

1153

ELECTION: LOCAL OPTION

1. CONDITION PRECEDENT TO ELECTION HELD UNDER TERMS OF §4303.29 RC—MAJORITY OF ELECTORS VOTING AGAINST REPEAL OF SEC. 9, ARTICLE XV, OHIO CONSTITUTION—NOV., 1933.
2. CONDITION PRECEDENT CANNOT BE MET BY A MUNICIPALITY ORGANIZED SUBSEQUENT TO SUCH DATE OF ELECTION—NOV., 1933.

SYLLABUS:

1. A majority of the electors in a municipality voting against the repeal of Section 9 of Article XV, Ohio Constitution, in the November, 1933, election, is a condition precedent to a subsequent election under the provisions of Section 4303.29, Revised Code, on the sole question of the sale of liquor by the glass in that municipality.

2. Where a municipality is incorporated subsequent to November, 1933, the condition precedent to an election on the sole question of the sale of liquor by the glass in that municipality, pursuant to Section 4303.29, Revised Code, is impossible of fulfillment.

Columbus, Ohio, October 11, 1957

Hon. Ted W. Brown, Secretary of State
Columbus, Ohio

Dear Sir:

Your request for my opinion reads in part as follows:

“We have received a request from the Cuyahoga County Board of elections for our opinion concerning the legality of an election to decide whether liquor shall be sold by the glass in the Village of Woodmere. Inasmuch as any ruling on this question would have state-wide application, we respectfully request your opinion on the following question:

“May the question of allowing spirituous liquor to be sold by the glass in the Village of Woodmere, be placed on the ballot for the general election to be held in November, 1957, pursuant to Section 4303.29 Revised Code?

“At the general election held in November, 1956, the Village

of Woodmere voted on questions (A), (B), (C), (D), and (E) pursuant to Section 4301.35, Revised Code. At this election the questions (A) and (E) received a majority of 'yes' votes. The questions (B), (C), and (D) received a majority of 'no' votes.

"In view of the above facts and the law pertaining thereto, may the sole question of allowing spirituous liquor to be sold by the glass be submitted for election in November, 1957, pursuant to paragraphs six and seven of Revised Code, Section 4303.29.
* * *

Stated briefly, you ask whether or not at the next general election the single question of sale of spirituous liquor by the glass in the Village of Woodmere may be put to a vote pursuant to Section 4303.29, Revised Code, rather than the usual five questions found in the local option statutes. Section 4301.32, *et seq.*, Revised Code. The relevant portions of Section 4303.29, *supra*, read as follows:

"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.

"Upon the petition of fifteen per cent of the number of voters voting for governor at the last election in any such liquor control district, filed with the board of elections of the county in which such political subdivision or part thereof is located sixty days before a general election, such board shall prepare ballots and hold *an election at such general election upon the question of allowing spirituous liquor to be sold by the glass in such liquor control district*. Such ballots shall be approved in form by the secretary of state. The results of such election shall be certified by the board to the secretary of state, who shall certify the same to the department. * * *." (Emphasis added.)

From the wording of this section, it is apparant that the legislature did not intend that every area in the state would be eligible for liquor permits upon the repeal of constitutional prohibition, Section 9, of Article XV, Ohio Constitution, but only those areas voting for repeal. Opinion No.

4937, Opinions of the Attorney General for 1935, at page 1531; Opinion No. 6457, Opinions of the Attorney General for 1943 at page 569; Informal Opinion No. 430, Informal Opinions of the Attorney General for 1948, at page 323. Thus there is a statutory inhibition against the issuance of any D-3, D-4 or D-5 permit in those liquor control districts which voted against repeal. This status, however, may be changed either by an election on the single question of the sale of spirituous liquor by the glass, pursuant to Section 4303.29, *supra*, or by the usual method of presenting on the ballot the five local option questions of Section 4301.35, Revised Code, which read as follows:

* * *

“(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?’

* * *

“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. * * *”

There is an important distinction to be made between an election on the single question of the sale of spirituous liquor by the glass, Section 4303.29, *supra*, and a local option election, Section 4301.35, *supra*. Whereas any municipal corporation or a residence district, consisting of two or more contiguous precincts, or a township exclusive of any municipal corporation located therein, may hold a local option election, Section 4301.32, *supra*, only those municipal corporations or townships, exclusive of any municipal corporation therein, which voted *against* repeal in November, 1933, may hold an election on the sole question of the sale of liquor by the glass, Section 4303.29, *supra*. Also, at this point, it might well be noted that a local option election may only be held, with few exceptions not herein applicable, every four years. Sections 4301.37 and 4301.38, Revised Code.

Upon the facts originally stated it would be impossible to answer your question; however, your office has supplied me with the additional data that the Village of Woodmere was incorporated on November 18, 1944, from the unincorporated area of Orange Township, which, parenthetically, voted 74 to 31 for the repeal of Section 9, Article XV, *supra*.

Testing these facts by the principles of law discussed above, it is at once obvious that inasmuch as the Village of Woodmere was not in existence in November, 1933, to have voted against repeal, the enabling condition precedent to an election under Section 4303.29, *supra*, on the sale of liquor by the glass, is impossible of fulfillment. Similarly, since question (D) at the 1956 local option election received a majority of "no" votes it is impossible to bring this sole question again before the electorate pursuant to Section 4301.38, *supra*.

Although the point is academic here, I am not unmindful of the fact that if Orange Township had voted against repeal in November, 1933, it could be argued that the Village of Woodmere acceded to the rights pertaining to the township. This argument might derive some support, at first glance, from certain rulings of this office on annexation, in which it was held that the "wet-dry" character of the annexed territory is not changed by annexation to a municipal corporation of opposite status. Opinion No. 1882, Opinions of the Attorney General for 1950, page 354; Opinion No. 597, Opinions of the Attorney General for 1957. See also *In re Davis & Foote Local Option*, 4 O. N. P. (N. S.), 417; *Browning v. Westropp*, 12 Ohio C. C. (N. S.), 456; 31 Ohio C. C., 394. The theory on which these cases and opinions proceeded is that local option of which the inhibition found in Section 4303.29, *supra*, is a form is the right of the people of a political or governmental unit to determine their own status and the correlative right to change it according to the provisions of law. Therefore, a status once achieved is usually considered to attach to the territory which was originally affected by the local option vote, and to remain operative unless lawfully changed, notwithstanding changes for other purposes in the designation, boundaries, or organization of the unit. Cf. Opinion No. 4642, Opinions of the Attorney General for 1954, page 648. In view of this it is the general rule that a designation, division, reassignment, reorganization, increase, diminution or abolition of a political or governmental unit, the people of which have adopted a local option status does not affect such status in any of the territory originally bound by the election.

While it is true that a part of a township which is subsequently incorporated into a municipality will remain "dry", or free from liquor permits if the township voted against repeal in November, 1933, it does not follow that the newly incorporated territory may hold an election on the single question of sale of spirituous liquor pursuant to Section 4303.29, *supra*, for the language of the legislature conditionally grants this right only to a " * * * municipal corporation, * * * township * * * in which at the November, 1933, election a majority of the electors voting thereon voted against repeal of Section 9 of Article XV, Ohio Constitution, * * *." Quite obviously, a subsequently formed municipal corporation cannot bring itself within this condition, for the *municipal corporation or township* is the liquor control district which is given their special local option right under Section 4303.29, *supra*, rather than the *part of each*. State *ex rel.* Olympia Athletic Club v. Department of Liquor Control, 129 Ohio St., 140. It is further noted that any other conclusion would lead to a wholly unworkable situation when a village is subsequently formed from two townships, one of which voted for repeal and the other against.

In specific answer to your inquiry, therefore, it is my view that the sole question of the sale of spirituous liquor by the glass may not be submitted to the electorate of Woodmere Village in November, 1957, pursuant to Section 4303.29, *supra*, for the reason that a majority vote against the repeal of constitutional prohibition in November, 1933, in that municipality, is a condition precedent to such an election, and since the Village of Woodmere was not incorporated at such time the statute authorizing such election by its own terms is not applicable.

Accordingly, it is my opinion that:

1. A majority of the electors in a municipality voting against the repeal of Section 9 of Article XV, Ohio Constitution, in the November, 1933, election, is a condition precedent to a subsequent election under the provisions of Section 4303.29, Revised Code, on the sole question of the sale of liquor by the glass in that municipality.

2. Where a municipality is incorporated subsequent to November, 1933, the condition precedent to an election on the sole question of the sale of liquor by the glass in that municipality, pursuant to Section 4303.29, Revised Code, is impossible of fulfillment.

Respectfully,
WILLIAM SANBE
Attorney General