



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

May 11, 1930

Honorable Richard Spinn
County Attorney,
Washington County
Brenham, Texas

Dear Sir:

Opinion No. 0-780

Re: Whether upon death of county
judge a county commissioner
may tender his resignation
and thereupon be appointed
county judge by other com-
missioners acting as com-
missioners' court?

We are in receipt of your letter of May 8, 1930,
wherein you outline the following facts:

"The incumbent of the office of County
Judge of Washington County became deceased
on May 7, 1930. Under the statute the duty
to appoint someone to fill the vacancy of
County Judge of said county devolves upon
the Commissioners' Court. One of the mem-
bers of said Commissioner's Court desires
to become an applicant, by tendering his
resignation and having the remaining three
commissioners accept his resignation and
tender his application for appointment to
fill the vacancy of County Judge."

You request our opinion in response to the following
questions:

"(1) Could such member of the court,
a Commissioner at present time and at the
time of the decease of the County Judge by
resigning and having his application to re-
sign accepted by the remaining three com-
missioners, be eligible and legally quali-



fied to be appointed County Judge in the event the remaining three Commissioners saw fit to appoint him?

"(2) In the event that the present four county commissioners appointed someone to fill the vacancy now existing in the office of County Judge of Washington County, and such person so selected and duly qualifies later decides not to continue holding the office, but prior to his resignation as County Judge so appointed to fill the vacancy created by the death of the original incumbent, one of the Commissioners should resign, his resignation be accepted and his successor be appointed by the judge and duly qualify say for a period of sixty days, and then when such first appointee to fill the vacancy of the office of county judge resigns, could the Commissioners Court accept his resignation, and in turn appoint the former Commissioner who had resigned about sixty days or more, resignation accepted and the successor had qualified, to now fill the vacancy created in the office of County Judge?"

Article 2355, Revised Civil Statutes, relating to commissioners' courts, their duties and powers, provides:

"The court shall have power to fill vacancies in the office of; county judge, county clerk, sheriff, county attorney, county treasurer, county surveyor, county hide inspector, assessor of taxes, collector of taxes, justices of the peace, constables and county superintendent of public instruction. Such vacancies shall be filled by a majority vote of the members of said court present and voting, and the person chosen shall hold office until the next general election. (Acts 1927, 40th Leg., 1st C. S., p. 248, ch. 90.)"

We wrote fully upon the questions here concerned in our opinion number 0-410, dated March 13, 1939, addressed to L. L. Steele, Thos. G. Pollard and Mrs. W. R. Potter, and since you have a copy of that opinion, it would be useless for us to repeat the reasons for our holdings and the authorities cited in support of the same.

Honorable Richard Spinn, May 11, 1939, page 3

When an official body is clothed with the power and duty of designating the person to fill a vacancy in public office, strong and controlling principles of public policy forbid such board or body from filling such vacancy by the appointment of one of its own members. The courts have with great unanimity throughout the country declared that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint.

Article 16, Section 17, Constitution of Texas, reads:

"All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified."

As pointed out in said opinion No. 0-410, under the above constitutional provision, the rule in Texas is that an officer's resignation is not effective until his successor qualifies. To this rule there are certain exceptions, such as in State v. Valentine, 198 S. W. 1007, and Lowe v. State, 201 S. W. 986, but the case which you submit to us does not fall within any such exception.

Article 2341, Revised Civil Statutes, provides:

"In case of vacancy in the office of commissioner, the county judge shall appoint some suitable person living in the precinct where such vacancy occurs, to serve as commissioner for such precinct until the next general election. (Acts, 1876, p. 51; G. L. vol. 6, p. 887.)"

Under the above statute it clearly appears that the commissioners' court is now charged with the duty of filling by appointment the vacancy in the county judge's office. Under Art. 16, Sec. 17, of the constitution, the commissioner whom you mention must serve until his successor qualifies. Since no one is authorized to appoint his successor except the county judge, the vacancy in that office must be filled before the commissioner can effectuate his resignation. It follows that your first question must necessarily be answered in the negative.

We have concluded that it would be improper for us to answer your second question.

Honorable Richard Spinn, May 11, 1930, page 4

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Glenn R. Lewis*
Glenn R. Lewis
Assistant

GRL-AR

APPROVED:

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ATTORNEY GENERAL OF TEXAS