



**THE ATTORNEY GENERAL
OF TEXAS**

**CRAWFORD C. MARTIN
ATTORNEY GENERAL**

AUSTIN, TEXAS 78711

December 14, 1970

Overruled by M-760
where conflicts

Honorable Louis Dugas, Jr.
County Attorney
Orange County Courthouse
Orange, Texas 77630

Opinion No. M-748

Re: Questions relating to
resignation of County
Commissioner and filling
the vacancy.

Dear Mr. Dugas:

In your recent letter to this office you state that one of the county commissioners whose current term of office expires on December 31, 1970, was re-elected at the general election on November 3, 1970, for the four-year term of that office which begins on January 1, 1971. You further state that subsequent to the general election the county commissioner has submitted his resignation to the county judge to become effective on January 5, 1971, and the county judge is prepared to make an appointment to the office of county commissioner pursuant to Article 2341, Vernon's Civil Statutes, but some question has arisen as to whether Article 2341 is in conflict with Section 18 of Article V, Texas Constitution. Our opinion is requested upon the following questions:

1. Whether Article 2341 is unconstitutional.

And in the event that Article 2341 is unconstitutional:

2. To whom must the commissioner address his resignation and who must accept it?

3. Who would call a special election as is provided in Article 4.09, Texas Election Code?

Section 18 of Article V of the Texas Constitution provides in part as follows:

" . . . Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. . . ."

Article 2341, Vernon's Civil Statutes, reads:

"In case of vacancy in the office of commissioner, the county judge shall appoint some suitable person living in the precinct where the vacancy occurs, to serve as commissioner for such precinct until the next general election."

After careful consideration, we are unable to perceive wherein Article 2341 is in conflict with our Constitution. Although it is true that the Constitution has made specific provision for the filling of vacancies in many of the offices created by the Constitution, (e.g., §§20, 21, 23, 28 of Article V), it has not been so provided in other instances. Two examples of the latter category, in addition to that presented by your request, are in the case of the offices of district attorney, created by Section 21 of Article V, and assessor and collector of taxes, created by Sections 14 and 16 of Article VIII. In those two instances, just as in that under consideration, the Legislature has provided for the filling of vacancies by appointment. Art. 328, Art. 2355, Vernon's Civil Statutes.

We do not consider the fact that the Constitution makes no provision for the filling of vacancies in the offices created by that document to operate as a denial of power to the Legislature to provide for filling them by appointment. The only instances where the power of the Legislature in this area has been denied is where it has attempted to provide that vacancies be filled in a manner contrary to that specified by the Constitution, as in State v. Valentine, 198 S.W. 1006 (Tex.Civ.App. 1917, error ref.). Just as the court in Anderson v. Parsley, 37 S.W.2d 358 (Tex.Civ.App. 1931, error ref.), found that it was well within the power of the Legislature to fix the beginning date of the terms of office and specify the date upon which newly elected officers could qualify, where the Constitution did not fix such dates, we hold that it is within the power of the Legislature to provide for the filling of vacancies in offices by appointment where the Constitution has not provided a method for doing so. You are therefore advised that Article 2341 is constitutional and establishes the process for filling vacancies in the office of county commissioner until the next general election. [In this connection see Attorney General's Opinion M-742 (1970)].

Although your second and third questions are predicated upon a finding that Article 2341 is unconstitutional, which we have not done, nonetheless, in the interest of clarity, we are constrained to comment upon the matters raised by those questions.

While no issue regarding the constitutionality of Article 2341 was raised in the case, it was held in Tobin v. Valerio, 309 S.W.2d 479 (Tex.Civ.App. 1958, error ref.) that the county judge was the proper officer to receive and accept the resignation of a county commissioner, but the resignation did not become effective until accepted by the county judge. This is in accord with Sawyer v. City of San Antonio, 149 Tex. 408, 234 S.W.2d 398 (1950), holding that the resignation of a public officer is not complete until accepted by the proper authority. Once accepted by the proper authority it is effective immediately even though it is tendered to take effect in the future. Attorney General's Opinion M-659 (1970) and cases there cited.

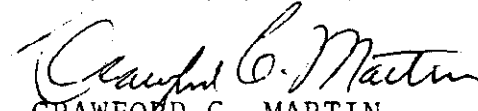
Article 4.09, Texas Election Code, has no application to vacancies in offices that are to be filled by appointment. It makes no attempt to specify whether a vacancy shall be filled by appointment or election, but merely undertakes to establish the procedures for calling and holding an election otherwise required by law. Attorney General's Opinion WW-550 (1959).

S U M M A R Y

Article 2341, Vernon's Civil Statutes, providing for the filling of vacancies in the office of county commissioner by appointment of the county judge is constitutional.

The county judge is the proper authority to accept the resignation of a county commissioner. The resignation becomes effective immediately upon acceptance even though it was tendered to take effect at a future date. Article 4.09, Texas Election Code, does not authorize the calling of a special election to fill the office of county commissioner.

Very truly yours,


CRAWFORD C. MARTIN
Attorney General of Texas

Prepared by W. O. Shultz
Assistant Attorney General

Hon. Louis Dugas, Jr., page 4 (M-748)

APPROVED:
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