



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Bert Ford, Administrator
Texas Liquor Control Board
Austin, Texas

Dear Sir:

Opinion No. O-1040

Re: May Board deny married woman permit to retail wine and beer on sole ground husband had been convicted of felony and was not entitled to such permit and would profit from her business under community property law.

We are in receipt of your letter seeking the opinion of this department on the following state of facts, which are taken from your letter, to-wit:

"We have before us a proposition in respect to an application for wine and beer retail permit as to which we would appreciate your advice.

"A certain man was convicted on the felony charge of keeping a gambling house, who subsequently appealed from such conviction in the district court, the conviction being affirmed March 8, 1939, and a motion for rehearing being denied May 24, 1939. This man was committed to the State Penitentiary and the Board of Pardons advises that he was granted a conditional pardon by the Governor on December 1, 1939. We are advised that his citizenship has not been restored and cannot be until the expiration of the normal term of his service in the Penitentiary in the absence of the conditional pardon.

Honorable Bert Ford, Administrator - Page 2

*This man's wife is now applying for a retail wine and beer permit in her own individual capacity. Unquestionably under the law no person is entitled to hold a license to sell beer if within two years immediately preceding the filing of his application he has been convicted of a felony. Presumably the man would therefore be disqualified until May 24, 1941, which would be two years from the date his conviction became final with the denial of a rehearing on the part of the Court of Criminal Appeals.

The Texas Liquor Control Act provides as causes for cancellation of existing license the use of a license in the operation of a business conducted for the benefit of any person not authorized by law to have an interest in said license. Under the community property laws of Texas we presume that the man who had been convicted would necessarily benefit from the operation by his wife of a retail beer business and there is no legal action which might be taken that would deny him the community interest in the profits to be derived from the business. If this be true, it would seem that the use of a license by the wife would be for the benefit of a person not qualified by law to have an interest in the license and that accordingly the wife would be disqualified on the husband's record.

The sole question propounded by you for our consideration, as we understand it, is whether a married woman may be denied a permit to retail wine and beer when her husband, who is disqualified from receiving such a permit would benefit thereby, under the community-property law of this State.

It seems settled law that a married woman may enter into the mercantile business at her will. 23 T. J. p. 304 § 266, from which we quote:

*Technically, a married woman may be a merchant or trader at will, so far

as the immediate transaction of the business is concerned. That is, she may own merchandise and wares freely, may buy or sell them at pleasure either for cash or on credit, may rent or lease buildings or employ clerks and other help needed. * * *

If the wife independently of her husband should go into the wine and beer business he would not in any way be liable for her debts. This was held in the case of J. B. Hirshfeld & Co. v. Evans et ux, 56 S. W. (2) 683, wherein the court said:

"The pleading fails to show any consideration for the subsequent promise made by the husband, Henry Evans, to pay for goods previously sold to his wife and for which she was not responsible. So far as the pleadings show, it was a verbal promise and is further void under the provisions of the statute of frauds."

This case reached the Supreme Court and was affirmed, 93 S. W. (2) 143.

It is true in the ordinary case, where the wife goes into business for herself, the profits from the business, if any, would by force of law become the community property of the wife and her husband. 23 T. J. § 266.

From the foregoing authorities it must be held that the husband has no interest whatever in the wife's business. It follows that if the husband should be benefitted from a permit issued to the wife, it would not be by virtue of any permit in which he was interested but solely because of the profits of the business covered by the permit issued to the wife alone, and in which he was not at all interested. The husband's rights come to him not from any interest which he has in the wife's business, but solely as a matter of law, which makes the profits community property.

Neither do we agree, under the facts submitted, that the profits derived from the wife's business would necessarily be community property. Clearly, the husband

would not be entitled to a permit to enter this business, for the reason that the law does not allow one guilty of his conduct to receive such a permit. Where the law denies a husband the right to go into a business, or profit therefrom, because of his conduct, and the wife enters such business, it would seem that the profits would be her separate property.

We think both the foregoing conclusions are fully supported by the celebrated case of Dickson v. Strickland, 265 S. W. 1012, in which the Supreme Court overruled the contention that Mrs. Miriam A. Ferguson could not qualify as Governor because of her husband's impeachment;

*The fifth question inquires whether Mrs. Ferguson was rendered ineligible by the decree of the Senate of Texas, sitting as a court of impeachment, removing her husband, James E. Ferguson, from the office of Governor and adjudging that he be henceforth disqualified to hold any office of power, trust, or profit under the state.

*Appellant's position is that the emoluments of the office of Governor are community property, and that James E. Ferguson could not receive his community half of his wife's salary as Governor without violating the decree of impeachment.

*It is unnecessary to inquire into the exact status of the wife's salary from public office as separate or community property, under our present Constitution and statutes. For, if it be assumed that Mrs. Ferguson's salary as Governor would belong to the community estate of her husband and herself, still James E. Ferguson would not be receiving or sharing any emolument or profit derived from any office held by James E. Ferguson under the state. The emolument would be derived from Miriam A. Ferguson holding an office and performing its duties. Such a disqualification

Honorable Bert Ford - page 5

as is here insisted on could be supported on no other theory than that of legal identity of husband and wife, and that theory we definitely repudiate, as it has been uniformly rejected from the earliest cases determined by this court.

*The Constitution forbids the imposition of penalties on members of the family of an impeached Governor by declaring that the Senate's judgment of impeachment shall extend, in addition to punishment after indictment and trial, only to removal from office and disqualification to hold office under the state.

There is a third reason why no supposed community interest of James E. Ferguson in the salary of an office held by his wife should render his wife ineligible to hold such office. And that is, if by his wrong he had deprived himself of any right to share such salary, the same would become his wife's separate estate. Wright v. Hays, 10 Tex. 136, 60 Am. Dec. 200; Nickerson v. Nickerson, 65 Tex. 281

Upon the foregoing authorities you are advised that it is the opinion of this department that the Board would not be authorized to deny the permit, under the facts related by you.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By 
Grover Sellers
Assistant

GS-MR

APPROVED MAR 8, 1940


ATTORNEY GENERAL OF TEXAS



hwt