



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

June 24, 1948

Hon. K. D. Hall
County Attorney
Refugio County
Refugio, Texas

Opinion No. V-615

Re: The authority of a
Special County Judge,
elected by the local
bar to serve during
illness of the County
Judge, to preside
over the Commission-
ers' Court and relat-
ed questions.

Dear Sir:

Reference is made to your recent request which reads, in part, as follows:

"Our County Judge is sick and cannot attend his duties as County Judge.

"Our County Judge is, in addition to County Judge, Ex-Officio County School Superintendent.

"A day or two after the Judge became sick, the lawyers of the local bar elected a Special County Judge to take his place, and the commissioners not knowing a Special Judge had been appointed, elected one of its members to preside over the court during the absence of the County Judge.

"My questions are as follows:

"1. Is such Special Judge to act as Ex-officio School Superintendent?

"2. Is such Special Judge to preside over the Commissioner's Court?

"3. When does the authority or power of the Special Judge cease or terminate?"

Article 1934, V. C. S., is as follows:

"If a county judge fails to appear at the time appointed for holding the court, or should he be absent during the term or unable or unwilling to hold the court, a special county judge may be elected in like manner as is provided for the election of a special district judge. The special county judge so elected shall have all the authority of the county judge while in the trial and disposition of any case pending in said court during the absence, inability, or such refusal of the county judge. Similar elections may be held at any time during the term, to supply the absence, failure or inability of the county judge, or any special judge, to perform the duties of the office. When a special county judge shall have been so elected, the clerk shall enter upon the minutes of the court, a record such as is provided for in like cases in the district court." (Emphasis added throughout)

Article 1887, V. C. S. reads as follows:

"Should the judge of a district court on the first or any future day of a term, fail or refuse to hold the court, the practicing lawyers of the court present may elect from among their number a special judge who shall hold the court and proceed with the business thereof."

Under Article 2107, V. C. S. the county judge of Refugio County is the ex-officio County School Superintendent.

With reference to the powers and duties of a special judge elected by the attorneys of the Bar, it is stated in Tex. Jur., Vol. 25, p. 325:

"During the continued absence of the regular judge, or his continued unwillingness to serve, a special judge elected by the attorneys is, within the meaning of the constitution and laws, a judge of the court. . . . He has all the authority of a regular

judge with respect to cases that properly come before him, or, at least, he has such of the regular judge's powers as are necessary to enable him to transact the business of the court."

Article 1934, supra, plainly states that the special county judge so elected shall have all the authority of the county judge while in the trial of any case pending in said court during the absence, inability, or such refusal of the county judge.

In the case of Markwell v. Galveston County, 186 S.W.(2d) 273, the court said:

"Its terms, however, do permit a county judge 'to be elected in like manner as is provided for the election of a special district judge', etc.; so that, when the provisions of such other statutes are read into it, it seems clear that not only was a special county judge made a judicial officer of the State, but he was endowed with all of the authority of the regular county judge while in the discharge of his duties; in other words, he was expressly made the same kind of an officer while in the discharge of such judicial duties as all the other judges, all of whom, without exception, were given compensation for their services."

The court states that the special county judge is made the same kind of officer while in the discharge of such judicial duties. In other words, the special county judge may perform all the duties that the regular county judge may perform only with reference to cases being tried before him, but he does not "step into the shoes" of the regular county judge for all purposes.

In the case of Holland v. Harris County, 129 Tex. 118, 102 S.W.(2d) 196, the Supreme Court impliedly held that a special district judge elected in the same manner and under similar circumstances as was the special county judge in this case, was not legally a member of the County Juvenile Board as a result of such election even though the regular district judge was a member of said board. We believe the same principle of

law is applicable here in regard to the special county judge.

In the absence of any statute authorizing the same and in view of the foregoing, it is our opinion that the special county judge of Refugio County elected under the provisions of Article 1934, is not the ex-officio county school superintendent by reason of such election.

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

"The county commissioners so chosen, with the county judge, as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed."

Article 2342 and Article 2343, V. C. S. are as follows:

"Art. 2342. The several commissioners, together with the county judge, shall compose the 'Commissioners Court,' and the county judge, when present, shall be the presiding officer of said court."

"Art. 2343. Any three members of the said court, including the county judge, shall constitute a quorum for the transaction of any business, except that of levying a county tax."

In the case of Dalton v. Allen, 215 S.W. 439, the Supreme Court stated:

". . . a quorum for the transaction of such business of the commissioners' court as that referred to in the certificate of the Court of Civil Appeals is constituted by any three commissioners, or by the county judge and any two commissioners, and hence the order under attack was duly passed at a meeting of the court, with a quorum present, regardless

of the participation of the county judge."

The courts of this State have not passed upon the question of whether the special county judge elected under the provisions of Article 1934 is also to preside over the county commissioners' court. However, in Kentucky, where the State has similar constitutional and statutory provisions to ours, and where the county fiscal courts perform practically the same duties as our county commissioners' court, the Supreme Court in the case of *Jefferson County Fiscal Court v. Grauman*, 136 S.W.(2d) 1102, said:

" . . . that a county judge may appoint a pro tem. county judge to perform all of the duties of the regular county judge in his absence, must be interpreted as authorizing the pro tem. county judge to perform only those duties which devolve upon the county judge as such, and not those other duties which the county judge himself is authorized to perform due to his being personally made, by section 144 of the Constitution, a member of the fiscal court and, as such, ex-officio its presiding officer."

See also *Martin v. Stumbo*, 140 S.W.(2d) 405.

Also in a former Attorney General's Opinion No. 0-5374, in answering this question, it was stated:

"As heretofore stated the selection or appointment of a special county judge is proper only upon the conditions specified in the Constitution and statutes. We fail to find any statute authorizing the election or appointment of a special county judge to preside over or act as a member of the commissioners' court. Therefore, it is our opinion, that no special county judge can be elected or appointed to perform such duties."

Therefore, in view of the foregoing, your second question is answered in the negative.

With reference to your third question, we assume that pursuant to Article 1934 and under the pro-

visions of Art. 1887, the special county judge was elected to serve in the place of the county judge during his absence and inability to serve.

In the case of *Ex Parte Templeton*, 186 S.W. (2d) 68, where the regular district judge was on active duty in the service of the United States Navy, the practicing lawyers of said district elected a special judge of said court during the absence of the regular judge in compliance with the provisions of Article 1887, V. C. S., and the court held that:

"There was no vacancy in the office of district judge, and therefore the practicing attorneys had a right to elect a special judge to serve during the absence of the regular judge, . . ."

Therefore, since the special county judge was elected to serve during the absence and inability of the regular county judge to serve under the procedure set out in Article 1887, et seq., and in view of the foregoing, it is our opinion that such special county judge may continue to serve from term to term in the absence or inability of the regular county judge.

SUMMARY

A special county judge elected under the provisions of Article 1934, V. C. S. is not authorized to act as ex-officio school superintendent. *Holland v. Harris County*, 102 S.W.(2d) 196.

A special county judge elected under the provisions of Article 1934, V. C. S. is not authorized to preside over the commissioners' court. *Jefferson County Fiscal Court v. Grauman*, 136 S.W.(2d) 1102; Attorney General's Opinion No. 0-5374.

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Hon. K. D. Hall, page 7 (V-615)

regular county judge. Ex Parte Temple-
ton, 186 S.W.(2d) 68.

Yours very truly,
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BA:mv

APPROVED:

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