

161-1/2

Loring, J.

E. Thomas O'Brien,
Petitioner,

33417 vs.

Harry J. O'Brien, Mike Holm as
Secretary of State of Minnesota,
Claude V. Cline, as Auditor of
the County of Aitkin, et al,
Respondents.

Endorsed:
Filed October 12, 1942
Grace Kaercher Davis, Clerk
Minn. Supreme Court

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S Y L L A B U S

Where a political party does not cast the required number of votes at a primary election the provisions of § 202.24 do not limit filings by petition to the candidate receiving the highest number of votes at the nullified primary.

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O P I N I O N

LORING, Justice.

This is an application for a writ under § 480.04 Minn. St. 1941 (Mason St. 1927, § 132) directing the county auditors in the sixth congressional district to desist from placing the name of Harry J. O'Brien on the general election ballot as a candidate of the Democratic party for the office of representative in congress from that district at the general election to be held November 3, 1942.

The petition involves the construction of Minn. St. 1941, § 202.24 and other provisions of the election laws. Both O'Briens were aspirants for the Democratic nomination for congress in the sixth district at the primary election September 8, 1942. The petitioner received 872 votes and Harry J. O'Brien received 599 votes for the nomination. The sum of all the votes cast for the Democratic nomination

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did not equal 10% of the average vote cast for state officers of that political party at the last general election in that district. The consequence was that no candidate was nominated under § 202.24. That section further provides "and in such case, such candidates of such political party may be nominated by petition as provided by sections 202.19 to 202.22, and the candidates of any such political party failing to receive such ten per cent of such vote shall be eligible for nomination under the terms of this provision."

It is the contention of the petitioner that the phrase "such candidates" italicized above refers to the ones receiving the highest vote at the nullified primary and that he alone, having received the larger number of votes, is eligible to nomination by petition. With that contention we cannot concur. The word "candidate" in the statute is used sometimes referring to candidates for nomination at the primary and sometimes with reference to candidates for election at the general election. The context must indicate which is intended. The phrase under consideration obviously refers to the general election. As we view the statute, when a political party fails to cast at its primary at least 10% of the average vote cast for state officers of that party at the last general election in the district, the result of the primary so far as that political party is concerned is a nullity; there is no nomination. The party then may nominate its candidates by petition. The primary having been a nullity, the ban of § 202.19 against persons who had been candidates at the primary election is lifted by the further provision of § 202.24 by making candidates for the nomination at the nullified primary eligible for nomination by petition. To hold as contended for by petitioner would be to resurrect and breathe life into the nullified vote which the statute states does not result in a nomination.

L. 1912 (Special Session) c. 2, § 13, provided that in case a party failed to cast the required vote, a nomination of candidates

could be made by party committees and in the absence of a committee, by petition. But c. 389, § 5, L. 1913 eliminated this provision and left only that for filling the vacancy by petition as now provided. Whether the provisions of L. 1912, § 13, superseded or conflicted with § 11G of that same chapter we need not here determine because of the 1913 amendment which eliminated nominations by party committee.

It may be that provisions of the present law create a situation that embarrasses a party delinquent of the required primary vote by authorizing too many candidates at the general election for the same office but the wisdom of the legislative provision is not for us to question. Adequate provision is made for a party to select a single candidate at the primary and without a minimum provision such as the 10% requirement other abuses would be encountered.

The numerous cases arising out of the recent primary, involving questions of construction of the election law indicate the necessity for its clarification. That is a problem for the legislature.

Petition denied.

State of Minnesota }
SUPREME COURT } ss.

I, Grace Kaercher Davis, Clerk of the above named Court and Custodian of the records thereof, do hereby certify that I have compared the within paper _____ writing, to which this certificate is attached, with the original _____

OPINION in re E. Thomas O'Brien vs. Harry J. O'Brien, et al,

#33417

_____ now remaining on file in said action, and that the same is/are a true and correct copy _____ of said original _____ and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, at the

Capitol in the City of Saint Paul, Minnesota,

Oct. 12, 1942

Grace Kaercher Davis
Clerk of Supreme Court.

By *Wae Sherman*
Deputy Clerk.

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No. _____

STATE OF MINNESOTA
SUPREME COURT

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
OCT 12 1942
M. W. Volker
Secretary of State.

CERTIFIED COPY
