



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Robert F. Cherry
County Attorney
Bosque County
Meridian, Texas

Dear Sir:

Opinion No. 6-2539

Re: May the commissioners' court in ordering a local option election for or against the sale of beer to be held at the same time and place as the Democratic Primary election legally appoint as judges of such election the same judges as those appointed by the county Democratic Committee to hold the county Democratic Primary election? And another question.

Your recent request for an opinion of this department on the questions as are herein stated has been received.

We quote from your letter as follows:

"The undersigned County Attorney of Bosque County has been requested by several citizens of the county to ask for the Attorney General's opinion on the following questions:

"Question No. 1. ' May the Commissioners' Court, in ordering a local option election for or against the sale of beer, to be held at the same time and place as the democratic primary election, legally appoint, as judges of such election, the same judges as those appointed by the county democratic committee to hold the democratic primary election?'

"Question No. 2: 'If the Commissioners' Court does appoint such judges and no others and the local option election is held at the same time and place as the democratic primary election, and under the supervision and direction of such judges, would the local option election be thereby invalidated?'

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"The facts are these: In obedience to the petition required by law for such local option election, the Commissioners' Court of Bosque County has ordered a county-wide local option election to determine whether or not the sale of beer, containing not more than four per cent of alcohol by weight, shall be legal in Bosque County, Texas. In order to save expense, the election has been ordered to be held on July 27th, the date of the democratic primary election, at the same polling places as that of the democratic primary, and the order for election designates as judges for said local option election the same judges as those appointed by the county democratic committee to hold the democratic primary on that date. In each case, only one judge has been appointed for each polling place, and in each case the one judge appointed is the same for the local option election as for the democratic primary.

"The law requires (Art. 666-33, V.A.C.S.) that the election be held not less than ten nor more than twenty days from the date of the order for said election. This being the 12th of July, and the election having been ordered for the 27th of July, it would be necessary for us to have your opinion not later than the 16th of July if the election order is to be amended to conform with your opinion and still permit the holding of the election on July 27th. I don't know if it will be possible to get the opinion so quickly, but, if so, we shall appreciate it.

"The County Attorney's brief on these questions is as follows:

"Art. 666-32 of V.A.C.S. of the State of Texas provides for the holding of a local option election to determine whether or not the sale of liquors shall be prohibited or legalized.

"Art. 666-33 of V.A.C.S. of the State of Texas provides that the Commissioners' Court shall in its

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order state the date upon which the election is to be held, the object of such election and shall be held to be prima facie evidence that all the provisions necessary to give it validity or to clothe the court with jurisdiction to make it valid, have been duly complied with, provided that said court shall appoint such officers to hold such elections as now required to hold general elections. Acts 1935, 43rd Leg., 2nd C.S., p. 1795, ch. 467, Art. 1, Sec. 33.'

"Vernon's Annotated Civil Statutes, Vol. 9, Title 50, ch. 3, sets out the qualifications of officers of election and the manner of their appointment. Art. 2937, said title and chapter, provides, in part, as follows: 'The Commissioners' Court at the February term shall appoint from among the citizens of each voting precinct in which there are less than 100 voters who have paid their poll tax, or received their certificates of exemption, two reputable qualified voters as judges of the election, selected from different political parties, if practicable, to act until their successors are appointed.... One of the judges, who shall in all cases belong to the party that at the last general election cast the largest vote for governor throughout the state, shall be designated as the presiding judge at the election.... The presiding judge shall act in receiving and depositing the votes in the ballot boxes, and the other judge act in counting the votes cast....' Acts 1st C.S. 1905, p. 533, sec. 57.

"Art. 2938 of said title and chapter is in part as follows: 'For every precinct in which there are 100 citizens or more who have paid their poll tax, or received their certificates of exemption, the Commissioners' Court shall appoint four judges of election who shall be chosen, when practicable, from opposing political parties, one of whom shall be designated as presiding judge. The presiding judge and one associate judge shall act in receiving and depositing the votes in the ballot boxes, and the other two judges shall act in counting the votes cast....providing that in all elections held under the provisions of this title other than general elections, local option elections,

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and primary elections, the officers to be appointed by the Commissioners' Court to hold said elections shall be a presiding judge and an associate judge and two clerks, whose compensation shall be \$2.00 per day and \$2.00 extra to the presiding judge for making return of the election.'

"The order for the local option election in Bosque County appoints one and only one judge for each election precinct, this judge being the same as that appointed by the democratic committee as judge of the democratic primary election to be held on the same day and at the same place. Each of these judges is a democrat, and each of them is, I believe without exception, a precinct chairman of the democratic county organization.

"Winston's Simplified Dictionary defined the word 'practicable' as used in Arts. 2937 and 2938, quoted above, as follows: 'Capable of being done or used.'

"There are qualified voters in Bosque County who belong to other parties than the democratic party, therefore the appointment of judges from the democratic party alone does not meet the requirement for the appointment of such officers as now required to hold general election. Art. 666-33, quoted above, requires the appointment of such officers to hold such election (local option election) as now required to hold general election.

"The order for the local option election appoints one and only one judge for each voting precinct in Bosque County. Art. 2937, quoted above, requires that in small precincts (Having less than 100 voters) there shall be appointed by the Commissioners' Court two judges to hold election. The article sets out specific duty for each of the two judges. Art. 2938, quoted above, provides that for large precincts (having more than 100 voters) the Commissioners' Court shall appoint four judges to hold election. Such article provides specific duties for each of said four judges and provides further that in all elections held under the provisions of this title other than general elections,

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local option elections and primary elections, the officers to be appointed by the Commissioners' Court to hold said election shall be a presiding judge, an assistant judge and two clerks.

"Bosque County has both small precincts and large precincts. The appointment of one election judge for each voting precinct does not therefore comply with provisions of Arts. 2937 and 2938 as to the appointment of officers required to hold general elections.

"Art. 666-33, providing for such local option election as that ordered for Bosque County, requires that the court shall appoint such officers to hold such elections as now required to hold general elections."

We quote from Texas Jurisprudence, Vol. 16, page 34, as follows:

"The statutes make ample provision for the appointment of officers to direct and assist in the conduct of an election. Irregularities in their appointment do not render an election void. The law in this respect has been summarized as follows: The statutes with reference to the manner of appointing election officers are directory. Where they have not been complied with if it be shown that the election was held at the time and place provided by law, that the election was fairly conducted, and that the vote as cast, counted and returned, expressed the will of the majority of the qualified voters voting at such place and time, irregularities as to the manner of appointing the officers will not in the absence of express provision of statute affect the validity of the election. In such case, if there is no protest on the part of the voters, they will be held to have ratified the illegal appointment of the election judges or their unauthorized assumption of authority where they have acted without being appointed by anyone." Hill vs. Smithville Independent School District, 239 SW 987, (affirmed Comm. of App.) 251 SW 209; Hunicutt vs. State, 12SW 106; Beaver vs. State, 66 SW 256; Ex Parte Mayes, 44 SW 831; Bell vs. Faulkner, 19 SW 480; 1 A.L.R. 1535.

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Article 666-33, Vernon's Annotated Penal Code, provides that local option election shall be held not less than ten nor more than twenty days from the date of the order for said election. Said statute further requires that the court shall appoint such officers to hold such election as now required to hold general elections.

As above stated, the statutes with reference to the manner of appointing election officers are directory. Where such statutes have not been complied with, if it be shown that the election was held at the time and place provided by law, and that the election was fairly conducted, etc., an irregularity as to the manner of appointing the officers will not in the absence of express provisions of the statutes affect the validity of the election. However, we are of the opinion that Article 666-33, supra, is an express provision of the statutes requiring the commissioners' court to appoint officers to hold local option elections as now required to hold general elections and in appointing or attempting to appoint the election officials designated to hold primary elections would not be in compliance with the express provisions of the above mentioned statute.

In view of the foregoing, you are respectfully advised that it is the opinion of this department that the commissioners' court does not have the legal authority to appoint as judges of a local option election the same judges as those appointed by the county Democratic Committee to hold the Democratic Primary election. In the event the same election judges, etc. holding the primary election were to hold the local option election at the same time, there would be no saving of expenses, for the county must pay the expenses of holding the local option election, and candidates, through the county chairman, pay the expenses of the primary election and the county could not legally avoid the payment of the expenses of holding the local option election by attempting to have the election officials of the primary election to hold the local option election along with the primary election, the expenses of such, being paid by the candidates in the primary election.

We cannot categorically answer your second question; however, to avoid any election contest, which would probably raise the question as to the validity of the local option elec-

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tion where the election officials of the primary election also hold the local option election, we think it advisable that the commissioners' court should appoint different election officials to hold the local option election other than the election officials appointed by the Democratic Committee to hold said primary election.

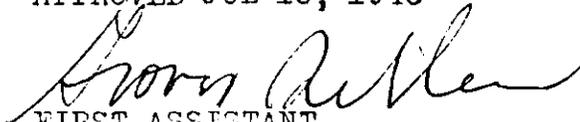
We want to thank you for the brief submitted with your inquiry which has been very helpful in passing upon your questions.

Trusting that we have fully answered your inquiry,
we are

Very truly yours

ATTORNEY GENERAL OF TEXAS

APPROVED JUL 15, 1940


FIRST ASSISTANT
ATTORNEY GENERAL

By



Ardell Williams
Assistant

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APPROVED
OPINION
COMMITTEE