



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

April 14, 1939

Hon. Charles T. Banister  
Criminal District Attorney  
Navarro County  
Corsicana, Texas

Dear Sir:

Opinion No. 0-588

Re: Effect of prohibitory local  
option election prohibiting  
sale of beer containing al-  
cohol not exceeding 4% by  
weight in territory where sale  
of beer 3.2% was legalized.

We wish to advise that this Department has con- sidered your request for an opinion, as contained in your letter of April 3rd, to which the above opinion number has been assigned, as to whether a conviction for selling beer would be upheld by the Court of Criminal Appeals in a county which has been voted dry by local option, in the light of the following facts taken from your letter:

"....when beer was made legal in this county the proposition submitted was for and against 'beer containing not more than Three and Two Tenths (3.2%) per centum of alcohol by weight'. Whereas the proposition which would be voted upon now would be for and against 'prohibiting the sale of beer contain- ing alcohol not exceeding Four (4%) per centum by weight.'"

The relevant part of Article 666-40, of the Texas Liquor Control Act, pertaining to local option elec- tions and the submission of issues, reads as follows:

"In areas where the sale of beer contain- ing alcohol not exceeding four (4%) per centum

by weight has been legalized and all other alcoholic beverages are prohibited, the following issue shall be submitted in any prohibitory election: (1). 'For prohibiting the sale of beer containing alcohol not exceeding four (4%) per centum by weight,' and 'Against prohibiting the sale of beer containing alcohol not exceeding four (4%) per centum by weight.'

Article 667-1 of the act, defining the term "beer" reads:

"(b) The term 'beer' means a malt beverage containing one-half of one per cent or more of alcohol by volume and not more than four (4%) per cent of alcohol by weight, and shall not be inclusive of any beverage designated by label or otherwise by any other name than beer."

We have been unable to find any case in point as to the identical question raised in your request. The courts seem to have declared in *Flowers vs. Shearer*, 107 SW 2nd 1049, error dismissed, and the case, *Akers et al vs. Remington*, 115 SW 2nd 714, cited in your letter, that any ballot which will sufficiently inform the voters as to the issues submitted and at the same time intelligently express the will of the voters may be used. We have viewed the authorities submitted by you, the *Akers* case, supra, and *Adamson vs. Conally*, 112 SW 2nd 287, and these cases unquestionably furnish a sound guide as to submitting the proposition for such prohibitory election under the above section (1), Article 666-40.

The gravamen of the offense as expressed by the ballot legalizing such sale heretofore and under our present ballot, being substantially the same, would be the unlawful sale of a malt beverage containing one-half of one per cent or more of alcohol by volume, and which would in our view have sufficiently been presented in the issues to the voters. The Texas Liquor Control Act has provided, as authorized by the constitutional provision, Article 16,

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Section 20, that counties may hold elections and by majority vote of those voting, determine from time to time whether the sale of intoxicating liquors for beverage purposes shall be prohibited or legalized within their prescribed limits and we are inclined to believe that under the ballot as authorized, should a majority of those voting be for prohibiting the sale of beer, that such would include all persons handling theretofore legalized 3.2% beer.

It is, therefore, the opinion of this Department that where a county dry by local option and having subsequently legalized the sale of 3/2% beer, votes by majority votes for prohibiting the sale of beer containing alcohol not exceeding four (4%) per centum by weight in subsequent election, a conviction under said local option law could be sustained.

Trusting that the foregoing answers your inquiry, we remain

Very truly yours

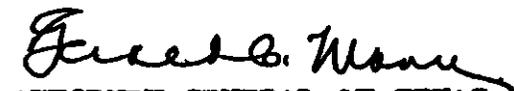
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By

  
Wm. J. R. Ring  
Assistant

WmK:AW

APPROVED:

  
ATTORNEY GENERAL OF TEXAS