



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN 11, TEXAS**

**WAGGONER CARR  
ATTORNEY GENERAL**

*See H-1042*

September 14, 1965

Honorable Franklin L. Smith  
County Attorney  
Nueces County Courthouse  
Corpus Christi, Texas

Opinion No. C- 506

Re: Whether Section 4 of Article 1937 as provided for by Section 1 of House Bill 125, Acts 59th Legislature, 1965, Regular Session, ch. 456, p. 941, is unconstitutional by virtue of Section 51 or Section 52 of Article III of the Constitution of Texas.

Dear Mr. Smith:

You have requested the opinion of this office upon the following questions:

"1. Is Section 4 of House Bill 125, 59th Legislature, constitutional insofar as it requires that the premiums for the liability insurance protecting the county clerk be paid out of county funds?

"2. If such provision is unconstitutional and the county is precluded from paying this premium, must the county clerk purchase such insurance for the protection of himself and his deputies?"

Section 4 of Article 1937, as provided for by Section 1 of House Bill 125, Acts 59th Legislature, 1965, Regular Session, ch. 456, p. 941, provides that:

"Each county clerk shall obtain an errors and omissions insurance policy, if the same be available, covering the county clerk and the deputy or deputies of the county clerk against liabilities incurred through errors and omissions in the performance of the official duties of said county clerk and the deputy or deputies of said

Hon. Franklin L. Smith, page 2 (C-506)

county clerk; with the amount of the policy being in an amount equal to a maximum amount of fees collected in any year during the previous term of office immediately preceding the term of office for which said insurance policy is to be obtained, but in no event shall the amount of the policy be for less than Ten Thousand Dollars (\$10,000). The premiums for said insurance shall be paid out of the funds of the county by the Commissioners Court of said county." (Emphasis added).

We are of the opinion that Section 4 of Article 1937, as provided for by Section 1 of House Bill 125, providing for the obtaining of an errors and omissions insurance policy covering the County Clerk and his deputies, is in violation of Section 51 and Section 52 of Article III of the Constitution of Texas. Section 51 of Article III of the Constitution of Texas provides in part that:

"The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual. . . ."

Section 52 of Article III of the Constitution of Texas provides in part that:

"The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual. . . ."

The rule of law in Texas is well settled that a county is not liable for the tortious or negligent acts of its officers, agents or employees. Heigel v. Wichita County, 19 S.W. 562 (Tex. Sup.Ct. 1892); Floria v. Galveston County, 55 S.W. 540 (Tex.Civ. App. 1900); Nussbaum v. Bell County, 97 Tex. 86, 76 S.W. 430 (1903); Bryan v. Liberty County, 299 S.W. 303 (Tex.Civ.App. 1927); Jones County v. Moore, 4 S.W.2d 289 (Tex.Civ.App. 1928, error ref.); Angelina County v. Bond, 16 S.W.2d 338 (Tex.Civ.App. 1929). Attorney General's Opinions Nos. 0-5315 (1943), 0-353 (1939), and 0-1922 (1940). In addition, it was stated by the Supreme Court of Texas in the case of State v. City of Austin, 160 Tex. 348, 331 S.W.2d 737 (1960) that:

". . . the use of public money to pay a claim predicated on facts which generate no state liability constitutes a gift or donation in violation of our Constitution."

Hon. Franklin L. Smith, page 3 (C- 506)

While the foregoing case involved the State rather than a county, the above-quoted rule of law would be equally applicable to a county in view of the language contained in Section 51 and Section 52 of Article III of the Constitution of Texas.

As it would be in violation of Section 51 and Section 52 of Article III of the Constitution of Texas for a county to pay a claim of a person for a loss suffered by such person for some act of the County Clerk or his deputies in the performance of their official duties, it would likewise be a violation of the same constitutional provisions for a county to pay the premiums on an insurance policy which had as its purpose the paying of a claim predicated on facts which generated no county liability. In this same connection it was stated in Attorney General's Opinion No. 0-1922 (1940) that:

" . . . It is fundamental that the county would have no authority to insure against a non-existent liability."

In the event the purpose of the insurance policy provided for in Section 4 of Article 1937, as provided for by Section 1 of House Bill 125, was to afford the County Clerk and his deputies a form of protection from personal monetary loss for some act of theirs which resulted in their personal liability to some member of the public, then the payment of the premiums of the insurance policy by the county would clearly constitute a gift or donation of public moneys to the County Clerk and his deputies in violation of Section 51 and Section 52 of Article III of the Constitution of Texas. See Attorney General's Opinion No. 0-353 (1939).

As we have held that Section 51 and Section 52 of Article III of the Constitution prohibits the county from paying the premiums on the insurance policy required by Section 4 of Article 1937, as provided for by Section 1 of House Bill 125, it becomes necessary to pass upon the question of whether the County Clerk is nevertheless required to obtain such errors and omissions policy.

In this connection, we are of the opinion that because the obtaining of this insurance policy is an official duty of the County Clerk and the method or means of performing this duty, the payment of the premiums upon the policy, is prohibited by the Constitution, then the requirement of obtaining the insurance policy must necessarily fall also.

In view of the result we have reached in connection with the questions posed concerning Section 4 of Article 1937,

Hon. Franklin L. Smith, page 4 (C-506)

as provided for by Section 1 of House Bill 125, it should be noted that Section 3 of House Bill 125 provides that:

"If any provision or provisions of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

By virtue of the foregoing provision and the fact that Sections 1, 2, and 3 of Article 1937, as provided for by Section 1 of House Bill 125, deal with the giving of a bond by the County Clerk, an entirely different subject matter which is independent of the provisions of Section 4 of Article 1937, we are of the opinion that Section 4 of Article 1937, as provided for by Section 1 of House Bill 125, is severable and its unconstitutionality does not invalidate the remaining provisions of House Bill 125.

#### S U M M A R Y

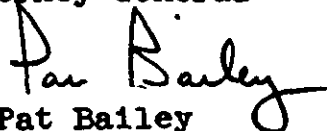
The payment of premiums by a county on the errors and omissions insurance policy required by the provisions of Section 4 of Article 1937, as provided for by Section 1 of House Bill 125, Acts 59th Legislature, 1965, Regular Session, ch. 456, p. 941, violates Section 51 and Section 52 of Article III of the Constitution of Texas.

The payment of the premiums by a county on the foregoing errors and omissions insurance policy being in violation of the Constitution of Texas, it is unnecessary for the County Clerk to obtain such insurance policy.

The invalidity of Section 4 of Article 1937, as provided for by House Bill 125, does not invalidate the remaining provisions contained in House Bill 125.

Very truly yours,

WAGGONER CARR  
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By:   
Pat Bailey  
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Hon. Franklin L. Smith, page 5 (C- 506)

APPROVED:  
OPINION COMMITTEE

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APPROVED FOR THE ATTORNEY GENERAL  
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