OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Superseded By Act 29 [illegible]

Wichita Co.

Honorable Z. D. Allen
District Attorney
Wichita Falls, Texas

Dear Sir:

Opinion No. O-2591
Re: The legal status of attempted nominations for the offices of county clerk, district clerk, and county and district clerk of Archer County, under the stated facts.

Your letter of recent date, requesting a legal opinion of this Department, reads in part as follows:

"Joe Branch, a resident citizen of Archer County, Texas, which is in the 30th Judicial District, of which I am District Attorney, was a candidate for County Clerk of Archer County, Texas, in the July Primary, and he and Jack Meredith received the first and second highest number of votes and are eligible for the Second Primary in August. Mrs. Nellie Davis was the only candidate for District Clerk and was nominated. Seven voters wrote on their ballot for Joint Clerk (meaning County and District Clerk) the name of Garvey Melugin.

"According to the 1930 census Archer County had a population of more than 8,000 persons. According to the unofficial report of the 1940 census released through the press, Archer County has a population of less than 8,000 persons.

NO COMMUNICATION IS TO BE CONSTRUED AS A DEPARTMENTAL OPINION UNLESS APPROVED BY THE ATTORNEY GENERAL OR FIRST ASSISTANT

"No. 1. Will you please inform the writer if Joe Branch is running for an office that does not exist?

"No. 2. Is Mrs. Nellie Davis, nominee for District Clerk, running for an office that does not exist?

"No. 3. Is Garvey Malugin who received 7 'writ-in' votes for Joint Clerk (County and District Clerk) the Democratic nominee for the office of County and District Clerk of Archer County, Texas?"

By supplemental letter you advise as follows:

"Supplementing our letter and request for an opinion dated August 1, 1940, we wish to state that the official census returns for Archer County Texas, for 1940 shows that the population of that county is LESS than 8,000.

"The official report was received by the County Judge of Archer County, sometime prior to the 1st primary election."

In our opinion No. O-2515, this Department held that in a county of less than 8,000 inhabitants there could not be a valid nomination for the separate offices of county and district clerk for the reason that under the Constitution and statutes of Texas, such offices are not subject to being filled by election by the qualified voters in the forthcoming general election, there being in lieu thereof only the joint office of county and district clerk -- one office -- to be filled. It was further pointed out in this opinion that for the name of a person to appear on the general election ballot as the nominee of the Democratic party for the joint office of county and district clerk, such person must have been lawfully nominated by the party for such office in the party primary, as to which neither a nomination by the party for the office of county clerk nor a nomination by the party for the office of district clerk would suffice as a nomination for the joint office of the county and district clerk. We are enclosing a copy of this opinion

for your information.

In our Opinion No. O-2337 this Department held that the 1940 census becomes controlling when the census figures for a county have been compiled and made available to the public. We are likewise enclosing a copy of this opinion for your information.

We assume, therefore, as indicated in your letters, that an official announcement of the census, within the purview of the cases cited in our Opinion No. 2357, has established the population of Archer County to be less than 8,000 inhabitants, as a result of which only one clerk shall be elected in Archer County in the forthcoming general election under Section 20 of Article V of the Constitution of Texas and Article 1903 of the statutes of Texas.

We further assume from the facts stated in your letter that there was printed on the primary ballot only the title of the separate offices of county clerk and district clerk and that there did not appear thereon the title of the joint office of county and district clerk, wherefore, the seven voters described in your letter who wrote in the name of Garvey Melugin for the office of county and district clerk also wrote in the title of such office.

Under the facts described in your letter, it follows under the holding of our Opinion No. O-2515 that the nomination of Joe Branch and Jack Meredith to enter the second primary for the office of county clerk served no purpose inasmuch as such office is not subject to being filled by the voters of Archer County in the forthcoming general election; likewise as to the nomination of Mrs. Nellis Davis for the office of district clerk. The question then arises as to whether the actions of seven voters in writing on the ballot the title of the joint office of county and district clerk, and also the name of Garvey Melugin therefor, constitute a valid and legal nomination by the Democratic party of such individual to the office of county and disgrict clerk, which would entitle such person to appear on the official ballot in the general election as the nominee of the Democratick party for such office.

We regard it as obvious that the voters of Archer County did not know that the office of county and district clerk must be filled in the general election and therefore did not

consider the matter of nominating a candidate for such office. The title of the office was not printed on the ballot and presumably the voting public had not been advised that they could or should select a nominee for this office. We therefore are of the opinion that the matter is controlled by the principles invoked in the case of Cunniggham v. Queen, 96 S. W. (2d) 798, by the San Antonio Court of Civil Appeals.

The pertinent facts of this case were as follows:

> "Hon. Birge Holt, who for several years past was the judge of the 117th Judicial District, and whose term of office would not have expired until January 1, 1939, resigned his office as such judge after the July, 1936, primary had been held, but before the August run-off primary had taken place. No names were placed upon the official ballot of the Democratic primary held on July 25, 1936, for the office of judge of the 117th judicial district, for the reason that there was at that time no vacancy in said office, and Judge Holt was what is commonly referred to as a 'hold-over' at said time.
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> "Shortly after Judge Holt's resignation, the Governor of this state appointed, as his successor, Hon. W. B. McCampbell, and thus it became apparent that it would be necessary at the general election to be held on November 3, 1936, to elect a judge for the 117th judicial district. The officers of the Nueces County Democratic Executive Committee took no notice of this fact, as far as the August run-off primary was concerned, and did not place the name of the office, or the name of any candidate, upon the official ballot of the run-off primary, August 22, 1936.
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> "However, eighteen voters at the August primary wrote the name of the office, that is, judge of the 117th judicial district, on the ballot and also wrote in the name of appellant, Tom J. Cunningham, as their choice for the Democratic nominee for this office."

Under this state of facts the Democratic executive committee of Nueces County refused to give any effect to these eighteen votes and declined to certify the name of Tom J. Cunningham as the Democratic nominee for the office of judge

of the 117th Judicial District. Suit was instituted to compel the committee to tabulate the votes so cast for this office under such facts. In affirming the action of the trial court in denying the relief sought, the appellate court declared:

> "Again, viewing this matter from a broad and common sense viewpoint, it is perfectly obvious that the voters of Nueces county did not consider the matter of nominating a candidate for the office of judge of the 117th judicial district had been submitted to them in the run-off primary. They did not find on the ballot even the name of the office, and, so far as this record affirmatively shows, only eighteen voters out of several thousand attempted to vote for this judgeship.
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> "It is true that where the public generally know, or should know, that an election is taking place for a particular purpose and only a small minority of the voters vote in such election, that it may be declared to be the public will and a valid election; but where, as in this case, it appears that it was not generally known and understood that an election was being held for the purpose of nominating a candidate for the office of judge of the 117th judicial district, and where there was no mention of such office on the ballot, and where the plain provisions of the statute preclude the idea that such a nomination could be held at a run-off primary, then there has been no expression of the public will and no election."

The only fact of any significance appearing in this case not existent in the situation described in your letter was that in the cited case the question arose in the run-off or second primary, whereas under the facts before us the question relates to the first or general primary. We do not regard this fact as essential in any respect to the disposition made of the question by the court in the Cunningham case, but regard the principles announced therein as entirely applicable to the present situation in Archer County.

You are therefore respectfully advised that it is the opinion of this Department that the attempted nomination by the voters of Archer County of Joe Branch and Jack Meredith to the office of county clerk, and of Mrs. Nellie Davis to the office of district clerk, was in each case ineffective as a nomination to any office subject to being filled by the voters at the forthcoming general election; and that the attempt of seven voters of Archer County to nominate Garvey Melugin to the one office of county and district clerk by writing in both the title of the office and the name of such person was likewise ineffective as a nomination of such person to the office of county and district clerk of Archer County, Texas.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By Zollie C. Steakley
Assistant

APPROVED AUG 13, 1940

FIRST ASSISTANT
ATTORNEY GENERAL

ZCS:BBB

ENCLOSURES

APPROVED
OPINION
COMMITTEE
BY BWB
CHAIRMAN