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1. CANDIDATE FOR OFFICE—NOMINATING PETITION—SECTION 3513.261, R. C.—INTEREST IN PETITION—DISQUALIFIED FROM ADMINISTERING OATH TO CIRCULATOR OF PETITION—PETITION INVALID.

2. BOARD OF ELECTIONS—SECTION 3501.11 AND SECTION 3513.262, R. C.—DUTY TO DETERMINE VALIDITY OF NOMINATING PETITIONS WHETHER OR NOT PROTEST IS FILED AS PROVIDED IN SECTION 3513.262, R. C.

SYLLABUS:

1. An individual who seeks to qualify as a candidate for office by filing a nominating petition in the form prescribed in Section 3513.261, Revised Code, has an interest in such petition sufficient to disqualify him from administering the oath, therein required, to a circulator of such petition, and the act of such candidate in purporting to administer such oath renders such petition invalid.

2. A board of elections is under a mandatory duty, under the provisions of Sections 3501.11 and 3513.262, Revised Code, to determine the validity of nominating petitions whether or not a protest is filed against them as provided in Section 3513.262, Revised Code.

Columbus, Ohio, July 26, 1956

Hon. Everett Burton, Jr., Prosecuting Attorney
Scioto County, Portsmouth, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The Board of Elections of Scioto County, Ohio has submitted the following request to my office: 'is it legal and proper

for the *candidate* to take acknowledgements of the circulator of the part petition papers?'

"When petitions for candidacy have been circulated by a circulator, in order for the petition to become valid, it is necessary for the circulator to have said petition acknowledged before a notary public or some other officer with authority to administer oaths.

"The specific question to be answered is as follows: 'is a part petition of a nominating petition invalidated by reason of the person declaring thereon as a candidate, also acting thereon as the notary public in administering the oath to the circulator of such part petition?'

"I am therefore submitting this question to your office for an opinion and I will appreciate an early reply to the same."

It is understood that the candidate here in question has submitted a nominating petition under the provisions of Section 3513.257, Revised Code, which reads in part as follows:

"The nominating petition of independent candidates for the office of judge of the court of appeals shall be signed by qualified electors not less in number than seven per cent of the number of electors who voted for governor at the next preceding regular state election in the territory over which such court has jurisdiction, or twenty-five hundred electors, whichever is the lesser number."

The form and content of such nominating petition is prescribed in Section 3513.261, Revised Code, which reads in part:

"A nominating petition may consist of one or more separate petition papers, each of which shall be substantially in the form prescribed in this section. Each nominating petition containing signatures of electors of more than one county shall consist of separate petition papers each of which shall contain signatures of electors of only one county; provided that petitions containing signatures of electors of more than one county shall not thereby be declared invalid. In case petitions containing signatures of electors of more than one county are filed, the board of elections shall determine the county from which the majority of the signatures came, and only signatures from this county shall be counted. Signatures from any other county shall be invalid. * * *"

"The form of the nominating petition and statement of candidacy shall be substantially as follows: * * *"

"The State of Ohio
County of .....

".....,, being duly sworn, deposes and says that he is the circulator of the foregoing petition paper containing

.....signatures; that said signatures were written in his presence and are the signatures of the persons whose signatures they purport to be; and that he resides at the address appearing below his signature hereto.

Signature of Circulator.....

Address .....

"Subscribed and sworn to before me this ..... day of .....,19.....

.....
(Signature of officer administering oath)

.....
(Title of officer)"

From the provisions of these sections it is clear that the oath of the circulator of a petition or part petition is a mandatory requirement and that it is an essential part of such petition or part petition.

The duty of the board of elections with respect to determining the validity of nominating petitions is stated in Section 3513.262, Revised Code, as follows:

"The nominating petitions of all candidates required to be filed before four p. m. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding the general election shall be processed as follows:

"If such petition is filed with the secretary of state, he shall, on the fifteenth day of June next following the filing of such petition, transmit to each board such separate petition papers as purport to contain signatures of electors of the county of such board. If such petition is filed with the board of the most populous county of a district or of a county in which the major portion of the population of a subdivision is located, such board shall, on such fifteenth day of June, transmit to each board within such district such separate petition papers of the petition as purport to contain signatures of electors of the county of such board.

All petition papers so transmitted to a board and all nominating petitions filed with a board shall, under proper regulations, be open to public inspection from the fifteenth day of June until four p. m. of the thirtieth day of June. Each board shall not later than the next fifteenth day of July, examine and determine the sufficiency of the signatures on the petition papers transmitted to or filed with it,*and the validity of the petitions filed with it,* and shall return to the secretary of state all peti-

> tion papers transmitted to it by him, together with its certification of its determination as to the validity or invalidity of signatures thereon, and shall return to each other board all petition papers transmitted to it by such other board, as provided in this section, together with its certification of its determination as to the validity or invalidity of signatures thereon. *All other matters affecting the validity or invalidity of such petition papers shall be determined by the secretary of state or the board with whom such petition papers were filed.*"
>
> (Emphasis added.)

Upon the filing of a protest as to the validity of any such petition, these provisions "authorize and require a board of elections * * * to determine the validity of such petition * * *." See State, ex rel. Flynn v. Board of Elections, 164 Ohio St., 193.

However, we find also the following provision in Section 3501.11, Revised Code:

> "Each board of elections shall exercise by a majority vote all powers granted to such board of Title XXXV of the Revised Code, shall perform all the duties imposed by law, and shall:
>
> "* * * (K) Review, examine, and certify the sufficiency and validity of petitions and nomination papers;"

As to this provision, formerly found in Section 4785-13, General Code, the Supreme Court held, in State, ex rel. Ehring v. Bliss, et al., 155 Ohio St., 99:

> "1. Under the provisions of Section 4785-13, General Code, and cognate sections, a county board of elections is authorized to review, examine and certify the sufficiency and validity of petitions and nominating papers even in the absence of a protest thereto. (*State, ex rel. McGinley, v. Bliss et al., Board of Elections,* 149 Ohio St., 329, approved and followed.)"

It will be noted that in the Bliss case the board had proceeded on its own initiative to make a determination of the validity of a nominating petition, and there was thus no occasion for the court to decide more, as to this point, than that such proceeding, in the absence of a protest, was "authorized." It can scarcely be doubted, however, that the use of the word "shall," both in Sections 3501.11 and 3513.262, supra, makes such determination mandatory on the board.

For the foregoing it thus appears (1) that the oath of the circulator is an essential part of a nomination petition, (2) that the board of

elections, either upon the filing of a protest as to any such petition, or in the absence of such protest, is *required* to determine its validity, including the validity of such oath. The question is, therefore, whether the oath as administered in the instant case is "valid."

On the point of an oath administered by an "interested party," and it is clear beyond doubt that a candidate is "interested" in his own nominating petition, there is not a uniformity of decisions in the several American jurisdictions. However, in 39 American Jurisprudence, 497, Section 11, it is said:

> "It is undoubtedly the prevailing view, even in the absence of statute, that an oath cannot be legally administered by one who is an interested party in the proceeding. * * *."

In Ohio the leading case seems to be Amick v. Woodworth, 58, Ohio St., 86. The syllabus reads in part:

> "1. A grantee in an instrument for the conveyance or incumbrance of real property is disqualified, on grounds of public policy, to be an attesting witness to its execution, or to act in an official character in taking and certifying the acknowledgment of the grantor.
>
> "2. A mortgage with but one attesting witness beside the mortgagee, or the acknowledgment of which was taken by him as a notary public, is not entitled to record, nor valid, though admitted to record, as against a subsequent properly executed and recorded mortgage."

Although the Court of Appeals of Franklin County, in Green v. Henderson, 39 Ohio Law Abs., 213, refused to extend this rule to the wife of a grantee having "merely an inchoate right of dower," the decision in the Amick case has not since been reversed or questioned by the Supreme Court, and thus appears to represent the established rule in this state.

The Amick case, moreover, was cited in Schirmer v. Myrick, 111 Vt., 225, 29 A (2d) 125, (1941) in support of the proposition that a candidate was sufficiently interested in his own certificate of nomination as to disqualify him from the administration of an oath in connection with them. In that case the court said:

> "2. But aside from this, the petition could not be granted. Although the administration of an oath is a ministerial act (Coolbeth v. Gove, 108 Vt. 499, 501, 189 A. 858), it has been

generally held that, whether ministerial or quasi judicial in nature, public policy forbids it to be done by one who has either a financial or a beneficial interest in the proceeding. This principle has been often applied where an acknowledgment to a deed or other instrument has been taken and certified by one who, although he was an officer legally authorized to perform the act, is a party to such deed or instrument, or otherwise interested therein. Among other decisions, reference may be made to Green v. Abraham, 43 Ark. 420, 422; Hayes v. Southern Home Bldg. & Loan Ass'n, 124 Ala. 663, 26 So. 527, 82 Am. St. Rep. 216, 218; Lee v. Murphy, 119 Cal. 364, 51 P. 549, 551, 955; Wilson v. Traer, 20 Iowa 231, 233, 234; Amick v. Woodworth, 57 Ohio St. 86, 50 N. E. 437, 440; Beaman v. Whitney, 20 Me. 413, 420; Groesbeck v. Seeley, 13 Mich. 329, 345; Armstrong v. Combs, 15 App. Div. 246, 44 N. Y. S. 171, 173; Ogden Bldg., etc., Ass'n v. Mensch, 196 Ill. 554, 63 N. E. 1049, 89 Am. St. Rep. 330, 336. And while it may be possible to draw a distinction between an acknowledgment and an affidavit, in both cases the same reason forbids official action by one who is benefited thereby. Smalley v. Bodinus, 120 Mich. 363, 79 N. W. 567, 77 Am. St. Rep. 602.

"(3) What constitutes a disqualifying interest on the part of an officer taking an acknowledgment or administering an oath cannot be determined by any fixed rule, for each case must depend upon its own facts. Horbach v. Tyrrell, 48 Neb. 514, 67 N. W. 485, 489, 35 L. R. A. 434, 437, In State ex rel. Sammon v. Chatterton, 11 Wyo. 1, 70 P. 466, 467, where the oath to certificates of nomination was administered by the candidate himself, the Court said that: 'Such a practice is, to say the least, of doubtful propriety,' but the decision went upon another point.

"(4) There can be no doubt, however, that in this case the petitioner had such a beneficial interest in the execution of the nomination certificates that he was disqualified from administering the oaths. Whether his action rendered the certificates void or merely voidable (See Fair v. Citizens' State Bank, 70 Kan. 612, 79 P. 144, 67 L. R. A. 851, 853), we need not inquire, since prompt objection was taken to them, and the invalidity insisted upon. They were not 'in apparent conformity to law', and the petitionee has committed no error in refusing to receive and file them.

"The petition is dismissed."

Similarly, the rule in the Amick case was relied on in Pfau v. Butterfield, 29 N. P. (N.S.) 285, another case involving nominating petitions. In that case Judge Darby said (pp. 288, 289):

"The prosecuting attorney claims that the last clause of Section 4785-72 authorizes the candidate to be a notary public in his own case. The language is:

" 'In case of a petition for a candidate for member of a party-controlling committee, the five persons signing such petition of candidacy shall subscribe and swear to (or affirm) the same before any person authorized by law to administer an oath or take an affirmation.'

"Had the Legislature intended to say that it might be taken before the candidate, it could have done that by very simple language; but it is clear that there are several acts to be performed—one is a declaration of candidacy by the candidate, another is a petition supporting said candidacy, another is the administering of the oath to the petitioners. This is not a case in which the attorney for an interested party may take an affidavit but it is a case of the interested party himself acting as notary public.

"It was never within the contemplation of the legislature in authorizing commissions to be issued to notaries public, that they should act in their own cases, and there is nothing in the election law to indicate that.

"There is a very clear purpose on the part of the legislature to purify elections, and to keep them clear of taint or possibility of fraud.

"No suggestion is made in this case that the candidate had any fraudulent purpose in what he did, but it is the possibility of fraud on the public that must be considered.

"There is no difficulty in suggesting instances in which fraud might operate in such a situation, as, *if after the signatures of the persons petitioning for the candidate one of them should deny his signature, the candidate-notary public would necessarily be a witness and a question of veracity might arise between him and the signer of his petition.*" (Emphasis added.)

It is probably unnecessary to point out that in the event of a similar denial of his signature by a circulator the necessity of the candidate-notary as a witness would likewise involve a "question of veracity between him" and such circulator.

In the Butterfield case, supra, Judge Darby, after quoting from the syllabus and the opinion in the Amick case continued:

"The Court, however, puts the invalidity of a grantee to act as a notary public on the broad ground of public policy and the prevention of frauds.

"The law requires that the petition in this case shall be signed, sworn to and acknowledged before an officer authorized (not generally but in such case) to administer oaths.

"The Court being of the opinion that it is against public policy and would be opening the door to the perpetration of frauds to recognize the validity of a petition sworn to and acknowledged before the candidate in whose behalf the petition is filed, finds the issues in the case in favor of the plaintiff, and that he is entitled to an order restraining the Board from certifying the name of Joseph A. Clark as such candidate, or printing his name on the ballot."

It is realized that one decision of Nisi Prius Court does not establish the law in this state but the well reasoned decisions of such courts are entitled to serious consideration. On this point it was said by Weygandt, C. J., in State, ex rel, Stanley v. Bernon et al., 127 Ohio St., 204 (208):

"Of course this is a decision of a *nisi prius* court, but the cogency of its reasoning and the recognized authorities upon which it relies entitle it to consideration, * * *"

Referring again to the Amick case, as to the true reason for the disqualification of interested parties in the administration of oaths, it was said by Judge Williams (pp. 100, 101):

"The true reason of the disqualification we apprehend is, that to permit a grantee to attest as a witness the execution of an instrument made to himself, or take its acknowledgment as an officer, where its attestation and acknowledgment are necessary to give it validity, would be against public policy, and practically defeat the real purpose of the law, which is to prevent the perpetration of frauds on the grantors, and afford reasonable assurance to those who deal with or on the faith of such instruments that they are genuine and represent *bona fide* transactions.

"In this particular instance Mr. Ludlow appears to have acted in good faith, and under an honest belief that his acts would be legal because he was but the nominal mortgagee, having no substantial interest, or but a very small one in the mortgage, the real party beneficially interested being Mr. Hughes. The mortgage is nevertheless invalid. *The rule of disqualification must be of general application, and not made to depend upon the result of inquiry into the motives of the parties; for such a modification of the rule would necessarily open the door to the mischiefs it was designed to prevent.*" (Emphasis added.)

This reasoning I deem to be applicable in the case at hand, and it impels me to the conclusion that a candidate is disqualified from acting as notary in administering the oath of the circulator of a nominating petition in the form prescribed in Section 3513.261, Revised Code, and that the action of a candidate in such capacity renders such petition invalid.

In a subsequent communication you present the following question:

> "Can a Notary Public, an attorney commissioned for the entire State of Ohio, whose last commission filed with the Clerk of Courts of the Common Pleas Court of the County where the attorney resided and maintains his law office, was on December 10th, 1949, and who has had two commissions since, the last being dated November 23rd, 1955, and neither one of which has been filed with the Clerk of Courts as required by Section 147.05 R. C. perform a valid official act in his own behalf, i.e., for his own benefit, where he clearly intended to act under the appointment or commission of November 23, 1955, as evidenced by his stamp of 'My Commission expires November 23, 1958'? No innocent party is involved and the act in question is that of administering the oath to the circulators of his part petitions of a Nominating Petition."

It is assumed that this question relates to the same transactions involved in your inquiry to which the foregoing discussion is responsive. The conclusions reached regarding the questions originally presented make it unnecessary to consider whether the petitions in question are invalid on the additional ground suggested.

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. An individual who seeks to qualify as a candidate for office by filing a nominating petition in the form prescribed in Section 3513.261, Revised Code, has an interest in such petition sufficient to disqualify him from administering the oath, therein required, to a circulator of such petition, and the act of such candidate in purporting to administer such oath renders such petition invalid.

2. A board of elections in under a mandatory duty, under the provisions of Sections 3501.11 and 3513.262, Revised Code, to determine the validity of nominating petitions whether or not a protest is filed against them as provided in Section 3513.262, Revised Code.

Respectfully,
C. WILLIAM O'NEILL
Attorney General