



**THE ATTORNEY GENERAL
OF TEXAS**

GERALD C. MANN
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ATTORNEY GENERAL

AUSTIN 11, TEXAS

Honorable R. C. Marshall
County Attorney
Cochran County
Morton, Texas

Dear Sir:

Opinion No. 0-3749

Re: Whether a newspaper established in January 1941, is a legal newspaper and its status in relation to House Bill No. 193, 47th Legislature amending Article 28a, Vernon's Annotated Civil Statutes.

Your letter of June 24th contains the following question upon which you request the opinion of this department:

"In view of the passage of House Bill No. 193 of the present Legislature, which amends Article 28a, V.A.T.S., thereby requiring that a legal notice must be published in a newspaper having been published continuously for a period not less than 12 months prior to the publication of such legal notice; is a newspaper established in January 1941, under Article 28a, a legal newspaper and duly authorized by virtue of said article 28a to publish legal notices?"

The particular portion of House Bill 193, 47th Legislature, relating to Legal Publications and defining the term "newspaper", material to your question, reads:

"Section 2. The term 'newspaper' shall mean any newspaper * * * having been published regularly and continuously for not less than twelve (12) months prior to the making of any publication mentioned in this act."

By your request you raise the question of the reasonableness of the above quoted qualification for a "newspaper" as defined in the Act and as to its constitutionality as an ex post facto law should it operate to prohibit a newspaper established January 1941, from meeting such qualification.

Substantially this same requirement was imposed in Article 28, R.C.S., 1925 prior to its repeal by the Acts of 1929, 41st Legislature. In the former Act, it was provided that such notices shall be given for publication thereof in a newspaper of general circulation "which has been continuously and regularly published for a period of not less than one year, in the county in which said act or proceeding is to occur * * *". This provision came under review by the Court of Civil Appeals, Amarillo, in the case of W. L. Pearson & Co. vs. Hutchinson County, 52 S.W. (2d) 509. In that case a newspaper was published in the county of the action but same had not been published for twelve (12) months at the time of the questioned publication. The court, recognizing the basis for such requirement, stated and we quote:

"We can understand the intent of the Legislature in requiring the continuous and regular publication of such newspaper for a period of as long as twelve months. This was evidently done to avoid publications of the 'fly-by-night' type which could be published for a period of time much less than that to serve a special purpose. Hence, we cannot hold that there was such a newspaper published in Hutchinson County which complied with the requirements of the statute."

In 9 Texas Jurisprudence, Para. 104, page 539, it is said:

"The legislature has the same power to enact laws retrospectively as it has to legislate prospectively; and very frequently the courts have held curative or validating acts to be constitutional and valid exertions of legislative power. Where a statute is expressly retroactive, and the object and effect of it are to correct an innocent mistake, remedy a mischief, execute the intention of parties or promote justice, then, both as a matter of right and of public policy affecting the peace and welfare of the community, the law should be sustained. * * *"

In the case of *In re Gillette Daily Journal*, (Sup. Ct. of Wyo.) 11 P. (2d) 265, Supplemental Opinion 17 P. (2d) 665, a statute requiring publication of legal notices in newspapers established for one year was held a general law of uniform operation, in that the classification was reasonable. The court held among other things that the Legislature has the right, in exercising the State's police power, to make regulations as to legal notices and in doing so, such statutes were not unconstitutional as impairing contract obligations; that it was at most a privilege not a right, which the Legislature can modify or take away without violating the Constitution. Quoted in the court's opinion, is the following provision from 46 C.J. 27, which reads:

"It is the policy of the law that notices or advertisements required to be published by law should be published in newspapers which have been in existence long enough to be of a permanent and substantial character."

A somewhat similar statutory provision was attacked as being unconstitutional in the case of Dollar, Sheriff, et al., vs. Wind, 70 S.E. 335, on the ground that it was a retroactive law, impairing the obligation of contracts. The Supreme Court of Georgia, in that case said:

"The part of the act thus attacked was that which declared that no newspaper which had not been published for two years should be selected as the official organ of any county. We fail to appreciate the force of that argument. Sheriffs are public officers. Their duties can be changed or modified by the Legislature. That body can prescribe reasonable qualifications for a newspaper before it shall be selected as a medium in which shall be published advertisements of Sheriff's sales, citations, and other similar advertisements. The rights of the public may be injuriously affected by the selection of an improper medium for giving such notices."

As to the above quoted portion of House Bill 193, 47th Legislature, we are unable to see any violation of the Constitution in that particular requirement by the Legislature that the newspaper be "one published regularly and continuously for not less than twelve (12) months." Such a requirement is hardly suggestive of any monopolistic grant of public advertising, but is more suggestive as a police regulation designed to serve a public purpose. As said in the Wyoming case, supra, the very necessities of the Government require that particular persons shall be selected to perform particular public service, and because such selections are made, nobody can complain for no unalienable right is taken away. The court further said and we quote: "Suppose, if you please, the legislature would change the manner of service of notice upon the taxpayers and in place of requiring the publication to be made in newspapers, they would require that notice be posted upon the door of every school house in the county, could the publisher of any newspaper complain that the law was unconstitutional, or took away from him to that extent his means of livelihood? It has been held in numerous cases that the publisher of a newspaper acts in an official capacity when publishing a tax notice."

It is therefore the opinion of this department that the provision in House Bill 193, 47th Legislature, Section 2, which among other qualifications, defines "newspaper" as "having been published regularly and continuously for not less than twelve (12)

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months prior to the making of any publication mentioned in this act," is a reasonable qualification and a newspaper established in January 1941, cannot meet the statutory requirement until January 1942.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By /s/ Wm. J. R. King
Wm. J. R. King
Assistant

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APPROVED JUL 28, 1941

/s/ Grover Sellers

FIRST ASSISTANT
ATTORNEY GENERAL

APPROVED
OPINION
COMMITTEE

BY /s/ BWE
CHAIRMAN