

180, is cited in support of the affirmative, but in that case and in all others that I have read, there was not the same set of facts as is in this case, where the voter seeks the punishment of one who is charged with having marked his ballot otherwise than directed. The provision pertaining to the sacredness of the secret ballot, in our laws and Constitution, was for the purpose of keeping the ballot secret and was for the protection of the voter in securing for him the right to vote as he pleases; if he wants to waive that right for the purpose of securing and enjoying the right of suffrage, and for the purpose of preventing corruption and fraud which denies him that suffrage or right to vote as he pleases, may he not do so, with the sanction of the law?"

From the facts given in your request, it is apparent that the election official is charged with violating either Article 224 or Article 225 of the Penal Code, 1925, which has to do with improper assistance to voters.

Article 3028 of the Revised Civil Statutes, 1925, provides for the custody of the official ballots and ballot boxes after the election judges have counted the ballots cast in an election. It will be noticed that the only provision for opening the ballot boxes after they have been turned over to the county clerk is in cases where a contest has developed and then the necessary boxes shall be delivered by said county clerk to "any competent officer having a process therefor, from any tribunal or authority authorized by law to demand such ballot box." Article 3041 of the Revised Civil Statutes, 1925, provides that election contests shall be filed in the District Court. Article 3071, Revised Civil Statutes, 1925, gives the District Court, in such election contests, very broad power, including the power to have the ballot boxes produced, opened and the ballots examined. Said statute deals only with the power of the court in cases where there is an election contest and could not be said to cover the instant case.

Our Court of Criminal Appeals has held in several cases that the only provision made under our laws for the opening of the ballot boxes and examining the ballots and introducing them in evidence is in cases where there is an election contest. This power has been held not to extend to criminal prosecution of election officials charged with violation of the Penal Statutes. This was the holding by

the Court of Criminal Appeals in Carroll v. State, 124 Cr. R. 180, 61 S. W. (2d) 1005. The defendant in that case was charged and convicted under Article 227 of the Penal Code, 1925, for making false canvass of votes cast at an election. The ballot boxes were opened and the ballots examined before the grand jury. This same evidence was introduced over proper objections in the trial of the case. The court held that it was improper for the ballot boxes to be opened before the grand jury as not being authorized by law. The court further held in reversing and remanding the case as follows:

"In June, 1911, there was before the Supreme Court of this state, the case of Clary et al. v. Hurst, reported in 104 Tex. 423, 138 S. W. 566, ****. The conclusion of the court is expressed at page 571 of 138 S.W., 104 Tex. 423, in the following language:

"'Again, it is manifest that the box containing these ballots cannot and was not intended to be opened, except in the event of a contest, and then only in response to and by authority of due and lawful process. And by "contest" here is meant, we think, a suit in which the validity of the election, or the correct ascertainment of the result thereof, is the subject-matter of litigation in a court having jurisdiction to hear and determine such issues. * * *.'

"In the case of Beach v. State, 75 Tex. Cr. R. 434, 171 S. W. 715, 716, a prosecution under the same article as is the present conviction, we find in the opinion of this court, written by Judge Davidson, the following conclusion:

"'The state was permitted to introduce in evidence and open the ballot box containing the names of the voters at the election mentioned in the indictment. Various and sundry objections were urged to the introduction of this testimony. At this late date, in view of the authorities, the Constitution and the statute, we are of opinion the court was clearly wrong, and the objections should have been sustained. * * *

"'But whether the ballot box had been opened or not, and whether the criminal prosecution occurred within 12 months, would make no difference,

so far as this case is concerned, because the statute has limited the opening of the ballot box to contested elections, and the authorities hold that these ballot boxes cannot be opened or the ballots used as evidence in criminal cases.'

"In support of his conclusion, Judge Davidson refers to the following cases: State v. Taylor, 220 Mo. 618, 119 S.W. 373 (a Missouri case); Ex parte Arnold, 128 Mo. 256, 30 S.W. 768, 1036, 33 L.R.A. 386, 49 Am. St. Rep. 557; State v. Francis, 88 Mo. 557. In the case of Ex parte Arnold, 128 Mo. 256, 30 S.W. 768, 1036, 33 L.R.A. 386, 49 Am. St. Rep. 557, the conclusion which coincides with that of the appellant here, is bottomed upon the view entertained by the Supreme Court of Missouri at the time the opinion was written that the constitutional provision declaring that an election by ballot carries with it the obligation that the ballot be kept secret unless its exhibition is made legal by some express provision of the law. The decisions throughout this country seem unanimous in holding that the requirement that the vote be by ballot, that a 'secret ballot' is meant, whether the requirement be in the Constitution or in a statute.

" * * * * .

"In article 3028, Rev. St. 1925, minute and express legislative direction is accorded with reference to the preservation and secrecy of the ballots. In the article, legislative sanction of the use of the ballot in a contest election case is accompanied with language which unmistakably shows that except in contested election cases the ballots shall not be opened and exhibited.

"* * * * .

"The conclusion stated, namely, that the vote by ballot means a 'secret vote,' and the zeal and care with which the courts have guarded them is emphasized by many courts and text-writers. See Wigmore on Evidence, Vol. 4, § 2214; Cooley's Const. Limitations (8th Ed.) Vol. 2, p. 1378.

"The decision of the Supreme Court of California upon the same subject as the present, and construing a law practically like the law of this state, held that unless there was a contest of the election, the ballots were not available to prove fraud in the election, nor could the ballots be exhibited where it appeared, as it does in the present appeal, that the regulation for the preservation and custody of the ballot has been disregarded. See Ex Parte Brown, 97 Cal. 83, 31 p. 840. In the same case, touching the criticism that the enforcement of the law as declared might be an impediment to the conviction for fraud, the court expressed the obvious view that the preservation of the secrecy of the ballot and its purity was primarily a subject for the Legislature.

"The use against the appellant of the evidence going to show how the individuals at the election voted is regarded as contrary to the law of the land, and we understand it has been so declared in the case of Beach v. State, supra, and also in the case of Clary et al. v. Hurst, supra. Its reception, being in conflict with the law as interpreted in the various decisions of other states and by virtue of article 727a, C. C. P. 1925, declaring that no evidence obtained in violation of the Constitution or laws of the state of Texas shall be admitted in evidence against the accused on the trial of any criminal case, we are constrained to conclude that the conviction of the appellant cannot be sustained.

"From the case of Ex parte Brown, 97 Cal. 83, 31 p. 840, 842, the following quotation is taken: 'We are asked by counsel how the declared intention of the legislature to punish frauds by election officers can be reconciled with an intention to prevent the use of the best means of proving such frauds. * * * This failure of provision, however, if, indeed, there was such failure, cannot be remedied by the courts, but must be left to the legislature itself for amendment. If it is though necessary to make the ballots available as evidence in criminal proceedings, the legislature can do so, under such limitations and restrictions as may be deemed essential to their integrity. The courts cannot open them for inspection without destroying all

safeguards, except as each particular judge who may order them into court shall see proper to apply, nor without impairing in all cases, and possibly destroying in many, their value as evidence for the only purpose for which the law has directed their preservation.'

"The views of this court are in accord with the remarks quoted above." (Underscoring ours).

We have been unable to find any specific authority providing for the opening of ballot boxes and the examination of the ballots and introducing them in evidence in criminal cases. Neither do we find such authority providing for the opening of a ballot box and the examination of a particular or singular ballot as would seem to be proper in the instant case. We believe the ruling in the Carroll v. State case, supra, and cases cited therein, control the law applicable to the instant case.

You are advised that it is the opinion of this department that the laws and decisions of this State prohibit the opening of a ballot box and the introduction of the ballot in evidence in the criminal case referred to in your inquiry.

In view of the above holding, we do not believe it is necessary to answer the other propositions covered in your inquiry.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By s/Harold McCracken
Harold McCracken
Assistant

HM:RS:wc

APPROVED FEB 3, 1941
s/Grover Sellers
FIRST ASSISTANT
ATTORNEY GENERAL

Approved Opinion Committee By s/BWB Chairman