

EVANS v. HUNTER.

4-7779

189 S. W. 2d 913

Opinion delivered October 29, 1945.

1. JUDGMENTS—CONFORMING TO PLEADINGS.—Where appellees petitioned the county court to call an election to determine whether intoxicating liquors should be manufactured or sold in the county, the judgments of the county court and of the circuit court on appeal omitting the word “manufacture” was substantially responsive to the petition.
2. JUDGMENTS—WHO MAY RAISE THE QUESTION OF VARIANCE.—Since appellant was engaged in the sale only of intoxicating liquors and the omission of the word “manufacture” did not affect him there is doubt as to his right to raise the question.

Appeal from Van Buren Circuit Court; *Garner Fraser*, Judge; affirmed.

W. F. Reeves, for appellant.

Opie Rogers, for appellee.

McHANEY, J. This is an appeal from the order and judgment of the circuit court, affirming the order of the county court which called a local option election in Van Buren county to vote upon the question whether intoxicating liquors, as defined by § 1 of Initiated Act No. 1, adopted by a vote of the people at the general election in

November, 1942, and printed in Acts of 1943 at p. 998, should be manufactured or sold in Van Buren county.

The single question presented for our determination, as stated by appellant is: "Was the judgment and order of the court responsive to the demands set out in the petitions?"

The petitions, of which there were a number of duplicates, prayed the court to call an election "to determine whether or not license shall be granted for the manufacture or sale, or the bartering, loaning or giving away, intoxicating liquors within Van Buren county," etc. The order of the county court, as also that of the circuit court on appeal, omitted the word "manufacture" as set out in said petition, but in that part of both orders giving directions to the election commissioners as to the preparation of ballots to be used at said election, both courts said: "The said election commissioners have printed upon said ballots the following: 'For the manufacture or sale of intoxicating liquors. Against the manufacture or sale of intoxicating liquors.'"

When we consider the whole order or judgment of each court, we think there was a substantial, if not a literal compliance with said act and was responsive to said petition. In other words, that there was no variance between the orders as a whole and the petition.

Furthermore, appellant is a retailer of liquor and not a manufacturer and there might be some doubt as to his right to question the orders, which, in the first instance omitted the word "manufacture" as one of the questions to be submitted to a vote, since it does not affect him. Be that as it may, the court orders were responsive to the prayer of the petition.

The judgment is, therefore, affirmed.