



PRICE DANIEL  
ATTORNEY GENERAL

**THE ATTORNEY GENERAL  
OF TEXAS**

AUSTIN 11, TEXAS

Apr. 2, 1947

Overruled by Kerby v.  
Collin County, 212 S.W. (2d)  
494, Dallas Civ. App. (1948)

Hon. R. E. Beasley  
County Auditor  
Collin County  
McKinney, Texas

Opinion No. V-115

Re: Whether an order of the Commissioners' Court appointing a County Treasurer to fill the unexpired term of her predecessor in office constitutes a written contract.

Dear Sir:

Your statement and request for an opinion are in part as follows:

"On February 8, 1947, the claim of Alta Browne Kerby (Exhibit "A") for salary (\$2,033.20) and interest (\$319.60) was filed with the Commissioners' Court of Collin County, Texas.

**"THE FACTS ARE AS FOLLOWS:**

"On the first day of May, 1943, the Commissioners' Court in regular session accepted the resignation of the then acting County Treasurer. On the same date and in the same motion, the Court approved the bond and oath of office of Alta Browne Kerby as county treasurer and appointed her to fill the unexpired term for that office (Exhibit "B"). At the time this action was taken, there was a special county treasurer salary law for Collin County on the Statute Books which provided for \$600.00 per year and at the time Alta Browne Kerby was appointed, she knew that that was the salary that was being paid for that office.

"We are well acquainted with the fact that many special statutes like this one have been declared to be unconstitutional and the Courts have held that this County Treasurer was entitled to a monthly salary based on an annual salary of \$2000.00 per year . . .

"Is this claim barred by the two year statute of limitations?"

Article 1703 of V.C.S. reads:

"A County Treasurer shall be elected at each regular general election for a term of two years."

Article 1707 of V.C.S. provides:

"In case of vacancy in the office of the County Treasurer, the Commissioners' Court of the county in which such vacancy occurs shall fill such vacancy by appointment, such appointment to be made by a majority vote of the Commissioners present, at a regular or special term of such court. Such appointment shall continue in force until the next general election."

Article 1708 of V.C.S. reads:

"The person appointed to fill the vacancy as provided in the preceding Article shall, before entering upon the discharge of the duties of such office and within twenty days after he has been notified of such appointment, take the oath and give the bonds required, as in the case of an election to such office." (Emphasis ours).

The authorities are uniform in holding that one appointed to an elective office holds an irrevocable position insofar as the appointing authorities are concerned. 89 A.L.R. 132; Collins v. Tracy, 36 Tex. 546.

Since under Article 1708, supra, the appointee to fill a vacancy shall perform all of the acts required of a duly elected County Treasurer, coupled with the further fact that his appointment from the point of view of the appointing authority is irrevocable, it naturally follows he assumes the full responsibility of the office just as though he had been elected to it.

Article 3030, V.C.S., provides:

"On the Monday next following the day of election, but not before, the Commissioners' Court shall open the election returns and estimate the result, recording the state of the polls at each precinct in a book to be kept for that purpose; . . ."

Article 3032, V.C.S., reads:

"After an estimate of the result of an election has been made as provided for in this title, the

County Judge shall deliver to the candidate or candidates for whom the greatest number of votes have been polled for county and precinct officers a certificate of election, naming therein the office to which such candidate has been elected, the number of votes polled for him, and the day on which such election was held and shall sign the same and cause the seal of the county court to be thereon impressed. . . ."

In the case of an elected official under Article 3030, supra, the Commissioners' Court estimates the result and records the state of the polls in each precinct in a book to be kept for that purpose, and under Article 3032, the County Judge delivers to the candidate who has polled the greatest number of votes for county and precinct officers, a certificate of election. In our opinion, this constitutes as much of a written instrument as the minutes of the Commissioners' Court appointing a person to fill a vacancy. This may be construed as analogous to the minutes of the Commissioners' Court in appointing a person to fill a vacancy in office, and clearly does not constitute an instrument in writing that would have the effect of a written contract.

Article 5526, V.C.S., reads:

"There shall be commenced and prosecuted within two years after the cause of action shall have accrued and not afterwards all actions or suits in court of the following description:

". . .

"4. Actions for debt where the indebtedness is not evidenced by a contract in writing."

Article 5527, V.C.S., provides:

"There shall be commenced and prosecuted within four years after the cause of action shall have accrued and not afterwards all actions or suits in court of the following description:

"1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing . . ."

Texas Jurisprudence, Volume 28, page 116, section 36, provides in part as follows:

". . . An order of a Commissioners' Court is not a written agreement if it contains no provisions as to many essential features of the contract. Nor does a general law in a city fixing the salary attached to an office and regulating the fee to which

an officer is entitled constitute a contract between the city and an officer who performs services pursuant to the ordinance . . . ."

The case of *Smith v. Wise County*, 187 S. W. 705, held that a County Treasurer can, at the expiration of his term of office, recover commissioners accruing and due only for a period of two years before institution of suit.

In the case of *City of Houston v. Stewart*, 90 S. W. 49, the Court said:

"While upon this subject, we will dispose of the contention of defendant that the commissions claimed having been earned under an ordinance or resolution of the city fixing the salary and fees of the city attorney, the suit for said commissions was founded upon a written contract and would not be barred until four years after the cause of action accrued. This ordinance cannot be regarded as a contract between the city and the city attorney under which the services for which the defendant claims compensation was rendered, but it was a general law of the city fixing the salary to be attached to the office of city attorney and regulating the fees to which such officer should be entitled. We think it clear that the fact that commissions claimed by an officer were earned under a general law fixing the compensation for the services rendered does not make the suit for such commissions one upon a written contract, and the trial court correctly held that the two year statute of limitations applied to defendant's claim for said commissions."

In the case of *Stegall, Sheriff v. McLennan County*, 144 S. W. (2d) 1111, the court held in an action involving a mutual mistake as to fees between a sheriff and the county that limitation begins to run on the sheriff's claim against the county in favor of the county from the time the claim matured regardless of whether it was presented to and rejected by the Commissioners' Court, and that such a claim would be governed by the two year statute of limitation.

The case of *Leslie v. City of Dallas*, 172 S. W. (2d) 777, held that the two year limitation statute was applicable in an action against a city to recover payments made under an unconstitutional ordinance for services of a special police officer, and hence, where action was filed more than two years after the last of such payments was made, the action was barred.

The court in the case of *Wilson v. Shaw*, 188 N.W. 940, 166 A.L.R. 842, said:

"Those appointed to fill vacancies shall hold until the next general election and until their successors are elected and qualified. . . . Therefore, whoever is appointed or elected is appointed or elected for an unexpired portion of a prescribed term. The term prescribed is a unit of time. A new term is not created. The appointee simply steps into the shoes, so to speak, of him who is elected for the constitutional term. . . . and is entitled to perform the duties and receive the emoluments of the office until the end of that term or until a successor shall have been elected. . . . The term lives on even though the incumbent resigns, is impeached or dies. Personality has nothing to do with the question." (Emphasis ours.)

In our opinion, an order of the Commissioners' Court appointing a treasurer to fill the unexpired term of County Treasurer is not a contract in writing within the meaning of Article 5526, V.C.S., but is only evidence of authority to hold such position by the appointee stepping into the shoes of the elected official. Since the order is not a contract in writing, it therefore follows that the two year statute of limitation is applicable, and your question is answered in the affirmative.

#### SUMMARY

An appointment by a Commissioners' Court of a County Treasurer to fill an unexpired term which is entered of record on the minutes of said court does not constitute a contract in writing, and the two year statute of limitations is applicable to a claim for certain salary items. (Article 5526, V.C.S.)

Yours very truly,

ATTORNEY GENERAL OF TEXAS

By

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Assistant

APPROVED  
APR 2, 1947

*Price Daniel*  
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RAH:JMc