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“ELECTION DAY”—§4301.22 (D) RC—REFERS TO TYPES OF ELECTION IN § 3501.01 RC—TIMES AT WHICH THE POLLS ARE IN FACT OPEN RATHER THAN CALENDAR DAYS—SALE OF INTOXICATING BEVERAGES PERMITTED IN TOWNSHIPS AND PRECINCTS WHERE POLLS ARE IN FACT NOT OPEN AND NO ELECTION HELD DUE TO THE LACK OF CONTEST IN SUCH ELECTION.

SYLLABUS:

“Election day”, as used in Section 4301.22 (D), Revised Code, prohibiting the sale of intoxicating liquors on certain days, refers only to those days on which elections are in fact held, and if the polls are not open, because there is no contest in a particular township or precinct, the sale of intoxicating liquor is not prohibited.

Columbus, Ohio, October 30, 1957

Hon. Fred A. Leaders, Acting Director
Department of Liquor Control, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

“The Department of Liquor Control has a question as a result of this past primary election on May 7, 1957, concerning

the correct interpretation and application of Section 4301.22 (D) of the Revised Code, in the following situation :

“Are sales prohibited in townships and precincts where the booths were not open and no election was held because, in fact, there was no contest in that particular area in accordance with the statutes providing for such?

“An opinion on this subject from your office would be greatly appreciated by the Department.”

Section 4301.22 (D), Revised Code, to which you have referred above reads in pertinent part as follows :

“No sales of intoxicating liquor shall be made after two-thirty a. m. on Sunday or on election day between the hours of six a. m. and seven-thirty p.m.”

The intent of this section is self-evident and needs no elaboration, for we all recognize that in an earlier era there were many abuses around the polling places due to the intemperate use of liquor. As a matter of common sense it would seem equally apparent that if no election in fact were held, and there was no need for voters to go to the polls, this section would serve no purpose whatsoever.

The above statute prohibits the sale of intoxicating liquor on “election day”. It is significant that nowhere in the statutes is the term “election day” defined; however, Section 3501.01, Revised Code, sets forth the following types of elections :

“(A) ‘General election’ means *any* election held on the first Monday in November.

“(B) ‘Regular municipal election’ means *the* election held on the first Tuesday after the first Monday in November in odd numbered years.

“(C) ‘Regular state election’ means *the* election held on the first Tuesday after the first Monday in November in even numbered years.

“(D) ‘Special election’ means *any* election other than the elections required to be regularly held on the day of a general or primary election, provided that a special election may also be held on the day of a general or primary election.

“(E) ‘Primary’ or ‘primary election’ means *an* election held for the purpose of nominating persons as candidates of political parties for election to offices, and for the purpose of

electing persons as members of the controlling committees of political parties. Primary elections shall be held on the first Tuesday after the first Monday in May of each year. * * *

(Emphasis added.)

In all five paragraphs of this section the "first Tuesday after the first Monday in November" and the "first Tuesday after the first Monday in May" are not denominated election days *per se*, but they are only such if "any election," "the election," or "an election" is in fact held on that day. Thus, if there is no issue before the electorate, there is no necessity or requirement to hold an election on that day. Parenthetically, the reason for prohibiting intoxicating liquor on election day would also seem to disappear if in reality no election is held. This construction of the statute is further suggested by the express provisions of the statutes which eliminate the legal necessity for primary election in certain situations. Thus, Section 3513.01, Revised Code, provides in part:

"* * * Primary elections shall not be held for the nomination of candidates for election of officers of any township, or any municipal corporation having a population of less than two thousand persons, as ascertained by the next preceding federal census, unless a majority of the electors of any such township or municipal corporation, as determined by the total number of votes cast in such township or municipal corporation for the office of governor at the next preceding regular state election, files with the board of elections of the county within which such township or municipal corporation is located, or within which the major portion of the population thereof as ascertained by the next preceding federal census, is located, if the municipal corporation is situated in more than one county, not later than one hundred five days before the day of a primary election, a petition signed by such electors asking that candidates for election as officers of such township or municipal corporation be nominated as candidates of political parties, in which event primary elections shall be held in such township or municipal corporation for the purpose of nominating persons as candidates of political parties for election as officers of such township or municipal corporation to be voted for at the next succeeding regular municipal election."

In Section 3513.02, Revised Code, it is provided:

"If, in any odd-numbered year, no valid declaration of candidacy is filed for nomination as a candidate of a political party for election to any of the offices to be voted for at the general election to be held in such year, or if the number of persons filing such declarations of candidacy for nominations as candi-

dates of one political party for election to such office does not exceed, as to any such office, the number of candidates which such political party is entitled to nominate as its candidates for election to such office, then no primary election shall be held for the purpose of nominating candidates of such party for election to offices to be voted for at such general election and no primary ballots shall be provided for such party. If, however, the only office for which there are more valid declarations of candidacy filed than the number to be nominated by a political party, is the office of councilman in a ward, a primary election shall be held for such party only in the ward or wards in which there is a contest, and only the names of the candidates for the office of councilman in such ward shall appear on the primary ballot of such political party."

Returning to your question, it would seem that if there is no actual election on one of the days on which an election may be held, it is not an "election day" within the meaning of Section 4301.22 (D), *supra*. In the few reported cases on this subject, in which the question of an election in fact was at issue, the Texas courts held that if an election was only voidable, for a mere irregularity in the publishing of notice, it cannot be urged as a defense to keeping a saloon open on election day; but if such election is void it is no election in fact, and, therefore, the statute does not apply. *Saddler v. State*, 48 Tex. Crim. Rep. 507, 89 S. W. 974, 122 Am. St. Rep. 770; *Neimann v. State*, 74 S. W. Rep., 558; *Miller v. State*, 69 S. W. Rep., 522; *Renter v. State*, 67 S. W. Rep., 505; *Cooper v. State*, 26 Tex. Crim. App., 575; *Janks v. State*, 29 Tex. Crim. App., 233; *Geib v. State*, 31 Tex. Crim. Rep., 514.

It is, therefore, my opinion in specific answer to your question that "election day" as used in Section 4301.22 (D), *supra*, refers to one of the five types of elections authorized by Section 3501.01, *supra*, which are elections in fact, or times at which the polls are open, rather than certain calendar days on which elections may be held. From this I conclude that in townships and precincts where the booths are not in fact open and no elections are actually held, because there are no contests in those particular areas, the sale of intoxicating liquor is not prohibited.

Respectfully,
WILLIAM SAXBE
Attorney General