



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Thomas E. Robertson
County Attorney
Camp County
Pittsburg, Texas

Dear Sir:

Opinion No. O-5093
Re: Whether district judge has
power to fill vacancy in
office of district clerk
or whether special election
should be called

This is with reference to your recent letter read-
ing in part as follows:

"I am requesting your opinion on the follow-
ing matter.

"At the last Democratic Primary, A. N. Car-
penter, was nominated to succeed himself as Dis-
trict Clerk of Camp County. Prior to the general
election held on November 2, 1942, he filed his
withdrawal as nominee with the County Democratic
Committee, and the committee duly certified the
name of Mrs. Francis Hancock, as the nominee, her
name appeared on the ballot and she was declared
duly elected. Prior to the first day of January
1943, Mrs. Francis Hancock, the District Clerk of
Camp County elect, removed from Camp County and
the State and took up her residence in Chicago,
and has not attempted to qualify as District
Clerk. A. N. Carpenter, has continued in of-
fice, pending the selection and qualification
of his successor.

"It is my opinion that a Special Election
to fill this office must be called under the pro-
visions of Section 6, Article 2953a, Vernons R.S.

Honorable Thomas E. Robertson, page 2

and that the District Judge is not authorized to make such appointment by authority of Article 1895 R.S., which provides for the filling of a vacancy in this office by his appointment. Under the facts in this case, the vacancy occurred in the place of the District Clerk-elect, and not in the office of District Clerk.

"Will you therefore, kindly advise me, under the facts set forth in the first paragraph above, if the District Judge is authorized to appoint a suitable person to the Office of District Clerk of Camp County, Texas, or should a Special Election be called for this purpose."

Section 6 of Article 2953a, Vernon's Annotated Civil Statutes, (Section 6, Senate Bill No. 1, Acts Forty-third Legislature) reads as follows:

"When the officer-elect to an office which must be filled by election dies or becomes ineligible to qualify for the office to which he was elected, the proper officer shall immediately order an election to elect a successor to the incumbent of the office."

In construing the meaning of the above quoted provision, in connection with the situation presented in your letter, we are necessarily called upon to determine whether the office of district clerk is "an office which must be filled by election" as that term is used in the Act. If the office can or may be filled in any way other than by election, it is not "an office which must be filled by election."

Section 9 of Article V of the Constitution of Texas declares:

"There shall be a clerk for the District Court of each county, who shall be elected by the qualified voters for the State and county officers, and who shall hold his office for two years, subject to removal by information, or by indictment of a grand jury, and conviction by a petit jury. In case of vacancy, the judge of the District Court shall have the power to appoint a clerk, who shall hold office until the office can be filled by election."

Article 1895, Revised Civil Statutes of 1925, provides:

"Whenever a vacancy occurs in the office of district clerk, it shall be filled by the district judge of such county; and such appointee shall give bond and qualify and may hold his office until the next general election. Where a vacancy occurs in a county having two or more district courts, the vacancy shall be filled by the judges of such courts; and if they fail to agree, the Governor, upon the certificate of such judges, shall order a special election to fill such vacancy."

From the constitutional and statutory provisions above quoted it can be seen that Section 6 of Article 2953a, supra, was not intended to apply to the office of district clerk because it can be filled in a way other than by election. It may be filled by appointment. It is therefore not "an office which must be filled by election."

There are some offices which must be filled by election. Among these are the offices of United States Senators and Representatives. Prior to the enactment of Article 2953a, several situations arose which prompted the Governor of Texas to submit to the Forty-third Legislature on January 11, 1933, Senate Bill No. 1, which was passed without delay and is now brought forth in Vernon's Civil Statutes as Article 2953a. For fuller understanding of the purpose of the bill, the Governor's message is copied from page 9 of the Senate Journal of the Forty-third Legislature:

"Executive Office,
"Austin, Texas, Jan. 11, 1933.

"To the Members of the Forty-third Legislature:

"I hereby submit for your special consideration as an emergency matter the following:

"Honorable John N. Garner, representing the 15th district of Texas and now serving as Speaker of the Seventy-third Congress, was re-elected in the last general election and at the

Honorable Thomas E. Robertson, page 4

same time honored by election as Vice-President of the United States. Necessarily, he can not qualify for both offices on March 4, 1933, and, with forethought characteristic of this servant of the people, he has notified me in writing that he does not intend to qualify as congressman from the 15th district and desires to resign his rights in the premises. This resignation has been accepted by me.

"The resignation of Mr. Garner from the term commencing March 4, 1933, discloses a defect in our election laws. I have been advised by the Attorney General that under the laws as they exist at present, the Governor is without authority to call a special election to fill a vacancy until the vacancy has actually occurred. This defect in the law threatens to deprive the citizenship of the 15th district of the representation for a time at least, to which they are entitled in the National Congress.

"A similar emergency has arisen in the 8th district by virtue of the sad passing away of the beloved Dan Garrett. I have heretofore called a special election for the 28th day of January, 1933, to fill his present unexpired term and at the same time, because it was deemed to be in the interest of the general public and in order to economize, have called an election to fill the full or regular term. There seems to be some doubt as to the authority of the Governor to call this special election for the latter purpose.

"I am therefore submitting in these emergencies for your special consideration the matter of providing for the ordering of special elections to fill prospective vacancies. A bill has been prepared, and will be introduced in the Senate by Senator Woodul, to provide for the ordering of special elections and fixing the time for the holding thereof, and providing that special elections may be ordered to elect a person to fill an unexpired term and to fill the succeeding term in certain offices where the incumbent is re-elected and thereafter dies, resigns, or where for

Honorable Thomas E. Robertson, page 5

any other reason a vacancy occurs in the unexpired term; providing that an election shall be ordered upon acceptance of resignation of an incumbent where he tenders a resignation effective at a future date; providing that where the officer-elect of certain offices dies before qualifying or becomes ineligible to qualify for the office to which he was elected, an election to select a successor to the incumbent shall immediately be ordered; designating the Governor to receive and accept resignations where no other officer is authorized to receive same; repealing Article 2952, Revised Civil Statutes of 1925; and validating elections heretofore held, or orders of election heretofore made, where same would have been authorized under the terms of the proposed act.

"I am attaching hereto a copy of the proposed bill, which I believe will take care of these contingencies and better protect the interests of the people.

"Respectfully submitted,
"R. S. Sterling,
"Governor."

In view of the above and foregoing authorities, it is the opinion of this department that the district judge is authorized to appoint a suitable person to fill a vacancy in the office of district clerk in Camp County and that in no event is a special election authorized for such purpose.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *E. G. Pharr*
E. G. Pharr
Assistant

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STATE OF TEXAS
ATTORNEY GENERAL

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