



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

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Dear Sir:

Opinion No. O-2677
Re: Article 11371 of the Penal
Code of Texas.

Your communication of August 22, 1940, requests a legal opinion from this Department construing Article 11371 of the Penal Code in certain particulars.

Section 1 of this Act, which was enacted by the 44th Legislature as Senate Bill 462, provides as follows:

"Section 1. No goods, wares, or merchandise, manufactured wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold in this State to any person, firm, association or corporation, except that nothing in this Section shall be construed to forbid the sale of such goods produced in the prison institutions of this State to the State, or any political division thereof, or to any public institution owned or managed and controlled by the State, or any political division thereof." (Emphasis ours)

The caption of title of this Act, which is Chapter 85 of the General and Special Laws of the 44th Legislature (p. 207) (1935), reads:

"An Act providing that it shall be unlawful for any person, firm or corporation to sell or to offer for sale, within the State of Texas, any goods wares and/or merchandise, manufactured out of the State of Texas, wholly or in part, by convicts or prisoners in penal and/or reformatory institutions

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except convicts or prisoners on parole or probation, providing exemptions, and providing penalties; and declaring an emergency." (Emphasis ours.)

Section 3, the emergency clause, states:

"The fact that prison made goods, wares, and/or merchandise manufactured out of the State of Texas, are now being offered for sale within the State of Texas and that there is no law to prohibit their sale creates an emergency and an imperative public necessity that the Constitutional Rule requiring that bills be read on three several days in each House be suspended and that this Act take effect and be in force from and after its passage, and it is so enacted."

An examination of the caption and the body of this Act in the light of Section 35, Article III, of the Constitution of Texas, compels us to the conclusion that this law is invalid, wherefore, an opinion construing its provisions would serve no useful purpose.

Section 35, Article III, of the Constitution of Texas provides:

"No bill . . . shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an Act, which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be so expressed."

The purpose of this constitutional requirement was early recognized and described by the Supreme Court of Texas, speaking through Mr. Justice Gaines, in the case of Adams & Wickes v. Water Company, 86 Tex. 485, 25 S. W. 605, wherein it was said:

"The inquiry is not what the Legislature intended to embrace in the title, but what, by the terms employed, it did in fact embrace.

"The purpose of the constitutional requirement is to give notice through the title of the bill, not only to members of the Legislature, but to the citi-

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zens at large, of the subject-matter of the projected law, and thereby to prevent the surreptitious passage of a law upon one subject under the guise of a title which expresses another . . ."

In *Ward Cattle & Pasture Co. v. Carpenter*, 200 S. W. 521, the Supreme Court again declared:

"The purpose of the constitutional provision in respect to the title of legislative Acts is well understood. It is that by means of the title the legislator may be reasonably apprised of the scope of the bill so that surprise and fraud in legislation may be prevented." (Emphasis ours).

The Court of Criminal Appeals of Texas has announced the same principles in many cases illustrated by *De Silvia v. State*, 229 S. W. 542, and *Ex parte Heartstill*, 38 S. W. (2d) 803.

In the first mentioned case the court said, through Judge Morrow:

"One object of the constitutional provision mentioned is 'to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire.' Cooley's Constitutional Limitations (7th Ed.) p. 205 . . ."

"The courts, in construing the provisions in connection with legislative acts, have, throughout the history of the state, been liberal toward the validity of the Act. Notwithstanding this practice, they recognized that the provision of the Constitution is mandatory and that, when viewing the Act in the light of the liberal policy mentioned, if it cannot be fairly said that the caption is not misleading, the law or the part of the law which is variant from the title of the Act must give way . . ."

In the second case mentioned, the court said, through Judge Lattimore:

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"All laws passed by the Legislature of this State originate in bills, upon each of which must appear a caption or title, and Section 35, Article III, of our Constitution forbids that any bill, with certain exceptions, shall contain more than one subject, which shall be expressed in its title. It has been held by the court that when the express verbiage of such title limits and restricts the purpose of the bill, any attempt to legislate otherwise in such bill, variant from the purpose prescribed, is in excess of the legislative power, and that a law subject to this complaint is unconstitutional."

A study of the caption and body of Senate Bill 462 (Article 11371) reveals that the caption or title describes the Act as one making it unlawful to sell within the State of Texas any goods, wares, and/or merchandise manufactured out of the State of Texas by convicts; whereas, Section 1 of the Act undertakes to make such a sale unlawful if manufactured by convicts whether in or out of the State of Texas. The exception appearing in Section 1 of the Act demonstrates beyond peradventure that it applies to goods manufactured by convicts in Texas, which is not expressed in the caption.

Clearly, therefore, the provisions in the body of the Act are broader than those in the title, and the difference is one of great materiality. Obvious, too, is the fact that the title in its restriction of the prohibition to goods manufactured by convicts out of the State of Texas, as compared with the lack of this restriction in the body of the bill, is calculated to mislead the legislator or any citizen interested in such legislation. The title or caption of the Act does not disclose or intimate that the sale of goods manufactured by convicts in Texas is to be made unlawful.

The rule applicable to such a situation is stated as follows in Sutherland On Statutory Construction (1st Ed.), paragraph 87, p. 94:

"The subject in an Act can be no broader than the statement of it in the title. --- It is required not only that an Act shall contain but one subject, but that that subject be expressed in the title. The title, thus made a part of each Act, must agree

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with it by expressing its subject; the title will fix bounds to the purview, for it cannot exceed the title-subject nor be contrary to it. An Act will not be so construed as to extend its operation beyond the purpose expressed in the title. It is not enough that the Act embraces but a single subject or object, and that all its parts are germane; the title must express that subject, and comprehensively enough to include all the provisions in the body of the Act. The unity and compass of the subject must, therefore, always be considered with reference to both title and purview. . . . The title cannot be enlarged by construction when too narrow to cover all the provisions in the enacting part, nor can the purview be contracted by construction to fit the title; but the title, if not delusively general, may be sufficient though more extensive than the purview."

These principles are expressed in Texas Jurisprudence, Vol. 39, paragraph 46, 47, pages 99, 100, 101:

"On the other hand, when the title is too narrow or restrictive to cover the body of the Act, the Act is void, at least as to any part that is not embraced in the title. . . . Whether a title is comprehensive or restricted, expressed in general terms or with particularity, it must be in agreement and conformity and not at variance with the subject of the legislation. In other words, the title and the body of the Act must deal with the same subject-matter and manifest the same legislative intent and purpose. . . .

"Obviously a misleading title does not comply with the constitutional requirements, and the Act of which it is a part or the provisions therein with which it is at variance, is invalid on the ground that its subject is not expressed in the title."

The case of Sutherland v. Board of Trustees, 261 S. W. 489 (error refused) demonstrates the reasoning of the court regarding a misleading title:

"The true test to be applied in cases of this character is: Does the title fairly give notice by its recitals to all persons concerned, of the subject-matter of the Act? If by its title it appears to affect only the residents of particularly designated localities, while the provisions in the body of the

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bill affect other localities or territory, then the title is misleading and unconstitutional, insofar as it affects the unnamed places"

It is apparent, also, that there can be no segregation or striking out of any provision of Article 11371 whereby it may be upheld in part. Moreover, were the body of the Act narrowed to make unlawful the sale in Texas of goods manufactured by convicts out of Texas, in conformity with the caption, the Act so limited would be discriminatory legislation and violative of the Constitution of the United States. *Whitfield v. State*, 56 Sup. Ct. 532, 297 U. S. 431, 80 L. Ed. 778.

Accordingly you are advised that it is the opinion of this department that Article 11371 of the Penal Code of Texas is unconstitutional, whereupon a construction of its provisions becomes unnecessary.

Yours very truly

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By

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APPROVED SEP 9, 1940

Gerald C. Mann

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