

ANIMALS: An attempt to administer a lethal dose of poison to a dog is a misdemeanor.

CRIMES: June 20, 1942

Mr. L. F. Gingery
Rushville, Missouri

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Dear Sir:

This is in reply to your request for our opinion by your recent letter, which is, in part, in the following terms:

"I am writing you for some information which I need very bad at this time. We have had a lot of dogs poisoned here the last few years and we have worked hard to catch up with the guilty parties and now we have caught him * ** putting it out was seen and got the party who was watching got the stuff and brought it to me and I sent it to the Jensial Laboratory and their test showed it contained strychnine.

"Now our attorneys say there is no state law against poisoning dogs. They say they are not classed in Missouri as a domestic animal so we can not file under the section of the statutes covering domestic animals, therefore they don't know what to file under.

"* * * * *

"I sure will appreciate any information you can give me to help me out in this matter.

"I was told that several years ago Champ Clark had a case in court and it was established in this case that a dog was a

domestic animal. But we cannot find anything to establish this.

"If you know of any prosecuting attorney who has handled a case like this and got a conviction I would sure like to know who he is.

"* * * * *Now that we have the evidence we sure would like to find a statute that we can convict on.

"Thanking you in advance for any information that you might give me in this matter, I will await an early reply."

Section 4556, R. S. Missouri, 1939, provides:

"Every person who shall willfully administer any poison to any cattle, hog, sheep, goat, horse, mule, ass or other domestic animal or to any domestic fowl, or shall maliciously expose any poisonous substance, with intent that the same shall be taken or swallowed by any cattle, hog, sheep, goat, horse, mule, ass or other domestic animal or domestic fowl shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years or in the county jail not less than six months, or by fine not less than two hundred and fifty dollars or by both a fine not less than one hundred dollars and imprisonment in the county jail not less than three months."

The courts of Missouri have not ruled on the question whether a dog is included in the provisions of Section 4556, supra, which prohibits poisoning "any cattle . . . or other

domestic animal." In general, the courts of some other states have held that a domestic animal is one "belonging to the house," and that a dog is a domestic animal. People v. Campbell, N. Y., 4 Parker, Cr. R. 386, 393; Wilcox v. State, 28 S. E. 981, 101 Ga. 563, 39 L. R. A. 709; Manies v. State, 32 S. W. (2d) 470, 116 Tex. Cr. R. 542.

On the other hand, courts of other states have held that a domestic animal is one which, in its domestic state, "furnishes some support to the family," or "adds to the wealth of the community," and that a dog is not such an animal. State v. Harriman, 75 Me. 562, 564, 46 Am. Rep. 423; Skog v. King, 254 N. W. 354, 355, 214 Wis. 591.

Regardless of whether a dog is a domestic animal, as that term is used in a general sense, it would appear that a dog is not a domestic animal in the sense in which that term is used in said Section 4556. It must be noted that the term, "domestic animal" follows more particular words -- "cattle, hog, sheep, etc.", Within the rule known as *ejusdem generis*, when a general term ("domestic animal") follows particular terms, the general term is limited in its meaning to things of the same nature or class as those meant by the particular terms. It was so held in State ex rel. Goodlow v. Wurdeman, 227 S. W. 64, 67, 286 Mo. 153, where the court said:

"It is a familiar rule of statutory construction that where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase should be construed to refer to things of the same kind."

It appears that the term, "domestic animal," as used in Section 4556, *supra*, includes only animals of the same kind or class as cattle, sheep, etc. Inasmuch as a dog is not of that kind or class, it would seem it is not included in the term, and that that section does not apply to dogs.

In a prosecution for killing a dog, in State v. Mease, 69 Mo. App., 581, l. c. 582, the St. Louis Court of Appeals

affirmed a judgment quashing an information, and said:

"* * * It is unquestionably the law that dogs are property in Missouri and that damages may be recovered civilly for injuries to them. It is also true that they are the subject-matter, by special statutes, of larceny. R. S. 1889, sec. 3535. But it was not an offense at common law to kill a dog, and in that respect the common law is still in force in this state. * * * * *"

When that decision was written in 1897, it is true there was no statute prohibiting the killing of a dog. There was then in force R. S. 1889, Section 3620 (mentioned in that opinion), which in part provided:

"Every person who shall . . . kill . . . any cattle of another . . . shall, upon conviction, be punished by imprisonment in the penitentiary . . . or . . . in the county jail . . . or by a fine . . . or by both such fine and imprisonment."

Those provisions were carried forward in Revised Statutes of 1899, Section 1987. The terms, "hog, sheep, goat," were added in Laws of 1909, page 459, section 1987, and carried forward with the felony provisions in Revised Statutes of 1909, section 4627; and, Revised Statutes of 1919, Section 3414. This statute was amended in Laws of 1929, page 166, section 3414, so as to provide:

"Every person who shall wilfully and maliciously or cruelly kill, maim, wound, beat or torture any dumb animal, whether belonging to himself or another, shall upon conviction be punished by imprison-

ment in the county jail for not more than three months, or by a fine of \$50.00 or by both such fine and imprisonment, provided that nothing herein contained shall be construed to prohibit or interfere with any scientific experiments or investigations, provided further, that nothing in this section shall apply to the hunting or trapping of wild animals."
(underscoring ours)

In the same form, that statute was carried forward in Revised Statutes of 1929, Section 4168, and is now Revised Statutes of 1939, Section 4557.

The reduction of punishment by the provision of making the offense only a misdemeanor, and the use only of the term, "any dumb animal," may be regarded as an indication of a legislative intent to broaden the scope of the statute so as to include many more animals.

It has been held that the term, "dumb animal" includes "every living" animal. People v. Brunell, N. Y. 48 How. Prac. 435, 447.

In McDaniel v. State (1879) 5 Tex. App. 475, l. c. 479, the Court of Appeals of Texas affirmed a conviction for killing a dog, under a statute prohibiting the killing of "any dumb animal," and said:

"* * * The information is a good one. It is made an offence by our statute to wilfully and wantonly kill a dog, as it is to kill any other dumb animal, the property of another. Pasc. Dig., arts. 2344, 2345."

Section 4557, supra, also prohibits torturing any dumb animal.

The Springfield Court of Appeals held that Section 4557, supra, includes dogs, by affirming a conviction of torturing a dog, in State v. Kemp, 137 S. W. (2d) 638.

It is noted that in this case the person did not succeed in killing a dog, or even in poisoning it. But he did put out the poison; he did attempt to poison a dog. With evidence of the lethal amount of poison, this would constitute an attempt to kill the dog. Section 4835, R. S. Missouri, 1939, in part, provides:

"Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction thereof, shall, in cases where no provision is made by law for the punishment of such attempt, be punished as follows: * * * * * sixth, if the offense so attempted be punishable by imprisonment in the county jail and fine, or by either imprisonment or fine, the person convicted of such attempt may be punished by both imprisonment and fine, or either, not exceeding one-half the longest time of imprisonment, and one-half of the greatest fine which may be imposed upon a conviction for the offense attempted; * * * * *"

Under this section the essential elements of the offense are, as held in State v. Wright, 112 S. W. (2d) 571, 1. c. 573, 342 Mo. 58:

"* * * But he would be guilty of an attempt to commit the fraudulent crime notwithstanding there was no insurance, 16 C. J. sec. 96, p. 117, since the requisite elements were present: (1) An intent to commit the crime; (2) an overt act toward its commission; (3) failure of consummation; (4) apparent possibility of commission, State v. Block, 333 Mo. 127, 131, 132, 62 S. W. (2d) 428, 431. * * * * *"

It appears that the putting out of a lethal dose of poison constitutes the overt act and apparent possibility of commission.

In our opinion the facts stated in your letter constitute the misdemeanor of attempting to kill a dumb animal, namely, a dog.

Section 4559, R. S. Missouri, 1939, provides:

"It shall not be necessary to show on the trial of any offense for malicious trespass or injury to property specified in this article that the offense was committed from malice conceived against the owner of the property, or against the animal or property injured; but if the act was wrongfully, intentionally and willfully done, it may be inferred that it was done maliciously."

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CONCLUSION

On the above mentioned authority, it is our opinion that one who wilfully and maliciously exposes a lethal amount of poison with intent to poison a dog, is guilty of the misdemeanor of attempting to kill a dumb animal, punishable by one-half of the jail sentence or fine, or one-half of both, provided by statute for killing such animal.

Respectfully submitted,

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APPROVED:

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