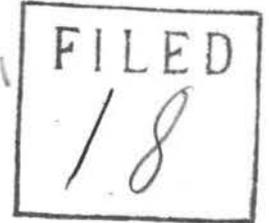


CRIMINAL Submissible case stated under Sec-  
LAW: tions 9865 and 9868 R. S. Mo., 1939.  
-----

January 9, 1943

Honorable William R. Collinson  
Prosecuting Attorney  
Greene County  
Springfield, Missouri



Dear Mr. Collinson:

This will acknowledge receipt of your letter of December 14, 1942, in which you request an opinion as follows:

"At the request of Mr. W. D. Cruce, who is a Supervisor of the Food and Drug Department, I am writing you about a situation which has arisen in this county. In reality, there are two situations, both of which I will outline.

"The first situation involves seizing of poultry by the Food and Drug Commissioner which is tainted, spoiled and unfit for human consumption. This poultry is the property of a wholesale produce company which does not sell at retail and which had the poultry stored in a refrigeration plant here in Springfield. Section 9865 R. S. Mo. 1939, provides it is a crime to 'sell, offer or expose for sale or have in his possession with intent to sell' adulterated or misbranded food. Since all defendants are presumed to be innocent until proven guilty, I fail to see how we could get to the jury in a case of spoiled chickens which were found stored, as these were. The most we could charge would be possession with intent to sell, and since the intent is the

January 9, 1943

essential part of the case, since it would be impossible to prove it by any direct evidence, the only question left would be whether the possession in a cold storage plant would be enough evidence to infer intent to sell. This is one question upon which I would like to have your opinion.

"The second question is this: An inspector from the State Food and Drug Department saw an employee of this produce company sell eight chickens from a barrel of chickens which were on a delivery truck. The chickens were delivered at the meat market from this barrel and the sale can be proved. The eight chickens sold were not examined in any way by the Food Inspector, but he seized the rest of the barrel of chickens and found that part of the remaining chickens in the barrel were tainted chickens unfit for human consumption. We have no direct evidence that the driver of the truck intended to deliver the rest of the chickens to other meat markets or that he intended to deliver the spoiled chickens which were found in the barrel.

"In your opinion, would the possession of these spoiled chickens in the barrel from which some chickens were delivered constitute a crime under Section 9865?

"Mr. Cruce is anxious to bring a case on one of these two situations of chickens. He states that if he cannot push criminal charges on cases like that that the law should be changed and he would like to have a test case to determine how far the statute goes, and

what are his powers in making a criminal prosecution. He is anxious to have your office cooperate in handling a test case of this nature and, of course, I know that you feel like I do, namely, that you would not wish to be a party to a criminal prosecution if there is no possibility of obtaining a conviction.

"I would like to have your opinion on this and your attitude toward the bringing of the test case."

In your letter you mention Section 9865 R. S. Mo., 1939, being the section of the statutes which makes it an offense to sell and have possession of adulterated food with intent to sell the same. Section 9868 R. S. Mo., 1939, defines what shall be considered as adulterated foods and from this section the sixth subdivision is quoted:

"If it consist wholly, or in part, of a diseased, filthy, decomposed, putrid, infected, tainted or rotten animal or vegetable substance, or any part or portion of an animal diseased or otherwise unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or of an animal that has died otherwise than by slaughter, and in case of meats, oysters or fish, sold or offered for sale in the fresh state, if such meats, oysters or fish shall have been inoculated, dusted, powdered, sprayed, rubbed, annointed, washed, sprinkled, fumigated, or in any other manner treated with any of the substances declared deleterious or dangerous by this article, or any antiseptic or chemical preservative or dyestuff whatsoever, whose use and apparent purpose is to mask decomposition, or

or to give to the meat, oysters or fish a false appearance of freshness or quality. And in the case of dairy products, if any such product be drawn or produced from cows fed on unhealthy or unwholesome food, or on waste, slops, refuse, leavings or residue of any nature or kind from distilleries, breweries or vinegar factories, or on food in a state of putrefaction, or from cows diseased in any way."

From reading these two sections it is apparent that the sale of spoiled, tainted, rotten, etc., food or the possession of such food with the intent to sell the same would be an offense.

The statement of facts in your letter is exceedingly brief and we should have appreciated having a statement more in detail.

For the purpose of showing the steps taken in reaching the conclusion of this opinion some elementary law with which you are thoroughly familiar will be set out herein. Of such nature is the following brief statement taken from the case of State v. Beverly, 201 Mo. 550, 558:

" \* \* \* \* \* The intent of a party in the doing of any particular act is seldom susceptible of positive and direct proof. The intent is a mere invisible resolve of the human mind and ordinarily must be gathered from the acts and conduct of the party charged with the commission of the act. \* \* \* \* \*"

This case was a case of assault with intent to rape. What is there said about intent is considered pertinent to your inquiry as in each instance it would be neces-

sary to allege and prove the specific intent.

The sections of the statutes relating to the sale or possession with intent to sell of misbranded or adulterated foods have not been before the appellate courts on many occasions. No case has been found wherein a ruling has been made as to the sufficiency of the evidence to establish intent where the only evidence before the court was the possession of adulterated food in a stock of merchandise. The case of *State v. Lief*, 248 Mo. 722, was a case in which the defendant was charged in one count of an indictment containing two counts with the offense of possessing adulterated soda water with intent to sell the same. There was a complete failure of proof as to any adulteration, and there is no showing in the reported case as to what evidence of the intent to sell was offered.

It is not considered necessary to cite authority for the statement that the test of whether or not a submissible case is presented is to determine if there is substantial evidence which, with the reasonable inferences that may be drawn therefrom, taken as true on a demurrer, would show prima facie the guilt of the defendant.

Considering the first situation stated in your letter, we have a wholesale produce farm found in possession of spoiled chickens in a refrigeration plant. Possession of the adulterated food is clearly proved. The firm is in the business of selling food and there is stock on hand for that purpose. Would not the inference naturally follow that it was the intention to sell its stock of merchandise? If this is true, that would make a prima facie case.

Under your second situation an employee of the

Hon. Wm. R. Collinson

6  
-3-

January 9, 1943

firm was found making deliveries from a barrel containing spoiled chickens intermingled with unspoiled chickens. This barrel had been taken out of the larger stock and placed under the control of an employee who was making deliveries to retail merchants. To the mind of the writer this would also make a prima facie case of the intent to sell the spoiled or adulterated chickens.

It is recognized that under a charge based on either set of facts detailed in your letter a great many defenses could be offered, and this is particularly true about the first set of facts for a small bit of adulterated food could easily be mingled in a large wholesale stock without the knowledge of the owner of the stock or without any intention on the part of the owner to sell such adulterated merchandise. But such other matters as might appear would be matters of defense or extenuation and should be considered by the prosecuting attorney in the exercise of his honest discretion in determining whether or not to file a charge.

Until the law has been definitely settled by having it ruled upon by the appellate courts, it is well to file a test case. If the law is impractical or unconstitutional and the purpose for which it was enacted cannot be accomplished, this should be determined at an early date in order that steps could be taken to make corrections. In connection with the possible filing of a test case, it is the view of the writer that the second state of facts would make a far stronger case than the first set of facts.

Respectfully submitted,

W. O. JACKSON  
Assistant Attorney-General

APPROVED:

ROY McKITTRICK  
Attorney-General

WOJ:FS