CITIES OF THIRD CLASS: City of third class has power to arrest, try and fine a person driving a motor vehicle while intoxicated within the limits of such city when an ordinance on such subject has been passed.
ORDINANCES:
DRUNKEN DRIVING:

FILED
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January 21, 1948

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Honorable Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

> "I would like to know whether or not a city of the third class has the power and authority under city ordinance to arrest, try, and fine a person charged with driving a motor vehicle while intoxicated."

Section 6949, R. S. Mo. 1939, provides as follows:

> "The mayor and council of each city governed by this article shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same."

In construing the above-quoted section, the Springfield Court of Appeals held in the case of Carthage v. Block, 139 Mo. App. 386, that such section authorized the passage of an ordinance prohibiting the drinking of intoxicating liquors on the streets, etc., of Carthage. Even though the ordinance in that case was held unreasonable, the court recognized the right of

the city to enact a reasonable ordinance under authority of Section 6949. The court said, l. c. 389:

> "Among the powers granted by the State to cities of the third class--of which the city of Carthage is one--is the power 'to enact ordinances to prohibit and suppress houses of prostitution and other disorderly houses and practices and gambling houses and all kinds of public indecencies.' (R. S. 1899, section 5835.) And, in what is called the general welfare clause, section 5834, R. S. 1899, it is provided: 'The mayor and council of each city governed by this article shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the constitution and laws of this State, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same.'
>
> "Is the ordinance in question a necessary or proper police regulation? Is it to be deemed by the courts as 'expedient for the good government of the city, the preservation of peace and good order,' or should it be denounced as an unwarrantable invasion of the 'personal liberty' of the citizen?
>
> "Should we find that the conduct interdicted was a proper subject for police regulation, we think there can be no reasonable question of the power of the city to enact the ordinance under the grant embodied in the provisions of the general welfare clause, though the subject of this precise regulation is not specifically mentioned in the statute. In the case of City v. Schoenbusch, 95 Mo. 618, the Supreme Court said: 'General welfare clauses are not useless appendages to the charter powers of municipal corporations. They are designed to confer other powers than those spe-

> cifically named. The difficulty in making specific enumeration of all such powers as may be properly delegated to municipal corporations renders it necessary to confer such powers in general terms. Ordinances relating to the comfort, health, good order, convenience and general welfare of the inhabitants are regarded as the exercise of police regulations.'

The court further said, l. c. 391:

> "The doctrine of these cases was applied by the St. Louis Court of Appeals in the case of the city of Lebanon v. Gordon, 99 Mo. App. 277. 'There can be no doubt of the authority of the mayor and board of aldermen of a city of the fourth class to pass an ordinance to punish the offense under the general power to pass such ordinances as "shall be deemed expedient for the good government of the city, the preservation of peace and good order."'"

The enactment of an ordinance by a city of the third class regarding the driving of a motor vehicle while intoxicated is, therefore, a proper police regulation under authority of Section 6949. The fact that there is a state law which makes driving while intoxicated a graded felony does not preclude the right of a city of the third class to enact, and enforce by fine, an ordinance regarding driving while intoxicated within the city limits.

In the case of City of St. Louis v. Vert, 84 Mo. 204, the Supreme Court upheld a conviction for violation of a city ordinance of St. Louis regarding the carrying of concealed weapons, even though there was a state law on the same subject, and held that a prosecution for a violation of a city ordinance was a civil proceeding. The court said, l. c. 209:

> "The action is a civil, rather than a criminal one, for breach of a city, not a state law, and does not affect, and is not affected by, the state law against the carrying of concealed weapons. Hollwedell case, supra.
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> "Under its general grant of powers, the city might well adopt and enforce, in manner as provided, such an ordinance as appellant is

> found to have violated. It is a wholesome provision for the preservation of peace and order in the city.
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> * * * * * * * * * * *
>
> "The constitution is not violated in the making or enforcing of the ordinance. In the constitution the citizen has many priceless rights guaranteed to him; but unluckily for appellant, the 'right' to carry concealed in his hip pocket knuckles of brass, a weapon of dangerous and deadly character, is not a 'right' protected by any constitutional guaranty."

The Supreme Court held in the case of State v. Muir, 164 Mo. 610, that since a prosecution for violation of a city ordinance of Mexico was a civil action, that after a conviction of violating the ordinance, a prosecution for the same act in the circuit court for violating the state law was not unconstitutional as violating the constitutional prohibition against double jeopardy. The court said, l. c. 615:

> "These deliverances of this court thus establishing that a prosecution under a city ordinance was but a civil action, necessarily precluded the idea of a conviction of violating such ordinance from being pleaded in bar of a prosecution by the State of a crime based on a violation of a State statute, which prosecution rests on the same foundation of fact as did the act for doing which the city first moved against the defendant. In a plea in bar to the prosecution of the State, the defendant must allege and prove that he is prosecuted for the same crime of which he had been autre fois convict, or autre fois acquit, in a prior prosecution by the city. But this he can not prove, if the proceeding instituted by the city was but a civil action."

The Supreme Court in the case of Canton v. McDaniel, 188 Mo. 207, on the authority of the Muir case, supra, held that an acquittal in a prosecution by the State was no bar to a civil action under an ordinance of a city. The court said, l. c. 228:

> "The civil action by the town for violating its ordinance was not affected by the criminal prosecution by the State. The acquittal of the latter was no bar to the civil action. * * *"

The Kansas City Court of Appeals in the case of City of Linneus v. Dusky, 19 Mo. App. 20, held that an ordinance of the City of Linneus with regard to the carrying of concealed weapons did not conflict with the State law on the same subject, and said, l. c. 23:

> "Certainly there is, in contemplation of well settled rules of law, no conflict between these laws. Both the state and the city may punish for the same offence. State v. Bentz, 11 Mo. 61; City of St. Louis v. Cafferata, 24 Mo. 96-97."

Section 6913, R. S. Mo. 1939, which provides, in part, as follows:

> "If, in the progress of any trial before the police judge, it shall appear that the accused ought to be put upon his trial for an offense against the criminal laws of the state and not cognizable before him as police judge, he shall immediately stop all further proceedings before him as police judge, and shall cause the complaint to be made before himself as a justice of the peace, or before some other justice of the peace, and the accused shall thereupon be proceeded against in the manner provided by general law. * * *"

would not prohibit a city of the third class from proceeding under an ordinance with regard to driving while intoxicated, since such section has been held to be directory only, andsince a prosecution for violation of an ordinance is a civil action only and is cognizable before the police judge.

In the case of Poplar Bluff v. Meadows, 187 Mo. App. 450, the Springfield Court of Appeals said, l. c. 456:

> "Defendant contends that the evidence adduced shows that he was guilty of a felony for displaying the sign of an honest occupation when in fact he was conducting a bawdyhouse and that the city thereupon lost its right to prosecute

> under its ordinances, citing section 4758 and section 9191, Revised Statutes 1909. The defendant is not charged with or convicted of a felony; nor will this judgment bar a prosecution by the State under section 4758. Section 9191 is merely a directory statute and not one that can avail the defendant in this connection."

The ordinance of a third class city with regard to driving while intoxicated need only be such an ordinance as will conform with the state law on the same subject as the ordinance, under the requirements of Section 7442, R. S. Mo. 1939.

Since in the statement of facts in your request for an opinion you have stated that the violation of the ordinance would result in a fine, it is obvious that the city ordinance in such case would conform with the state law on the same subject.

CONCLUSION

It is the opinion of this department that a city of the third class has the power and authority, under an ordinance of such city with regard to driving a motor vehicle while intoxicated within the city limits, to arrest, try and fine a person charged with the violation of such ordinance.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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