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CAUSE NUMBER 2016-75249

The State of Texas, ex rel. Sara Elizabeth Andrews, Relator v. David Paul Jennings, in his Official Capacity as Council Member for the City of Shoreacres, Texas, Respondent.	§ § § § § § § § § § § §	In the 189th District Court Harris County, Texas

RESPONDENT'S BENCH BRIEF

David Paul Jennings ("Respondent") files this bench brief concerning his Plea to the Jurisdiction. Respondent asks the Court to dismiss the Petition for Removal of Municipal Officer ("Petition") filed by Sara Elizabeth Andrews ("Relator") because of lack of jurisdiction. The Petition is now moot following Respondent's 2017 reelection.

Respondent serves as a member of the Shoreacres City Council ("Council"). Respondent was first elected to the Council on May 9, 2015 and sworn in on May 26, 2015.[1] Respondent was reelected to a second term on May 6, 2017 and sworn in on May 22, 2017.[2]

The district attorney represents the State of Texas in a removal action.[3] On

[1] *See* 2015 Election Results, http://www.cityofshoreacres.us/election2015.htm.
[2] *See* 2017 Election Results, http://www.cityofshoreacres.us/election2017.htm. *See also* City of Shoreacres Notice of Meeting, http://www.cityofshoreacres.us/documents/ca170522.pdf.
[3] *See* Tex. Loc. Gov't Code §21.029.

June 2, 2017, Harris County Assistant District Attorney Elizabeth Stevens sent a letter to counsel for Respondent and counsel for Relator concerning the jurisdictional issues in this case:

> . . . our assessment of the petition is that the Court lacks jurisdiction to proceed with the removal case because the controversy is moot.[4]

In Texas, an officer may not be removed for an act committed before election to office if the act was a matter of public record or otherwise known to the voters.[5] Chapter 21 was amended by the 76th Legislature in response to the Texas Supreme Court decision in the case of Scott Bradley, a mayor who was unlawfully removed from office.[6]

In *Reeves*, the Texas Supreme Court held that each term of office "legally becomes an entity, separate and distinct from all other terms of office."[7] In *Solomon*, a 2014 Dallas Court of Appeals case, the Court applied *Reeves* and held that expiration of the officer's term rendered the cause moot.[8] In *Solomon*, the City of Tawakoni mayor filed a petition to remove Carol Solomon, a city council member. Solomon

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[4] A true and correct copy of this letter is attached hereto and incorporated herein as Appendix A.
[5] *See* Tex. Loc. Gov't Code §21.024.
[6] *See Bradley v. State ex rel. White*, 990 S.W.2d 245 (Tex. 1999) attached hereto and incorporated herein as Appendix B. *See also* House Research Organization, Bill Analysis, Tex. H.B. 3836, 76th Leg., R.S. (1999) attached hereto and incorporated herein as Appendix C.
[7] *See Reeves v. State ex rel. Mason*, 267 S.W. 666, 668 (Tex. 1924) attached hereto and incorporated herein as Appendix D.
[8] *Solomon v. State of Texas ex rel. Pete Yoho*, 214 WL 350547 (Tex. App.—Dallas Jan. 30, 2014, no pet.) attached hereto and incorporated herein as Appendix E.

denied the allegations, filed a counterclaim for defamation and malicious prosecution, and sought sanctions. The Court entered an interlocutory judgment that was not final until April 2013 – months after Solomon was reelected. The Dallas Court of Appeals dismissed the case as moot because there was no controversy between the parties as Solomon's term expired.

Respondent denies all allegations in Relator's Petition and respectfully moves the Court to grant his Plea to the Jurisdiction and dismiss all claims in the Petition because the Petition is moot.

Dated: August 23, 2017

BAKER & HOSTETLER LLP

By: */s/ Rachel Hooper*
Rachel Hooper
Texas Bar Number 24039102
rhooper@bakerlaw.com
811 Main Street, Suite 1100
Houston, Texas 77002-6111
713.646.1329, telephone
713.751.1717, facsimile

Counsel for Respondent David Paul Jennings

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document is being served upon all counsel of record below via e-mail and the electronic filing system's service mechanism on August 23, 2017.

Michael D. Gillespie {226sheldon@gmail.com}
Gillespie Law Firm
226 Sheldon Road
Channelview, Texas 77530
Counsel for Relator Sara Elizabeth Andrews

Elizabeth Stevens {stevens_elizabeth@dao.hctx.net}
Harris County District Attorney's Office
1201 Franklin, Suite 1100
Houston, Texas 77002
Counsel for the State of Texas

A

Tom Berg
First Assistant

Vivian King
Chief of Staff

Criminal Justice Center
1201 Franklin, Suite 600
Houston, Texas 77002-1901

HARRIS COUNTY DISTRICT ATTORNEY
KIM K. OGG

June 2, 2017

Mr. Michael D. Gillespie
226 Sheldon Road
Channelview, Texas 77530

Via email and certified mail

Ms. Rachel Hooper
811 Main Street
Suite 1100
Houston, Texas 77002-6111

Via email and certified mail

Re: Cause No. 2016-75249; *State of Texas ex rel. Sara Elizabeth Andrews v. David Paul Jennings,* In the 189th Judicial District Court, Harris County, Texas.

Dear Mr. Gillespie and Ms. Hooper:

In a letter from Mr. Gillespie dated May 3, 2017, the District Attorney's Office was notified of the above-styled petition. The petition seeks removal from office of Mr. Jennings as a Member/Alderman of the City of Shoreacres City Council.

We have reviewed the petition and the relevant statutes and case law. Under Section 21.029 of the Texas Local Government Code, it appears that the District Attorney represents the State in this type of proceeding.

However, we have also determined that under the relevant statutes and case law, the petition, which was filed on October 28, 2016, is now moot as a result of Mr. Jennings' reelection to office on May 6, 2017.

Specifically, Section 21.024 provides that an officer may not be removed for acts occurring prior to his election to office:

> An officer may not be removed under this chapter for an act the officer committed before election to office if the act was a matter of public record or otherwise known to the voters.

Similar provisions concerning removal proceedings have been interpreted to preclude any removal based on acts of the officeholder that occurred during a previous term in office. *See, e.g., Reeves v. State ex rel. Mason,* 114 Tex. 296, 267 S.W. 666, 669 (Tex. 1924). The mootness of a removal proceeding under Chapter 21 when an election occurs during the pendency of the litigation has also been specifically addressed by the Dallas Court of Appeals in *Solomon v. State of Texas ex rel. Pete Yoho,* 2014 WL 350547 (Tex. App.–Dallas, Jan. 30, 2014, no pet.).

Thus, our assessment of the petition is that the Court lacks jurisdiction to proceed with the removal case because the controversy is moot. Please review the foregoing and let us know if you disagree with the conclusion we have reached. We intend to seek a dismissal from the Court, unless there is a valid legal basis to proceed.

Please contact me with any questions or to discuss. My direct line is 713.274.5949.

Sincerely,

Elizabeth Stevens
Assistant District Attorney
Office of the General Counsel

B

990 S.W.2d 245
Supreme Court of Texas.

Scott BRADLEY, Petitioner,
v.
The STATE of Texas on the Relation
of Dale WHITE, Respondent.

No.
97
–
1135
.
|
Argued Sept. 28, 1998.
|
Decided April 8, 1999.

State brought quo warranto action when mayor purported to remain in office after removal trial conducted by board of aldermen. The 342nd District Court, Tarrant County, Bob McGrath, J., entered summary judgment for mayor, and State appealed. The Court of Appeals, 956 S.W.2d 725,reversed and rendered. Mayor filed petition for review. The Supreme Court, Baker, J., held that testimony of aldermen in proceeding in which board of aldermen were adjudicating whether to remove mayor from office violated rule prohibiting judge from acting as witness in trial over which judge is presiding, and thus, board of aldermen did not lawfully remove mayor from office.

Reversed and rendered.

Abbott, J., filed a concurring opinion.

West Headnotes (6)

[1] Appeal and Error
Extent of Review Dependent on Nature of Decision Appealed from

When both sides move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review both sides' summary judgment evidence, determine all questions presented, and render the judgment that the trial court should have rendered.

115 Cases that cite this headnote

[2] Appeal and Error
Rendering Final Judgment

If a party brings the case to the Supreme Court and it reverses the court of appeals, the Supreme Court should render the judgment that the court of appeals should have rendered.

13 Cases that cite this headnote

[3] Appeal and Error
Scope and theory of case

When a trial court's order granting summary judgment does not specify the grounds relied upon, the reviewing court must affirm summary judgment if any of the summary judgment grounds are meritorious.

95 Cases that cite this headnote

[4] Constitutional Law
Resolution of non-constitutional questions before constitutional questions

Reviewing court does not consider constitutional challenges when it can dispose of a case on nonconstitutional grounds.

7 Cases that cite this headnote

[5] Witnesses
Judges, jurors, and officers acting at trial, as witnesses

Rule prohibiting a judge from testifying as a witness in a trial over which he is presiding does not apply only to members of the judiciary, but also to those performing judicial functions that conflict with a witness' role. Rules of Evid., Rule 605.

8 Cases that cite this headnote

[6] **Municipal Corporations**
Competency of officers to act in proceedings

Public Employment
Requisites and sufficiency of hearing

Public Employment
Bias or other disqualification of decisionmaker

Testimony of aldermen to prove facts that served as basis for removal of mayor from office, in proceeding in which board of aldermen were adjudicating whether to remove mayor, violated rule prohibiting judge from acting as witness in trial over which judge is presiding, and thus, board of aldermen did not lawfully remove mayor from office, particularly where aldermen's testimony was not necessary to removal proceedings. Rules of Evid., Rule 605.

7 Cases that cite this headnote

Attorneys and Law Firms

***246** Bob E. Shannon, Joe R. Greenhill, Scott K. Field, Austin, E. Eldridge Goins, Jr., James W. Morris, Jr., Jeffrey S. Wigder, Dallas, for Petitioner.

Ann Diamond, Tim Curry, Marshall M. Searcy, Jr., Dee J. Kelly, William N. Warren, Michael Schattman, Barbara P. Neely, Fort Worth, for Respondent.

Opinion

Justice BAKER delivered the opinion of the Court, in which Chief Justice PHILLIPS, Justice HECHT, Justice ENOCH, Justice OWEN, Justice HANKINSON, Justice O'NEILL and Justice GONZALES join.

This is a quo warranto case. Scott Bradley asserts that the Board of Aldermen of the Town of Westlake, Texas did not lawfully remove him as Mayor under section 21.002(f) of the Texas Local Government Code because the removal proceedings violated Texas Rule of Civil Evidence 605. [1] We agree. Therefore, we reverse the court of appeals' judgment for the State and render judgment for Bradley.

I. BACKGROUND

In May 1994, Scott Bradley was elected Mayor of Westlake, a general-law municipality. He was reelected in May 1996. On April 14, 1997, Howard Dudley, a Westlake alderman, filed a complaint against Bradley alleging official misconduct and incompetency. Specifically, Dudley alleged that Bradley (1) canceled a special town meeting called by alderman Carroll Huntress and removed the public notice of the meeting; (2) directed the Town Secretary to exclude from the meeting agenda an item Huntress requested and to remove a part of the proposed minutes from another town meeting; and (3) caused the Town Engineer to prepare a false boundary map of Westlake, and then presented the falsified map to the Board of Aldermen as part of an ordinance.

On April 28, 1997, the Westlake Board of Aldermen sat as a court to hear the charges against Bradley and to decide whether there was sufficient cause for his removal from the Mayor's office. During the trial, Dudley and another alderman, Al Oien, testified against Bradley. Dudley testified that he had provided Bradley with a request for and notice of the meeting Bradley allegedly canceled. Oien testified that when the Board passed the ordinance at issue, no map was attached to it. At the end of the trial, four of the five aldermen, including Dudley and Oien, found Bradley guilty of the charges. On motion made by Oien and seconded by Dudley, the Board voted to remove Bradley as Mayor of Westlake. Days later, the aldermen appointed Dale White as Mayor. Bradley refused to recognize the aldermen's judgment on the grounds that the removal procedure violated applicable procedural rules, substantive state law, and his federal and state constitutional rights.

On May 20, 1997, the State of Texas, on relation of Dale White, filed a quo warranto action seeking a declaration that White, not Bradley, was the lawful Mayor. The State alleged that: (1) the aldermen had lawfully removed Bradley from the Mayor's office under Texas Local Government Code section 21.002(f); (2) the aldermen had lawfully appointed Dale White as Mayor; (3) White had taken the oath of office on May 2, 1997, and therefore, lawfully held office as Mayor; and (4) Bradley

had unlawfully usurped and intruded into the Mayor's office since his lawful removal. The State filed a motion for summary ***247** judgment asserting as grounds the allegations in its quo warranto petition.

Bradley filed a cross-motion for summary judgment. In his summary judgment motion Bradley alleged the following affirmative defenses: (1) Texas Local Government Code section 21.002 violates the Texas Constitution's separation of powers doctrine; (2) section 21.002 is unconstitutionally vague; (3) Bradley's removal trial violated his federal and state procedural due process rights; (4) a section 21.002 removal trial is penal in nature, and Bradley was denied his state constitutional right to a jury trial; (5) the aldermen were disqualified under the Texas Constitution to sit as judges in the removal trial because they had a pecuniary interest in the outcome; (6) the removal trial violated Texas Rules of Civil Evidence 605, 607, and 611b, and Texas Rules of Civil Procedure 18b, 527, 528, 544, and 571; (7) the removal trial violated the Texas Open Meetings Act; (8) the evidence at trial did not support Bradley's removal; (9) the removal judgment became a nullity when a new board of aldermen granted Bradley's motion for new trial; and (10) the removal judgment became a nullity when Bradley filed an appeal bond with the new board of aldermen.

The trial court denied the State's motion for summary judgment and granted Bradley's motion for summary judgment without specifying upon which of Bradley's summary judgment grounds it based its judgment. The court of appeals held that the State had conclusively proved the elements of its quo warranto action. 956 S.W.2d at 745. The court of appeals also held that Bradley had not conclusively proved all essential elements of his defense in quo warranto as a matter of law nor had he defeated at least one element of the State's quo warranto claim. Accordingly, the court of appeals reversed the trial court's judgment and rendered summary judgment for the State.

II. APPLICABLE LAW

A. STANDARD OF REVIEW—CROSS MOTIONS FOR SUMMARY JUDGMENT

[1] [2] [3] [4] When both sides move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review both sides' summary judgment evidence and determine all questions presented. *See Commissioners Court of Titus County v. Agan,* 940 S.W.2d 77, 81 (Tex.1997); *Jones v. Strauss,* 745 S.W.2d 898, 900 (Tex.1988). The reviewing court should render the judgment that the trial court should have rendered. *See Agan,* 940 S.W.2d at 81; *Members Mut. Ins. Co. v. Hermann Hosp.,* 664 S.W.2d 325, 328 (Tex.1984). If a party brings the case to this Court and we reverse the court of appeals, we should render the judgment that the court of appeals should have rendered. *See Agan,* 940 S.W.2d at 81; *Tobin v. Garcia,* 159 Tex. 58, 316 S.W.2d 396, 400–01 (1958). When a trial court's order granting summary judgment does not specify the grounds relied upon, the reviewing court must affirm summary judgment if any of the summary judgment grounds are meritorious. *See Star–Telegram, Inc. v. Doe,* 915 S.W.2d 471, 473 (Tex.1995). We do not consider constitutional challenges when we can dispose of a case on nonconstitutional grounds. *See Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10, 13 (Tex.1994).

B. REMOVAL PROCEDURES

The Texas Local Government Code governs a mayor's removal from office in a general-law municipality. *See* TEX. LOC. GOV'T CODE § 21.002. A mayor may be removed from office for official misconduct, intentional violation of a municipal ordinance, habitual drunkenness, incompetency, or a cause prescribed by a municipal ordinance. *See* TEX. LOC. GOV'T CODE § 21.002(c). When a complaint is made against the mayor, the complaint must be presented to an alderman of the municipality. *See* TEX. LOC. GOV'T CODE § 21.002(f). ***248** The alderman shall then file the complaint, serve the mayor with a copy, set a date for trial of the case, and notify the mayor and the other aldermen to appear on that day. *See* TEX. LOC. GOV'T CODE § 21.002(f). A majority of the municipality's aldermen constitutes a court in the mayor's removal trial with one of the aldermen presiding over the trial. *See* TEX. LOC. GOV'T CODE § 21.002(f). If two-thirds of the members of the court who are present at the trial find the mayor guilty of the complaint's charges and find that the charges are sufficient cause for removal from office, the court's presiding officer shall enter a judgment removing the charged officer and declaring the office vacant. *See* TEX. LOC. GOV'T CODE § 21.002(h).

Section 21.002 removal proceedings are subject to the procedural rules governing the justice courts and to procedural rules governing district and county courts, to the extent these govern justice courts. *See* TEX. LOC. GOV'T CODE § 21.002(h); TEX.R. CIV. P. 523 ("All rules governing the district and county courts shall also govern the justice courts, insofar as they can.") In addition, the Texas Rules of Civil Evidence apply to section 21.002 trials. *See* TEX.R. CIV. EVID. 101(b) ("[E]xcept as otherwise provided by statute, these rules govern civil proceedings in all Texas courts other than small-claims courts.").

C. TEXAS RULE OF CIVIL EVIDENCE 605

"The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve this point." TEX.R. CIV. EVID. 605. Texas Rule of Civil Evidence 605 is identical to its federal counterpart. *See* FED.R.EVID. 605. Not surprisingly, there are few reported federal or state cases involving Rule 605 violations. Most cases that do involve judges testifying at the trial over which they are presiding are decided on due process grounds. *See, e.g., Brown v. Lynaugh,* 843 F.2d 849, 851 (5th Cir.1988); *Tyler v. Swenson,* 427 F.2d 412, 415 (8th Cir.1970); *Terrell v. United States,* 6 F.2d 498, 499 (4th Cir.1925); *Haynes v. State of Missouri,* 937 S.W.2d 199, 202 (Mo.1996); *Wilson v. Oklahoma Horse Racing Comm'n,* 910 P.2d 1020, 1024 (Okla.1996). These cases hold that a judge testifying as a witness violates due process rights by creating a constitutionally intolerable appearance of partiality. *See Brown,* 843 F.2d at 851 ("[I]t is difficult to see how the neutral role of the court could be more compromised, or more blurred with the prosecutor's role, than when the judge serves as a witness for the state."); *Tyler,* 427 F.2d at 416 ("The danger ... of subjecting [the judge's] impartiality to doubt and of placing the [party against whom the judge testifies] at an unfair disadvantage ... is very obvious."); *see also In Re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955)(disapproving of the "spectacle" of a trial judge presenting testimony which he must consider in adjudicating guilt or innocence).

Rule 605 is similarly concerned with the appearance of partiality. *See Hensarling v. State,* 829 S.W.2d 168, 170 (Tex.Crim.App.1992)(referring to Texas Rule of Criminal Evidence 605, which is identical to Texas Rule of Civil Evidence 605 and noting that the Rule's purpose is to preserve the judge's posture of impartiality before the parties and the jury); WRIGHT & GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6062 (1990)(referring to Federal Rule of Evidence 605).

Comments of the Federal Advisory Committee on Proposed Rules indicate that Federal Rule of Evidence 605 purports to protect the appearance of impartiality. The Committee describes Federal Rule of Evidence 605 as:

> a broad rule of incompetency, rather than [a rule of] incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? ***249** Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality?

FED.R.EVID. 605 advisory committee's note.

Indeed, one of the few federal cases to apply Rule 605 held that it was reversible error for a trial judge's law clerk to testify about facts favorable to the plaintiff because the danger that the jury would identify the law clerk with the trial judge was obvious. *See Kennedy v. Great Atl. & Pac. Tea Co.,* 551 F.2d 593, 598 (5th Cir.1977). The court held that the "potential for prejudice" was so great that it rendered inquiry into actual prejudice to the parties "fruitless." *See Kennedy,* 551 F.2d at 598.

[5] Rule 605 does not only apply to members of the judiciary, but also to those performing judicial functions that conflict with a witness's role. *See Gary W. v. Louisiana Dept. of Health and Human Resources,* 861 F.2d 1366,

1368 (5th Cir.) (applying Rule 605 to prohibit deposition of special master appointed to ensure compliance with protective order in family law case); *Central Platte Natural Resources Dist. v. State of Wyoming,* 245 Neb. 439, 513 N.W.2d 847, 864 (1994) (applying Rule 605 and holding that court properly excluded testimony of doctor who assisted in decision making process in administrative adjudication); *but see Williams v. State,* 11 Ark.App. 11, 665 S.W.2d 299 (1984) (permitting testimony from trial court's bailiff, called as a rebuttal witness to impeach a defense witness's credibility).

III. ANALYSIS

[6] Because the trial court did not specify upon which ground it rendered summary judgment for Bradley, we can render judgment for Bradley if one of Bradley's summary judgment grounds is meritorious. *See Star–Telegram,* 915 S.W.2d at 473. We first consider Bradley's nonconstitutional summary judgment grounds. *See Moriel,* 879 S.W.2d at 13. One of Bradley's summary judgment grounds is that he was not lawfully removed from office as the State's quo warranto action alleges because Oien and Dudley testified against him while they sat in judgment over his removal trial, violating Texas Rule of Civil Evidence 605. The court of appeals responded to Bradley's Rule 605 argument by citing case law that holds that aldermen who assert a complaint against a mayor are not disqualified from judging the mayor's removal hearing. *See Riggins v. Richards,* 97 Tex. 229, 77 S.W. 946, 949 (1904). The court of appeals then noted that section 21.002 allows all citizens of general-law municipalities, including aldermen, to file a complaint against a mayor. *See* TEX. LOC. GOV'T CODE § 21.002(f). However, the court of appeals did not discuss the aldermens' dual roles as judges and *witnesses* against Bradley in the removal trial.

Although Oien and Dudley are not members of the judiciary, they assumed judicial roles in the removal trial, roles which conflicted with their roles as witnesses. Section 21.002 required the aldermen to sit as a "court" over the removal "trial." *See* TEX. LOC. GOV'T CODE § 21.002(f), (g), and (h). Oien and Dudley, along with their fellow aldermen, decided whether Bradley had committed the acts the complaint described and if so, whether these acts warranted removal. Oien and Dudley testified against Bradley about the facts that served as the basis for the complaint and then adjudicated whether Bradley was guilty of the complaint's charges. Their testimony created the appearance of bias that Rule 605 seeks to prevent and such a potential for prejudice to Bradley that inquiry into actual prejudice is fruitless. *Accord Kennedy,* 551 F.2d at 598. Therefore, we need not and do not conduct a harm analysis.

***250** The concurring opinion asserts that section 21.002 is void for vagueness because the statute does not specify which justice court and district court rules apply to removal trials. The concurrence concedes, however, that the language of section 21.002 and Texas Rule of Civil Procedure 523 indicate that Texas Rule of Civil Evidence 605 applies to removal trials. The concurrence suggests that, nevertheless, Rule 605 should not apply because aldermen may be the only people familiar with the facts that form the basis for the complaint against a mayor.

Here, however, there is no indication that Oien and Dudley's testimony was necessary to the removal proceedings. On the contrary, the record reveals that it was not. Bradley himself admitted the substance of the first complaint. He testified at the removal trial that he canceled the meeting Huntress had called and removed the posted public notice of the meeting. [2] Bradley's concession rendered Dudley's testimony—that he had provided Bradley with notice of and a request for the meeting—unnecessary. The aldermen voted that Bradley was guilty of canceling the meeting and removing notice of the meeting and that those actions alone were sufficient cause for removal. Accordingly, Oien's testimony, which dealt solely with the falsified-map charge, was not necessary to the removal proceedings either.

IV. CONCLUSION

We conclude that Oien and Dudley, by testifying, violated Texas Rule of Civil Evidence 605. Therefore, the Board of Aldermen did not lawfully remove Bradley as Mayor. Because Bradley conclusively negated an element of the State's quo warranto action—that the aldermen had lawfully removed Bradley under section 21.002—the court of appeals improperly reversed the trial court's judgment for Bradley. We do not need to consider any of Bradley's other summary judgment grounds. Accordingly, we reverse the court of appeals' judgment and render

judgment for Bradley on the State's quo warranto action. We declare that Bradley was the lawful Mayor of the Town of Westlake when the State filed its quo warranto action.

Justice ABBOTT filed a concurring opinion.

Justice ABBOTT, concurring.

The Court holds that the Westlake Board of Aldermen violated Texas Rule of Civil Evidence 605 when board members who sat as judges in Bradley's removal court also testified as witnesses against him. In so doing, the Court sidesteps a more fundamental flaw in the removal: the statute governing removal proceedings is unconstitutionally vague and thus denies Bradley due process and due course of law. *See* U.S. CONST. amend. XIV, § 1; TEX. CONST. art. I, § 19. Because I would hold the statute used to remove Bradley is void for vagueness, I concur in the Court's judgment.

I

The statute providing for removal of a mayor in a general-law municipality such as Westlake states that "a majority of the aldermen constitutes a court to try and determine the case against the mayor," and the removal proceeding "is subject to the rules governing a proceeding or trial in a justice court." TEX. LOC. GOV'T CODE § 21.002(g), (h). Bradley asserts that a removal proceeding is a civil proceeding, and civil justice court rules provide for, among other things, venue change,[1] empaneling of juries,[2] a right to appeal,[3] and ***251** a right to move for new trial.[4] Bradley further argues that Rules of Civil Procedure and Evidence apply through Texas Rule of Civil Procedure 523, which states that "[a]ll rules governing the district and county courts shall also govern the justice courts, insofar as they can be applied, except where otherwise specifically provided by law or these rules." TEX.R. CIV. P. 523. Bradley contends that these applicable rules provide for recusal of judges,[5] prohibit judges from testifying in cases in which they sit,[6] and allow the right to full cross-examination and impeachment of witnesses.[7]

The State responds that "to graft onto § 21.002 all of the rules of civil procedure would render the statute virtually meaningless" and "would lead to an absurd result." Following the State's logic, the court of appeals concluded that justice court rules should apply when they are "not in conflict with" the intended structure of removal proceedings. 956 S.W.2d 725, 738.

Both approaches are flawed. Bradley's contention founders upon the clear text of the statute. Although section 21.002(h) states that a removal proceeding is subject to the rules governing a justice court trial, several justice court rules directly contravene requirements of section 21.002. For example, Bradley requested a venue change and jury trial that justice court rules provide for, but both requests conflict with the statute's express statement that "[a] majority of the aldermen constitutes a court to try and determine the case against the mayor." TEX. LOC. GOV'T CODE § 21.002(g). This specific textual provision of the statute precludes Bradley's proposal to apply all justice court rules and all rules of civil procedure. *See* TEX. GOV'T CODE § 311.026 (codifying the common-law doctrine for statutes *in pari materia,* which states that when an irreconcilable conflict occurs between a general and a special statutory provision, the special provision prevails as an exception to the general provision). As the State contends, application of all the justice court rules and rules of civil procedure would lead to an "absurd result."

The interpretation of the statute that the State urges suffers from its own flaws. The State's argument leaves it to the caprice of the aldermen—many of whom are untrained in the rules of procedure and evidence—to pick and choose which rules may apply to a removal proceeding, and to choose which rules may not apply because they are "in conflict with" the structure of removal proceedings. A mayor subject to these removal proceedings would not know exactly which rules apply until the aldermen make that decision—a decision that may not be made until the proceedings are already underway. In effect, the State asks the Court to swap the "absurd result" that follows from Bradley's contentions for the arbitrariness that follows from its own proposal.

The Court should not be constrained to choose the lesser of the evils presented by the parties. Instead, the statute's unavoidable incongruities and ambiguities lead me to

conclude, as Bradley argues in the alternative, that it is unconstitutionally vague.

II

Under the United States Constitution, "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). They "may trap the innocent ***252** by not providing fair warning" and they "impermissibly delegate[ ] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108–09, 92 S.Ct. 2294. In order to avoid these dangers, the Due Process Clause requires that laws be reasonably clear. As the Supreme Court explained, due process:

> ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to the requirements of law, and permits meaningful judicial review.

Roberts v. United States Jaycees, 468 U.S. 609, 629, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

Responding to these concerns, the United States Supreme Court and this Court have long applied the principle that statutory language may not be so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926), *quoted in Texas Antiquities Comm. v. Dallas County Community College Dist.,* 554 S.W.2d 924, 928 (Tex.1977) (plurality opinion).

Although the vagueness standard applies most frequently to penal statutes, a civil statute may also be so vague that it violates due process. *See A.B. Small Co. v. American Sugar Ref. Co.,* 267 U.S. 233, 239–40, 45 S.Ct. 295, 69 L.Ed. 589 (1925) (explaining that the rationale of previous vagueness cases is not limited only to criminal cases because "[i]t was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all"); *Jones v. City of Lubbock,* 727 F.2d 364, 373 (5th Cir.1984); *Texas Antiquities Comm.,* 554 S.W.2d at 927–28 (plurality decision striking down a civil statute as unconstitutionally vague). The degree of clarity that the vagueness standard requires, however, "varies according to the nature of the statute, and the need for fair notice or protection from unequal enforcement." *Jones,* 727 F.2d at 373; *see also Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) ("[Vagueness] standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates —as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment."); *Texas Antiquities Comm.,* 554 S.W.2d at 927 (plurality decision stating that "varying degrees of specific standards" have been required in testing vagueness and breadth of legislative delegations, "[d]epending upon the nature of the power, the agency, and the subject matter"). In the case of this statute, the Court should consider that few actors deserve more clarity than elected officials who can be removed from office at the hands of other competing elected officials.

III

The statute at issue, which provides for removal of a mayor in a general-law municipality, is a civil statute. *See Meyer v. Tunks,* 360 S.W.2d 518, 520–21 (Tex.1962) (action to remove a county officer is civil in nature). Our vagueness review must therefore apply a more tolerant standard for civil statutes. [8]

The statute fails even under that deferential standard. In *Texas Antiquities Committee,* a plurality of the Court professed that "[t]here has been called to our ***253** attention no case in Texas or elsewhere in which ... powers ... are more vaguely expressed or less predictable than those permitted by the phrase in question." *Texas Antiquities Comm.* 554 S.W.2d at 927. [9] The exercise of powers under this statute is hardly more predictable. In the context of a proceeding to remove a mayor in which his fellow aldermen are directed to sit as

a court, the phrase "subject to the rules governing a proceeding or trial in a justice court" may at first glance seem clear. When one is forced to apply the provision, however, the inherent ambiguities become inescapable. The confusion and potential disregard for Bradley's rights that his petition describes—as well as similar predicaments described by amici [10] —illustrate this lack of a comprehensible standard.

A significant number of civil rules for a justice court either conflict directly with the statute's scheme for removal proceedings, [11] or they provide no relevant guidance to a board of aldermen. [12] Whether other justice court rules apply has been and will continue to be a matter of guesswork for aldermen, mayors, and even reviewing courts, leaving a situation ripe for "resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned,* 408 U.S. at 109, 92 S.Ct. 2294. For example, does the successful party recover costs as provided by Civil Rule 559? [13] Can the removal "court" order a new trial, as provided by Civil Rules 567–70? [14] If so, could a new trial be ordered by newly elected aldermen taking the place of the aldermen who presided over the original trial?

Texas Rule of Civil Procedure 523, which states that rules governing district and county courts shall also govern justice courts, creates an assortment of other conundrums. Do Evidence Rule 605, prohibiting a judge from testifying as a witness, and Texas Rule of Civil Procedure 18b, providing for recusal of interested judges, apply to aldermen sitting as removal judges? Evidently the Court believes that Civil Procedure Rule 605 applies, and both of these rules would seem to apply under the language of both the statute and Civil Procedure Rule 523. However, these rules stand opposed to the reality that the very aldermen who sit as a court to try the mayor may also be the ones who bring the charge, "may have substantial knowledge of the evidence to be presented," or may have had past differences with the mayor. *See Quinn v. City of Concord,* 108 N.H. 242, 233 A.2d 106, 108 (1967); *see also Rutter v. Burke,* 89 Vt. 14, 93 A. 842, 849 (1915) (holding that a mayor who acted as accuser, prosecutor, and witness was not disqualified from voting, because "the Constitution of the city council, its exclusive jurisdiction as a trier, and the diversity of duties imposed upon it, preclude the idea that impartiality can be made the test" of the right of a board member to sit in a proceeding); *State v. Common Council,* 72 Wis.2d 672, 242 N.W.2d 689, 698 (1976) ***254** ("[T]he mere fact that [a council member] had stated under oath ... that there were grounds to remove [the city clerk] did not disqualify him from subsequently sitting as an impartial adjudicator."); 4 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 12.259.20, at 595 (3rd ed. 1992) ("[I]n a proceeding to remove, members of the council are not disqualified because of the fact that they were members of a committee to investigate and afterwards preferred charges; the fact that they may have formed an opinion concerning the accused is regarded as immaterial."). Indeed, the aldermen may well be the only people familiar with the facts underlying the removal proceeding. *Cf. id.* § 12.259.25, at 598 ("Particularly, an objection for bias against ... a member of a hearing tribunal will not be sustained where to do so would destroy the only tribunal with power in the premises."). Rare would be the occasion when a mayor could be tried by truly disinterested, unbiased, and uninformed aldermen. Yet that is the fiction that the Court forces upon the parties.

Ignoring these probabilities and applying these rules sets the stage for future enigmas. For instance, the statute states that "a majority of the aldermen constitutes a court." Assuming, as the Court does, that Evidence Rule 605 or Civil Procedure Rule 18b apply, what occurs if at least half of the aldermen must be recused because of bias or the necessity that they testify? The statute provides no guidance—"no rule or standard at all." [15] Neither does the Court.

IV

Admittedly, courts "will often strain to construe legislation so as to save it against constitutional attack." *Scales v. United States,* 367 U.S. 203, 211, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961). Nevertheless, even if the Court assumed the burden of repairing this paradoxical statute, the task would require such a revision of the Legislature's words that the Court would exceed the bounds of its proper role in our divided government. The "constructions" urged by the parties would require us either to ignore specific words of the statute or to write our own ad hoc exceptions into the statute. As one scholar has recognized, "there is a difference between adopting a saving construction and rewriting legislation altogether."

TRIBE, AMERICAN CONSTITUTIONAL LAW § 12–30, at 1032 (2d ed., 1988). We are invited to do the latter, but I believe we should decline the invitation. *See West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 651, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) ("It is, of course, beyond our power to rewrite the State's requirement....") (Frankfurter, J., dissenting); *United States v. Reese,* 92 U.S. 214, 221, 23 L.Ed. 563 (1875) ("To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.").

Rewriting a statute rife with traps and uncertainties is the power and duty of the Legislature. As the controversy at hand evinces, the decisions of local governments affect the lives of their citizens as profoundly and concretely as those of any other level of government. Sometimes a mayor's conduct necessitates removal proceedings. Nevertheless, such proceedings can reverse a majority of the local citizens' judgment as to who is best to lead them. Consequently, our state government owes a duty not only to the mayor but to his colleagues and constituents to ensure that such proceedings are neither arbitrary nor unfair, and never unconstitutional. This vague and unwieldy statute fails to carry out the task. I urge the Legislature to mend it soon.

All Citations

990 S.W.2d 245, 42 Tex. Sup. Ct. J. 513

Footnotes

1 Because the removal trial was held April 28, 1997, the former Texas Rules of Civil Evidence apply. Former Texas Rule of Civil Evidence 605 is identical to current Texas Rule of Evidence 605. *See* TEX.R. EVID. 605.

2 Bradley testified that he canceled the meeting and removed the notice because it was an illegally called meeting.

1 *See* TEX.R. CIV. P. 528.

2 *See* TEX.R. CIV. P. 544.

3 *See* TEX.R. CIV. P. 573.

4 *See* TEX.R. CIV. P. 567.

5 *See* TEX.R. CIV. P. 18b.

6 *See* TEX.R. CIV. EVID. 605 (currently TEX.R. EVID. 605).

7 *See* TEX.R. CIV. EVID. 607 (currently TEX.R. EVID. 607); TEX.R. CIV. EVID. 611(b) (currently TEX.R. EVID. 611 (b)).

8 *See Chavez v. Housing Auth.,* 973 F.2d 1245, 1249 (5th Cir.1992) (A civil statute that does not implicate the First Amendment is sufficiently unclear to violate due process if it is " 'so vague and indefinite as really to be no rule or standard at all' or if it is 'substantially incomprehensible' "); *Jones,* 727 F.2d at 373 (same).

9 The vague phrase in *Texas Antiquities Committee* was "buildings ... and locations of historical ... interest." *Id.*

10 Amici Paul Skelton and Marian Hill describe their experiences with removal proceedings in Parker and Seven Points, Texas. Skelton argues that the court of appeals' construction of the removal statute violates separation of powers and due process guarantees. Hill argues that the removal statute in question is unconstitutionally vague.

11 *See* TEX.R. CIV. P. 527–32 (relating to motions to transfer and venue changes); TEX.R. CIV. P. 540, 542, 544–56 (relating to juries).

12 *See* TEX.R. CIV. P. 524 (justices to keep a civil docket); TEX.R. CIV. P. 533 (requisites for writ or process from justice courts); TEX.R. CIV. P. 543 (dismissal for plaintiff's failure to appear); TEX.R. CIV. P. 560 (judgment for specific articles of property); TEX.R. CIV. P. 561 (enforcing a judgment for property).

13 *See* TEX.R. CIV. P. 559.

14 *See* TEX.R. CIV. P. 567–70.

15 *See Chavez,* 973 F.2d at 1249; *Jones,* 727 F.2d at 373.

C

SUBJECT: Removing a member of the governing body of a general-law city

COMMITTEE: Urban Affairs — committee substitute recommended

VOTE: 6 ayes — Carter, Burnam, Clark, Ehrhardt, Hodge, Najera

0 nays

3 absent — Bailey, Edwards, Hill

WITNESSES: For — Scott Bradley, Eldridge Goins, and D.R. Redding, Town of Westlake; Bill Lewis, *The Keller Citizen*; Kelly Bradley; Susan Goins; Betty Redding; Annette Bush; Kay Shickles; Elizabeth Sheppard; Sharon Sanden

Against — None

BACKGROUND: Local Government Code, sec. 21.002 provides that when a written complaint charges an alderman of a general-law city with an act or omission that constitutes grounds for removal from office, the mayor and other aldermen constitute a court to try and determine the case against the charged alderman. When such a complaint is made against a mayor, a majority of the aldermen constitutes a court to try and determine the case against the mayor. The aldermen select an alderman to preside during the trial.

These types of proceedings are subject to rules governing a proceeding or trial in a justice court. An officer cannot, however, be removed under this section for an act committed before election to office. If two-thirds of the members of the court who are present at the trial find the defendant guilty of the charges in the complaint and find those charges sufficient grounds for removal from office, the presiding officer enters a judgment removing the charged officer and declaring the office vacant. An officer removed under this section is not eligible for reelection for two years after the date of removal.

General-law cities do not have a home-rule charter and generally have populations under 5,000.

DIGEST:

CSHB 3836 would repeal Local Government Code, sec. 21.002, governing the removal from office of a mayor or alderman in a general-law city, and would replace it with a new subchapter on the same subject.

A city officer still could not be removed for an act committed before election to office, and an officer removed under the provisions of CSHB 3836 would not be eligible for election to the same office for two years thereafter.

A district judge would have to require a petitioner to execute a bond with at least two sureties in an amount fixed by the judge. That bond would be used to pay damages and costs to the officer if the alleged grounds for removal proved untrue. The officer would have to notify the petitioner and bondsman within 90 days after the bond was executed stating the officer's intention to hold them liable for the bond. If the final judgment established the officer's right to the office, the petitioner would have to pay an amount determined by the judge to compensate the officer for damages suffered as a result of the removal action.

Removal provisions. A written petition to remove an officer would have to be filed in a district court of the county where the officer lived by any city resident not under any indictment in the county. The petition would have to be addressed to the district judge of the court and would have to cite clearly the time and place of the occurrence of each act alleged as grounds for removal with as much certainty as the nature of the case permitted.

An officer could be removed for incompetency, official misconduct, or intoxication, as long as the intoxication was not caused by drinking an alcoholic drink on the direction or prescription of a licensed physician.

The bill would define incompetency as gross ignorance or gross carelessness in the discharge of official duties or inability or unfitness to discharge official duties because of a serious mental or physical defect that did not exist at the time of the officer's election. It would define official misconduct as intentional unlawful behavior relating to official duties and intentional or corrupt failure, refusal, or neglect to perform a duty imposed by law.

After a petition for removal was filed, the person who filed it would have to apply to the district judge in writing for an order requiring a citation and a certified copy of the petition to be served on the officer. If the judge refused

to issue the order for citation, the petition would be dismissed at the cost of the petitioner, who could not appeal the judge's decision or apply for a writ of mandamus.

If a judge did grant the order, the clerk would have to issue it with a certified copy of the petition, and the petitioner would have to post security for costs in the manner provided for other cases. The citation would have to order the officer to appear and answer it on a date fixed by the judge no earlier than five days after the citation was served. Disposition of this matter would take precedence over other civil matters on the court's docket. The district attorney would represent the state in a proceeding to remove an officer.

An officer would have the right to a trial by jury. In a removal case, the judge could not submit special issues to the jury but would have to instruct them to find from the evidence whether the grounds for removal were true. If the petition alleged more than one ground, the jury would have to indicate in the verdict which grounds they sustained.

Either party to a removal action could appeal the final judgment to a court of appeals. The officer would not have to post an appeal bond but could be required to post a bond for costs. An appeal of a removal action would have to take precedence over the ordinary business of the court of appeals and be decided quickly. If the judgment was not set aside or suspended, the court of appeals would have to issue its mandate within five days after the court rendered its judgment.

The conviction of an officer by a petit jury for a felony or for a misdemeanor involving misconduct would operate as an immediate removal from office. The court rendering judgment would have to include in the judgment an order removing the officer. If the officer who was removed appealed the judgment, the appeal would supersede the removal order unless the court rendered a judgment finding that the public interest required suspension.
This bill would take effect September 1, 1999, and would apply only to an officer who engaged in an act constituting grounds for removal on or after that date.

SUPPORTERS SAY:

CSHB 3836 would repeal an archaic section of the Local Government Code, enacted in 1875 by the 14th Legislature, that was brought into question by a decision of the Texas Supreme Court in April 1999. The case, *Scott Bradley*

vs. The State of Texas on the Relation of Dale White, No. 97-1135, concerned the removal of Bradley, the mayor of Westlake in Tarrant County, by the local board of aldermen. The aldermen used sec. 21.002 to remove the mayor, and the case reached the Supreme Court on September 28, 1998.

The Supreme Court held that the Westlake board of aldermen had violated Texas Rule of Civil Evidence 605 when board members who sat as judges in Bradley's removal also testified as witnesses against him.

In a concurring opinion, Justice Greg Abbott wrote that the statute governing the removal proceedings was unconstitutionally vague and thus denied Bradley due process and due course of law guaranteed by the both the U.S. and Texas constitutions. Abbott wrote:

> Sometimes a mayor's conduct necessitates removal proceedings. Nevertheless, such proceedings can reverse a majority of the local citizens' judgment as to who is best to lead them. Consequently, our state government owes a duty not only to the mayor but to his colleagues and constituents to ensure that such proceedings are neither arbitrary or unfair, and never unconstitutional. This vague and unwieldy statute fails to carry out the task. I urge the Legislature to mend it soon.

Justice Abbott said that the current removal statute "leaves it to the caprice of the aldermen — many of whom are untrained in the rules of procedure and evidence — to pick and choose which rules may apply to a removal proceeding, and to choose which rules may not apply because they are 'in conflict with' the structure of removal proceedings." A mayor subject to these removal proceedings, wrote Justice Abbott, would not know exactly which rules applied until the aldermen made their decision — a decision that might not be made until the proceedings were underway.

Justice Abbott wrote that when one is forced to apply the provision that the aldermen sit as a court and are subject to the rules governing a proceeding or trial in a justice court, "inherent ambiguities become inescapable," since a significant number of civil rules for a justice court either conflict directly with the statute's scheme for removal proceedings or provide no relevant guidance to a board of aldermen. Abbott wrote: "Whether other justice court rules apply has been and will continue to be a matter of guesswork for aldermen, mayors, and even reviewing courts, leaving a situation ripe for

'resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'"

CSHB 3836 would eliminate these problems by replacing the troublesome section of the Local Government Code with statutes close to those that govern removal of county officers, which would not present constitutional problems. The current removal statutes for general-law cities allow city council members to sit as a court, put colleagues on trial, and act as judges, jury, and witnesses for as long as the "trial" continues. After a judgment is issued, however, they may disband so there is no possibility for appeal.

It would be better to remove an official through judicial proceedings than through a recall election, because an election in a sparsely populated area could be engineered by a small group of people with an agenda that in no way represented the interests of the majority of the area's registered voters.

OPPONENTS SAY:

Rather than allow an elected official to be removed from office by a judge or jury, it would be better to leave removal up to a recall election by the voters who elected that official and whom the official represents.

NOTES:

The original bill would have deleted Local Government Code, sec. 21.002 and provided that the voters of a general-law city could recall a member of the city's governing body in a recall election if a petition signed by 10 percent of the registered voters of the area were filed with the city clerk. It would have specified procedures for such a petition and election.

D

114 Tex. 296
Supreme Court of Texas.

REEVES
v.
STATE ex rel. MASON et al. *

(No. 4156.)
|
Dec. 20, 1924.

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Quo warranto by the State, on the relation of W. W. Mason and others, to remove John J. Reeves from the office of sheriff of Titus county. Defendant was removed, and on appeal the judgment of removal was by the Court of Civil Appeals affirmed (258 S. W. 577), and defendant brings error. Reversed and remanded.

West Headnotes (5)

[1] Judges
Effect on acts and proceedings of judge

Where judge in quo warranto against sheriff, on objection to his qualification because of relationship to private relator, permitted amendment of petition so as to take such relator out of case, and thereafter proceeded to trial without issuing new order for citation of defendant, *held,* under Rev.St. arts. 6041, 6042, 6044 [Vernon's Ann.Civ.St. arts. 5976, 5977, 5979], order of citation first issued was void, and all subsequent proceedings void for lack of proper order of citation.

6 Cases that cite this headnote

[2] Judges
Relationship to party or person interested

Under Rev.St. arts. 6041, 6042, 6044 [Vernon's Ann.Civ.St. arts. 5976, 5977, 5979], private relators in quo warranto to remove sheriff from office are "parties to the suit" within statute disqualifying judge when he is related within third degree to a party to suit.

4 Cases that cite this headnote

[3] Appearance
Waiver of process or notice

Defendant sheriff in quo warranto proceedings, who objected to qualifications of judge and objected and took bill of exceptions to action of judge in permitting amendment of petition, eliminating as a party to the suit one related to him within a prohibited degree, *held* not to have waived lack of valid service upon him.

Cases that cite this headnote

[5] Public Employment
During prior term or employment

Sheriffs and Constables
Resignation, suspension, or removal

In quo warranto to remove sheriff, admission of evidence of misconduct during prior term, which could not be grounds for removal, held reversible error.

3 Cases that cite this headnote

[5] Public Employment
During prior term or employment

Sheriffs and Constables
Resignation, suspension, or removal

Under Rev.St. arts. 6030, 6055, Vernon's Ann.Civ.St. arts. 5970, 5986, sheriff may not be removed from office for misconduct committed during prior term.

4 Cases that cite this headnote

Attorneys and Law Firms

****667 *297** I. M. Williams, J. F. Wilkinson, Hiram Brown, and J. A. Ward, all of Mt. Pleasant, for plaintiff in error.

***298** J. H. Beavers, of Winnsboro, and T. C. Hutchings and Sam Williams, both of Mt. Pleasant, for defendants in error.

Opinion

***300** PIERSON, J.

John J. Reeves was elected sheriff of Titus county in November, 1920, and duly qualified for that office on December 1, 1920. He was elected to a second term in November, 1922, and duly qualified for that term on January 8, 1923. On June 20, 1923, this proceeding, in the nature of a quo warranto, was begun in the district court of Titus county, to remove from the office of sheriff the said John J. Reeves for official misconduct in office. The petition was drawn and filed in the name of the state of Texas by the district and county attorneys on the relation of W. W. Mason, W. P. Traylor, and 10 others, under title 98, c. 2, Revised Statutes. The petition was presented to Hon. R. T. Wilkinson, judge of the Seventy-Sixth judicial district in Titus county, Tex., under the provisions of Rev. St. art. 6044; whereupon he entered his order directing that citation and certified copy of the petition be served on the defendant John J. Reeves, and set the case down for hearing on June 29, 1923. He ***301** also entered an order suspending the defendant Reeves from the office of sheriff during the pendency of the proceeding. The defendant John J. Reeves was duly served with citation and copy of petition, and on June 27th filed an answer, consisting of demurrers and denials. The case came on for trial on June 29th, but by agreement was passed until July 2d, and again by agreement was passed to July 3d.

On this date the said John J. Reeves filed a motion in writing, calling attention to the fact that the district judge, Hon. R. T. Wilkinson, was related to W. P. Traylor, one of the relators plaintiff, within the third degree, and alleged that on account thereof the said judge was disqualified to try the case, and that all proceedings theretofore had were void and of no effect in law. The trial judge found it a fact that said W. P. Traylor being his second cousin, was related to him within the third degree. Thereupon Hon. T. C. Hutchings, distict attorney, and Hon. Sam Williams, county attorney, asked and obtained permission of the court to file an amended petition in the case in the name of the state of Texas by themselves as relators and as representatives of the state of Texas, and praying that all the original relators be dismissed from the case. The trial judge granted this motion, and dismissed the prior relators, including W. P. Traylor, from the case, and said relators paid up all costs accrued to that time. The defendant John J. Reeves duly excepted to said action, and the case proceeded to trial without any additional order having been entered by the trial judge permitting the proceedings to be instituted and ordering service of new citation and certified copy upon defendant Reeves. Under the allegations the court admitted testimony as to acts of official misconduct occurring in the first term of office, as well as in the second term of office, of the defendant.

The defendant Reeves was duly convicted by the jury upon separate findings of acts of official misconduct in both terms of office, and judgment was entered permanently removing said Reeves from the office of sheriff of Titus county. This judgment was affirmed by the honorable Court of Civil Appeals for the Sixth Supreme Judicial District. The Court of Civil Appeals held that the state of Texas, only, is a party plaintiff in the cause and that relator Traylor and the other private relators, within the meaning of the law, could not be classed as parties to the cause, and that therefore the trial judge was not disqualified to hear the cause, but found further that if he was so disqualified on account of the relationship of W. P. Traylor, on account of his being named as a party and being liable for court costs, this objection was entirely removed by the subsequent proceedings in the cause, and that therefore the case properly proceeded to trial. It held further that John J. Reeves could not be ousted on testimony ***302** of acts committed in his first term of office, but inasmuch as the jury on separate findings found him guilty of official misconduct during both his first and second terms, the judgment of ouster could be sustained, and that the admission of testimony of acts committed in his first term was harmless and without injury to him, because of the fact that the jury found him guilty of acts committed during his second term.

The judgment will have to be reversed, first, because there was no valid order entered by the trial judge authorizing the service of citation and certified copy of the petition upon the defendant, and second, because of the admission in evidence of acts committed during his first term of office.

[1] If no valid order authorizing the suit to be filed was entered by the trial judge, no further action in the case could be had. If W. P. Traylor was a party to the suit, such ****668** as would disqualify the trial judge to hear the case on account of his relationship to him, then the original and only order authorizing service of citation, etc., to be

had upon the defendant would be void, and all subsequent action taken in the case would also be void under article 6044. This article reads as follows:

> 'After the filing of such petition, the person or persons so filing the same shall make a written application to the district judge for an order for a citation and a certified copy of the said petition to be served on the officer against whom the petition is filed, requiring him at a certain day named, which day shall be fixed by the judge, to appear and answer to the said petition; and until such order is granted and entered upon the minutes of the court (if application is made during term time) no action whatever shall be had thereon; and, if the judge shall refuse to issue the order so applied for, then the petition shall be dismissed at the cost of the relator, and no appeal or writ of error shall be allowed from such action of the judge.'

If the judge was disqualified to try the case with W. P. Traylor as a party on account of his relationship, then he was disqualified to enter the order permitting the complaint to be filed and ordering citation and certified copy of petition to be served on the defendant, and also to enter the order dismissing Traylor and the other relators from the suit and adjudging costs against them. If this be true, there was no case pending against John J. Reeves, no valid order ever having been entered as required by article 6044, and all the proceedings in the case were void. This article is mandatory and is clear in its provisions. The Legislature fixed the public policy of the state in this regard that a public offficer should not be disturbed in the discharge of his duties, and no suit to oust him from office for official misconduct could be filed and prosecuted, unless such proceedings ***303** are begun with the express consent of the district judge. We have concluded that W. P. Traylor was such a party to the suit as to disqualify the trial judge from taking any action whatever in the case.

[2] Article 6041 provides that the proceedings 'may be commenced * * * by first filing a petition * * * by a citizen' who has resided for six months in the county, and who is not himself under indictment. Article 6042 requires that the petition shall be sworn to by at least one of the parties filing it, and 'the proceedings shall be conducted in the name of 'the State of Texas,' upon the relation of the person filing the same.' Article 6044 provides that the person or persons filing the petition shall make application to the district judge for an order for citation, etc., and that until such order is granted and entered upon the minutes of the court, 'no action whatever shall be had thereon,' and that if the judge shall refuse to issue such order, 'then the petition shall be dismissed at the cost of the relator,' and that no appeal or writ of error should be allowed from such action.

While an action to oust a county officer for official misconduct is for the benefit of the public, and must be conducted in the name of the state of Texas, and be represented by a county or district attorney, yet we think the permission given by these statutes to relators to act in these matters by and with the consent and under the direction of the authorized agents and representatives of the state, and the resultant liability fixed upon such relators by the statutes, constitute them proper parties to the suit, and such parties as would affect the qualification of the trial judge to try the case.

Under the last-named article, W. P. Traylor, as a party relator, was interested in the case personally, at least to the extent of the costs of court, and this could not be adjudicated by his relative. It would seem that the case of Collingsworth County v. Myers, 35 S. W. 414 (Court of Civil Appeals of Texas), is analagous. There it was held that a county judge who had wrongly been made a party, but who was in no sense a proper or necessary party, and could not be liable on the case or for costs, could not enter an order dismissing himself and the county commissioners from the suit, and could not enter any order whatever.

In the case of Dennard v. Jordan, 14 Tex. Civ. App. 398, 37 S. W. 876, it was held that the article of the statute which provides that the judge of a district court shall be disqualified to sit in any cause, where either of the parties is connected with him by affinity or consanguinity within the third degree, applies, though the person so related to the judge is a party to the action only as administrator. ***304** In ruling the case Judge Williams used the following language:

'The Constitution provides that 'no judge shall sit in any case * * * where either of the parties may be connected with him by affinity or consanguinity within such degree as

may be prescribed by law.' Article 5, s 11. The Legislature has fixed the degree of kinship which shall disqualify at the third degree. Sayles' Civ. St. art. 1090. Appellee was related to the judge within that degree, and was a party to the cause. There were but two parties before the court, one side of the controversy being represented by appellant, and the other by appellee, as administrator. The latter was a litigant, in the full sense of the term. That he acted in a fiduciary capacity made him no less a party to the case. He was not merely a nominal party, but was the active litigant. It may be doubted whether the absence of pecuniary interest in the controversy will prevent the disqualification declared by the Constitution and the statute to arise from relationship to one who is in fact a 'party.' The Constitution does not say 'party in interest,' but simply 'party.' It may be argued with reason that the mere fact that the relation **669 of the judge was identified with the controversy as a party to the record was deemed sufficient to work disqualfication, whether his pecuniary interests are involved or not. The language used supports such a view. If by construction a particular case is to be taken out of the operation of that language, by absence of interest of the party in the cause, the fact should, to say the least, be very clear.'

In the instant case the order entered by Judge Wilkinson permitting the proceedings to be instituted, and ordering that citation and copy of the petition be served on the defendant, involved the exercise of judicial discretion and judgment. If he had refused to enter the order, no action whatever could have been had on the petition, and his action, under the statute, would have been final. No new proceedings were inaugurated, and no new order was ever entered authorizing the proceedings and ordering service to be had on the defendant, and therefore all proceedings had in the case were without authority and void. The statute provides that until such order is granted and entered, no action whatever shall be had on the petition. This is true, notwithstanding Mr. Traylor was dismissed from the case and the case was prosecuted by others.

[3] We think the Court of Civil Appeals erred in holding that the defendant Reeves, plaintiff in error here, voluntarily appeared and answered the petition against him, and waived the disqualification of the judge as to W. P. Traylor or the invalidity of the initial proceedings. He made objections and took a bill of exceptions to the actions of the court in regard to them. Besides, as we have stated, this proceeding could not be prosecuted until the court had entered ***305** a valid order granting permission for the proceedings to be instituted and directing service.

[4] The Court of Civil Appeals correctly held that the defendant Reeves, plaintiff in error here, could not be removed from office during his second term for offenses committed during his first term. In support of this holding we advance the following reasons, in addition to those given by the Court of Civil Appeals which we approve: Article 6030, R. S., provides for removal from office for certain acts of official misconduct while in office. Article 6055, R. S., provides that 'no officer shall be prosecuted or removed from office for any act he may have committed prior to his election to office.'

As said by the Court of Civil Appeals:
'The phrase 'prior to his election to office' would, and is intended to apply to a re-election as well as election in the first instance, since the re-election of the same officer is in legal effect the same as an original election. As the Constitution does not provide for continuity of terms of office, each 'term of office' legally becomes an entity, separate and distinet from all other terms of the same office. This being so, the Legislature doubtless intended in the enactment of the statute to provide that an officer should not be removed for official misconduct except for acts committed after his election to the term of office he is then holding and from which it is attempted to oust him.' Thurston v. Clark, 107 Cal. 285, 40 P. 435; Speed v. Common Council of Detroit, 98 Mich. 360, 57 N. W. 406, 22 L. R. A. 842, 39 Am. St. Rep. 555; Smith v. Ling, 68 Cal. 324, 9 P. 171.

In Texas we have frequent elections, for county officers every two years. The main, if not the only, justification for such frequent elections is that thereby the elections are kept in the hands of and close to the people, and ample opportunity is afforded to retire incompetent or corrupt officers. We construe article 6055 to mean that an officer cannot be removed for acts committed prior to his election to the term of office he is holding. An election to a second term is as much an 'election to office' as to a first term. This doubtless is more consistent with the legislative intent, and is to give it a more practical value and application in connection with the purpose of the Act and our system of elections. To construe it differently would be to agree to the argument of defendant in error wherein it says:

> 'Article 6055, Rev. Stat., by providing that no officer shall be removed from office for any act he may have committed prior to his election to office, in our opinion, carries no more force than if such article had not been enacted, as he could not be guilty of official misconduct until he was inducted into office ***306** by taking the oath of office and executing official bond.'

But we think the Legislature did not idly enact the article, and that it should be given 'force.' To do so we must apply it only to acts committed subsequent to an election to the term the officer is holding, and from which it is sought to oust him.

[5] We think, however the Court of Civil Appeals erred in holding that the admission in evidence of acts of official misconduct during the plaintiff in error's first term of office should not work a reversal of the judgment against him. The jury, under the direction of the court, as provided in article 6043, there being more than one distinct cause of removal alleged, did, by separate findings in their verdict, say which cause they found to be sustained by the evidence, and which were not sustained, and they found acts of official misconduct in both terms of office. We think, however, that the admission in evidence of other and separate acts charged and found by the jury to have been committed during the first term in office could not help but be prejudicial to plaintiff in error, and to have influenced the jury in their findings upon the issues submitted to them of acts committed during the second term, and should not have been admitted for any purpose.

****670** For the reasons stated herein, the judgments of the Court of Civil Appeals and of the district court are reversed, and the cause is remanded.

All Citations

114 Tex. 296, 267 S.W. 666

Footnotes

* Rehearing denied February 18, 1925.

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2014 WL 350547
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION
Court of Appeals of Texas,
Dallas.

Carol SOLOMON, Appellant
v.
STATE of Texas ex rel. Pete YOHO, Appellee.

No. 05–12–01636–CV.
|
Jan. 30, 2014.

On Appeal from the 196th Judicial District Court, Hunt County, Texas, Trial Court Cause No. 76,070. Stephen R. Tittle Jr., Judge.

Attorneys and Law Firms

James Timothy Brightman, Law Office of J. Timothy Brightman, Charles J. Crawford, Larry R. Boyd, Abernathy, Roeder, Boyd & Joplin, P.C., McKinney, TX, for appellants.

Noble Dan Walker Jr., Hunt County District Attorney, Greenville, TX, Charles I. Calkins, West Tawakoni, TX, for appellees.

Before Justices FITZGERALD, FRANCIS, and MYERS.

MEMORANDUM OPINION

Opinion by Justice FRANCIS.

***1** Carol Solomon appeals the trial court's judgment ordering her removed from office as a City of Tawakoni council member. Because we conclude the cause is moot, we vacate the judgment and dismiss the cause.

City of Tawakoni Mayor Pete Yoho filed a petition to remove Solomon from office for official misconduct.[1] *See* TEX. LOC. GOV'T CODE ANN.. § 21.026 (West 2008). The petition alleged city workers removed a tree stump and set a drainage culvert on Solomon's property without Solomon paying for the work or obtaining a permit. Solomon, who was elected in 2010, denied the allegations, filed a counterclaim for defamation and malicious prosecution, and sought sanctions for the filing of a frivolous pleading.

Although the original petition and each subsequent amended petition asserted that time was of the essence, the removal case did not go to trial until October 2012, two years after the lawsuit was filed and less than two months before Solomon's term expired. (Solomon's counterclaims were to be tried later.) The Hunt County district attorney prosecuted the case. *See* TEX. LOC. GOV'T CODE ANN.. § 21.029(d) (West 2008). After hearing the evidence, a jury found Solomon "accepted or agreed to accept" a benefit from "a person she knew to be subject to regulation, inspection or investigation" by her or the West Tawakoni City Council and that this conduct constituted official misconduct. That same day, the trial court signed an interlocutory judgment ordering her removed from office and then finding it was in the "public interest" to suspend her from office pending appeal. Solomon's term of office expired on December 1, 2012. In the meantime, she was re-elected as councilwoman in November 2012. An order nonsuiting the last of Solomon's counterclaims was signed in April 2013, making the trial court's interlocutory judgment final.

We are prohibited from deciding moot controversies. *Nat'l Collegiate Athletic Ass'n v. Jones,* 1 S.W.3d 83, 86 (Tex.1999). A justiciable controversy between the parties must exist at every stage of the legal proceedings, including the appeal, or the case is moot. *See Williams v. Lara,* 52 S.W.3d 171, 184 (Tex.2001).

Here, the parties agree the cause of action sought to remove Solomon from her term of office which expired on December 1, 2012. *See Reeves v. State ex rel. Mason,* 114 Tex. 296, 267 S.W. 666, 668 (Tex.1924) (explaining that each term of office "legally becomes an entity, separate and distinct from all other terms of office.") At that time, only an interlocutory judgment was in place. Before the judgment became final and appealable, Solomon's term expired, rendering the cause moot. *See Griffith v. State ex rel. Ainsworth,* 226 S.W. 423, 423 (Tex.Civ.App.-El Paso 1920, no writ) (concluding quo warranto action was moot on expiration of term of office and must be

dismissed); *see also City of Alamo v. Montes,* 934 S.W.2d 85, 85 (Tex.1996) (dismissing case as moot when employee resigned, leaving no controversy between parties, in suit challenging termination).

***2** We therefore vacate the trial courts judgment and dismiss the case as moot.

All Citations

Not Reported in S.W.3d, 2014 WL 350547

Footnotes

1 Two other plaintiff's named in the original petition nonsuited their claims.