

CRIMINAL LAW: A criminal action may be filed against a tavern owner who maintains a public nuisance under Section 4347.

February 21, 1940

2-23



Hon. A. L. Gates
Prosecuting Attorney
Moniteau County
California, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated February 17, 1940, which reads as follows:

"I would like for you to give me an official written opinion as to the law covering the following facts:

"There is a small business located in rural Moniteau County which is being operated as a soft drink parlor and sandwich shop. There is maintained in connection with this shop a dance floor. Patrons from all parts of the county frequent this place and there is considerable drinking done on the outside on the premises of this shop. There is an average of from one to two fights every week. These patrons will go on the outside on the roadway adjoining the premises and drink and mix drinks. Bottles are thrown upon the highway and land adjoining the highway, considerable cursing and profanity are engaged in by these patrons. All of this taking place in front of the shop and on the roadway.

"A number of complaints have come to this office by citizens of this community that it is a nuisance. I am wondering if under these facts this place can be described as a public nuisance under Section 4347, R. S. 1929, and can be declared to be a public nuisance under that act."

Section 4347 R. S. Missouri, 1929, reads as follows:

"Every person who shall erect or maintain any public nuisance not specified in the four next preceding sections, to the annoyance or injury of any portion of the inhabitants of this state, shall be deemed guilty of a misdemeanor: Provided, however, that the establishment, transaction or carrying on of any legitimate business or business of utility, not detrimental to the neighborhood, shall not be prohibited and the question as to whether or not such business is a legitimate business or one of utility is hereby declared to be a judicial question; and provided further, that nothing herein contained shall be so construed as to prevent reasonable regulation of or the licensing of any business or calling within the state or by any municipal authority or municipality, but the reasonableness of any such regulation or licensing shall be a matter to be determined by a court of general jurisdiction."

It will be noticed under the above section that it includes public nuisances not specifically set out in the four preceding sections which are in reference to slaughter houses, soap and other factories, excessive smoke and keeping stallions and jacks from view of the public. Although Section 4347, supra, provides for the punishment of maintaining any public nuisance, it does not prohibit the prosecution of certain nuisances which were punishable under the Common Law. In the case of State v. Boll, 59 Mo. 321, l.c. 323, the court said:

"As to the other point, the provisions of the statute in regard to nuisances do not undertake to cover all cases of public nuisance, and as to those not provided for by statute, the common law remains in force. This principle is recognized as to other common law offenses, belonging to a general class, in regard to some of which provision has been made by statute, in the case of the State vs. Appling, (25 Mo., 315) and the State vs. Rose (32 Mo., 560). The case at bar does not come within any of the statutory provisions cited above, but the facts charged constitute an offense at common law."

Of course most nuisances are governed primarily by the facts in each case which is a matter of law to be first passed upon by the court. To be a nuisance and be punishable under Section 4347, supra, it must be a nuisance that annoys or injures a portion of the inhabitants of the state and not just an individual.

In the case of State v. McIntyre, 277 S. W. 571, l.c. 572, the court said:

"* * To sustain the offense charged

in the indictment the evidence must disclose such an offense as would be intended to annoy the whole community in general and not some particular person. Even treating the admission of the evidence as to what took place in the yard as competent, it is hardly sufficient to sustain the charge in the indictment. No persons of ill repute congregated at the McIntyre home. There was not a single immoral act shown to have taken place in that home, and the fact that Mrs. McIntyre exposed her person twice in one year in a tantalizing manner toward the prosecuting witnesses, Lovelace and his wife, would hardly sustain the charge of maintaining a common nuisance, especially when it was in her back yard, and evidently intended to annoy only Lovelace and his wife."

In this case the court refused to affirm the verdict of a fine found by a jury, for the reason that the annoyance or injury under which the action was brought did not offend the public or a part of the inhabitants, but only affecting a family adjoining the place where the nuisance was alleged to have been committed.

Section 4347, supra, was passed upon in the case of State v. Brown, 66 Mo. 280, l.c. 281, which section was referred to as Section 3851 R. S. Mo., 1889, and in which case a copy of the information is set out. Section 3851 R. S. Missouri, 1889, as mentioned in the above case was repealed but reenacted by the Laws of 1925, page 123, by adding provisions. In that case the fine was affirmed by the court of appeals but was on a question of fact as to a factory. In that case the court said:

"The count in question is framed under section 3851 of the Revised Statutes of 1889, which is to wit: 'Every person who shall erect or maintain any public nuisance not specified in the four next preceding sections, to the annoyance or injury of any portion of the inhabitants of this state, shall be deemed guilty of a misdemeanor.'

"It is objected to this count that it does not aver that the persons alleged to have been damaged were inhabitants of the state, and also that it uses the words 'great damage and common nuisance,' instead of 'annoyance or injury,' in describing the effect of the acts complained of. The count in question, omitting formal parts and the allegations of venue, is as follows: 'That the said Thornton L. Brown and William S. Thompson, on the days and times, and during the period aforesaid, willfully and unlawfully did deposit, place and store, and cause and permit to be deposited, placed and stored, in, about and upon the certain building, buildings and premises, known and designated as the "Crystal Soap Works," and then and there used and occupied by said Thornton L. Brown and William S. Thompson, and the premises adjacent thereto, large quantities of garbage, offal and other filth, in a decomposing, malodorous and stenchy condition, and there render the same; whereby divers noisome and unwholesome smells from the said garbage, offal and other filth, so decomposing as

as aforesaid, and from the rendering of the same, then and on said other days and times did arise; so that the air was then and on the said other days and times then (there) greatly corrupted and infected; to the great damage and common nuisance, not only of the said August Rediger, William P. Krueger and other complainants, but all the people there lawfully being and residing, and going and returning and passing over and along said public road and highway; contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state."

CONCLUSION.

In view of the above authorities, it is the opinion of this department that under the facts stated in your request an information may be filed charging the owner or owners of the small business located in rural Moniteau County with maintaining a public nuisance, under Section 4347 R. S. Mo., 1929, but it is still a question of fact as to whether or not under the facts a nuisance has been committed to the annoyance or injury of a portion of the inhabitants of this state. The information may be filed, but it is a question of fact as to whether or not the defendant or defendants are guilty of maintaining a nuisance.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

TYPE W. BURTON
(Acting) Attorney General

WJB:RW