OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

March 20, 1939

Mr. Chas. H. Slaughter
County Attorney
Martin County
Stanton, Texas

Dear Mr. Slaughter:

Opinion No. O-509
Re: Whether or not an election clerk is privileged from arrest by a game warden while such clerk is on duty

This will acknowledge receipt of your letter of March 16, 1939, requesting an opinion of this department, the pertinent part of which is quoted as follows:

"A complaint was filed in this county in the court having competent jurisdiction, against a state game warden, charging him with disturbing a general election which was being held, in that he interfered with one of the election clerks while on duty at the polling place and then and there taking him and detaining him in an automobile about fifty feet from the polling place against his will and against the protest of the Judge of the election.

"Under Article 3023... 'In all cases except treason, felony or breach of the peace, voters shall be privileged from arrest during their attendance at elections, and in going to and returning from'. I would like your opinion as to whether or not you consider an election clerk privileged from arrest by a game warden for the offense of shooting migratory birds under the range of this article."

Privilege from arrest means just that; it is a privilege and not a right and must be conferred on the person claiming it, either by the Constitution or the laws of this State. Neither the Constitution nor the laws of the State of Texas provide that an election clerk shall be privileged from arrest during his attendance at an election, although it is so provided in some states, one of which is Pennsylvania. Matter of Election Officers, 1 Brewster (Pa) 182; 5 C. J., 388.

The question of privilege from arrest, but not the question raised by you, is discussed in Volume 4 of Texas Jurisprudence at page 740, and by the Supreme Court of Texas in the case of Gentry vs. Griffith, 27 Tex. 461. For this reason, we must look to the decisions of the courts in other jurisdictions for guidance.

Even though an election clerk did come within the range of Article 3023 quoted above, he would not be privileged from arrest under the facts quoted, because the commission of the offense of shooting migratory birds is by the laws of Texas made a misdemeanor, a crime, and the privilege covered by the aforesaid Article does not extend to crimes, but covers only privilege from civil arrests. Williamson vs. United States, (1907) 207 U. S., 425, 52 L. Ed., 278, 28 Sup. Ct. Rep. 163.

The scope of the privilege extended by the terms "treason, felony and breach of peace" has a very interesting background, which is discussed in the case of Com. ex rel, Bullard vs. Keeper of Jail (1877) 4 W. N. C. Pa. 540. That case was one wherein a member of the General Assembly was arrested on a charge of embezzlement and it was insisted that, by virtue of the constitutional provision exempting members of the general assembly from arrest, except in cases of "treason, felony, violation of his oath of office, and breach or surety of the peace," he was immune, and entitled to be discharged. Holding that the immunity could be claimed only in civil cases, the court said:

> "The constitutional privilege claimed by the relator is borrowed from the privileges claimed by and accorded to members of the British Parliament. These privileges were recognized and

enjoyed in Pennsylvania before any written constitution had been adopted. They were a part of our common law. The privileges, from very small beginnings, had, by accumulation, assumed alarming proportions. Parliament, being the judge of its own privileges, could not be confined within any certain limits, and for this reason the framers of the Federal Constitution inserted the clause defining what the privileges of members of Congress should be, and beyond which they should not go. The object was not to create the privileges therein expressed, for they were already established by our common law, but rather to render them certain, and fix limits within which they should be confined. The several states followed the national Constitution, and inserted similar clauses in all their constitutions. As the object was to limit the privilege from arrest to that then enjoyed by members of the British Parliament, and as the same language is employed as had been adopted in England to express the offenses for which members of Parliament could be arrested, to-wit: 'Treason, felony, and breaches of the peace,' it follows that all offenses in England, comprehended in the words breach of the peace, are excepted from the privilege from arrest. Blackstone says there is no precedent for any such privilege, but only in civil suits. . . . It may be safely concluded that the privilege from arrest in America is, in no case, greater than the same privilege in England. We cannot, by a liberal construction of the language of our Constitution, enlarge the privileges of our legislators beyond those formerly enjoyed by members of the Parliament in England. See Story, Const. §§c. 863. The reason of the law is its life, and while there is great reason for privileging public servants from civil detentions and arrests, there is none for shielding them from apprehension for crimes against the peace and dignity of the state."

Therefore, it is the opinion of this department that the answer to your question is no, an election clerk is not privileged from arrest and that he does not come under the range of Article 3023, Revised Civil Statutes of Texas, 1925.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By James Noel
James Noel
Assistant

JN-s

APPROVED:

Gerald C. Mann
ATTORNEY GENERAL OF TEXAS