



**THE ATTORNEY GENERAL
OF TEXAS**

GERALD C. MANN

ATTORNEY GENERAL

AUSTIN 11, TEXAS

Honorable Bowen Bond
County Attorney
Freestone County
Fairfield, Texas

Dear Sir:

Opinion No. 0-5487

Re: Local option election -- May an election, to determine whether or not the sale of beer that does not contain alcohol in excess of 4% by weight shall be legalized, be held in a justice precinct, incorporated town or city located within a dry county?

Your letter, dated July 27, 1943, requesting an opinion concerning the above matter, reads in part as follows:

"Citizens of a particular justice precinct or town or city of my county are interested in calling an election under Article 666, Sections 32, 33, 35, 37, 38, 39 and 40, Vernon's Annotated Penal Code, as amended by S. B. 117, Chapter 325, page 509, Acts of the 48th Legislature, for the purpose of determining whether or not the sale of 'beer that does not contain alcohol in excess of four (4%) per centum by weight', shall be legalized in such political subdivision.

"Freestone County is a dry area, having prohibited the sale of 'beer that does not contain alcohol in excess of four (4%) per centum by weight' on December 21, 1940, by an election called for that purpose.

"Question: Does S. B. 117, Chapter 325, page 509, Acts of the 48th Legislature, authorize an election in a justice precinct or incorporated town or city located within the limits of a dry county for the purpose of determining whether or not the sale of 'beer that does not contain alcohol in excess of four (4%) per centum by weight' shall be legalized?

""

Article XVI, Section 20-C, Constitution of the State of Texas:

"In all counties, justice's precincts or incorporated towns or cities wherein the sale of intoxicating liquors had been prohibited by local option elections held under the laws of the State of Texas and in force at the time of the taking effect of Section 20, Article XVI of the Constitution of Texas, it shall continue to be unlawful to manufacture, sell, barter or exchange in any such county, justice's precinct or incorporated town or city, any spiritous, vinous or malt liquors or medicated bitters capable of producing intoxication or any other intoxicants whatsoever, for beverage purposes, unless and until a majority of the qualified voters in such county or political subdivision thereof voting in an election held for such purpose shall determine such to be lawful; provided that this subsection shall not prohibit the sale of alcoholic beverages containing not more than 3.2 per cent alcohol by weight in cities, counties or political subdivisions thereof in which the qualified voters have voted to legalize such sale under the provisions of Chapter 116, Acts of the Regular Session of the 43rd Legislature."

In the case of *Houchins v. Plainos*, 110 S.W.2d 549, the Supreme Court of Texas held that where power is given by Constitution and means by which, or manner in which, it is to be exercised is prescribed, such means and manner is exclusive.

In Opinion No. 0-2114, this department held, among other things, should a county as a whole vote for prohibiting the sale of all alcoholic beverages, the county would be dry regarding all alcoholic beverages, and the various precincts would have no authority to call and hold any local option election.

In the case of *Walling v. King*, 87 S.W.2d 1074, Judge German, speaking for the Supreme Court of Texas, said:

"Prior to the adoption of section 20, article 16, it had been the law of this state for many years that when a county, justice's precinct, or other political subdivision of a county voted to prohibit the sale of intoxicating liquors, it continued to be unlawful to sell such liquors within the prohibited territory until the voters of the identical territory which had adopted prohibition voted to repeal it. In *Ex Parte Pollard*, 51 Tex. Cr. R. 488,

103 S.W. 878, Judge Davidson, speaking for the Court of Criminal Appeals, said: 'Wherever a local option law is once legally put into operation in a given territory, it must remain in force until it has been voted out by the voters of the territory where such law was originally vitalized.'

"Several cases are cited in support of this holding.

"The constitutional amendment set out above by express words adopted this rule of law. The language is that in any county or any political subdivision thereof where the sale of intoxicating liquors had been prohibited prior to the adoption of section 20, article 16, it should remain unlawful to sell same (including beer) in said county or political subdivision 'until a majority of the qualified voters in said county or political subdivision thereof voting in an election held for such purpose shall determine it to be lawful to manufacture, sell, barter and exchange in said county or political subdivision thereof vinous or malt liquors containing not more than three and two-tenths per cent (3.2%) alcoholic content by weight'.

"The very constitutional amendment by which appellant is accorded his right to a license expressly provided that if local option prevailed in the county where he sought to obtain his license it was necessary for the voters of that county to authorize the sale of the 3.2 per cent beer before he could obtain a license. This the county has never done, but on the contrary it had for the second time voted in favor of local option so far as beer was concerned. It necessarily follows that as Childress County had prohibited the sale of intoxicating liquors within its boundaries prior to the adoption of section 20, article 16, by virtue of subdivision (a) set out above, it was unlawful to sell beer within any part of said county until voters of the whole county determined otherwise. Local option within the county as a whole could not be repealed by piecemeal."

The law is well settled in this State that where local option within the county as a whole has been adopted that the same cannot be repealed except by a countywide election. We assume from the facts stated in your letter that Freestone County is a dry county.

In view of the authorities above cited, it is the opinion of this department that Senate Bill 117 does not, and could not, authorize an election

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to be held in a justice precinct, incorporated town or city located within the limits of a dry county, to determine whether or not the sale of beer that does not contain alcohol in excess of 4% by weight shall be legalized.

Yours very truly

ATTORNEY GENERAL OF TEXAS

/s/Jesse Owens

By

Jesse Owens
Assistant

JO:db

APPROVED AUG 10, 1943

/s/Grover Sellers

FIRST ASSISTANT
ATTORNEY GENERAL

APPROVED
OPINION
COMMITTEE

BY /s/BWB
Chairman