



**THE ATTORNEY GENERAL
OF TEXAS**

**CRAWFORD C. MARTIN
ATTORNEY GENERAL**

AUSTIN, TEXAS 78711

October 19, 1967

Hon. Robert S. Calvert
Comptroller of Public Accounts
State Capitol
Austin, Texas

Opinion No. M-151

Re: Compensation of an
Associate Justice of
the Court of Civil
Appeals after retire-
ment under the provi-
sions of Section 1a
of Article V of the
Constitution of Texas
where no successor has
been appointed.

Dear Mr. Calvert:

Your request for an opinion reads as follows:

"This department has been advised by a letter dated September 8, 1967 that Associate Justice Ewing Werlein of the Court of Civil Appeals, First Supreme Judicial District, was 75 years of age when the provisions of Article V, Section 1-a of the Constitution was adopted, but he had not served a period of ten (10) years at that time. I was further advised that Judge Werlein qualified as Judge of the 157th District Court of Harris County on the first day of September, 1957 and served on that court until he qualified as Associate Justice of the Court of Civil Appeals and has continued to serve as Associate Justice of the Court of Civil Appeals. I was advised that Judge Werlein wrote the Governor that it was his intention to retire as of the close of the day of September 1, 1967.

"Under a letter dated September 18, 1967 I was further advised that Judge Werlein completed his ten (10) years service on September 1, 1967, that on September 18 Judge Werlein was assigned by Chief Justice Calvert to sit as Judge in the 80th District Court of Harris County.

"Under a letter dated September 15, 1967 I was advised that Judge Werlein, by written

statement, elected to continue serving as a judicial officer for the State of Texas in compliance with the requirements of Senate Bill 397, Section 7, passed by the 60th Legislature.

"Under a letter dated September 22, 1967 I was advised that Judge Werlein was assigned to service as Judge of the 80th District Court of Harris County for the week beginning September 25, 1967. This was done under the provisions of Articles 6228a and 200a as amended.

"This department has received a payroll duly approved for the salary of Judge Werlein for the entire month of September, 1967 as Associate Justice of the First Court of Civil Appeals. Our records reflect that Judge Werlein was paid as Associate Justice of the First Court of Civil Appeals for the entire month of August, 1967.

"This department wishes to be advised if the salary, or any part of the salary for Judge Werlein as Associate Justice of the First Court of Civil Appeals for the month of September, 1967, can be legally paid in view of the above statements and the provisions of the Constitution, Article V, Section 1-a, and Article 16, Section 17.

"I am enclosing copies of the four above mentioned letters."

Section 17 of Article XVI of the Constitution of Texas provides that "all officers of this State shall continue to perform the duties of their offices until their successors shall be duly qualified." This provision, which has been construed by the courts as mandatory, continues an officer in office following his resignation until his successor has qualified. Jones v. City of Jefferson, 66 Tex. 576, 1 S.W. 903 (1886); Keen v. Featherston, 69 S.W. 983 (Tex.Civ.App. 1902, error ref.); Plains Common Consol. School Dist. No. 1 v. Hayhurst, 122 S.W.2d 322 (Tex.Civ.App. 1938). However, an officer may divest himself of an office before his successor has qualified by himself qualifying for and entering upon the duties of another office which he cannot lawfully hold at the same time. Peden v. Valentine, 198 S.W. 1006 (Tex.Civ.App. 1917, error ref.); Pruitt v.

Hon. Robert S. Calvert, page 3, (M-151)

Glen Rose Independent School District No. 1, 126 Tex. 45, 84 S.W.2d 1004 (1935).

In view of the foregoing, it is our opinion that the "resignation" by Justice Werlein did not, itself, divest Justice Werlein from the office of Associate Justice of the Court of Civil Appeals. We must, therefore, determine whether the adoption of the provisions of Section 1a of Article V of the Constitution of Texas operates to create an exception to Section 17 of Article XVI of the Constitution of Texas in those instances where the office of justice or judge becomes vacant by the operation of the provisions of Section 1a of Article V rather than by any act by the justice or judge.

The provisions of Section 1a of Article V of the Constitution of Texas, applicable to your question, read as follows:

"The office of every such Justice and Judge shall become vacant when the incumbent reaches the age of seventy-five (75) years or such earlier age, not less than seventy (70) years, as the Legislature may prescribe; but, in the case of an incumbent whose term of office includes the effective date of this Amendment, this provision shall not prevent him from serving the remainder of said term nor be applicable to him before his period or periods of judicial service shall have reached a total of ten (10) years."

Under the facts submitted in your request, the provisions of Section 1a of Article V above quoted did not become applicable to Justice Werlein until his period or periods of judicial service reached a total of ten years. The term of office that Justice Werlein was serving at the time his period of judicial service reached a period of ten years, did not include the effective date of the adoption of Section 1a of Article V of the Constitution. Under the facts submitted in your request Judge Werlein qualified as Judge of the 157th District Court of Harris County on the 1st day of September, 1957, and he has continued to serve continuously either as Judge of the 157th District Court or as Associate Justice of the Court of Civil Appeals. Therefore, the period of judicial service reached a total of ten years at midnight, August 31, 1967. As of that date, the provisions of Section 1a of Article V, in our opinion, became applicable to Justice Werlein under the

Hon. Robert S. Calvert, page 4, (M-151)

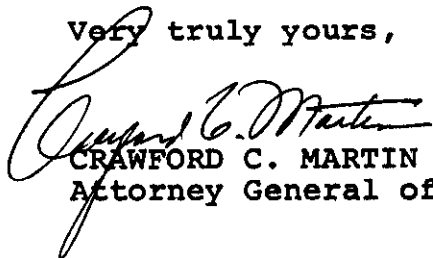
facts submitted by you. Section 1a of Article V specifically provides under such circumstances "the office. . . shall become vacant. . . ." The provisions of Section 1a of Article V have not been construed by the courts of this State. However, we believe that the above quoted provisions are mandatory and the office of Associate Justice of the Court of Civil Appeals previously held by Justice Werlein became vacant at midnight of August 31, 1967, and that Justice Werlein does not hold over until his successor has qualified. We are supported in this view by the fact that it has been administratively determined by the Chief Justice of the Supreme Court that Justice Werlein was eligible for assignment by the Chief Justice of the Supreme Court to sit as Judge in the 80th District Court of Harris County.

In view of the foregoing, you are advised that you are not authorized to pay any part of the salary for Judge Werlein as Associate Justice of the First Court of Civil Appeals for the month of September, 1967.

S U M M A R Y

Section 1a of Article V of the Constitution of Texas is mandatory and when applicable the office of justice or judge becomes vacant and the justice or judge does not hold over until his successor has qualified.

Very truly yours,


CRAWFORD C. MARTIN
Attorney General of Texas

Prepared by John Reeves
Assistant Attorney General

APPROVED:
OPINION COMMITTEE

Hawthorne Phillips, Chairman
Kerns Taylor, Co-Chairman

Hon. Robert S. Calvert, page 5, (M-151)

W. V. Geppert
Malcolm Quick
Ralph Rash
Arthur Sandlin

A. J. CARUBBI, JR.
Staff Legal Assistant