ELECTIONS - Primary. - Whether or not candidates actually signed declaration a question of fact upon which the Secretary of State has no power to pass.

7-19

July 18, 1934

FILED

Hon. Dwight H. Brown,
Secretary of State
Jefferson City, Mo.

Dear Sir:

This Department is in receipt of your letter of July 14th requesting an opinion as to the following state of facts:

> "Enclosed find protest of Hon. Waldo P. Johnson to the certification by this office of the name of Arthur N. Lindsay as a candidate for State Senator in the 16th Senatorial District.
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> We certified out the list of candidates who filed in this office on June 12, 1934, I am enclosing a copy of this list with a copy of Mr. Johnson's protest, and I ask for your opinion as a guide to my action in this matter."

In this case certain evidence has been filed consisting of affidavits and other papers to the effect that Arthur N. Lindsay did not personally sign his written declaration for the Democratic nomination for State Senator for the 16th Senatorial District. On June 12th, 1934, the Secretary of State certified out a list of candidates and on July 9th a protest was filed requesting the Secretary of State to correct this certification.

Section 10261, Revised Statutes of Missouri 1929, provides:

> "At least fifty-five days before any primary preceding a general election, the secretary of state shall transmit to each county clerk a certified list containing the name and postoffice address of each person who shall have filed declaration papers in his office, and entitled to be voted for at such primary, together with a designation of the office for which he is a candidate, and the party or principle he represents."

The determination of the question before us necessarily involves the powers and duties of the Secretary of State. The general rule thereon is well stated in 59 Corpus Juris 116:

> "The secretary of state is an executive or ministerial officer and possesses no judicial powers."

This general power was discussed in the case of State ex rel. v. O'Malley v. Lesueur, 103 Mo. l.c. 262:

> "But it is strenuously urged for the relator that the duties of the respondent secretary are strictly ministerial; that he is not clothed with any judicial powers. This is granted, and has already been sufficiently answered in the preceding paragraph in reference to the incompleteness of the O'Malley certificate.
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> But it may be further said in answer to the contention made, that, though the secretary of state is a ministerial officer, yet he does not for that reason occupy the attitude of a mere figurehead or automaton, moved about at the whim or touch of every eager applicant who desires the performance of duties which pertain to his office.
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> When applied to for the discharge of such duties, although his discretion may not reach the height known as judicial, and, therefore, uncontrollable by writ of mandamus, yet it cannot be doubted that some portion of the qualities and attributes of discretion necessarily inhere in the discharge of his official duties, requiring him to consider before acting and to search and inquire before reaching or announcing a conclusion. Any other theory would be wholly inconsistent with the proper and orderly discharge of his official duties. His course in this respect in the case at bar, in filing the O'Neill certificate, and in certifying his nomination to the recorder of voters, etc., as the result of a subsequent primary election and convention held in obedience to the order of the Democratic state committee, is free from fault, as will presently be more fully shown."

On the same general question, Judge Ferriss,in the case of State ex rel v. Roach, 246 Mo. l.c. 64 said:

> "Section 5849 provides that all certificates of nomination which are in apparent conformity with the provisions of law shall be deemed to be valid, unless objections are filed thereto within three days. In the absence of such objections, the validity of such nomination stands unquestioned, and the duty of the Secretary of State to certify same is purely ministerial. (State ex rel. v. Talley, 8 N. D. 90; State ex rel. v. Talley, 83 N. W. 860; State ex rel. v. Miller, 39 N. E. 24; People ex rel. v. District Court, 31 Pac. 339)"

This Department has held in a former opinion that all candidates for office who run at the August Primary as a prerequisite to having his or her name printed on the official primary ballot must file a written declaration with the proper officials and must personally sign this declaration.

In the case here under consideration, it is contended that the candidate did not personally sign the declaration. However, this is a question of fact as the declaration on its face purports to have been signed by the candidate. Once the formality of the statute has been complied with, it is the duty of the Secretary of State to certify that person's name to the county clerk. If, as a matter of fact, the candidate did not sign the declaration, then the certification to the county clerk by the Secretary of State was illegal; but this is a question for the courts to pass on.

A somewhat similar question was before the Supreme Court in the case of State exrel v. Shannon, 133 Mo. 165, in which the Court said:

> "But we are of the opinion that the right of relator to the office can not be inquired into in this proceeding. No authority of power is conferred on the comptroller of the city to pass upon or decide the validity of relator's claim to the office. His duty with respect to the approval of the bond of the superintendent of waterworks, is purely ministerial.
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> When relator's appointment was approved by the board of public works, it became the duty of the comptroller to approve his bond when tendered to him for that purpose unless some

valid legal objection existed to the bond itself. It was not for him to decide upon the legality of relator's appointment, or whether he was in fact entitled to hold the office. Upon that question we do not undertake to pass, as it is not involved in this proceeding.

Beck v. Jackson, 43 Mo. 117, was a proceeding by mandamus to compel the respondent judge of the circuit court of that circuit which included the county of Cape Girardeau to approve the bonds of the relator as clerk of the circuit court and recorder of that county, to which positions he had been appointed and commissioned by the Governor. And it was held, that the commission issued by the governor was at least prima facie evidence of title to the office, and a peremptory mandamus would issue to compel the judge of the court to approve the bonds; and that the validity or legality of the commission would only be determined by a proceeding in the nature of a quo warranto. A similar ruling was made in State ex rel. v. Wear, 37 Mo. App. 325."

In view of the foregoing, it is the opinion of this Department that the duty of the Secretary of State with respect to declarations filed in his office, is purely ministerial and when a declaration is once filed and purports to bear the signature of the candidate it becomes the Secretary of State's duty to certify that name to the county clerk. Whether or not the candidate actually and in fact did personally sign said declaration is purely a question of fact upon which question of fact the Secertary of State has no power to pass; the authority to pass thereon being clearly vested in the Courts of the State of Missouri.

Respectfully submitted,

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APPROVED:

ROY McKITTRICK
Attorney-General

JWH/mh