



**OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN**

**GERALD C. MANN  
ATTORNEY GENERAL**

**Honorable Woodrow Curtis  
County Attorney  
Frio County  
Pearsall, Texas**

**Dear Sir:**

**Opinion No. O-4129**

**Re: Under the facts set forth can  
the Commissioners' Court order  
the local option election under  
the new petition?**

Your letter of October 14, 1941, requesting an opinion of this department on the above stated question reads in part as follows:

"On August 11th 1941 in compliance with a petition bearing the required number of signatures, petitioning the Commissioners Court of Frio County, to order an election in Justice Precinct No. 1 for the prohibition of the sale of Beer, the Commissioners Court of Frio County ordered a Local Option Election to be held in said Justice Precinct No. 1 of Frio County on August 30th 1941, the issue submitted being the legalizing the sale of Beer, on September 13th 1941, the said Court in canvassing the returns of the said election declared the result to be 2 votes against the sale of Beer.

"At a Special Term of the District Court of the 81st Judicial District, on October 8th 1941, said election was declared to be void, because of form of Ballot, in the Decree of the District Court, the Court did not 'order the proper officer to order another election to be held, etc' as provided in Article 666-40a Penal Code.

"On October 13th 1941, there was filed and presented to the Court an entirely new petition asking for an election in the said Justice Pre-

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inct No. 1 on the issue of prohibiting the sale of beer. The Territory being the same as that covered by the first petition.

"On the hearing of the new petition, October 13th 1941, some of the members of the Court took the position that it was mandatory on the District Court to order the proper officers to order another election, etc., as provided in Art. 666-40a Penal Code, and that the District Judge should hold a Special term of Court and correct his judgment.

"Two of the members of the Court took the position, that as an entirely new petition had been filed the Commissioners Court could disregard all that had happened in the past, the same as if no election had been held, and order the election under the new petition."

Article 666-40a, Vernon's Annotated Penal Code, regarding the contest of local option elections held pursuant to the provisions of the Texas Liquor Control Act, specifically provides in part:

". . . , the District Court of the county in which such election has been held, which shall have original and exclusive jurisdiction of all suits to contest such election, and the proceedings in such contest shall be conducted in the same manner, as now govern the contest of any general election, and said court shall have jurisdiction to try and determine all matters connected with said election, including the petition of such election and all proceedings and orders relating thereto, embracing final count and declaration and publication of the result putting local option into effect, and it shall have authority to determine questions relating to the legality and validity of said election, and to determine whether by the action or want of action on the part of the officers to whom was entrusted the control of such election, such a number of legal voters were denied the privilege of voting, as had they been allowed to vote, might have materially changed the result, and if it shall appear from the evidence that such irregularities existed in bringing about said election or in holding same, as to render the true result of the election impossible to be arrived at, or very doubt-

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ful of ascertaining,, the court shall adjudge such election to be void, and shall order the proper officer to order another election to be held, and shall cause a certified copy of such judgment and order of the court to be delivered to such officer upon whom is devolved by law the duty of ordering such election.

.. ."

We think that the above mentioned provision of Article 666-40a, supra, is mandatory, and that the court which adjudges such election to be void is required to order the proper officer to order another election to be held, and shall cause a certified copy of such judgment and order of the court to be delivered to such officer upon whom is devolved by law the duty of ordering such election.

A most difficult question presented by your inquiry is, whether or not the district court has the legal authority and power to amend or correct his former judgment which omitted the order of the proper officer to order another election to be held as provided by Article 666-40a, supra.

We quote from the case of Flannery, et al v. Klien, 106 S. W. (2d) 837 (writ of error dismissed), as follows:

"While it is the law that the trial court may not, after the term at which the judgment was rendered, correct what is termed a judicial error, 'The power of a court to correct inadvertent judgment entries or irregularities \* \* \* is derived from the constitution which creates the court,' and are not dependent upon legislative authority. 25 Tex. Jur. p. 530, par. 135.

"Although jurisdiction over the subject matter and the parties is generally exhausted after final judgment, yet, in a proper case, the court may make other orders not inconsistent with the adjudication. Thus necessity for protecting persons or property in the control of the court may arise after judgment has been pronounced, and the exercise of jurisdiction over such persons or property may be entirely consistent with the integrity of the final judgment and therefore not affected by the rule which forbids a change in the judgment after expiration of the term. Certainly a court has inherent authority at any

time to direct such process or make such orders as may be necessary to carry its judgment into execution.' 25 Tex. Jur. p. 531, par. 137.

"After stating that the court after the term is closed has no power to revise or modify a judgment on the merits, the Supreme Court as early as *Chambers v. Hodges*, 3 Tex. 517, 529, says: 'This limitation upon the authority of the court, will not prevent the correction of clerical errors or mistakes, or defects of form, or the addition of such clause as may be necessary to carry out the judgment of the court.'

"In *Trammell v. Trammell*, 25 Tex. Supp. 261, the Supreme Court says: 'The court may, after the term, amend its records and judgments so far as to correct merely clerical errors or mistakes, or by adding such omitted clause in the rendition of the judgment as may be necessary to give it effect, when there is anything in the judgment by which to amend.'

"This judgment is on its face indefinite, uncertain, and ambiguous.

"See, also, *Coleman v. Zapp*, 105 Tex. 491, 151 S. W. 1040; *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.* (Tex. Civ. App. ¶ 189 S. W. 784.

"A judgment may properly be amended so as to relieve it of ambiguity.

"Incorrect and erroneous recitals may be corrected, omitted recitals supplied, and improper recitals stricken out, by amendment.' 34 C. J. p. 236.

"See, also, *Freeman on Judgments*, vol. 1, p. 274, par. 142; *Black on Judgments*, vol. 1, p. 178, par. 157."

For the purposes of this opinion, we must assume that the district court intended and did perform the duty imposed upon him by the above mentioned statute, and that the judgment and order actually rendered by the court complied with the provisions of the said Article 666-40a, although the judgment

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and order as actually written did not contain such provision. If this be true, it is our opinion that the district court is authorized to correct the judgment as actually written to the extent that it will conform with the judgment and order actually rendered. If this be done, the Commissioners' Court must order the election in compliance with the order of the court. (See the case of Smith v. Blunt, 127 S. W. (2d) 325.) However, on the other hand, if the court had no intention and the judgment and order of the court did not comply with the provisions of Article 666-40a, supra, the judgment of the court cannot now be corrected to conform with the provisions of said statute.

Apparently there was no appeal from the judgment of the district court and the term of the court at which such judgment was rendered has terminated. If the judgment and order of the court cannot be amended or corrected as above mentioned and the judgment of the court holding the election void is final, it is our opinion that the Commissioners' Court can legally order an election in compliance with the new petition presented to the court.

Trusting that the foregoing fully answers your inquiry, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

APPROVED OCT 27, 1941

FIRST  
ATTORNEY GENERAL

By

Ardell Williams  
Assistant

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