



THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

July 6, 1951

Hon. Allen Harp
District Attorney
100th Judicial District
Childress, Texas

Opinion No. V-1201

Re: Constitutionality and mandatory or discretionary character of Senate Bill 444, Acts 52nd Legislature, authorizing appointment of a stenographer and provision of office space for the District Attorney of the 100th Judicial District.

Dear Sir:

Reference is made to your request in which you ask the following questions:

1. Is Senate Bill 444, Acts of the 52nd Legislature, 1951, constitutional?
2. Are the provisions contained therein mandatory or discretionary on the part of the commissioners' courts involved?

The bill appears to be in proper form in every respect. Section 1 of the bill provides:

"The District Attorney of the 100th Judicial District of Texas is hereby authorized to appoint a stenographer who shall receive a salary not to exceed Twenty-four Hundred Dollars (\$2400) per annum. Said salary shall be fixed and determined by the District Attorney of said Judicial Districts, and the District Attorney shall file with the Commissioners Court of each County in said District a statement specifying the amount of salary to be paid said stenographer. Said salary shall be paid monthly by the Commissioners Court of each County comprising said District in the manner and on the same pro ratio basis as that

contained in the order of the District Judge of such Districts for the payment of the salary of the official shorthand reporter.

"The Commissioners Court of the County in which the District Attorney resides shall furnish the District Attorney with adequate office space and the supplies necessary to the efficient operation of said office."

Section 56 of Article III, Constitution of Texas, provides in part:

"The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, . . .

". . .

"Regulating the affairs of counties, cities, towns, wards or school districts;"

It is apparent that Senate Bill 444 falls within the classification of a local or special law. To be invalid as such, it must come within the provisions of Section 56 of Article III of the Constitution of Texas Fort Worth v. Bobbitt, 121 Tex. 14, 36 S.W.2d 470, 41 S.W.2d 228 (1931); Bexar County v. Tynan, 128 Tex. 223, 97 S.W.2d 467 (1936); Miller v. El Paso County, 136 Tex. 370, 150 S.W.2d 1000 (1941); Anderson v. Wood, 137 Tex. 201, 152 S.W.2d 1084 (1941).

Section 1 of Article V, Constitution of Texas, provides:

"The judicial power of this State shall be vested in one Supreme Court, in Courts of Civil Appeals, in a Court of Criminal Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.

"The Criminal District Court of Galveston and Harris Counties shall continue with the district jurisdiction and organization now existing by law until otherwise provided by law.

"The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto."

The court, in Jones v. Anderson, 189 S.W.2d 65 (Tex.Civ.App. 1945, error ref.), upheld Article 52-161, V.C.C.P., creating the office of Criminal District Attorney for Bexar County. Among other things, the act provided for the appointment of assistant district attorneys, investigators, and stenographers, and fixed their salaries. The court stated:

"Section 1 of said Article 5 clearly authorizes the Legislature to enact just such a bill as House Bill 131, now known as Article 52-161, Vernon's Code of Criminal Procedure.

". . .

"Appellant further complains that the Act violates Sections 56 and 57 of Article 3 of our constitution in that it attempts to regulate the affairs of a county by a local or special law. We overrule this contention, the first sentence in Section 56 reads as follows: 'The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law.' Section 1, Article 5, of the Constitution authorizes the enactment of just such an act as Article 52-161, C.C.P., and is therefore made an exception in the very first sentence of Sec. 56, Art. 3, of the Constitution. . . ." (189 S.W.2d at 66.)

In Harris County v. Crooker, 224 S.W. 792 (Tex. Civ.App. 1920), affirmed 112 Tex. 450, 248 S.W. 652 (1923), the court upheld an act, special in nature, which changed "the territorial limits of the criminal jurisdictional district composed of Galveston and Harris Counties so as to include Harris County alone," and which provided for the compensation of the "district attorney for said court." In holding that the Legislature derived its authority to pass such an act from Section 1 of Article V, the court said:

"We think it should be held that, when the people by said section 1 of article 5 specifically conferred upon the Legislature power to enact a special law creating and providing for the organization of the court referred to, they intended the power to include everything necessary or proper to be done to that end, and that one of the things necessary and proper to be done was to provide compensation for those who were to constitute the court. Of course, if that was the intention of the makers of the Constitution, they did not intend that the inhibition in section 56 of article 3 against special laws regulating the affairs of counties should be applied to the case." (224 S.W. at 796.)

The court, in Neal v. Sheppard, 209 S.W.2d 388 (Tex.Civ.App. 1948, error ref.), upheld Article 199-124, V.C.S., a special law for the 124th Judicial District, composed of Gregg County. Among other things, the act authorized the appointment of assistant district attorneys, an investigator, and a stenographer for the Criminal District Attorney of the 124th Judicial District and fixed the salaries to be paid to each.

In view of the foregoing, it is our opinion that Senate Bill 444, Acts 52nd Leg., 1951, does not violate Section 56 of Article III, Constitution of Texas, and therefore is constitutional.

In 2 Sutherland, Statutory Construction (3rd Ed. 1943) 216, it is stated:

"Although in every case the legislative intent should control in determining whether a statute or some of its provisions are mandatory there are, nevertheless, certain forms and certain types of statutes which generally are considered mandatory. Unless the context otherwise indicates the use of the word 'shall' (except in its future tense) indicates a mandatory intent."

In Elms v. Giles, 173 S.W.2d 264, 268 (Tex.Civ. App. 1943, error ref. w.o.m.) the court, in construing an act to determine whether it was mandatory or permissive, stated:

" . . . By the use of the word 'shall' in each of the provisions above quoted, the Act makes it mandatory that such notices be given . . ."

The word "shall" is used in Senate Bill 444 in each instance wherein the duties of the commissioners' courts are prescribed. In view of the foregoing, it is our opinion that Senate Bill 444, Acts 52nd Leg., 1951, is mandatory in regard to the provisions relating to the duties of the commissioners' courts involved.

SUMMARY

Senate Bill 444, Acts 52nd Leg., 1951, authorizing the District Attorney of the 100th Judicial District to appoint a stenographer, is constitutional. The provisions of the act relating to the duties of the affected commissioners' courts are mandatory.

APPROVED:

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Yours very truly,

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By


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