

- I. INTOXICATING LIQUOR: (1) Information. (2) Sell intoxicating liquor without a license. (3) Proof that a retailer has no license. (4) Principal's liability to act of agent.
- II. LEGAL ETHICS.

February 19, 1935.



Hon. H. Parker York
Prosecuting Attorney
Schuyler County
Lancaster, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date, requesting an opinion from this office, which reads as follows:

"In as much as there seem to be few, if any, decisions by appellate courts under the new liquor control act (since repeal) I would appreciate it if your office would send me approved forms or citations where they may be found, of informations that could be used in prosecuting persons for selling at retail liquor without a license and for possessing liquor not stamped or manufactured as provided by law. Will you also tell me the customary manner of proving that a retailer does not possess a State license for selling liquor (whisky, etc.) by the package. I have a witness who will testify that he purchased alcohol from an employee in a road house. The owner was present but not in the room at the time. Under the new act could I stick the owner for the sale, he had no license to sell anything but 3.2 beer. If I could not stick him for the sale could any other charge be brought? Any information you can give me along this line will be deeply appreciated as I would like to stop bootlegging around here if there is any way to do it.

"I would also like your opinion on a matter of legal ethics. Before taking office as Prosecuting Attorney I was appointed by the court to defend a man charged with stealing sheep. There was also another attorney appointed to assist me. The Def. was found guilty and we appealed. Now that I am Prosecuting Attorney would it be wrong for me to follow up this appeal on behalf of the defendant, or should I withdraw from the case?"

I.

Information for selling intoxicating liquor without a license.

The appellate courts of this State have not passed on any information drawn under the provisions of the new "Liquor Control Act" found at page 77, Laws of Missouri, Extra Session, 1933-1934. For that reason there is no approved form for Informations drawn under the new act. We are of the opinion, however, that an Information which substantially follows the language of the statutes would be sufficient, and we are enclosing a copy of an Information charging the sale of intoxicating liquor without a license which we believe would be sufficient.

II.

Law applicable to the sale of intoxicating liquor without a license.

Under the old dramshop law, a license was required to sell intoxicating liquor in any quantity less than three gallons. In Kelley's Criminal Law and Procedure, (4th ed.), page 985, the Note thereon has the following to say in regard to the sale of intoxicating liquor without a license:

"No person shall, directly or indirectly, sell intoxicating liquors in any quantity less than three gallons either at retail or in the original package, without taking out a license as a dramshop keeper.

"This law remains on the statute books unrepealed, and there would seem to be

no reason why prosecutions may not still be brought under it, notwithstanding the greater strictness of the prohibition law, with which it is not otherwise inconsistent.

"The indictment must charge that the defendant sold intoxicating liquor in less quantity than three gallons; it is not sufficient to allege that he sold one pint, nor that he sold a less quantity than three gallons. But it is not necessary to state the name of the person to whom the sale was made, nor the price of the liquor, nor the kind of liquor, except 'intoxicating liquor'; nor that it was made to some person or persons to the jurors unknown. But it must be charged that the sale was made without a license. If the indictment gives a specific description of the offense by setting out the price, kind and quantity of liquor, and to whom sold, the proof must correspond with the indictment, so far at least as regards the kind of liquor and person to whom sold. Thus, where the charge was for selling intoxicating liquors, to wit, whisky, brandy, rum, gin, proof that the liquor sold was alcohol was insufficient to sustain the charge. Proof of the sale of a half pint or any quantity less than three gallons will sustain the charge, although the indictment allege the sale of one pint. Nor is time material, further than to show that the offense was committed within one year previous to the finding of the indictment; therefore a sale may be alleged on one day, and the proof may be of a sale on another. But if the evidence is specific as to the date alleged, and no other proof is shown, it is error to instruct as to other dates. Every distinct sale, whether to the same person or to several persons separately, constitutes a distinct and separate offense, for which there may be distinct counts or indictments, and separate punishments assessed. In general the date on which an offense is alleged to have been committed is immaterial, but when there are two or more indictments against the same person for similar offenses, and the feature distinguishing them is the difference in the dates, the date is immaterial to prevent the defendant from being twice convicted for the same offense. It has been suggested by

the court that, when one is to be indicted at the same term for several or successive violations of the statute, the better practice would be to present one indictment, with a separate count for each offense, and distinguish them from each other by date or name of the person to whom the liquor was sold, or in some other intelligent manner. When the indictment charges the selling in a general way, without specifying the person or price or kind of liquor involved in the sale, the state may call any witness or witnesses and prove an illegal sale, and, if the court permits witnesses to testify as to separate and distinct acts or sales, the prosecutor will not be required to elect upon which one he will rely. The prosecutor may be allowed to call witnesses and prove or attempt to prove several distinct sales or violations of the law, when the indictment contains but one count and charges but one offense. If evidence of sales on more than one day is introduced, a conviction or acquittal is a bar to further prosecution of any of such sales.

*In a prosecution for selling intoxicating liquors, there must be proof of a sale, or of facts from which a sale may be inferred; it is not sufficient to prove merely that liquor was drunk on defendant's premises. But where the defendant said to another that if he would furnish the money defendant would supply the whisky, and, upon receiving the money, he returned after a short absence with a pint of whisky and the change, held to be a sale by defendant. It must be shown that the sale was made in the county in which the indictment was found. The court will not permit the law to be circumvented or evaded by any artifice or device resorted to for that purpose, such as selling on credit, or in payment of services rendered, or selling some other article and delivering the liquor also, or adding something else with it, or selling a gallon to be taken away at different times, or by any other contrivance to evade the law; every such transaction amounts to a sale of the liquor in violation of the

law, as much as if the party should openly hand it to a customer at the counter or bar, and receive the money for it.

"It is a question for the jury, in every such case, whether the act was a sale under a mere device to evade the law, or was a lawful disposition of the liquor.

"It is not necessary that the defendant should own the liquor, or have authority from the owner to sell it. Yet, if he acts as clerk, or servant, or agent of another in selling, he is not excused, unless his principal is protected by a license or by the law, because no man can authorize another to violate the law. If the sale is made under the direction of the principal, both will be liable. But, in general, if the person sought to be charged did not give authority, or in any way favor or assent to the act, or suffer his will to concur therein, he cannot be held liable. And it was held that a dramshop keeper is not responsible for the act of his agent in selling to a drunkard against his express direction not to do so. But the statute declares that any sale, gift or other disposition of intoxicating liquors to any minor without the permission or consent required or to any habitual drunkard, by any clerk, agent or other person acting for any dramshop keeper or other person, shall be deemed and taken to be, for all the purposes of the law as the act of such dramshop keeper or other person. And the Court of Appeals has held that, under this statute, it is no defense to an indictment for selling to a minor, etc., that the sale was made by the bartender, without the knowledge or desire of the defendant, and in his absence and against his positive instructions. If a wife sells in the presence of her husband, he is guilty and she is excused; if he is absent and she sells by his direction, both are liable; if without his consent, she alone is guilty.

"The indictment must negative the provisos and exceptions in the statute creating the offense. Thus, it must be charged that the defendant had no license. But this negative

averment need not be proved by the state. It devolves upon the defendant to show that he had a license, and if he fails to show that he has a license it will be presumed that he had none, and the averment will be taken as proved. This rule is not universal; on the contrary, some of the authorities hold that the state must produce some presumptive evidence, at least, that the defendant had no license, before he is required to prove the contrary."

Many cases are cited in support of the above statements of law and we believe that they are applicable to selling intoxicating liquor without a license under the new "Liquor Control Act" insofar as the statutes are similar.

III.

Method of proving a retailer
does not possess a license to
sell intoxicating liquor.

In the case of State v. Wilson, 39 Mo. App. 1.c. 115, the Court said:

"The court instructed the jury that, if the defendant had a dramshop license, it was his duty to produce or prove it. This, the defendant claims, was error.

"The instruction was proper, and announced the correct rule. State v. Edwards, 60 Mo. 490; Schmidt v. State, 14 Mo. 137; Wheat v. State 6 Mo. 455. If the defendant had a license it was a matter peculiarly within his knowledge, and, if he relied on it as a defense, he should have produced it. The general rule is, that, when 'the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party.' 1 Greenleaf on Evidence (14 ed.) sec.

See also State v. Gaiss, 39 Mo. App. 1.c. 190 and cases cited.

We are therefore of the opinion that the averment in an information that the defendant had no license to sell intoxicating liquor would be taken as true unless disproved by the defendant.

IV.

Act of Agent done with the knowledge and consent of principal would be the act of the principal.

In the case of State v. Brown, 151 Mo. App. 1.c. 351, the Court stated:

"The trial court properly overruled the motion for a new trial despite this affidavit. Putting aside other considerations the 'mistake' which appears to weigh so heavily on the tardily quickened conscience of the witness involved only an immaterial fact. It was the defendant's drug store and the defendant's whiskey and the defendant was present at the sale. It cannot make the slightest difference in the criminal liability of defendant whether he handed out the liquor and took in the money or his agent, the doctor, did that service for him. Where a person acts as the clerk or agent of another in selling intoxicating liquors in violation of law, either may be indicted. (Schmidt v. State, 14 Mo. 137; Hays v. State, 13 Mo. 346; State v. Quinn, 40 Mo. App. 637; State v. Morton, 42 Mo. App. 64; State v. Reints, 45 Mo. App. 403; State v. Dugan, 110 Mo. 138.) The judgment is affirmed."***

See also State v. Crawford, 151 Mo. App. 1.c. 404.

It is therefore the opinion of this office that the sale of intoxicating liquor without a license by an agent with the consent and knowledge of the principal would make both agent and principal guilty of selling intoxicating liquor without a license.

V.

Legal Ethics.

The canons of ethics of the American Bar Association is silent in regard to a Prosecuting Attorney appealing a case for a client whom he represented before being elected Prosecuting Attorney. We know of no law or rule of ethics that would prevent you from representing your client in an appeal to Appellate Court; and we are unable to see how it would conflict with your duties as Prosecuting Attorney, especially since under Section 11322, R. S. Mo. 1929, it would be impossible for you to represent the State against your former client. However this may be, it is our opinion that since you are now Prosecuting Attorney of your county, it would be a better policy, and certainly within the spirit of the ethics of the legal profession, for you to withdraw from this case if you can do so without harm to the interests of your client.

Respectfully submitted,

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APPROVED:

ROY McFITTRICK
Attorney-General.

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