

✓ BEER: Criminal prosecution not appropriate for unlawfulness
in declaring it to be a misdemeanor by the act.

October 20th, 1933

Hon. John B. Owen
Prosecuting Attorney
Henry County
Clinton, Missouri



Dear Sir:

Your letter of September 21st requesting an opinion of this office was as follows:

"Supplementing my conversation with your office over the phone this morning will you kindly advise me what penalty if any follows Section 13139z8 CERTAIN FIXTURES UNLAWFUL - Laws Missouri 1933 page 266. I assume this section is a misdemeanor for the violation thereof but am in doubt. Sec. 13139y of above provides penalty for the article but not the particular section in issue. Would a criminal proceedings lie. Am troubled with the curtain proposition on windows of place of business selling beer under state permit. This matter is urgent and your opinion at once will be appreciated as I advised over phone."

Section 13139z8 of the Laws 1933, p. 266 provides as follows:

"It shall be unlawful for any holder of a permit authorizing the sale of non-intoxicating beer for consumption in or upon the premises described in such permit, to have or maintain in any room on said premises, wherein such non-intoxicating beer is sold and / or served to customers, any bar, mirror, or other fixtures having the appearance of a saloon such as existed, and was conducted in this state prior to, the effective date of the Eighteenth Amendment to the Constitution of the United

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States of America, or to have and maintain any blinds or screens, or any other thing, in any such room, that will obscure the interior of such room from public view. It shall also be unlawful for any holder of such permit to keep or secrete, or to allow any other person to keep or secrete, in or upon the premises described in such permit, any intoxicating liquor including beer having an alcoholic content in excess of 3.2 per cent by weight."

Section 13139y of the Laws of 1933, p. 264 provides as follows:

"Any person convicted of the violation of any provision of this article, the violation of which is by this article defined as a misdemeanor, and for which no specific punishment is in this article provided, shall upon conviction thereof be punished as otherwise provided by law, and if any person so convicted shall be the holder of any permit issued by the Food and Drug Commissioner under authority of this article, such permit shall from and after date of such conviction, be void, and the holder thereof shall not thereafter, for a period of one year after date of such conviction, be entitled to any permit for any purpose authorized in this article."

Thus we see that the Legislature declared it to be unlawful for one holding a permit to sell beer for consumption on the premises to have or maintain in the sales room certain fixtures which were always used and maintained in the old fashioned saloon of pre-Volstead days. No place in the same section is a penalty provided for one committing the unlawful act, nor is there a statement in said section that one violating its provisions is guilty of crime or misdemeanor in unequivocal terms. If in violating the provisions of said section one be guilty of crime or misdemeanor, it is because the word 'unlawful', as used in said statute, means that the remedy intended by the Legislature for the doing of the unlaw-

ful act, was intended to be a criminal remedy. There can be no doubt but that the public are afforded a legal right under the above section to expect those permitted to sell beer for consumption on the premises, to sell only as permitted by law, and one who violates the mandates of the law commits an unlawful act under the simple wording of the statute.

If the Legislature intended to punish those who commit the unlawful act for a crime or misdemeanor, it can only be done by virtue of the provisions of Section 13139y, as above set out, for in the whole act, that section is the only provision that would indicate the remedy that the Legislature intended. Other sections of the beer law declared certain defined and prohibited acts punishable as a misdemeanor, but not to include permittees who unlawfully maintain a sales room for consumption of non-intoxicating beer on the premises. Section 13139y provides that 'the violation of any provision of this article, the violation of which is by this article defined as a misdemeanor, and for which no specific punishment is in this act provided, shall upon conviction thereof be punished as otherwise provided by law'. That phrase simply means that the misdemeanors set out in the beer law and providing no punishment (and not a single described misdemeanor in the whole act declares a penalty), shall carry the common law penalty, under the provisions of Sections 645, 646, and 648, R. S. Mo. 1929.

Section 645 R. S. Mo. 1929 provides as follows:

"The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this state, or the statute laws in force for the time being, shall be the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that the same may be in derogation of, or in conflict with, such

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common law, or with such statutes or acts of parliament, but all such acts of the general assembly, or laws, shall be liberally construed so as to effectuate the true intent and meaning thereof."

Section 646 of the R. S. Mo. 1929 provides as follows:

"Punishment by virtue of the common law shall in nowise be other than by fine or imprisonment, or both, and such fine shall not exceed one hundred dollars, and the term of such imprisonment shall not exceed two months; nor shall any of the British statutes for the punishment of crimes and misdemeanors be in force in this state."

Section 648 of the R. S. Mo. 1929 provides as follows:

"No person's body shall be imprisoned or restrained unless by authority of law."

Thus we see that under the beer law where certain unlawful acts are declared misdemeanors, the penalty provided can only be the common law penalty, as above set out and limited. Section 13139y further provides for a revocation of the permit in cases where there is a conviction under the provisions of the section. Said section, by its own limitations, does not apply to your problem because by its terms it applies only where unlawful acts in the beer law are declared to be a misdemeanor and the unlawful act of which you complain is not declared to be a misdemeanor in the act.

Thus, you have a question of one operating a sales room for the consumption of beer on the premises in an unlawful manner without the Legislature providing any remedy. The doing of such unlawful act, we think, was not a crime at common law, so you cannot expect the courts to enforce a criminal remedy as in a common law crime when the Legislature itself does not even as much as declare such unlawfulness to be a misdemeanor. Misdemeanors were punishable at common law but not unlawfulness.

The act itself, although defining non-intoxicating beer and many other

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words and phrases, does not define the word 'unlawful' as used in its context. The Missouri statutes, while defining over seven hundred words and phrases, does not even pretend to define the word 'unlawful'.

R. S. Mo. 1929 provides that:

"Words and phrases shall be taken in their plain or ordinary sense, but technical words and phrases having an appropriate meaning in law shall be understood according to their technical import".

The word 'unlawful' as used in this statute, has no other meaning in law than its ordinary meaning. I find that Noah Webster defines the word 'unlawful' thus:

"Not lawful; contrary to law."

It would be going too far for this office to say that the word 'unlawful' means 'criminal', as here used by the Legislature, for it would have been a simple matter for the Legislature to have defined it as meaning 'criminal', if they intended it to have that meaning. We take its meaning as Webster defined it, above set out.

Even if one who unlawfully operates a sales room for consumption of non-intoxicating beer on the premises, by keeping and maintaining fixtures prohibited by law, be guilty of a misdemeanor at common law, they would be guilty only of an unlawful act which is not necessarily a crime after the passage of this beer law, and our Supreme Court said, State vs. Crane, 202 Mo. 54 l.c. 81, 100 S.W. 422

"It is a familiar rule of construction that a statute is impliedly repealed by a subsequent one revising the whole subject matter of the first, and in case of a statute revising the common law, the implication is equally as strong.*** So here, as in State v. Church, supra, we are of the opinion that when the Legislature took this subject of the trial of insane persons in hand, it must be held that the statutory provisions on that subject are controlling, and that whatever the rule might have been at common law and in other states, our statute must govern.*****"

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In the beer law, you have a revision by a subsequent act of the Legislature of the whole beer law in Missouri, as said law relates to non-intoxicating beer. The whole law is repealed, not only by implication but by the express provisions of the new law. The statutory provisions of the new law, as they exist, must control.

It is the opinion of this office that criminal proceedings will not lie against one who unlawfully operates a sales room for consumption of non-intoxicating beer on the premises by keeping and maintaining fixtures prohibited by law, as the statutory provisions of the present beer law do not declare any punishment for such an unlawful act.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General

Approved:

ROY McKITTRICK
Attorney-General

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