

## Opinion No. 37-1677

June 15, 1937

**BY:** FRANK H. PATTON, Attorney General

**TO:** Hon. James B. McGhee District Judge Roswell, New Mexico State Department of Public Health Santa Fe, New Mexico

{\*122} This opinion is in response to a request that this office pass upon the validity of the following portion of Section 11, Chapter 39, Laws of 1937, relating to the certification of births by a district judge. We herein set out the portion involved as follows:

"Certification of births occurring one year or more before the date of filing shall be made by a district judge upon a form prescribed by regulation of the State Board and after submission of evidence conclusive to the court that the birth took place as stated on the certificate, the judge shall affix his seal and signature to such certificate and order that it be filed with the district health officer of the health district in which the birth took place."

The first question presenting itself is whether the legislature, by the aforementioned section of the law, imposed upon the district courts of this state duties which are nonjudicial. If so, such legislation is invalid for that reason alone.

A general statement of the law on this proposition is found in Corpus Juris as follows:

"(sec. 242) d. Imposing Nonjudicial Duties. In the absence of **express constitutional provision**, the legislature cannot assign to the judiciary any duties other than those properly **judicial**, to be performed in a **judicial manner**." 12 C. J. 810.

The following statement is also found in Corpus Juris:

"(sec. 376) 2. Statutes Conferring on Courts or Judges Nonjudicial Powers -- a. In General. Under the American constitutional system, not only is it true that the judiciary may not, of its own authority, exercise powers not judicial, but, generally speaking, it is also true that the legislature may not confer or impose such powers upon the judiciary." 12 C. J. 873.

Our constitution makes no effort to accurately define the scope or {\*123} nature of the judicial powers and, as a matter of fact, the term "judicial power" is not capable of a precise definition. Various definitions have been announced by various courts and various tests have been suggested for determining what are or are not judicial powers or duties.

However, duties performed by a district judge do not become judicial acts merely because they are performed by a judicial officer, notwithstanding an act of the legislature requiring the performance of such duties. If the action of the judicial officer is

in regard to matters which are exclusively executive or administrative in their nature, then the act of the legislature imposing such a duty upon the district judge is invalid and void. See Esmeralda County vs. Third District Court, 5 Pac. 64, 18 Nev. 438.

By Chapter 39, Laws of 1937, the legislature vested in the State Department of Public Health, an administrative branch of the executive department, the administration of our public health laws, with power to make and enforce rules and regulations for the enforcement of our health laws. Section 11 of said act provides that each district health officer, by and with the approval of the Board of Public Health, shall appoint sub-registrars for the purpose of receiving for registration birth and death certificates. Said section then provides that certification of births occurring one year or more prior to the date of filing shall be made by a district judge **upon a form prescribed by regulation** of the State Board of Public Health.

It appears from the act, therefore, that the district judge is called upon to do an administrative act rather than a judicial act. The only difference between a district judge and a sub-registrar is that the sub-registrar takes care of all certifications where the birth took place within one year from the date of presentation of the certificate, whereas the district judge takes care of all certifications where the birth occurred one year or more prior to the date of filing of the certificate. That the act imposes an administrative rather than a judicial duty is evidenced by the fact that the legislature made no provision for a hearing or judicial investigation, nor does the act specify who, if anyone, may be parties to any purported judicial proceeding, nor does the act provide for notice to be served on anyone, nor does the act contemplate that any action taken by the district judge shall be a final determination of some right of some party, nor does the act contemplate that the action of the judge shall in any way be conclusive and binding on anyone. Very much in point is the case of Home Insurance Company vs. Flint, 13 Minn. Rep. 235, where the Supreme Court of Minnesota stated as follows:

"A judicial investigation proceeds after notice, and eventuates in a judgment, which is the final determination of the rights of the parties, unless reversed by an appellate tribunal. The necessity of notice in the inception, and the conclusive character of the determination, are perhaps as good a test as any other, as to what proceedings are judicial. In this case it cannot be pretended that notice is required, or that the determination, or certificate, would be conclusive in collateral proceedings."

So it is with the matter at hand. It does appear that that portion of Section 1 of Chapter 39, Laws of 1937, herein involved does not purport to assign to the judiciary a judicial duty to be performed in a judicial manner, and for that reason alone it is void and invalid as imposing nonjudicial duties upon the judicial branch of our government.

{\*124} There is only one phase of the section of law herein involved, which might be construed as imposing a judicial duty upon the district courts and that is the following provision:

"**after submission of evidence conclusive to the court** that the birth took place as stated on the certificate, the judge shall affix his seal and signature to such certificate and **order** that it be filed, etc."

Even assuming that the duties so imposed are judicial, it does appear that the terms of the section of the law imposing those duties are so vague, indefinite, uncertain and incomplete, that if properly attacked in court, I believe the same would be declared inoperative and void for those reasons.

If the duties imposed are in fact judicial, then the following are some of the questions that at once present themselves:

1. How should the alleged judicial proceedings be instituted?
2. Who, if any one, are proper parties to institute such an alleged judicial proceeding?
3. Upon whom, if any one, should notice be served of the inception of the alleged judicial proceedings.
4. Is the action of the court a final determination of the rights of any person?
5. Is the determination or judge's certificate conclusive in a collateral proceedings?
6. And last but not least, where is the venue for the alleged proceedings?

Frankly, if called upon to answer the above questions we are forced to state that from a reading of the act the same can not be definitely answered. This being the case, the following rules of law are applicable:

"(Sec. 160) c. Certainty and Definiteness (Statutes) An act of the legislature, to have the force and effect of a law, must be intelligibly expressed. Where the terms of an act are so vague as to convey no definite meaning to those whose duty it is to execute it, ministerially or judicially, it is inoperative." 59 C. J. 601.

"(Sec. 62) Indefiniteness and Uncertainty. Where an act of the legislature is so vague, indefinite and uncertain that the courts are unable to determine, with any reasonable degree of certainty, what the legislature intended, or is so incomplete \* \* \* in its provisions that it can not be executed, it will be declared to be inoperative and void." 25 R. C. L. 810.

The Supreme Court of this state has very recently expressed itself on matters of this kind in the case of Safeway Stores vs. Vigil, reported in 40 N.M. 190, 57 P. (2d) 287. Our Supreme Court there used the following language:

"When the language of an act appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate, it is simply void."

We conclude, therefore, that if the legislative act herein involved be construed as imposing a non-judicial duty upon the judiciary of this state it is void as imposing non-judicial duties upon the judicial branch of our government. If, on the other hand, the act does in fact impose upon the courts a judicial duty, then the act is inoperative and void for the reason that it is indefinite, uncertain and incomplete and impossible of any precise or intelligible application {*\*125*} in the circumstances under which it was intended to operate.

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