



**THE ATTORNEY GENERAL  
OF TEXAS**

PRICE DANIEL  
ATTORNEY GENERAL

AUSTIN 11, TEXAS  
August 8, 1952

Hon. C. E. Patterson  
County Attorney  
Brewster County  
Alpine, Texas

Opinion No. V-1505

Re: Official status of a county commissioner following his conviction in federal court for unlawfully importing cattle into the United States, where execution of sentence is suspended.

Dear Sir:

Your request for our opinion reads in part as follows:

"On the 7th day of July, 1952, one of the county commissioners of Brewster County was convicted in the United States District Court of Western District of Texas for importing cattle into United States unlawfully. It was ordered in the judgment in said Court, same being upon a plea of guilty, and without a jury, as follows: 'It is the order and sentence of the Court that the defendant, . . . , for the offense by him committed, be imprisoned for the period of ONE "1" YEAR and ONE (1) DAY in an institution to be designated by the Attorney General of the United States.' Said judgment further provided: 'And it appearing to the Court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, it is further ordered that the execution of the sentence herein imposed be, and it is hereby SUSPENDED and said defendant released upon probation for a period of TWO (2) YEARS and committed to the custody, control and supervision of Jesse J. Saxon, United States Probation Officer for the Western District of Texas, upon conditions provided in the order of this Court made and entered on March 26th, 1946, . . . .'

**"QUESTION:** Does this conviction in Federal Court, which was suspended, bar and suspend this County Commissioner from office?

". . .

"This Commissioner was convicted under Section 545 of Title 18, USCA for illegal importation. This carries with it a maximum penalty of \$5,000 and/or five years."

Section 5 of the Texas Election Code (V.A.T.S. Election Code, Art. 1.05) prescribes the conditions on which a person shall be eligible to hold the office of county commissioner. This statute reads, in part:

"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,..."

Section 2 of Article XVI, Constitution of Texas, provides:

"Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, those who may have been or shall hereafter be convicted of bribery, perjury, forgery, or other high crimes. ..."

This constitutional provision contemplates that persons convicted of "high crimes" shall be ineligible to hold office in this State. Snodgrass v. State, 67 Tex. Crim. 615, 150 S.W. 162, 177 (1912). In regard to the meaning of "other high crimes," it was stated in Att'y Gen. Op. 0-2698 (1940):

"There would seem to be no doubt that the expression 'other high crimes' would include the crime of burglary. Certainly any crime of the same grade as the enumerated ones, namely, felonies, is comprehended by this provision of the Constitution."

The Legislature has interpreted these words to include all felonies, in the enactment of Article 5968, V.C.S., which reads:

"All convictions by a petit jury of any county officers for any felony, or for any misdemeanor involving official misconduct, shall work an immediate removal from office of the officer so convicted. Each such judgment of conviction shall embody within it an order removing such officer."

While Article 5968 may have been directed only toward the procedure to be followed in removing the individual from public office when he is convicted in a court of this State, it nevertheless reflects the legislative interpretation of the constitutional provision. A felony is defined in Article 47, V.P.C.:

"An offense which may - not must - be punishable by death or by confinement in the penitentiary is a felony; every other offense is a misdemeanor."

Section 2 of Article XVI does not expressly confine the disqualification to convictions under the laws of this State, and it is our opinion that it was not intended to do so. The same considerations of public policy exist with respect to convictions obtained in other jurisdictions as with respect to convictions under our own laws. The fact that the offense for which the person was convicted did not fall within the jurisdiction of the courts of this State does not lessen its gravity or render the guilty individual any more fit to serve as a public officer.

An analogy is found in disqualification for jury service and suffrage. Pursuant to the requirement of this constitutional provision, the Legislature has enacted laws excluding from jury service all persons convicted of a felony. Art. 2133, V.C.S.; Arts. 616, 619, V.C.C.P. In Amaya v. State, 87 Tex. Crim. 160, 220 S.W. 98 (1920), the court rejected the contention that the conviction must have been obtained in a court of this State, in the following language:

". . . The reasoning which underlies some of these cases is that the judgment in a criminal case cannot be enforced in another jurisdiction. This principle seems not controlling in this state, in that the object of the Legislature appears to be not the punishment of the

convicted juror, but the protection of society against the pollution of the jury system by committing its execution to persons whose moral status has been judicially established as criminal. . . ."

The disqualification results even though the wrongful act would not have constituted a felony under the laws of Texas. Hughes v. State, 105 Tex. Crim. 57, 284 S.W. 952 (1926). Also see Speer v. State, 109 S.W.2d 1150, 1154 (Tex. Civ. App. 1937, error dismissed); Cisneros v. State, 147 Tex. Crim. 123, 179 S.W.2d 313 (1944). Similarly, in Harwell v. Morris, 143 S.W.2d 809 (Tex. Civ. App. 1940), it was held that a person convicted of an offense which was made a felony by federal statute was disqualified to vote.

The federal statute under which the county commissioner was convicted (18 U.S.C.A. § 545) provides in part:

"Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law -

"Shall be fined not more than \$5,000 or imprisoned not more than two years, or both."

It is provided in 18 U.S.C.A. § 1 that "any offense punishable by death or imprisonment for a term exceeding one year is a felony." Clearly the offense committed was a felony as defined by both the state and the federal statutes.

Passing next to the question of the effect of the suspension of the execution of sentence, in Att'y Gen. Op. 0-2698 (1940) it was held that the word "convicted" in Section 2 of Article XVI "embraces the status resulting from the application of the suspended sentence law of Texas to a verdict ascertaining and publishing the guilt of a person charged with a criminal offense." Under the Texas law a conviction is not a final one where the sentence is suspended. Art. 778, V.C.C.P.; Bierman v. State, 73 Tex. Crim. 284, 164 S.W. 840 (1914). Yet this opinion held that the defendant nevertheless has been "convicted" and is thereby rendered ineligible to hold office. However, it is not necessary to rest our answer on the reasoning of that opinion. Under federal law, a judgment of conviction is final where sentence is imposed, even though the execution of the sentence is suspended. Berman v. United States, 302 U.S. 211 (1937). In our opinion, unquestionably there has been a conviction in the present case within the meaning of Section 2, Article XVI of the Constitution.

Since it is our conclusion that a final conviction of a felony in a federal court renders a person ineligible for public office under Section 2, Article XVI of the Constitution, you are advised that the county commissioner is now disqualified to hold that office.

It remains for us to consider whether the conviction resulted in an automatic removal from office. Here, the officer was convicted upon a plea of guilty without the intervention of a jury. The answer to this question turns on the applicability of Article 5968, V.C.S., quoted above. This statute provides that "all convictions by a petit jury of any county officers for any felony . . . shall work an immediate removal from office of the officer so convicted." It further provides that the judgment of conviction shall embody within it an order of removal.

As we have stated, this statute may have been intended to operate only in cases of conviction by a court of this State, since it is obvious that the command for inclusion in the judgment of an order removing the officer could not be imposed on courts of other jurisdictions. Be that as it may, in Att'y Gen. Op. 0-2619 (1940) it was held that a conviction in a state court upon a plea of guilty where a jury was waived did not automatically remove the officer. In construing Article 5968, this opinion stated:

"The above statute speaks only of convictions by petit juries, perhaps because when it became law there could be no conviction of a felony except upon a jury trial. Article 10a, C.C.P., giving to the defendant the right to waive a jury in a felony case less than capital, upon a plea of guilty and with the consent of the District Attorney and of the Court, was not enacted until 1931. We are more inclined to think, however, that in passing Article 5968, with its requirement of a jury conviction, the Legislature had in mind Section 24, of Article 5, of the State Constitution, reading as follows:

"County Judges, county attorneys, clerks of the District and County Courts, justices of the peace, constables, and other county officers, may be removed by the Judges of the District Courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury."

While we think there is argument for reaching a conclusion that neither Article 5968 nor Section 24, Article V. of the Constitution makes a jury verdict necessary where the defendant has elected to waive a jury, we are not strongly enough convinced of the correctness of that view to warrant overruling this opinion. We therefore hold that the officer was not automatically removed from office by the conviction in federal court without a jury, but that he is subject to removal through further proceedings in a district court of this State, as set out in Section 24 of Article V of the Constitution.

Article 6253, V.C.S., provides that a quo warranto proceeding may be instituted for ousting any public officer who unlawfully holds any office or who "shall have done or suffered any act which by law works a forfeiture of his office." We are of the opinion that this procedure is available in the present case. We are also of the opinion that a proceeding for removal could likely be had under Article 5970 et seq., V.C.S. In this connection your attention is directed to the fact that Article 5970 enumerates certain specific causes for removal, which do not include "other causes defined by law," as

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stated in Article V, Section 24 of the Constitution. However, we think it likely that a court would hold this procedure available, by virtue of the constitutional provision, where the judgment of conviction did not itself remove the officer.

SUMMARY

A county commissioner who is convicted of a felony in federal court and assessed a sentence, the execution of which is suspended, is disqualified to serve as county commissioner and is subject to removal from office by quo warranto proceedings under Article 6253, V.C.S.

APPROVED:

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Yours very truly,

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Attorney General

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