



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GROVER SELLERS
ATTORNEY GENERAL

Honorable Jouette M. Bonner
County Attorney
Jack County
Jacksboro, Texas

Dear Sir:

Opinion No. O-7051
Re: Application of Arts.
950 and 951, C.C.P.,
and Art. 335, R.C.S.,
to civil proceedings
under Arts. 666-42
and 666-30, P. C.

We have received your recent request for an opinion on the following matter:

"There have been a number of cases here since I was appointed in March 1945, where there was a conviction, the whiskey is on hand, and as I understand, the Liquor Control Board has promulgated certain rules for the disposition of it, under some section of Art. 666, Penal Code, I do not know just what.

"Under Art. 666-30 it provides for turning over the confiscated whiskey to the Board, but I am advised by some one that in certain instances it is sold in the counties, the expenses paid and proceeds paid over to the Board, the sales being to permittees, only.

"Under Section 44, of above article, on the sale of certain equipment therein referred to, the sheriff is directed to deduct the expenses, only.

"Even if only the property described in above section is sold, I feel the sheriff would be entitled to more than his expenses. Under Art. 951,

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Code of Criminal Procedure, the sheriff or other officer, (with exception) who collects money for the State or county, except jury fees, under any provision of this code, shall be entitled to retain five per cent.

"Further, under Art. 335, Revised Civil Statutes, the county attorney is entitled to ten per cent of moneys collected, applying to escheat. It seems to me that whiskey so taken, as well as other property, escheats to the state, and if sold, even by the Board, the sheriff and county attorney should not be deprived of the fees as above provided."

Article 666-42, Penal Code, provides as follows:

"(a) All alcoholic beverages declared by this Act to be a nuisance, and all illicit beverages as defined by this Act, may be seized with or without a warrant by an agent or employee of the Texas Liquor Control Board, or by any peace officer, and any person found in the possession or in charge thereof may be arrested without a warrant. No alcoholic beverages or articles so seized shall be replevied, but shall be stored by the Board, or by the sheriff of the county wherein the seizure was made, to be held for final action of the court as hereafter provided.

"(b) It shall be the duty of the Attorney General, the District Attorney, and the County Attorney, or any of them, when notified by the officer making the seizure, or by the Texas Liquor Control Board, that such seizure has been made, to institute a suit for forfeiture of such alcoholic beverages and property, such suit to be brought in the name of the State of Texas in any court of competent jurisdiction in the county wherein such seizure was made. Notice of pendency of such suit shall be served in the manner

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prescribed by law and the case shall proceed to trial as other civil cases. If upon the trial of such suit it is found that alcoholic beverages or property are a nuisance or were used or kept in maintaining a nuisance, under the terms of this Act, or that the alcoholic beverage is illicit, as defined by this Act, then the court trying said cause shall render judgment forfeiting the same to the State of Texas and ordering the same disposed of as provided for by Section 30 of this Article. The costs of such proceedings shall be paid by the Board, out of funds derived under the provisions of said Section 30, or from any other fund available to the Board for such purposes.

"(c) As to any property or articles upon which there may be a lien, by a bona fide lien holder, the holder of such may intervene to establish his rights and shall be required to show such lien to have been granted in a bona fide manner and without knowledge of the fact at the time of creation of the lien, that any article or property upon which such lien exists had been used or was to be used in violation of this Act. If the holder of any such lien shall intervene, then the court trying said cause shall render judgment forfeiting the same to the State of Texas, and authorizing the issuance of an order of sale directed to the sheriff or any constable of the county wherein the property was seized, commanding such officer to sell said property in the same manner as personal property is sold under execution. The court may order such property sold in whole or in part as it may deem proper and the sale shall be conducted at the courthouse door. The money realized from the sale of such property shall be applied first to the payment of the costs of suit and expenses incident to the sale and after such expenses have been approved and allowed by the court trying the case, then the further proceeds of such sale shall be used to pay all such liens according to priorities, and any remaining proceeds shall be paid to the Board to be allocated as provided in Section 30 hereof. All such liens against property sold under this section shall be transferred from the property to the proceeds of its sale.

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"(d) The sheriff executing said sale shall issue a bill of sale or certificate to the purchaser of said property, and such bill of sale or certificate shall convey valid and unimpaired title to such property."

Article 666-30, Penal Code, provides as follows:

"(a) All alcoholic beverages and the containers thereof, equipment, and other property forfeited to the state as nuisance, unless otherwise herein provided, and all illicit beverages and the containers thereof forfeited to the state, shall be turned over to the Board for public or private sale in such place or manner as it may deem best; provided, that the Board shall exercise diligent effort to obtain the best available price for anything thus sold; provided, further, that any bill of sale executed by the Board or Administrator shall convey a good and valid title to the purchaser as to any such property sold. The Board shall sell alcoholic beverages only to the holders of qualified permits or licenses. No alcoholic beverages unfit to be sold for public consumption, or of illicit manufacture, may be sold by the Board, but are declared a nuisance per se and may be destroyed by the Board. The certificate of any qualified chemist shall be accepted by the Board as evidence of unfitness of such alcoholic beverages.

"In the event the United States Government shall provide any plan or method whereby illicit alcoholic beverages and other property belonging to or forfeited to the state as nuisance shall be sold at ceiling prices during a national emergency, the Board shall have the right to comply with Federal law or regulations in the sale or disposal of such illicit alcoholic beverages or other property, even to the extent of partially or wholly abrogating any provisions hereof which may be in conflict with the Federal law or regulations.

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"(b) All moneys derived from the sale of any beverages or property shall be placed in a separate fund in the State Treasury to be designated as the Confiscated Liquor Fund. Twenty per centum (20%) of said Confiscated Liquor Fund shall be available to the Board to defray the expenses of purchasing and accumulating evidence as to violations of and for the purpose of enforcing the provisions of this Act and to defray the expenses incurred in assembling, storage, transportation, sale and accounting for such confiscated liquor and property. Any balance remaining in said fund on September 1st of each biennium shall be transferred and deposited in the General Fund of the State of Texas.

"As to liquors confiscated by representatives of the Board, or any peace officer, it shall be incumbent upon the officer making the seizure to list each and every item or items so confiscated and the place and name of owner, operator, or person from whom such seizure is made. Such report shall be made in quadruplicate, two copies of which shall be verified by oath; one verified copy shall be retained in the permanent files of the Liquor Control Board or other agency making the seizure, and one verified copy shall be filed with the Comptroller of the State of Texas, which shall constitute a permanent file, and both of which shall be subject to inspection by any member of the Legislature or any duly authorized law-enforcement agency of the State of Texas, and one copy shall be delivered to the owner, operator, or person from whom such seizure is made. A false statement of said confiscated liquor, beer, wine, or other personal property shall be punishable as now provided for false swearing."

Article 335, Revised Civil Statutes, provides as follows:

"Whenever a district or county attorney has collected money for the State or for any county, he shall within thirty days after receiving the

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same, pay it into the treasury of the State or of the county in which it belongs, after deducting therefrom and retaining the commissions allowed him thereon by law. Such district or county attorney shall be entitled to ten per cent commission on the first thousand dollars collected by him in any one case for the State or county from any individual or company, and five per cent on all sums over one thousand dollars, to be retained out of the money when collected, and he shall also be entitled to retain the same commissions on all collections made for the State or for any county. This article shall also apply to money realized for the State under the escheat law."

Article 666-42 makes it the duty of the Attorney General, the District Attorney, the County Attorney, or any of them, to institute proceedings for the forfeiture to the State of all alcoholic beverages declared to be a nuisance and all illicit beverages. This article further provides that the Court's judgment of forfeiture shall order all such beverages "disposed of as provided for by Section 30 of this article." Section 30 specifically provides that such beverages be "turned over to the Board" (Liquor Control Board) for sale. No other agency is authorized under the Texas Liquor Control Act, as amended, to sell such beverages forfeited to the State.

We note your statement to the effect that while Section 30 provides for turning confiscated liquor over to the Board for selling, you have been advised that in certain instances such liquor is sold locally in the counties. It is believed that you have reference to the provisions of Section 30 as they read prior to amendment by the 48th Legislature in 1943 (Acts 1943, 48th Leg., p. 509, ch. 325, § 6). Prior to such amendment Article 666-30 provided:

"All contraband alcoholic beverages so seized shall be turned over to either the sheriff of the county in which such seizure is made or to any authorized representative or agent of the Board.

* * *

"All contraband alcoholic beverages remaining in the hands of the sheriff shall be sold by him at public auction to the highest bidder, after

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due notice of such sale has been posted for a period of at least ten (10) days, but no sale of liquor shall be made to any person unless he is a permittee who is privileged to have possession thereof. No delivery of liquor so sold shall be made to any permittee unless and until the proper State tax stamps have been purchased and affixed as required by this Act.

** * *

"The net proceeds from all sales as provided in this Section shall be placed in a separate fund by the Board and may be used from time to time for defraying such expenses, as may be necessary, for the investigation of and obtaining evidence for violations of the provisions of this Act. All money remaining in said fund on August 31st of each year shall be deposited with the State Treasurer for the benefit of the General Fund. The fund herein created is hereby appropriated and shall be independent of and in addition to any other appropriation which may be made for the use of the Board."

The procedure thus provided was radically changed by the 48th Legislature. Under amended Section 30 all sales of forfeited liquor are made by the Board. Instead of the "net proceeds" of such sales being placed in a separate fund for the use of the Board, the current provision of the law is that:

"All moneys derived from the sale of any beverages or property shall be placed in a separate fund in the State Treasury to be designated as the Confiscated Liquor Fund. Twenty per centum (20%) of said Confiscated Liquor Fund shall be available to the Board to defray the expenses of purchasing and accumulating evidence as to violations of and for the purpose of enforcing the provisions of this Act and to defray the expenses incurred in assembling, storage, transportation,

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sale and accounting for such confiscated liquor and property. Any balance remaining in said fund on September 1st of each biennium shall be transferred and deposited in the General Fund of the State of Texas." (Emphasis Supplied)

It is true that Section 42 provides with respect to forfeiture proceedings that,

"The costs of such proceedings shall be paid by the Board, out of funds derived under the provisions of said Section 30, or from any other fund available to the Board for such purposes."

This provision, however, relates to Court costs, and not commissions. Moreover, since the Board is required to place all moneys in the Treasury, such Court costs may be paid only on warrants drawn therefor.

The sheriff is entitled to retain none of the proceeds from the sale of confiscated liquors for several reasons, the first and foremost being that the sheriff has no authority under the present state of the law to sell. Secondly, the statute specifically provides that all moneys derived from the sale of beverages shall be placed in a separate fund in the State Treasury. We construe the phrase "all moneys" to mean just what it says; no deductions for commissions are permissible. The phrase previously used by the Legislature was "the net proceeds." The intention of the Legislature could hardly be more clearly expressed than by its amendment using the phrase "all moneys" rather than "net proceeds". Compare opinion No. O-5334, approved July 23, 1943, a copy of which is enclosed. Finally, you are advised that in our opinion the forfeiture proceedings authorized by Article 666-42, V. A. F. C., are in nature civil, rather than penal, actions by the very terms of that section. Articles 950 and 951 of the Code of Criminal Procedure, referred to by you, relate solely to commissions on criminal fines and forfeitures

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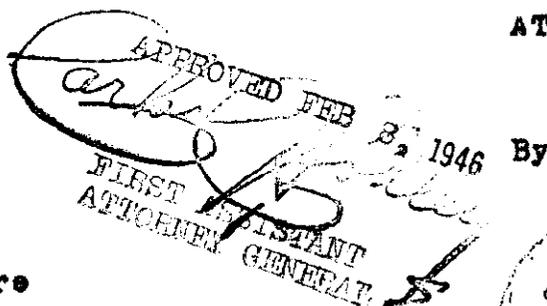
resulting from criminal prosecutions under the Penal Code and the Code of Criminal Procedure. These statutes do not govern in the instant case. Compare State vs. Moore, 57 Tex. 307.

We are compelled to answer your second question regarding commissions of the County Attorney in the same manner and for the same reasons. In this connection you have called our attention to Article 335, Revised Civil Statutes of Texas, 1925, which provides for commissions to the County Attorney when such officer "has collected money for the State or for any county." In addition to the other reasons given why commissions are not collectible in liquor forfeiture proceedings, you are advised that in our opinion a judgment confiscating unlawful liquor under the Texas Liquor Control Act, which judgment has resulted from a suit instituted by the County Attorney, is not "the collection of money" for the State within the meaning of Article 335. This article has long been interpreted as meaning what it plainly purports; that is, the actual collection of money by an officer named in the article, or the obtaining of a money judgment on which money is collected.

You are, therefore, advised that unlawful liquor confiscated under the Texas Liquor Control Act may be sold only by the Texas Liquor Control Board; and that neither a County Attorney nor a sheriff may collect commissions on such sales.

Yours very truly

ATTORNEY GENERAL OF TEXAS

APPROVED FEB 23 1946 BY

 FIRST ASSISTANT
 ATTORNEY GENERAL

James D. Smullen
 Assistant

JDS:jt

enclosure

