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**Houchins v. Plainos**, 130 Tex. 413, 110 S.W.2d 549, 1937 Tex. LEXIS 295 (Tex. 1937)

Restrictions: *Analysis (ALLNEGATIVE)*

FOCUS(TM) Terms: *No FOCUS terms*

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Citing Ref. Signal Legend:

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- Ⓢ {Warning} -- Negative case treatment is indicated for statute
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- Ⓐ {Analysis} -- Citing Refs. With Analysis Available
- Ⓜ {Cited} -- Citation information available

**PRIOR HISTORY** ( 1 citing reference )

1. *Plainos v. Houchins*, 106 S.W.2d 745, 1937 Tex. App. LEXIS 588 (Tex. Civ. App. 1937) ●  
*Reversed by (CITATION YOU ENTERED):*  
*Houchins v. Plainos*, 130 Tex. 413, 110 S.W.2d 549, 1937 Tex. LEXIS 295 (Tex. 1937) ⚠

**CITING DECISIONS** ( 1 citing decision )

**TEXAS COURT OF CIVIL APPEALS**

2. **Distinguished by:**  
*Myers v. Martinez*, 320 S.W.2d 862, 1959 Tex. App. LEXIS 1868 (Tex. Civ. App. San Antonio 1959) ●  
**LexisNexis Headnotes HN3**  
 320 S.W.2d 862 p.865

LEXSEE



Caution  
As of: May 05, 2009

**O. W. Houchins v. John Plainos and Savo Plainos**

No. 7304

Supreme Court of Texas

130 Tex. 413; 110 S.W.2d 549; 1937 Tex. LEXIS 295

November 24, 1937, Decided

**SUBSEQUENT HISTORY:** [\*\*\*1] Rehearing Overruled December 29, 1937.

**PRIOR HISTORY:** Error to the Court of Civil Appeals for the First District, in an appeal from Harris County.

**DISPOSITION:** Judgment of the Court of Civil Appeals is reversed and that of the district court is affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant Attorney General of Texas sought review of a judgment from the Galveston Court of Civil Appeals (Texas), which reversed a trial court's judgment, dissolving a temporary injunction prohibiting appellee liquor licensees from selling vinous or malt beverages in a suit brought by the Attorney General under Tex. Const. art. XVI, § 20 (amended 1891).

**OVERVIEW:** The licensees were granted a state liquor license to sell liquor and malt beverages in a city. The voters of the city later elected to be a "dry" area. Subsequent to the election, the city voters elected to dissolve the municipality, and the area was annexed to the city of Houston, which was not a "dry" area. The Attorney General filed suit, seeking a temporary injunction prohibiting the licensees from selling liquor and beer. The trial court issued the temporary injunction, which the appellate court later dissolved. Upon further review, the court reversed the appellate court and affirmed the trial court's judgment. The court held that under the provisions of Tex. Const. art. XVI, § 20 (amended 1891), once an area was voted "dry" it could not become "wet" without an

election for that specific purpose. The court determined that the fact that the area was annexed by a "wet" city did not have the effect of making the area "wet" again because no election for that purpose had been held. The court found that § 20, with its many amendments, had the effect of keeping "dry" areas dry unless specifically changed by the voters of the area.

**OUTCOME:** The court reversed the appellate court and affirmed the trial court's judgment.

**LexisNexis(R) Headnotes**

*Constitutional Law > Prohibition  
Criminal Law & Procedure > Criminal Offenses > Intoxicating Liquors > Distribution & Sale > General Overview*

*Governments > Local Governments > Elections  
[HN1]Tex. Const. art. XVI, § 20 (amended 1891) read as follows: The legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice's precinct, town or city, by a majority vote, from time to time, may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits.*

*Criminal Law & Procedure > Criminal Offenses > Intoxicating Liquors > Distribution & Sale > General Overview*

*Criminal Law & Procedure > Criminal Offenses > Intoxicating Liquors > Manufacture > General Overview  
Governments > Local Governments > Elections*

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[HN2]Tex. Const. art. XVI, § 20 (amended 1891) reads as follows: The open saloon shall be and is hereby prohibited. The legislature shall have the power, and it shall be its duty to define the term "open saloon" and enact laws against such. Subject to the foregoing, the legislature shall have the power to regulate the manufacture, sale, possession, and transportation of intoxicating liquors, including the power to establish a state monopoly on the sale of distilled liquors. The legislature shall enact a law or laws whereby the qualified voters of any county, justice's precinct or incorporated town or city, may, by a majority vote of those voting, determine from time to time whether the sale of intoxicating liquors for beverage purposes shall be prohibited or legalized within the prescribed limits, and such laws shall contain provisions for voting on the sale of intoxicating liquors of various types and various alcoholic content.

*Constitutional Law > Prohibition*

*Criminal Law & Procedure > Criminal Offenses > Intoxicating Liquors > Distribution & Sale > General Overview*

*Governments > Local Governments > Elections*

[HN3]Tex. Const. art. XVI, § 20 (amended 1891) reads as follows: In all counties, justice's precincts or incorporated towns or cities wherein the sale of intoxicating liquors had been prohibited by local option elections held under the laws of the State of Texas and in force at the time of the taking effect of § 20, it shall continue to be unlawful to manufacture, sell, barter or exchange in any such county, justice's precinct or incorporated town or city, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication or any other intoxicants whatsoever, for beverage purposes, unless and until a majority of the qualified voters in such county or political subdivision thereof voting in an election held for such purpose shall determine such to be lawful; provided that this subsection shall not prohibit the sale of alcoholic beverages containing not more than 3.2 percent alcohol by weight in cities, counties or political subdivisions thereof in which the qualified voters have voted to legalize such sale under the provisions of ch. 116, 43rd Leg.

*Governments > Legislation > Effect & Operation > General Overview*

[HN4]In Texas where a power is expressly given by the Texas Constitution, and the means by which, or the manner in which it is to be exercised, is prescribed, such means or manner is exclusive of all others.

*Governments > Legislation > Interpretation*

[HN5]It is the intention of a legislative act that governs, and statutes are often given an interpretation or construction not in technical accord with the literal words used. Courts will not follow the letter of a statute where to do so would violate the purpose of the act, and lead to a conclusion contrary to its evident intent. Courts should consider the history of the times out of which a constitutional provisions grew, the evils intended to be remedied, and the good sought to be accomplished in interpreting constitutional provisions.

**HEADNOTES**

**Local Option -- Elections.**

A territory which has adopted local option within its limits remains dry until voted wet at a subsequent election held for that purpose in and for the same identical area, and the change or even the abolition of the political or corporate entity which comprised such area does not alter this fact or rule of law.

**Municipal Corporations -- Local Option.**

Where a town has voted local option within its limits a subsequent election to abolish its corporate existence and become a part of another city which is not local option does not change its status regarding local option, as having once voted the territory dry it can not be changed by merely voting upon a collateral matter.

**Constitution -- Grant of Power.**

Where the Constitution expressly grants a power and prescribes the means by which, or the manner in which, it may be exercised, such means or manner is exclusive of all others.

**[\*\*\*2] Constitution -- Prohibition -- Amendment.**

The effect of the amendment to our State Constitution in 1933, regarding prohibition, was to make the area of any county, justice's precinct, town or city, which was dry prior to and at the time the entire State became dry under a previous amendment to the Constitution, to continue to remain dry, but with the privilege of becoming wet as to vinous and malt liquor of not more than three and two-tenths per cent. alcoholic content by so voting at an election held for that purpose in the exact territory that had originally voted dry.

**Constitution -- Prohibition -- Statutory Construction -- Words and Phrases.**

The phrase "any political subdivision thereof," as used in the prohibition amendment to the Constitution, was intended to include towns and cities, as courts will not follow the letter of a statute where to do so would

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1937 Tex. LEXIS 295, \*\*\*

violate the purpose of the act, and lead to a conclusion contrary to that intended.

#### Local Option.

Under the constitutional amendment of 1935, the entire State became wet except as to those areas which were dry at the time said amendment became effective. Those areas, however, had the right [\*\*\*3] to become wet by so voting at an election legally ordered and held, in the formerly dry territory, under the local option statutes.

#### Municipal Corporations -- Local Option -- Elections.

A city which had voted local option but later ceased to exist as a municipal corporation and became a portion of another city, still existed for the purpose of holding a local option election to vote on the question of making it lawful to sell intoxicating liquors within the area formerly voted dry.

#### SYLLABUS

Upon the affidavit of O. W. Houchins, William McCraw, Attorney General for the State of Texas, under the authority conferred by the "Texas Liquor Control Act," instituted suit against John and Savo Plainos, asking that a temporary injunction be issued restraining them from selling liquor containing in excess of one-half of one per cent. of alcohol in the area of the City of Houston known as Houston Heights, and upon final hearing that such injunction be made permanent. It was alleged that such area constituted a prohibited district by virtue of a valid local option election, which was in full force and effect at the time. The temporary injunction was issued as prayed for. This judgment [\*\*\*4] was reversed and the injunction dissolved by the Court of Civil Appeals (106 S. W. (2d) 745) and Houchins has brought error to the Supreme Court.

**COUNSEL:** *William McCraw, Attorney General, Leon O. Moses, Vernon Coe, Victor Bouldin, Sam Lane, M. C. Martin, Assistants Attorney General, Lloyd Davidson, Jr., Legal Investigator, and Spurgeon Bell, Assistant District Attorney, both of Houston, for plaintiff in error.*

Where a district has legally adopted local option, a subsequent election, having for its purpose the consolidation of said district with a city which is not local option, does not have the effect of changing the status of the district from local option to "wet." *Smith v. City of Port Arthur*, 62 S. W. (2d) 385; *Boone v. State*, 10 Texas Crim. App. 418; *Cohen v. City of Houston*, 205 S. W. 757; *City of Houston v. City of Magnolia Par*, 115 Texas 101, 276 S. W. 685.

*Sidney Benbow, Richard Burns, Andrews, Kelley, Kurth & Campbell*, all of Houston, for defendants in error.

The constitutional amendment adopted in 1919 repealed all local option laws, and the amendment of 1935, known as the "wet amendment," did not revive or resurrect the former local option status [\*\*\*5] of any of the political subdivisions of the State, but only designated as "dry" those counties, justice's precincts and incorporated towns or cities wherein local option was in force when the amendment of 1919 was adopted, and the particular territory herein involved, not being in existence as a city or town, at that time, having been incorporated in the City of Houston, it could not be included in the designation. *Teal v. State*, 90 S. W. (2d) 651; *Ex parte Mills*, 79 S. W. 555; *Ex parte Heyman*, 78 S. W. 349; *Sutherland on Statutory Construction*, Vol. 2, par. 572.

**JUDGES:** Mr. Justice Critz delivered the opinion of the Court.

#### OPINION BY: CRITZ

#### OPINION

[\*415] [\*\*549] Upon the affidavit of one O. W. Houchins the Honorable William McCraw, Attorney General of Texas, filed this suit in the district court of Harris County, Texas, against John and Savo Plainos to enjoin them, and each of them, from selling or in any way distributing vinous or malt beverages containing alcohol in excess of one-half of one per cent. in the territory comprised within the area of what was once the duly incorporated City of Houston [\*\*550] Heights, in Harris County, Texas. On presentation to him of the duly [\*\*\*6] verified petition, the district court entered an order granting a temporary injunction as prayed for by the Attorney General. Later Plainos appeared in the district court and moved to dissolve the temporary injunction. After a hearing the motion was overruled, and Plainos appealed to the Galveston Court of Civil Appeals. On final hearing in the last mentioned court the judgment of the district court was reversed and the temporary injunction in all things dissolved. 106 S. W. (2d) 745. The case is before this Court on writ of error granted on application of the Attorney General. We pause here to remark that this suit was filed by authority of the pertinent provisions of House Bill No. 77, Chapter 467, Acts Second Called Session, 44th Legislature, effective November 22, 1935. Also, the act involved is generally known as "Texas Liquor Control Act of 1935." Such act appears in Vernon's Texas Statutes, 1936, as Articles 666 and 667, Penal Code.

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The case was tried in the district court on an agreed statement of facts. Such statement is fairly brief, and we here reproduce it in full.

"AGREED STATEMENT OF FACTS.

"It is hereby agreed by and between counsel for plaintiff and defendant [\*\*\*7] that the following matters are true and correct and the same are hereby admitted in evidence in the above cause, to-wit:

"1. John Plainos and Savo Plainos are the owners of the place of business located at 357 th W. 19th Street, Houston, Harris County, Texas, together with the stock of beer, merchandise, [\*416] lease and fixtures therein, as provided by House Bill No. 77, Acts of the Second Called Session of the 44th Legislature of the State of Texas, by reason of license No. 5299 issued by the proper authorities of the State of Texas.

"2. That the defendant is engaged in the business of selling vinous and malt beverages containing alcohol in excess of one-half of one per cent by volume.

"3. That defendant is a person legally entitled to such license and has complied with all laws necessary to obtain the same, and as such license was duly issued and delivered to him by the proper authorities of the State of Texas, he is entitled to operate said place of business, unless it is found that such place of business was and is located within what is termed a 'dry area,' as defined by the said Texas Liquor Control Act and the Constitution of the State of Texas.

"4. That on [\*\*\*8] September 15, 1912, Houston Heights, where the defendant's place of business is now located, was a separate municipality known as the City of Houston Heights, and as such separate municipality there was held in and for the City of Houston Heights a valid local option election wherein the qualified voters therein adopted local option and determined that the sale of liquor should not be permitted within said territory.

"5. That on February 20, 1918, through a vote of the people of Houston Heights, the independent municipality of Houston Heights was dissolved, and that territory or area was annexed to the City of Houston, and since that time has been an integral part of the City of Houston, and Houston Heights as an independent municipality with a separate form of government has not existed since such time.

"6. That since September 15, 1912, when local option was adopted in the municipality of Houston Heights, there has never been held a local option election in and for the territory which was known as Houston Heights where defendant's place of business is now located, wherein local option was repealed, nor has there been any election held since that time wherein the sale of any

[\*\*\*9] vinous or malt beverages in excess of one-half of one per cent of alcohol by volume has been legalized.

"6a. There has never been a local option election held in and for the City of Houston.

"7. That the territory or area which was formerly an independent municipality and known as Houston Heights is not coextensive with a justice's precinct, a Commissioner's precinct, a city, town or county.

"8. We further agree that the following is the only question of law involved in this cause:

[\*417] "Is that territory which was formerly the City of Houston Heights, and now being a part of the City of Houston, Harris County, Texas, a wet or a dry area?"

As shown by the above agreed statement of facts this case involves but one question, and that a question of law. The question is: "Is that territory which was formerly the City of Houston Heights, and now being a part of the City of Houston, Harris [\*551] County, Texas, a wet or a dry area?" By this we mean: Is the sale of intoxicating liquors now prohibited within the territory or area once comprising the territory or area of the now defunct or abolished City of Houston Heights, Harris County, Texas? Before proceeding [\*\*\*10] further we deem it proper to quote and give a history of the several provisions of our State Constitution relating to the sale of intoxicating liquors in this State. In this regard we begin with the pertinent provision of the Constitution of 1876 and end with the pertinent constitutional provision adopted August 24, 1935.

Section 20 of Article XVI of the Texas Constitution of 1876 [HN1] read as follows:

"Sec. 20. The legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice's precinct, town or city, by a majority vote, from time to time, may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits."

In 1891 Section 20 of Article XVI of our Constitution, supra, was amended so that it read as follows:

"Sec. 20. The legislature shall at its first session enact a law whereby the qualified voters of any county, justice's precinct, town, city (or such subdivision of a county as may be designated by the commissioners' court of said county) may by a majority vote determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits."

In 1919 Section [\*\*\*11] 20 of Article XVI, supra, was again amended so that it read as follows:

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"Sec. 20. (a) The manufacture, sale, barter and exchange in the State of Texas, of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, or any other intoxicant whatever except for medicinal, mechanical, scientific or sacramental purposes, are each and all hereby prohibited.

"The Legislature shall enact laws to enforce this section.

"(b) Until the Legislature shall prescribe other or different regulations on the subject, the sale of spirituous, vinous or malt liquors, or medicated bitters, capable of producing intoxication, [\*418] or any other intoxicant whatever, for medicinal purposes shall be made only in cases of actual sickness and then only upon the prescription of a regular practicing physician, subject to the regulations applicable to sales under prescriptions in prohibited territory by virtue of Article 598, Chapter 7, Title 11 of the Penal Code of the State of Texas.

"(c) This amendment is self-operative and until the Legislature shall prescribe other or different penalties, any person acting for himself or in behalf of another, or in behalf of any partnership, [\*\*\*12] corporation or association of persons, who shall, after the adoption of this amendment violate any part of this constitutional provision, shall be deemed guilty of a felony, and shall, upon conviction in a prosecution commenced, carried on and concluded in the manner prescribed by law in cases of felonies, be punished by confinement in the penitentiary for a period of time not less than one year nor more than five years, without the benefit of any law providing for suspended sentence. And the district courts and the judges thereof, under their equity powers, shall have the authority to issue, upon suit of the Attorney General, injunctions against infractions or threatened infractions of any part of this constitutional provision.

"(d) Without affecting the provisions herein, intoxicating liquors are declared to be subject to the general police power of the State; and the Legislature shall have the power to pass any additional prohibitory laws, or laws in aid thereof, which it may deem advisable.

"(e) Liability for violating any liquor laws in force at the time of the adoption of this amendment shall not be affected by this amendment, and all remedies, civil and criminal, for such [\*\*\*13] violations shall be preserved."

In 1933 Section 20 of Article XVI of our Constitution was again amended so that it read as follows:

"Sec. 20. (a) The manufacture, sale, barter, or exchange in the State of Texas of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, or any other intoxicant whatever except vinous or malt liquors of not more than three and two-tenths per

cent (3.2%) alcoholic content by weight, (except for medicinal, mechanical, scientific or sacramental purposes) are each and all hereby prohibited. The Legislature shall enact laws to enforce this Section, and may from time to time prescribe regulations and limitations relative to the manufacture, sale, barter, exchange or possession for sale of vinous or malt liquors of not more [\*\*552] than three and two-tenths per cent (3.2%) alcoholic content by weight; provided the Legislature [\*419] shall enact a law or laws whereby the qualified voters of any county, justice's precinct, town or city may, by a majority vote of those voting, determine from time to time whether the sale for beverage purposes of vinous or malt liquors containing not more than three and two-tenths [\*\*\*14] per cent (3.2%) alcohol by weight shall be prohibited within the prescribed limits; and provided further that in all counties in the State of Texas and in all political subdivisions thereof, wherein the sale of intoxicating liquors had been prohibited by local option elections held under the laws of the State of Texas and in force at the time of the taking effect of Section 20, Article 16, of the Constitution of Texas, it shall continue to be unlawful to manufacture, sell, barter or exchange in any such county or in any such political subdivision thereof, any spirituous, vinous or malt liquors or medicated bitters, capable of producing intoxication or any other intoxicant whatsoever unless and until a majority of the qualified voters in said county or political subdivision thereof voting in an election held for such purpose shall determine it to be lawful to manufacture, sell, barter and exchange in said county or political subdivision thereof vinous or malt liquors containing not more than three and two-tenths per cent (3.2%) alcoholic content by weight, and the provision of this subsection shall be self-enacting."

In 1935 Section 20, supra, was again amended so as to now [HN2]read as [\*\*\*15] follows:

"Sec. 20. (a) The open saloon shall be and is hereby prohibited. The Legislature shall have the power, and it shall be its duty to define the term 'open saloon' and enact laws against such.

"Subject to the foregoing, the Legislature shall have the power to regulate the manufacture, sale, possession and transportation of intoxicating liquors, including the power to establish a State Monopoly on the sale of distilled liquors.

"(b) The Legislature shall enact a law or laws whereby the qualified voters of any county, justice's precinct or incorporated town or city, may, by a majority vote of those voting, determine from time to time whether the sale of intoxicating liquors for beverage purposes shall be prohibited or legalized within the prescribed limits; and such laws shall contain provisions for

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1937 Tex. LEXIS 295, \*\*\*

voting on the sale of intoxicating liquors of various types and various alcoholic content.

"(c) [HN3]In all counties, justice's precincts or incorporated towns or cities wherein the sale of intoxicating liquors had been prohibited by local option elections held under the laws of the State of Texas and in force at the time of the taking effect of Section [\*420] 20, Article [\*\*\*16] XVI of the Constitution of Texas, it shall continue to be unlawful to manufacture, sell, barter or exchange in any such county, justice's precinct or incorporated town or city, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication or any other intoxicants whatsoever, for beverage purposes, unless and until a majority of the qualified voters in such county or political subdivision thereof voting in an election held for such purpose shall determine such to be lawful; provided that this subsection shall not prohibit the sale of alcoholic beverages containing not more than 3.2 per cent alcohol by weight in cities, counties or political subdivisions thereof in which the qualified voters have voted to legalize such sale under the provisions of Chapter 116, Acts of the Regular Session of the 43rd Legislature."

The constitutional provision last above quoted is the one now in force in this State.

A reference to the agreed statement, supra, will disclose that on September 15, 1912, the City of Houston Heights was a separate duly incorporated municipality. Also, it is shown that it remained such at all times between such date and February 20, 1918. [\*\*\*17] On the last named date its corporate existence was dissolved and its territory annexed to and became an integral part of the wet City of Houston. Since such last mentioned date the City of Houston Heights has ceased to exist as a separate municipality.

On September 15, 1912, while the City of Houston Heights was a separate duly incorporated municipality, there was held in and for the same a valid local option election wherein the qualified voters determined that intoxicating liquors should not be sold within its territorial limits. A reference to the several constitutional provisions, supra, will disclose that at the time this election was had Section 20 of Article XVI of our Constitution, as adopted in 1891, was in effect. Under its plain provisions it was permissible to adopt local option within the area comprising the corporate limits of a [\*\*553] town or city. Since no election on the question of local option has been held as regards the original area of Houston Heights since September 15, 1912, it is evident that local option remained in full force and effect in the area in which it was originally voted until the City of Houston Heights was dissolved and its area annexed [\*\*\*18] to

the wet City of Houston. As we understand this record, no one questions this conclusion.

In 1919 Section 20 of Article XVI of our Constitution was again amended. The undoubted effect of this amendment was to [\*421] abolish all local option areas, as such, and to constitute the entire State of Texas dry territory; not by virtue of any previous local option elections, but by virtue of the 1919 amendment itself.

As already shown, the City of Houston Heights by vote of its qualified electors was annexed to the wet City of Houston on February 20, 1918. Section 20 of Article XVI of our Constitution as amended in 1919 was adopted in May of such year. It thus appears that at the time the City of Houston Heights was abolished and its area annexed to the City of Houston Section 20 of Article XVI of our Constitution as adopted in 1891 was in effect. It was certainly then the law that the abolition of the corporate existence of the City of Houston Heights and the annexation of its territorial area to the then wet City of Houston did not in any way affect the area originally comprised within the corporate limits of the City of Houston Heights as regards local option. In other [\*\*\*19] words, it was certainly the law at the time the City of Houston Heights voted to dissolve its corporate existence and annex its territory to the wet City of Houston that when an area voted dry it remained dry until it was voted wet at a subsequent election held in and for the same identical area which had theretofore voted dry, and the change, or even abolition, of the political or corporate entity which comprised such area did not alter this fact or rule of law. *Medford v. State*, 45 Texas Crim. Rep. 180, 74 S. W. 768; *Woods v. State*, (Tex. Crim. App.) 75 S. W. 37; *Oxley v. Allen*, (Tex. Civ. App.) 107 S. W. 945; *Nelson v. State*, (Tex. Crim. App.) 75 S. W. 502; *Ex parte Pollard*, 51 Texas Crim. Rep. 488, 103 S. W. 878; *Hill v. Howth*, 101 Texas 620, 111 S. W. 649; *Griffin v. Tucker*, 102 Texas 420, 118 S. W. 635 and 119 S. W. 338; *Ex parte Fields*, (Tex. Crim. App.) 86 S. W. 1022; *Ex parte Curlee*, 51 Texas Crim. Rep. 595, 103 S. W. 895; *Ex parte Elliott*, 44 Texas Crim. Rep. 575, 72 S. W. 837; *Ex parte Hayman*, 45 Texas Crim. Rep. 532, 78 S. W. 349; *Lewis v. State*, (Tex. Crim. App.) 127 S. W. 808. These authorities could be multiplied several fold, but we think they are sufficient to establish [\*\*\*20] the rule of law we have announced.

It is contended that the above authorities do not apply in this case because they deal with political subdivisions of counties abolished or changed by commissioners' courts, while the present case deals with a city abolished by a vote of its qualified electors and annexed to a wet city in the same way. We think this contention is untenable. It is conceded that the City of Houston Heights did not exist as a municipality after September 15, 1918, but it did exist for local option purposes until

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the [\*422] State-wide prohibition amendment was adopted in 1919. That status was engrafted on it while it existed as a city, and such status continued to be so engrafted until 1919, when the entire State became dry. When the people of Houston Heights voted to become a part of the wet City of Houston they did not vote on local option at all. This must be true, because, under the law in effect, when Houston Heights voted dry, and also under the law in effect when Houston Heights voted annexation with the City of Houston, a territory once voted dry could only be voted wet by strict compliance with the then existing local option laws. Certainly, such [\*\*\*21] local option laws did not permit local option once voted into effect to be voted off by merely voting on a collateral matter. A reading of such statutes clearly negatives such a conclusion. In this regard it is settled as the law of [HN4]this State that where a power is expressly given by the Constitution, and the means by which, or the manner in which it is to be exercised, is prescribed, such means or manner is exclusive of all others. *Parks v. West*, 102 Texas 11, 111 S. W. 726. At the time the City of Houston Heights voted dry and at the time it was annexed to the wet City of Houston the local option laws of this State governed, and governed exclusively the matter of voting upon such question.

It is evident from what we have already said that we hold that the territory or area comprising the City of Houston Heights as it existed on September 15, 1912, became dry by virtue of the local option [\*\*554] election held on that date. It is further evident that we hold such territory remained dry, as such, until the entire State became dry by the 1919 amendment of Section 20 of Article XVI of our Constitution. We now come to consider what effect subsequent amendments to Section 20 [\*\*\*22] of Article XVI, supra, have had on the status of such territory or area as regards the question under discussion.

As already shown, Section 20 of Article XVI, supra, was amended in 1933. By the terms of this amendment the entire State was continued as constitutionally dry territory, except as to vinous and malt liquors containing not more than three and two-tenths per cent. alcohol by weight. As to such liquors this amendment made the entire State, as such, wet, with certain exceptions and limitations. As to three and two-tenths per cent. vinous and malt liquors the 1933 amendment provided for a system of local option whereby the qualified voters of any county, justice's precinct, or town, or city could determine from time to time whether the sale, etc., thereof for beverage purposes should be therein prohibited. This amendment then provided, in effect, that all counties and political subdivisions thereof [\*423] wherein the sale of intoxicating liquors had been prohibited by local option elections held under the laws of the State of Texas and in

force at the time of the taking effect of Section 20 of Article XVI, supra, should be dry territory as to all intoxicating liquors [\*\*\*23] unless and until they should be voted wet as to vinous and malt liquors containing not more than three and two-tenths per cent. alcohol by weight. The effect of this provision was to make the area of any county, justice's precinct, or town, or city, which was dry at the time the entire State became dry under the amendment of 1919, still dry territory; but with the privilege of becoming wet territory as to vinous and malt liquors of not more than three and two-tenths per cent. alcoholic content by so voting at an election held in and for the exact area that had originally voted dry. *Walling v. King*, 126 Texas 446, 87 S. W. (2d) 1074; *Coker v. Kmeick*, 126 Texas 440, 87 S. W. (2d) 1076; *Teal v. State*, (Civ. App.) 90 S. W. (2d) 651; *Powell v. Smith*, (Civ. App.) 90 S. W. (2d) 942. It may be argued that this amendment did not save the areas of towns and cities as dry territory which had theretofore so voted, because it only saves counties and political subdivisions thereof. We are fully aware of the fact that ordinarily towns and cities are not classed as political subdivisions of counties. In spite of this, we think the phrase "any political subdivision thereof," as used in this amendment, [\*\*\*24] was intended to cover and include towns and cities. [HN5]It is the intention of a legislative act that governs, and statutes are often given an interpretation or construction not in technical accord with the literal words used. Courts will not follow the letter of a statute where to do so would violate the purpose of the act, and lead to a conclusion contrary to its evident intent. *Gilmore v. Waples*, 108 Texas 167, 188 S. W. 1037; *Edwards v. Morton*, 92 Texas 152, 46 S. W. 792; *Winder v. King*, (Com. App.) 1 S. W. (2d) 587; *Travelers Insurance Co. v. Marshall*, 124 Texas 45, 76 S. W. (2d) 1007; 39 Tex. Jur., pp. 179 to 186, inclusive, and notes. In *Insurance Company v. Marshall*, supra, Chief Justice Cureton, speaking for this Court, reviewed the authorities on this question at great length, and in effect applied the above rules to the interpretation of constitutional provisions. In that opinion it was expressly held that courts should consider the history of the times out of which a constitutional provisions grew, the evils intended to be remedied, and the good sought to be accomplished in interpreting constitutional provisions. When we consider this amendment from its four corners, [\*\*\*25] and in the light of the history out of which it grew, the purported evils it sought to remedy, and the purported good it sought to accomplish, it is evident that it intended to save as dry all areas [\*424] that were dry at the time the 1919 amendment became effective, where at the same time local option was provided for in such areas by such 1933 amendment. In other words, the phrase "any political subdivision thereof," as used in this amendment, referred to and included the area of any justice's precinct, or town, or city. From all that

130 Tex. 413, \*; 110 S.W.2d 549, \*\*;  
1937 Tex. LEXIS 295, \*\*\*

has been said it is evident that we hold that the area which once comprised the City of Houston Heights remained dry territory all during the time the 1933 amendment was in force.

We now come to consider whether the territory which once comprised the corporate area of the now defunct City of Houston Heights is dry under the provisions of the amendment of 1935. That amendment is the one now in effect and its provisions, construed in the light of what [\*\*555] has gone before, must govern this case. By the terms of this amendment the entire State, as such, is again made wet as to all intoxicating liquors; but with certain exceptions and [\*\*\*26] limitations. In effect, this amendment contains provisions which make any county, justice's precinct, or city, or town dry which was dry at the time it became effective. It therefore preserved as dry any county, justice's precinct, or city, or town which was dry when it went into effect. Of course, any such area has the right to become wet by so voting at an election legally ordered and held for that purpose under

present local option statutes. In this connection, however, we again note that such election must be held in the same area that originally voted dry. As to the case at bar we hold that while it is true that the City of Houston Heights has long since ceased to exist as a municipal corporation, still it yet exists for the purpose of holding a local option election to vote on the question of making it lawful to sell intoxicating liquors within the area originally voted dry. Ex parte Fields, supra; Griffin v. Tucker, supra. In this connection it will be noted that such vote may be had on the question of making such territory wet as to all intoxicating liquors or only as to wine and beer as defined by statute.

The judgment of the Court of Civil Appeals is reversed and [\*\*\*27] that of the district court affirmed.

Opinion delivered November 24, 1937.

Rehearing overruled December 29, 1937.

Date of Printing: May 05, 2009

**KEYCITE**

**H** Myers v. Martinez, 320 S.W.2d 862 (Tex.Civ.App.-San Antonio, Jan 28, 1959) (NO. 13430)

**History**

**Direct History**

- => 1 Myers v. Martinez, 320 S.W.2d 862 (Tex.Civ.App.-San Antonio Jan 28, 1959) (NO. 13430)  
*Writ Refused N.R.E. by*
- ▷ 2 Myers v. Martinez, 160 Tex. 102, 326 S.W.2d 171 (Tex. Jul 29, 1959) (NO. A-7246)

LEXSEE

Warning  
As of: May 05, 2009

Jay S. Myers, County Judge et al., Appellants, v. Francisco J. Martinez et al., Appellees

No. 13430

Court of Civil Appeals of Texas, San Antonio

320 S.W.2d 862; 1959 Tex. App. LEXIS 1868

January 28, 1959

CASE SUMMARY:

**PROCEDURAL POSTURE:** Appellant county officials challenged the decision of the trial court (Texas), which ordered a writ of mandamus requiring the officials to call an election to legalize the sale of alcoholic beverages in the incorporated city of the county. Appellees were city residents and voters.

**OVERVIEW:** The voters instituted sought the issuance of a writ of mandamus requiring the officials to call an election to legalize the sale of alcoholic beverages in the city, which was located in a dry county. The trial court ordered the writ of mandamus to issue. On appeal, the court affirmed. The court found that the petition was issued and signed by the required number of qualified voters residing in the city for an election to legalize the sale of alcoholic beverages in that city. The court held that the city could may vote to legalize the sale of liquor within the corporate limits of the city. The court held that the doctrine of local self-government required that the will of the smaller unit, the city, controlled over the will of the larger unit, the county. The court held that the doctrine of local self-government would not support a rule to the effect that the county must control the precinct or city.

**OUTCOME:** The court affirmed the trial court's issuance of a writ of mandamus requiring the officials to call an election to legalize the sale of alcoholic beverages in the city, which was located in a dry county.

LexisNexis(R) Headnotes

*Criminal Law & Procedure > Criminal Offenses > Intoxicating Liquors > Distribution & Sale > General Overview*

*Criminal Law & Procedure > Criminal Offenses > Intoxicating Liquors > Manufacture > General Overview > Governments > Local Governments > Elections*

[HN1]Tex. Const. art. 16, § 20 (1935) states: (a) The open saloon shall be and is hereby prohibited. The legislature shall have the power, and it shall be its duty to define the term 'open saloon' and enact laws against such. Subject to the foregoing, the legislature shall have the power to regulate the manufacture, sale, possession and transportation of intoxicating liquors, including the power to establish a state monopoly on the sale of distilled liquors. (b) The legislature shall enact a law or laws whereby the qualified voters of any county, justice's precinct or incorporated town or city, may, by a majority vote of those voting, determine from time to time whether the sale of intoxicating liquors for beverage purposes shall be prohibited or legalized within the prescribed limits; and such laws shall contain provisions for voting on the sale of intoxicating liquors of various types and various alcoholic content.

*Criminal Law & Procedure > Criminal Offenses > Intoxicating Liquors > Distribution & Sale > General Overview*

*Governments > Local Governments > Duties & Powers > Governments > Local Governments > Elections*

320 S.W.2d 862, \*; 1959 Tex. App. LEXIS 1868, \*\*

[HN2]Tex. Const. art. 16, § 20 (1935) states: (c) In all counties, justice's precincts or incorporated towns or cities wherein the sale of intoxicating liquors had been prohibited by local option elections held under the laws of the State of Texas and in force at the time of the taking effect of Tex. Const. art. XVI, § 20, it shall continue to be unlawful to manufacture, sell, barter or exchange in any such county, justice's precinct or incorporated town or city, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication or any other intoxicants whatsoever, for beverage purposes, unless and until a majority of the qualified voters in such county or political subdivision thereof voting in an election held for such purpose shall determine such to be lawful; provided that this subsection shall not prohibit the sale of alcoholic beverages containing not more than 3.2 per cent alcohol by weight in cities, counties or political subdivisions thereof in which the qualified voters have voted to legalize such sale.

tion petitioned for [\*\*2] in a dry county, the Commissioners' Court refused the petition.

The question here presented is whether or not a city located within a dry county may vote to legalize the sale of liquor within the corporate limits of such City. In 1933, the people of Dimmit County, in a county-wide election, voted to permit the sale of 3.2% beer, but in 1935, in another county-wide election, the people of that county voted to prohibit the sale of all alcoholic beverages within the county. In 1933, the voters of Texas adopted a constitutional amendment permitting the sale of 3.2% beer, with the provision that elections could be held throughout the State, in counties, justice precincts, or cities and towns, to prohibit the sale of such 3.2% beer. 1933 Amendment of art. 16, § 20, Texas Constitution, Vernon's Ann.St. In 1935, Section 20 of Article 16 was again amended authorizing the sale of various kinds and types of intoxicating liquors within the State, and providing that elections could be held in counties, precincts, incorporated cities or towns to prohibit or legalize the sale of such alcoholic beverages. The amendment further provided that all territory of the State which was legally dry [\*\*3] at the time of the adoption of statewide prohibition in 1919, should remain dry territory, unless an election was held in such county, precinct, incorporated city or town to legalize the sale of alcoholic beverages therein. It was after the adoption of this 1935 amendment to the Constitution that Dimmit County voted prohibition on a county-wide basis, and thus we have the question as to whether or not an incorporated city located within a county that has adopted county-wide prohibition since the 1935 amendment may hold an election and legalize the sale of alcoholic beverages within the corporate limits of such a city.

**Constitutional Law > Relations Among Governments > General Overview**

[HN3]The doctrine of local self-government requires that the will of the smaller unit shall control over the will of the larger unit. The doctrine of local self-government will not support a rule to the effect that the county must control the precinct or city.

The question above stated is of statewide importance, and for that reason we think it would be well to here state the history of the constitutional provisions and statutes affecting the sale of intoxicating liquor in Texas. This history may be divided into four chronological periods: First, the period from 1876 to 1887; second, the period from 1887 to 1919; third, the period from 1933 to 1935, and fourth, the period from 1935 to the present time.

**OPINION BY: [\*\*1] MURRAY**

**OPINION**

[\*862] W. O. MURRAY, Chief Justice.

This suit was instituted by Francisco J. Martinez and others against Jay S. Myers, County Judge of Dimmit County, W. F. Johnson, H. H. Herrington, C. W. Barker, and J. L. Hester, County Commissioners of Dimmit County, each in his official capacity, seeking the issuance of a writ of mandamus requiring them to call an election to legalize the sale of alcoholic beverages in the incorporated city of Asherton in Dimmit County. After a hearing, the trial court ordered the writ of mandamus to issue, and the County Judge and Commissioners have prosecuted this appeal.

When the 1876 Constitution of the State of Texas was adopted it was lawful to sell intoxicating beverages throughout [\*\*4] the State. The plan of local option elections on the liquor question were introduced by this Constitution. Section 20, of Article 16, of that Constitution provides:

It appears that a petition was issued and signed by the required number of qualified voters residing in Asherton for an election to legalize the sale of alcoholic beverages in that City. The Commissioners' Court apparently refused to order the election because the County of Dimmit had theretofore held a county-wide election in which a majority of the electorate had voted to prohibit the sale, manufacture and barter of all alcoholic beverages in the entire county of Dimmit, and being of the opinion [\*863] that it would be illegal to hold the elec-

"The Legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice's precinct, town or city, by a majority vote, from time to

320 S.W.2d 862, \*; 1959 Tex. App. LEXIS 1868, \*\*

time, may determine whether the sale of intoxicating liquors, shall be prohibited within the prescribed limits."

The Legislature, in keeping with the mandate given it in the above section, passed the first statute to bring local option of the sale of intoxicating liquor into effect. The pertinent part of this statute reads as follows:

"\* \* \* it shall be the duty of the Commissioners' Court of each county in the State, upon the written petition of fifty qualified voters of said county, or upon such petition by twenty qualified voters of any Justice's precinct, town or city therein, to order an election to be held by the qualified voters of said county, Justice's precinct, town or city, as the case may be, to determine whether the sale of intoxicating liquors, and medicated biters producing intoxication, shall be prohibited in such county, Justice's [\*\*5] precinct, town or city, or not; \* \* \* § Gammel's Laws 862.

It will be seen that both the constitutional provision and the statute provided for an election to determine whether the sale of liquor should be prohibited, but neither provided for an election to legalize the sale of liquor.

[\*864] The first case discussing the constitutional provision of 1876 and the statute enacted in keeping therewith was *Whisenhunt v. State*, 18 Tex.App. 491. The effect of this opinion was to hold that even though a county should vote dry, nevertheless, a Justice's precinct or a city or town within such a county could hold an election and legalize the sale of alcoholic beverages within its borders. In other words, it put the county on an equal footing with a Justice's precinct or an incorporated city or town. The court there said:

"One of the primary intentions was to give to justice's precincts, cities and towns in the county the same right 'from time to time' to test the matter by election as a county should have \* \* \*.

"In a word, the enumerated subdivisions, recognized both in the Constitution and the law, were vested with the same rights as were counties, provided they might desire [\*\*6] to exercise and enforce such rights independently of county action. To say they cannot have it independently of the rest of the inhabitants in a county would be to nullify what every one must concede is the plain intention and provision of the law."

In 1886, a like decision was made by the Court of Appeals in *Woodlief v. State*, 21 Tex. Civ. App. 412, 2 S.W. 812.

Thereafter in 1887, the Legislature enacted a statute which had the effect of setting aside the holding of the opinions in the two above cases. That law provided in part as follows:

"\* \* \* but when prohibition has been carried at an election ordered for the entire county, no election on the question of prohibition shall be thereafter ordered in any justices precinct, town, or city of said county until after prohibition has been defeated at a subsequent election for the same purpose, ordered and held for the entire county, in accordance with the provisions of this title; nor in any case where prohibition has carried in any jusuces precinct shall an election on the question of prohibition be ordered thereafter in any town or city in such precinct until after prohibition has been defeated at a subsequent election [\*\*7] ordered and held for such entire precinct." Gammel's Laws of the State of Texas, art. 3238, p. 896.

Thus the Legislature interpreted the constitution and laws relating to the sale, etc., of intoxicating liquor to be a one-edgc sword, and thereafter you could have a dry precinct in a wet county, but not a wet precinct in a dry county.

This Act of the Legislature was held to be constitutional in *Kimberly v. Morris*, 87 Tex. 637, 31 S.W. 808. See also, *Board of Trustees of Town of New Castle v. Scott*, 125 Ky. 545, 101 S.W. 944.

This brings us to the second period hereinabove mentioned. The statute enacted in 1887 remained in effect until 1919, when it apparently was repealed by the adoption of national prohibition. *Conc v. State*, 90 Tex.Cr.R. 508, 236 S.W. 485. In any event it was repealed by not being included in the Revised Civil Statutes of 1925. During the period this statute was in effect there were a number of decisions to the effect that the voters could not create by election a wet precinct in a dry county. *Griffin v. Tucker*, 102 Tex. 420, 118 S.W. 635; *Ex parte Fields*, 39 Tex.Cr.R. 50, 46 S.W. 1127; *Ex parte Pollard*, 51 Tex.Cr.R. 488, 103 S.W. 878. After the adoption [\*\*8] of nation-wide prohibition in 1919, and until its repeal in 1933, there were no further decisions upon this question.

We now reach the third period. In 1933 there was a constitutional amendment, art. 16, Sec. 20, of our State Constitution, so as to permit the sale of 3.2% beer, subject to local option elections. After the adoption of this amendment it was held that a justice precinct or an incorporated city or town could not legalize the sale of 3.2% beer in a county that had adopted countywide [\*865] prohibition prior to 1919. *Walling v. King*, 126 Tex. 446, 87 S.W.2d 1074; *Coker v. Kmeicik*, 126 Tex. 440, 87 S.W.2d 1076.

This brings us to 1935, when Section 20, Article 16, of the Texas Constitution was again amended and adopted in its present form, reading as follows:

"§ 20. Intoxicating liquors; open saloon; regulation; local option

320 S.W.2d 862, \*; 1959 Tex. App. LEXIS 1868, \*\*

"Sec. 20. (a) [HN1]The open saloon shall be and is hereby prohibited.

The Legislature shall have the power, and it shall be its duty to define the term 'open saloon' and enact laws against such.

"Subject to the foregoing, the Legislature shall have the power to regulate the manufacture, sale, possession and transportation of intoxicating [\*\*9] liquors, including the power to establish a State Monopoly on the sale of distilled liquors.

"(b) The Legislature shall enact a law or laws whereby the qualified voters of any county, justice's precinct or incorporated town or city, may, by a majority vote of those voting, determine from time to time whether the sale of intoxicating liquors for beverage purposes shall be prohibited or legalized within the prescribed limits; and such laws shall contain provisions for voting on the sale of intoxicating liquors of various types and various alcoholic content.

[HN2]"(c) In all counties, justice's precincts or incorporated towns or cities wherein the sale of intoxicating liquors had been prohibited by local option elections held under the laws of the State of Texas and in force at the time of the taking effect of Section 20, Article XVI of the Constitution of Texas, it shall continue to be unlawful to manufacture, sell, barter or exchange in any such county, justice's precinct or incorporated town or city, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication or any other intoxicants whatsoever, for beverage purposes, unless and until a majority of [\*\*10] the qualified voters in such county or political subdivision thereof voting in an election held for such purpose shall determine such to be lawful; provided that this subsection shall not prohibit the sale of alcoholic beverages containing not more than 3.2 per cent alcohol by weight in cities, counties or political subdivisions thereof in which the qualified voters have voted to legalize such sale under the provisions of Chapter 116, Acts of the Regular Session of the 43rd Legislature. As amended Aug. 11, 1891, proclamation Sept. 22, 1891; May 24, 1919; Aug. 26, 1933; Aug. 24, 1935."

Article 666-32, Vernon's Ann.Penal Code, was enacted to carry these provisions into effect. It uses language very similar to the provisions of said Section 20 of the Constitution and provides for elections to prohibit or legalize the sale of alcoholic beverages.

The question of whether or not a precinct, town or city may hold an election to "legalize" the sale of alcoholic beverages under the present Constitution and statute has never been passed upon by any Court in this State, so far as we are able to determine. Appellant

seems to rely primarily upon the following four cases: Houchins v. [\*\*11] Plainos, 130 Tex. 413, 110 S.W.2d 549; Jackson v. State, 135 Tex.Cr.R. 140, 118 S.W.2d 313; Walling v. King, 126 Tex. 446, 87 S.W.2d 1074; Mayhew v. Garrett, Tex.Civ.App., 90 S.W.2d 1104. In the Houchins v. Plainos case the Court went no further than to hold that a dry city could not be made into a wet city by simply dissolving the city and transferring the territory into another city that was wet. In the Jackson case, regardless of the general statements made in the opinion, the Court went no further than to hold that [\*\*66] if county-wide prohibition existed at the time of the adoption of the constitutional amendment in 1933, a precinct in such a county could not hold an election to legalize the sale of liquor in such precinct, so long as the county remained dry. In Walling v. King, the Court held that where a county was dry in 1919, and after the adoption of the 1933 amendment voted against legalizing the sale of 3.2% beer, a city within such county could not by an election legalize the sale of 3.2% beer in such city. In Mayhew v. Garrett, the Court held the same thing as in the Walling case, except that the case related to a justice's precinct rather than to a city. None [\*\*12] of these cases passed upon the question we have before us here. It is plain from the provisions of the 1935 amendment and the statute enacted thereunder, that the Legislature in submitting the constitutional amendment and enacting the statute, and the people in adopting the 1935 amendment, intended that counties, justice's precincts and incorporated cities or towns should be on an equal footing, and that by complying with the provisions of the law either of them might hold an election at any time to either "legalize" or "prohibit" the sale of alcoholic beverages, in keeping with the provisions of Sec. 40, art. 666, Vernon's Ann.Penal Code. The only limitation is that an election for the same purpose in the same area must not be held oftener than once a year, as is provided by Article 666-32, which reads in part as follows:

"No subsequent election upon the same issue shall be held within one (1) year from the date of the last preceding local option election in any county, justice's precinct, or incorporated city or town."

Fox v. Burgess, Tex., 302 S.W.2d 405; Mitchell v. McCharen, Tex.Civ.App., 119 S.W.2d 676. To hold otherwise would be to say that the Legislature and the [\*\*13] electorate of this State did a useless thing in adding the words "or legalized" to § 20, art. 16, of the Constitution as adopted in 1935, and to ignore the plain language contained in the Liquor Act, art. 666-32, Vernon's Ann.Penal Code.

Appellant contends that where a county was voted dry the area is fixed, and the entire county remains dry until the same area votes wet, and that therefore you can-

