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LOCAL OPTION ELECTION—PROCEDURE IN §4305.14, R. C.
MANDATORY.

SYLLABUS:

1. In any special election held pursuant to the provisions of Section 4301.35, Revised Code, it is necessary to submit each and all of the questions set out in such section to the electors of the district involved.

2. The procedure for a local option election pertaining to the sale of "beer" under a D-1 permit is contained in Section 4305.15, Revised Code.

3. A local option election on the question of the sale of malt liquors or malt beverages, as defined in Section 4301.01, Revised Code, and included in the definition of "intoxicating liquor" found in that section, must be conducted as provided in Section 4301.35, Revised Code, such question to be resolved by the "yes" or "no" vote on question (A) as stated in that section; and a majority vote of "yes" on questions (A), (B), and (C) of such section would authorize the issuance of unrestricted D-2 permits within the district concerned.

Columbus, Ohio, May 29, 1959

Hon. Hubert D. Lappen, Prosecuting Attorney
Hocking Count, Logan, Ohio

Dear Sir :

Your request for my opinion reads as follows :

“The Board of Elections of Hocking County, Ohio, has asked me to submit to you the following question :

‘Where the privilege of local option is sought to be exercised in respect to beverages dispensed under D-1 and D-2 permits only, by the electors of a township exclusive of any municipal corporation or part thereof therein located, in which a majority of the electors voting thereon at the 1933 election, voted against the repeal of Article XV, Section 9 of the constitution, is it necessary to submit to such electors each and all of the questions set out in Section 4301.35 of the Revised Code of Ohio?’

“I shall be pleased to have your answer to this question at your earliest convenience.”

Section 4303.29, Revised Code, reads in part :

“* * * No D-3, D-4, or D-5 permit shall be issued in any municipal corporation, or in any township, exclusive of any municipal corporation or part thereof, in which at the November, 1933 election a majority of the electors voting thereon voted against the repeal of Section 9 of Article XV, Ohio Constitution, unless the sale of spirituous liquor by the glass is authorized by a majority vote of the electors voting on the question in such municipal corporation or township or part thereof, in this section designated as the liquor control district, at an election held pursuant to this section or by a majority vote of the electors of the liquor control district voting on question (D) at a special local option election held in such district pursuant to section 4301.35 of the Revised Code.* * *”

It is clear from this provision that since the 1933 vote was *against* repeal of Section 9 of Article XV, Ohio Constitution, the proposed local option election so far as D-3, D-4 or D-5 permits are involved, *must* be conducted as provided in Section 4301.35, Revised Code.

Section 4301.35, Revised Code, to which reference is thus made, and to which you also refer, reads as follows :

“A special election shall be held in the district as defined in section 4301.32 of the Revised Code at the time fixed as provided in section 4301.33 of the Revised Code. In cases in which the district does not constitute a political subdivision, the expenses of holding such election, otherwise chargeable to a political subdivision, shall be charged to the municipal corporation or township of which the district is a part.

“At such election all of the following questions shall be submitted to the electors of the district:

“(A) ‘Shall the sale of any intoxicating liquor be permitted in.....?’

“(B) ‘Shall the sale of wine by the package for consumption off the premises where sold be permitted in.....?’

“(C) ‘Shall the sale of wine for consumption on and off the premises where sold be permitted in.....?’

“(D) ‘Shall the sale of spirituous liquors by the glass be permitted in.....?’

“(E) ‘Shall state liquor stores for the sale of spirituous liquor by the package, for consumption off the premises where sold, be permitted in.....?’

“The board of elections to which the petition is presented shall furnish printed ballots at such election in accordance with section 3505.06 of the Revised Code, except that if such special election is held at the same time at which a general election is held, separate ballots shall be used therefor. *All the foregoing questions shall be set forth on each ballot* and the board shall insert in each question the name or an accurate description of the district in which the election is to be held. Votes shall be cast as provided in section 3505.06 of the Revised Code.”

(Emphasis added)

It appears clear that in a special election held under Section 4301.35, *supra*, all of the questions contained in division (A), (B), (C), (D), and (E) of said section must be submitted to the electors of the district. The words “all of the following questions shall be submitted to the electors” and “all the foregoing questions shall be set forth on each ballot”, noted above, appear to be definite in this regard.

On a related question, one of my predecessors in office had occasion to rule on identical language to that mentioned above, then contained in General Code Section 6064-33. The syllabus in that case appears in Opinion No. 6457, Opinions of the Attorney General for 1943, p. 569, and reads as follows:

“Where the privilege of local option, with respect to the sale of spirituous liquor, is sought to be exercised by the electors of a township exclusive of any municipal corporation or part thereof therein located, in which a majority of the electors voting thereon at the November, 1933, election, voted for the repeal of then section 9 of the Article XV of the Constitution of Ohio, it is necessary to submit to such electors each and all of the questions set out in section 6064-33 of the General Code; and consequently the board of election of the county wherein said district is located is without authority in law to submit to the electors of such district at the next general election the sole question of whether the sale of spirituous liquor by the glass shall be permitted therein, even though a petition bearing the number of signatures required by section 6064-32 of the General Code is filed with it sixty days before such election.”

The 1943 opinion dealt with the electors of a township exclusive of any municipal corporation or part thereof, the same as in the instant case. The cases differ, however, in that the 1943 question dealt with a township which had voted *for* repeal of Article XV, section 9 of the Ohio Constitution in 1933 while your question deals with a township which voted *against* such repeal in 1933. I, however, can see nothing in Section 4301.35, *supra*, which would cause the submission of the five questions to be dependent on the outcome of the 1933 constitutional vote. Thus, it is my opinion that in *any* election held pursuant to Section 4301.35, *supra*, it is necessary to submit to the electors each and all of the questions set out in said section.

In reviewing your request, the question has arisen as to whether an election under Section 4301.35, *supra*, is appropriate on the question of D-1 and D-2 permits, alone, as none of the five questions contained in said section appear to deal specifically with such permits.

Section 4303.13, Revised Code, defining a D-1 permit, reads as follows:

“Permit D-1 may be issued to the owner or operator of a hotel or restaurant licensed pursuant to section 3731.01 of the Revised Code, or of a club, amusement park, drugstore, lunch stand, boat, or vessel, to sell beer at retail either in glass or container, for consumption on the premises where sold; and to sell beer at retail in other receptacles or in original packages containing not less than one container and in total quantities at each sale of not more than two hundred eighty-eight fluid ounces and not for consumption on the premises where sold. The fee for this permit is one hundred dollars for each location, boat or vessel.”

For the purpose of Section 4303.13, *supra*, “beer” is defined as follows:

“* * * all malt beverages containing one-half of one per cent or more of alcohol by weight but not more than three and two-tenths per cent of alcohol by weight.” (See Sections 4301.01 and 4303.01, Revised Code).

“Intoxicating liquor” as used in Section 4301.35, *supra*, is defined as follows:

“(1) ‘Intoxicating liquor’ and ‘liquor’ include all liquids and compounds containing more than three and two-tenths per cent of alcohol by weight which are fit to use for beverage purposes, from whatever source and by whatever process produced, by whatever name called and whether or not the same are medicated, proprietary, or patented. Such phrase includes alcohol and all solids and confections which contain any alcohol.* * *” (See Section 4301.01, Revised Code).

Thus, “beer”, not being an intoxicating liquor, would not be included within the purview of Section 4301.35, *supra*. The procedure for a local option election controlling the sale of “beer” and the privileges under a D-1 permit is, however, contained in Section 4305.14, Revised Code, which reads in pertinent part:

“* * * The question of the sale of beer by holders of C or D permits may be presented to the qualified electors of a municipal corporation, a residential district of a municipal corporation, a township in which no municipal corporation exists, of to the qualified electors of that part of a township outside of a municipal corporation, for their adoption or rejection. * * *”

Section 4303.14, Revised Code, relating to D-2 permits, provides that a D-2 permit holder may:

“* * * sell ale, stout, and other malt liquors containing more than three and two-tenths per cent of alcohol by weight and not exceeding seven per cent of alcohol by weight, wine, and prepared and bottled cocktails, cordials, and other mixed beverages manufactured and distributed by holders of A-4 and B-4 permits at retail, either in glass or container, for consumption on the premises where sold, only at tables where meals are served.* * *”

While none of the five questions to be submitted under Section 4301.35, *supra*, appear to relate directly to “ale, stout, and other malt liquors”, questions (B) and (C) relate to the sale of wine which may be

sold under a D-2 permit. Also, Section 4301.36, Revised Code, which deals with the effect of an election under Section 4301.35, *supra*, provides in pertinent part:

“If a majority of the electors voting on the question set forth in section 4301.35 of the Revised Code in a district *vote ‘no’ on question (A), no C or D permit holder shall sell intoxicating liquor of any kind within the district concerned, * * **”
(Emphasis added).

Since intoxicating liquor is sold under a D-2 permit, this provision would be applicable to such a permit but not to a D-1 permit.

The second paragraph of Section 4301.36, Revised Code, provides:

“* * * If a majority of the electors voting on said questions in such district vote ‘no’ on question (A) or (E), all state liquor stores in such district shall be forthwith closed and, during the period such vote is in effect, as defined in section 4301.37 of the Revised Code, no state liquor store shall be opened therein. *If a majority of the electors voting on said questions in such district vote ‘yes’ on question (A) and ‘no’ on any one or more of questions (B), (C), or (D), no C or D permit holders shall sell intoxicating liquor of the kind specified in such one or more of the last named questions, in the manner therein specified, within the district concerned, during the period such election is in effect as defined in section 4301.37 of the Revised Code.*” (Emphasis added).

It thus appears that if in an election under Section 4301.35, Revised Code, there is a majority vote of “yes” on question (A) then the sale of malt liquors and malt beverages, as defined in Section 4301.01, Revised Code, by a D-2 permit holder would be permissible even though in such election all other questions thus submitted for decision should receive a negative majority vote; and such a “yes” vote combined with a “yes” majority vote on question (B) and (C) would permit issuance and enjoyment of an unrestricted D-2 permit. The validity of a restricted D-2 permit is demonstrated by Section 4301.39, Revised Code, which, referring to an election held pursuant to Section 4301.35, *supra*, reads in part:

“* * * If, as the result of such election, the use of a permit is made *wholly* unlawful, the department shall forthwith cancel such permit.* * *” (Emphasis added).

Accordingly, it is my opinion and you are advised:

1. In any special election held pursuant to the provisions of Section 4301.35, Revised Code, it is necessary to submit each and all of the questions set out in such section to the electors of the district involved.

2. The procedure for a local option election pertaining to the sale of "beer" under a D-1 permit is contained in Section 4305.14, Revised Code.

3. A local option election on the question of the sale of malt liquors or malt beverages, as defined in Section 4301.01, Revised Code, and included in the definition of "intoxicating liquor" found in that section, must be conducted as provided in Section 4301.35, Revised Code, such question to be resolved by the "yes" and "no" vote on question (A) as stated in that section ; and a majority vote of "yes" on questions (A), (B), and (C) of such section would authorize the issuance of unrestricted D-2 permits within the district concerned.

Respectfully,

MARK MCELROY

Attorney General