



THE ATTORNEY GENERAL
OF TEXAS

AUSTIN 11, TEXAS

GERALD C. MANN

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ATTORNEY GENERAL

Honorable A. A. Miller
County Attorney
Newton County
Newton, Texas

Dear Sir:

Opinion No. 0-2853

Re: The holding of a local option
liquor election on general elec-
tion day, together with related
questions.

Your letter of October 23, 1940, recites that the commissioners' court of your county has called a local option election for the 5th day of November, 1940, which is general election day, to determine whether or not the sale of liquors within the county shall be legalized. In connection therewith, you propound two questions stated by you as follows:

"1. Can a Commissioners Court order an election on the question of the sale of intoxicating liquor in a dry County to be held on General Election day November 5, 1940, at the same time and polling places that will be used for the General Election and supervised by the same election officials?

"2. If the answer to question number one is 'yes', will the Court be required to furnish separate ballot boxes and poll books for the liquor law election or can the liquor law ballots be dropped in the same ballot boxes as the General Election ballots and be listed and counted in the General Election books?"

The statutes regulating local option liquor elections and general elections do not contemplate or make specific provision for the holding of a local option election and a general election at the same time and in the manner described in your letter. Nevertheless, there is no prohibition against such being done.

The courts of Texas have established liberal precedents pertaining to elections and consistently hold that the

statutory regulations are directory rather than mandatory. It is said in Texas Jurisprudence, Vol. 16, para. 5, page 10:

"Thus the Supreme Court has said that the ultimate test of the validity of an election is involved in the question: Did the qualified electors at the time and place designated, acting in concert, either actively or by acquiescence, hold an election and cast their votes in the ballot box; and has this been done in a manner sufficiently conformable to the direction of the law as that the true result can be arrived at with reasonable certainty?"

In Miller vs. Tucker, 119 SW 2d 92, 94, it was held:

"Appellees' contention that the election was rendered invalid because J. Roy Lawson, the presiding officer, was at the same time mayor of Newton is also without merit. There was no showing or contention that the presence of Mr. Lawson as presiding officer in any way improperly affected the result of the election. No objection was made to Mr. Lawson serving. The election was fairly and honestly held and, so far as shown by the record, the votes were correctly counted and returns accurately made. Article 2940, Vernon's Ann. Civ. St., is directory only and an election is not vitiated by the fact that the election judge acting under the color of authority did not possess the required qualifications in the absence of a showing of fraud or misconduct. Hill v. Smithville Independent School Dist., Tex. Civ. App. 239 S.W. 987; Gayle v. Alexander, Tex. Civ. App., 75 S.W. 2d 706."

In Orth vs. Benevides, 125 SW 2d 1081, 1084, there is quoted with approval the following language by the Supreme Court in Fowler vs. State, 68 Tex. 35, 3 SW 255:

"Electors must not be deprived of their votes on account of any technical objection to the manner in which the election has been held, or for any misconduct on the part of its presiding officers, if these have not affected the true result of the election.... This would be to deprive citizens of a great constitutional privilege

for a mere informality, - to place it within the power of a few persons to defeat the right of suffrage altogether. The very means provided to insure a fair and proper election might become an instrument of fraud and dishonesty. Hence, all such irregularities of the officers in the conduct and return of the election as have not prevented the electors from a free and fair exercise of the right of suffrage, and from having their votes fairly estimated for the candidate of their choice, and which the law has not declared shall set aside their ballots, must be treated as informalities not vitiating the election. This principal is to be taken with the qualification that it must be made to appear that the neglect or misconduct of the officers has not, in the particular case, prevented an honest and fair election."

"Adverting to the subject at hand in the light of these well-settled principles, it is observed that Section 33, Article I, of the Texas Liquor Control Act (Article 666-33 V.A.P.C.) stipulates that when the commissioners' court has ordered an election it shall be its duty to order such election to be held at the voting places in the county within a specified time and "that said court shall appoint such officers to hold such election as now required to hold general elections."

It is also to be noted that Section 36, Article I, of this Act, states that "the officers holding such election shall, in all respects not herein specified, conform to the general election laws in force regulating elections.... The provision of the general election laws shall be followed in calling and conducting said election where not inconsistent herewith."

The holding of a local option election on general election day is, of course, calculated to result in more voters participating therein and a consequent greater expression of the public will. The desirability of this is apparent. The expediency and economy incident thereto is likewise manifest. Such is not prohibited and it is our opinion that neither election would be invalid if each is otherwise conducted so as to secure a fair and honest election.

Article 2937, et seq., R.C.S., provides for the appointment by the commissioners' court of election judges who in turn appoint the election clerks. We can perceive no reason why these election officials could not, at the same time, supervise both a local option liquor election and a general election.

We therefore hold in answer to your first question that the commissioners' court may order an election on the question of the sale of intoxicating liquor in a dry county to be held on general election day, November 5, 1940, at the same time and at the same polling places, and that each election may be under the supervision of the same election officials.

With reference to the use of the same ballot boxes, it is to be noted that the statutory plan pertaining to ballot boxes comprises four different boxes with each serving a particular purpose. Ballot box No. 4 receives defectively printed ballots together with defaced and mutilated ballots, and Article 3016, R.C.S., prescribes the purpose of ballot boxes Nos. 1, 2 and 3 as follows:

"At the expiration of one hour after voting has begun, the receiving judges shall deliver ballot box No. 1 to the counting judges, who shall at once deliver in its place ballot box No. 2, which shall again be opened and examined in the presence of all the judges and securely closed and locked; and, until the ballots in box No. 1 have been counted, the receiving judge shall receive and deposit ballots in ballot box No. 2. Ballot box No. 1 shall, on its receipt by the counting judges, be immediately opened and the tickets taken out by one of them, one by one, when he shall read and distinctly announce while the ticket remains in his hand, the name of each candidate voted for thereon, which shall be noted on the tally sheets, and shall then deliver the ballot to the other counting judge, who shall place the same in box No. 3, which shall remain locked and in view until the

counting is finished, when said box shall be returned with the other boxes, locked and sealed, to the county clerk. Ballot boxes Nos. 1 and 2 shall be used by the receiving judge and the counting judge alternately, as above provided, as often as the counting judge has counted and exhausted the ballots in either box."

Ballot box No. 3 therefore is the locked and sealed repository for the ballots after they have been counted and until the ballots have been destroyed in accordance with law or are subjected to examination and inspection in a manner incident to a proceeding contesting the election as specifically provided for by the Legislature.

It is manifest that if both the ballots cast in the local option election and in the general election are deposited in ballot box No. 3 after being counted, the ballots cast in both elections would be subject to an exposure, however casual or incidental it might be, in the event of a contest of either election whereunder the ballots cast in the particular election being contested would be subject to examination and inspection.

In *Carroll vs. State*, 61 SW 2d 1005, the constitutional safeguard surrounding the ballot was recognized and enforced. It was pointed out that ballots cast in an election may be opened and inspected only in a manner, and incident to a proceeding, authorized by the Legislature. The court declared:

"The mandate of the Constitution of this State that the vote be by ballot must be construed as meaning a 'secret ballot'...."

Anything that would relax this protection to the voter, namely, that his ballot in a particular election shall be kept secret, is to be scrupulously avoided. Accordingly, if the use of the same ballot boxes in the holding of a local option election and a general election at the same time would in any way permit a ballot cast in either election to be exposed other than in a manner, and incident to a proceeding, authorized by the Legislature, it should not be done. We therefore regard it as indispensable that the commissioners' court shall at least furnish a separate ballot box No. 3 when it has ordered a local option election to be held at the same time as a general election. We deem it more desirable and appropriate, moreover, that separate ballot boxes Nos. 1, 2 and 4 also be furnished, relating to each election, although

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there is no compelling objection to the use thereof as exists with reference to ballot box No. 3.

It would not appear necessary that separate lists of the voters be furnished but the tally and poll lists of the votes cast in each election, and the returns of each, would necessarily have to be separate and distinct.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By /s/ Zollie C. Steakley

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Assistant

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APPROVED NOV 1, 1940

/s/ Gerald C. Mann

ATTORNEY GENERAL OF TEXAS

APPROVED
Opinion Committee

By BWB
Chairman