



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable L. B. Fowler  
County Attorney  
Nacogdoches County  
Nacogdoches, Texas

Dear Sir:

Opinion No. O-3080

Re: (a) Whether one drafted into the United States Army vacates the office of Constable; (b) Whether, if a vacancy exists, the commissioners' court may declare the office vacant and appoint a successor.

This will acknowledge receipt of your letter of January 20, 1941, requesting the opinion of this department on the above stated questions. Your letter reads, in part, as follows:

"Lynn Holmes of Precinct No. 1, Nacogdoches County, Texas, was elected in the November election as Constable of Precinct No. 1, Nacogdoches County, Texas; that on or before the first day of January 1941, he qualified as such constable by taking the oath of office and filing his official bond, which bond was approved by the Commissioners' Court; that he has recently been notified that he is drafted into the United States Army for one year training, or more as an emergency may arise, that he will leave his office and be inducted in the United States Army.

"Will his leaving the office create a vacancy as Constable of Precinct No. 1, Nacogdoches County, Texas; if this question is answered in the affirmative then, does the Commissioners' Court have the power under the constitution and laws of this state to declare a vacancy in the constables office of Precinct No. 1, Nacogdoches County, Texas, and does the Commissioners' Court under the constitution and

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laws provide that the Commissioners' Court can appoint a suitable man to fill the vacancy."

We shall set forth below the pertinent constitutional and statutory provisions:

"County Judges, county attorneys, clerks of the District and County Courts, justices of the peace, constables, and other county officers, may be removed by the Judges of the District Courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury." Article 5, Section 24, Constitution of Texas.

"All civil officers shall reside within the State; and all district or county officers within their districts or counties, and shall keep their offices at such places as may be required by law; and failure to comply with this condition shall vacate the office so held." Article 16, Section 14, Constitution of Texas.

"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." Article 2355, Vernon's Annotated Civil Statutes.

"All district and county attorneys, county judges, commissioners, clerks of the district and county courts and single clerks in counties where one clerk discharges the duties of district and county clerk, county treasurer, sheriff, county surveyor, assessor, collector, constable, cattle and hide inspector, justice of the peace and all county officers now or hereafter existing by authority either of the Constitution or laws, may be removed from office by the judge of the district

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court for incompetency, official misconduct or becoming intoxicated by drinking intoxicating liquor, as a beverage, whether on duty or not; provided such officer shall not be removed for becoming intoxicated when it appears upon the trial of such officer that such intoxication was produced by drinking intoxicating liquors upon the direction and prescription of a duly licensed practicing physician of this State." Article 6970, Vernon's Annotated Civil Statutes.

As we understand your request three questions are presented: (1) Does a vacancy exist in the office of Constable under the facts related? (2) May the commissioners' court declare the office vacant? (3) May the commissioners' court appoint a new Constable?

In *Ehlinger v. Ranking*, 9 C. A. 424, 29 S. W. 240, the court held that under Section 24 of Article 5 of the Constitution of Texas the commissioners' court has no jurisdiction to determine whether a county officer, by changing his residence, has vacated his office; that this jurisdiction under the Constitution lies with the district court.

The court further held that while a judgment of the district court declaring a vacancy is not necessarily a condition precedent to the exercise of the appointive power by the commissioners' court (under Article 5, Section 21 of the Constitution, Article 2355, V.A.C.S., 1925) if a vacancy in fact exists, the determination of the question of vacancy can be made only by a district court.

*Hamilton v. King* (T.C.A. 1918) 206 S.W. 953, is an almost identical case. In 1916 appellant Hamilton was duly elected to the office of County Attorney, had entered upon the duties of his office and had appointed a deputy. In 1918 he was involuntarily inducted into the Army of the United States of America; and in September of the same year the commissioners' court declared the office of county attorney to be vacant and appointed appellee King county attorney notwithstanding that appellant Hamilton's deputy or assistant attorney had at all times discharged (during appellant's absence) the duties of the office.

In reversing and remanding the case for further proceedings the court said:

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\*\*\*. There can be no doubt of the correctness of the contention made by appellant that the commissioners' court of a county in this state has no authority or power to remove from office any county official or to declare a vacancy in any such office, but such authority seems to be vested alone in the district court, Constitution of the State of Texas, Art. 5 § 24. It is provided by Section 21 of the same Article of the Constitution, however, that, in case of a vacancy in the office of county attorney, the commissioners' court of such county shall have power to appoint a county attorney until the next general election. See also, Ehlinger v. Rankin, 9 Tex. Civ. App. 424, 29 S. W. 240. The question here to be determined is, not whether the commissioners' court of Sabine County was authorized to declare a vacancy in the office of county attorney of Sabine County, but the question is: Was there a vacancy in such office to be filled by that court by appointment at the time it undertook to do so by appointing the appellee to such office, and was such vacancy shown by the pleadings in this case?

As stated above, it is alleged by appellant that he was a citizen of Sabine County, and that he was only temporarily absent from the county, and that he had never been in any manner impeached by any competent authority, nor his office declared vacant by any authorized tribunal, and that the duties of the office were still being discharged by him through his legally constituted assistant. On the other hand, the showing made by appellee in his answer was, not that appellant had removed permanently from Sabine County, but simply that he was absent from the county at the time of the action of the commissioners' court in declaring the office vacant and appointing appellee thereto, and that appellant had been so absent from said county since March before such action on the part of the commissioners' court in September following, and that such absence was caused by the fact that appellant had been inducted involuntarily into the Army of the

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United States. This allegation of the answer showed, of course, that appellant was actually absent from Sabine county at the time of such action on the part of the commissioners' court; but as to how long such absence would continue was not shown, nor was any fact alleged in the answer from which the duration of appellant's absence could be determined, other than the statement that he was in the military service of the United States involuntarily.

"After very careful investigation, we have been unable to find any statute of this state or provision of the Constitution which declares that an absence from the county of one of its officials, who shall be engaged as a private soldier in the Army of the United States, shall create a vacancy in the office of such official; and, in the absence of any such provision, we are of the opinion that the commissioners' court in this instance had no authority to declare the office of county attorney vacant, and to appoint appellee thereto, but that, in the absence of such provision, the authority to determine and declare such question was vested in the district court of Sabine County.

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"And so, it must be said here that the mere involuntary absence of appellant from Sabine County, as alleged in the answer of appellee, with no further statement as to the duration or probable duration of that absence, did not, in our opinion, show a vacancy in the office of the county attorney and authorizing the commissioners' court to appoint appellee to that office. We would not be understood as holding that the facts and circumstances touching appellant's absence from said county under such circumstances might not be shown to be such as to authorize the district court of that county to declare the office of county attorney vacant; but

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such a showing has not been made by the pleadings in this case upon which alone the district judge acted in denying the temporary injunction, and for that reason we are of the opinion that, as the pleadings stood, appellant was entitled to the writ as prayed for, and that the district judge erred in denying same." (Underlining ours)

It is our opinion that under the facts submitted to this department the Commissioners' Court of Macogoches County may not declare that a vacancy in the office of Constable and appoint a successor to the present incumbent.

It is our further opinion that under Section 24 of Article 5 of the Constitution of Texas and Articles 5970, et seq., Vernon's Annotated Civil Statutes, jurisdiction to determine the matter of vacancy in the office of Constable is vested in the district court. The suit is in the nature of a quo warranto and must be instituted and conducted in the name of the State of Texas by or under the direction of the county or district attorney. State v. Starnee (T.C.A.) 246 S. W. 424; Reeves v. State (T.C.A.) 258 S. W. 577; Johnson v. Money (T.C.A.) 241 S. W. 308.

You are further advised that in a suit to declare the office of constable vacant the one alleged to have vacated his office is entitled to a trial by a jury upon fact issues. Money v. Graham, 39 Tex. 1; State v. O'Keefe, (C.C.A., 1934) 74 S. W. (2d) 146. If upon the trial it is held that the office of constable is vacant the Commissioners' Court of Macogoches County may, acting pursuant to Article 2355, V.A.C.S., appoint a new constable to serve until the next general election.



Very truly yours

ATTORNEY GENERAL OF TEXAS

By

*James D. Smullen*  
James D. Smullen  
Assistant

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APPROVED APR 3, 1941

*Gerald B. Mann*

ATTORNEY GENERAL OF TEXAS