court 1 "B" litigants and peace officers could file their civil

Honorable Charles H. Theobald, page 5

suite and criminal cases in court 1 "A" and it would then be the mandatory duty of the Justice of Court 1 "A" to dispose of the civil and criminal litigation filed in his court.

Trusting that this satisfactorily answers your inquiry, we are

Very truly yours

ATTORNEY GENERAL OF TEXAS

Wm. J. Penning

By

Wm. J. Penning
Assistant

WJF:db

RECEIVED DEC 19, 1942

George B. Mann

ATTORNEY GENERAL OF TEXAS

Reid