



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable G. A. Walters
County Attorney
San Saba County
San Saba, Texas

Dear Sir:

Opinion No. O-2632

Re: (1) Proper steps to establish ineligibility of candidate for office of county attorney; (2) proper officer to institute necessary proceedings; (3) Other questions based upon assumption that timely action will not be taken.

We have for reply your letter of August 14, 1940, requesting the opinion of this department upon the following matter:

"There were two candidates for county attorney in the nomination at the primary election held on the 27th day of July. A young man who was without license to practice law was one of the candidates against the present incumbent after having failed to secure the requisite number of points under two examinations and taken his third examination at the time of his candidacy before the primary, but the same had not been acted on by the examining committee. He, anticipating that he would be successful on that third examination, made the race and was nominated over the present incumbent. This week brings the information that he failed again for the third time. I presume he will take another examination, and if he does I assume that the result will be known before the November election.

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"Unless prohibited, either through a mandamus or injunction, one or both proceedings, his name will be certified by the committee and his name will go up on the ticket at the general election."

On the basis of these facts you desire to know:

- (1) What steps may be taken to establish the ineligibility of the candidate for the office of county attorney;
- (2) If steps may be taken, who is authorized to institute the necessary proceedings;
- (3) Other questions based upon the assumption that timely steps will not be taken.

In Opinion No. O-2285 this department held that under Articles 332 and 2927 of the Revised Civil Statutes, 1925, one who does not have his license to practice law and will not have it at the time of the July primary election is not entitled to have his name certified as a candidate for the office of county attorney at such election.

Articles 2927, 2928 and 2929 of Vernon's Annotated Civil Statutes, read as follows:

"Art. 2927.

"No person shall be eligible to any State, county, precinct or municipal office in this State unless he shall be eligible to hold office under the Constitution of this State, and unless he shall have resided in this State for the period of twelve months and six months in the county, precinct, or municipality, in which he offers himself as a candidate, next preceding any general or special election, and shall have been an actual bona fide citizen of said county, precinct, or municipality for more than six months. No person ineligible to hold office shall ever have his name placed upon the ballot at any general or special election, or at any primary election where candidates are selected under primary election laws of this State; and no such ineligible candidate shall ever be voted upon, nor have votes counted for him, at any such general, special, or primary election.

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"Art. 2928.

"Neither the Secretary of State, nor any county judge of this State, nor any other authority authorized to issue certificates, shall issue any certificates of election or appointment to any person elected or appointed to any office in this State, who is not eligible to hold such office under the Constitution of this State and under the above article; and the name of no ineligible person, under the Constitution and laws of this State, shall be certified by any party, committee, or any authority authorized to have the names of candidates placed upon the primary ballots at any primary election in this State; and the name of no ineligible candidate under the Constitution and laws of this State shall be placed upon the ballot of any general or special election by any authority whose duty it is to place names of candidates upon official ballots.

"Art. 2929.

"The district court shall have authority to issue writs of injunction and all other necessary process at the suit of any interested party, or of any voter, to enforce the provisions of the above two articles and to protect thereunder the rights of all parties and the public; for such purpose, jurisdiction and authority is conferred upon all district courts of this State and all cases filed hereunder shall have first right of precedence upon trial and appeal."

Under the Articles of the Revised Civil Statutes, above set forth, the candidate mentioned in your letter is not entitled to have his name go on the ballot in the general election in November as the Democratic nominee for the office of county attorney. He should not be voted upon at that time as such nominee, and under Article 2929 an injunction may issue from the district court to prevent his name being placed before the voters at the general election.

Let us point out here for your guidance that while Article 8253, Vernon's Annotated Civil Statutes, pro-

vides the remedy of an information in the nature of a quo warranto to be directed against one unlawfully intruding upon or assuming the duties of an office which he is not entitled, that remedy is not available until the one against whom the writ is to be directed has actually intruded into and unlawfully held the office. As stated in Callaghan v. Tobin, 40 T. 90 S. W. (2d) 328, writ refused,

"There is nothing in that statute that would protect the incumbent of an office from one who threatened to remove him from the same and to take possession of the property appertaining to the office. That statute gives a remedy against a person who has already usurped, intruded into, and unlawfully holds an office, as the very designation of the proceeding clearly implies. It is a proceeding by quo warranto, to be used against one in possession of an office, and cannot be used by an incumbent to protect him from attempted usurpation of his office."

See also Williams v. Castleman, 112 247 S. W. 263.

You have been advised that an injunction to prevent the name of an ineligible candidate appearing upon the ballot at the general election as the Democratic nominee for the office concern ourselves with the question of who is to institute the necessary proceedings.

Although Article 2929 provides in ha that "any interested party, or any voter" may injunction there provided for, the case of All decided by the Commission of Appeals in 1928, 9 S. W. (2d) 731, construes the statute differ

In that case one Braly, the plaintiff and a third man were candidates for the office of attorney. At the election it appeared that Bral the highest number of votes cast and the plain second largest number. Braly, however, was in der Article 2927 to be a candidate for the office of triet attorney, and the plaintiff, the second

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instituted the necessary steps, as a voter, to procure an injunction under Article 2929 to prevent the name of Braly from appearing upon the ballot at the general election and to prevent his certification as the Democratic nominee for the office of district attorney. The Court stated:

"The petition therefore fails to show that the plaintiff has a legal right, distinct from the general public of which he is a member, which will be affected by the certification of Braly as the Democratic nominee for district attorney, or by the printing of his name, as such, on the official ballot at the general election in November. The plaintiff, as an individual, is not shown to have a justiciable interest in the matter. He therefore is not entitled to maintain this suit unless authorized to do so under that provision of article 2929 of the statutes now to be noticed. A portion of that article provides in effect that the district court shall have authority to issue writs of injunction at the suit of 'any voter,' to restrain the placing of the name of an ineligible candidate upon the official ballot at any general or special election. Under the facts of this case, and though Braly be ineligible as alleged, the certification of his name as the Democratic nominee, and the placing of his name on the ballot at the general election, are matters of public concern exclusively. Such being the case, any suit in respect of those matters must be prosecuted by the state. Staples v. State, 112 Tex. 61, 245 S. W. 639. Whatever be the true import of the statutory provision just referred to, that provision cannot have effect to invest the plaintiff, simply because he is a voter, with the authority to maintain this suit. The Constitution does not permit this to be done. It is said in the case just cited that:

"It is necessary for the state to be a party where the action is for the benefit of the public at large, though growing out

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of a party primary election. The statute cannot confer a right upon private individuals to act for all where it is shown they have no interest different from all others.'

"The Constitution provides that the county attorney shall represent the state in all cases in the district court. By other constitutional provisions the Legislature is authorized to impose that duty on the Attorney General, and, in prescribed circumstances, upon the district attorney. See State Constitution, art 5, § 21; art. 4, § 22. These constitutional provisions mark the limits of legislative authority to prescribe who shall represent the state and control its interests in a lawsuit in the district court. The Legislature is impliedly restrained from conferring such duty and responsibility on the individual citizen. Maud v. Terrell, 109 Tex. 97, 200 S. W. 375. The plaintiff therefore has no authority to maintain this suit, as a voter, independently of a public official who is properly clothed with that authority."
(Underscoring ours)

We may therefore conclude that any suit provided for by Article 2929 must be prosecuted by the State.

Section 21 of Article 5 of the Constitution of Texas, reads, in part, as follows:

"* * *. The county attorney shall represent the State in all cases in the District and inferior courts in their respective counties; * * *."

In Maud, County Tax Collector, v. Terrell, State Comptroller, 109 Tex. 97, 200 S. W. 375, the Court stated:

"* * *. That instrument, by Section 21 of Article 5, lodges with the county attorneys the duty of representing the State in all cases in the district and inferior courts, with the right in the Legislature to regulate by law the respec-

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tive duties of district and county attorneys where a county is included in a district having a district attorney; and by Section 22 of Article 4 that duty as to suits and pleas in the Supreme Court is confided to the Attorney General. * * *."

See also Staples v. State, 112 Tex. 61, 245 S. W. 639; Dickson v. Strickland, 114 Tex. 176, 265 S. W. 1012.

It is the opinion of this department and you are respectfully advised that you in your official capacity as county attorney are authorized to represent the State in a suit for an injunction under Article 2929 of the Revised Civil Statutes, 1925, to prevent the name of an ineligible candidate for the office of county attorney in your county from being placed upon the ballot, voted upon, or certified as the Democratic nominee for the office at the general election in November.

Each of the other questions you have presented for our consideration are based upon hypothetical situations which may never arise, and in view of the foregoing advising that the remedy of injunction is available now, their answer is rendered unnecessary.

Very truly yours

APPROVED AUG 22, 1940 ATTORNEY GENERAL OF TEXAS

James D. Smullen

FIRST ASSISTANT
ATTORNEY GENERAL

By

James D. Smullen
James D. Smullen
Assistant

JDS:RS

