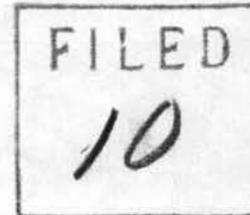


LIQUOR SEARCH AND SEIZURE
CRIMINAL LAW

Disposition of proceeds of sale
of contraband liquor after payment
of fine and costs assessed by the
court.

June 24, 1949



Hon. Joseph M. Bone
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Sir:

This will acknowledge receipt of your request for
an opinion which reads:

"January 15, 1949, Edward Lee Bugg and
C. M. Irvine were arrested in this
county for violation of Sec. 4900 (G)
R.S. Mo. 1939, in connection with this
arrest a search warrant was issued for
the business premises operated by them
under the provisions of Sec. 4916, and
the following contraband liquor was
confiscated under said search warrant,
31 3/4 cases of beer and 1070 bottles
of whiskey and assorted liquors.

"Sections 4916 and 4917 R.S. Mo. for
1939 in part provide a method for dis-
posing of the proceeds from the sale of
contraband. However, this act appears
very incomplete and does not provide for
disposition to be made of the proceeds
from the sale of contraband over and
above that part applied in payment of any
fine and cost. Section 4917 provides for
turning over the proceeds of sale of con-
traband, connected with the production and
manufacture of liquor, to the school fund,
but does not cover the disposition to be
made in case of illegal or unlawful sale of
contraband liquor.

"I would like to have the opinion of your
department construing these sections
relative to the factual statements above."

As we gather from your inquiry, what you are anxious to know is where you shall place the proceeds from the sale of said contraband liquor after the payment of fine and costs assessed by the court.

Certainly any intoxicating liquor being unlawfully kept, sold or otherwise disposed of is declared to be contraband and no person has any property right whatsoever in or to said liquor. Also the court is duly authorized to order sale of such contraband and the proceeds of such sale shall be applied against the payment of fines and costs assessed against the person so convicted. Section 4916, Mo. R.S.A., reads in part:

"* * * All intoxicating liquor unlawfully manufactured, stored, kept, sold, transported or otherwise disposed of, and the containers thereof and all equipment used or fit for use in the manufacture or production of the same, including all grain or other materials used, in the unlawful manufacture of intoxicating liquor, and which are found at or about any still or outfit for the unlawful making or manufacture of intoxicating liquor, are hereby declared contraband, and no right of property shall be or exist in any person or persons, firm, or corporation owning, furnishing or possessing any such property, liquor, material or equipment; but all such intoxicating liquors, property, articles and things, shall be sold upon an order of the court and in the manner hereinafter provided and the proceeds thereof shall be applied on the payment of any fine and costs lawfully assessed against any person or persons convicted of the unlawful manufacture, production, transportation, sale, gift, storing, or possession of intoxicating liquor, * * *"

As shown hereinabove such contraband liquor shall be sold upon an order of the court in the manner hereinafter provided. Section 4916, supra, does not provide what disposition shall be made of any remaining money from the sale of contraband liquor over and above the payment of fine and costs.

As heretofore stated, the only real question involved here is where shall the proceeds be placed. Shall they be paid into the county treasury for the benefit of the school fund as provided in Section 4917, Mo. R.S.A., or in some other manner.

Section 4917, supra, requires the officer seizing and holding any of the property hereinabove mentioned, which applies to Section 4916, supra, which provision includes intoxicating liquor as in this instance, to make application to the court upon final determining of said prosecution, for an order to sell same. The statute requires the court to order a sale if the court is satisfied, that such property seized and held, was at the time of seizure being kept or used or was fit for use in the unlawful manufacture or production of intoxicating liquor. While certainly the Legislature must have intended this Section to apply to all such conditions as stated in your request, same is rather ambiguous. It would appear at first blush from the language used in Section 4917, supra, that it does not apply to intoxicating liquor having the proper revenue stamps of the state and federal government affixed thereon, which is not illegal per se, since said intoxicating liquor was not kept, used, or fit for use in the unlawful manufacture or production of intoxicating liquor. However, since there is no other statute dealing specifically with the disposition of fines and penalties derived from the sale of such intoxicating liquor, which has been declared to be contraband under Section 4916, supra, we are inclined to believe that it was the intent of the Legislature to make Section 4917, supra, likewise apply to such intoxicating liquor. This conclusion is supported by the title to said act which under rules of statutory construction may be considered when a statute is ambiguous. The title to said Liquor Control Act when passed by the 58th General Assembly, page 269, Laws of Mo. 1935, reads in part:

"* * * providing for searches and seizures
and for the disposition, sale or destruction
of intoxicating liquor, manufactured, sold or
possessed illegally; * * *"

Under any circumstances the person convicted in this case cannot contend that he is entitled to such proceeds for the reason that the law clearly states in Section 4916, supra, that no person can have any property right in or to said intoxicating liquor. We are inclined to believe that this ambiguity is more or less cured by the passage of Senate Bill #110 by the 65th General Assembly of the State of Missouri, which bill was approved by the Governor on May 24 and since it carried an emergency clause, the bill became effective upon approval by the Governor.

Senate Bill #110, supra, repealed Section 4916, Mo. R.S.A. and enacted in lieu a new section known as 4917 and 4917a, which sections clearly require the proceeds of such sale to be paid into the general revenue fund of the State of Missouri, on page 6 which reads:

"* * * Or, if the property is valued at more than the established lien and all costs of proceedings and sale, an order shall be made for the sale of said property by the seizing officer or by the Supervisor of Liquor Control, if the seizure was made by him or one of his agents, at public or private sale, subject to the approval of the court, and out of the proceeds of such sale shall be paid (1) storage, if any (2) the lien, (3) the cost of the proceedings, and (4) the residue, if any, shall be paid into the General Revenue Fund of the State of Missouri. If it shall be determined that no person, other than the defendant, has any interest in said property or that the person or persons having any interest in said property knew of or connived or gave consent, express or implied, to the illegal use thereof, and if it shall be found by the court that said property was, at the time it was seized, being illegally used and was contraband, as declared by any section of the Liquor Control Law of the State of Missouri, the said property shall be declared to be forfeited to the State of Missouri, and the court shall order the officer who seized said property or the Supervisor of Liquor Control, if the property was seized by one of his agents, to sell said property at public or private sale, subject to the approval of the court, and out of the proceeds of said sale shall be paid (1) the cost of storage, if any, (2) cost of the proceedings of the case and (3) the balance thereof shall be paid into the General Revenue Fund of the State of Missouri.* * *"

While there is a constitutional inhibition against Ex Post facto laws and laws impairing the obligation of contracts or retrospective operation and the making of irrevocable grants of such immunities, (See Sec. 13, Art. I, Constitution of Mo. 1945) it is well established that procedural statutes should be given a liberal construction rather than technical, in an effort to determine the cause of its merits and such procedural statutes may act retroactively. (See Sec. 700, C. J. Vol. 59; Gerber v. Schutte Investment Co., 194 S.W. (2d), 354 Mo. 426)

In view of the fact no person has any property right in and to said intoxicating liquor declared to be contraband, no vested rights are impaired and Section 4917, supra, relative to

disposition of proceeds of any such sale is more or less procedural, that disposition of such proceeds should go into the General Revenue Fund of the State of Missouri. However, it is well established that the General Assembly cannot circumvent any provision of the Constitution of the State of Missouri and any part of any act that is in conflict therewith, is invalid. In view of Section 7, Art. IX, Constitution of Missouri, 1945, which reads:

"All real estate, loans and investments now belonging to the various county and township school funds, except those invested as hereinafter provided, shall be liquidated without extension of time, and the proceeds thereof and the money on hand now belonging to said school funds of the several counties and the city of St. Louis, shall be reinvested in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which are fully guaranteed by the United States, and sacredly preserved as a county school fund. Any county or the city of St. Louis by a majority vote of the qualified electors voting thereon may elect to distribute annually to its schools the proceeds of the liquidated school fund, at the time and in the manner prescribed by law. All interest accruing from investment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the State, the net proceeds from the sale of estrays, and all other moneys coming into said funds shall be distributed annually to the schools of the several counties according to law."

Which section is clearly self-enforcing and requires no enabling act of the General Assembly for the placing of the proceeds of such sale of intoxicating liquor into such funds and which provision requires such proceeds to be placed into the county school fund, we are of the opinion that that part only of Section 4917 which provides that the proceeds of such fine or penalty shall be placed in the General Revenue of the State conflicts with the provisions of Art. IX, Sec. 7, Constitution of Mo. 1945, and therefore that part of Section 4917, Senate Bill No. 110 must be considered invalid and that the part of Section 7, Art. IX, supra, dealing with the custody of such proceeds shall apply in this instance.

Certainly under Sections 4916 and 4917, supra, the payment of any fine and costs assessed by the court against a defendant, shall take priority over any other demand against the proceeds from the sale of contraband liquor. It is after the payment of fine and costs that the "clear proceeds" from the sale shall be placed into the county school fund as provided in Section 7, Art. IX, Constitution of Mo. 1945.

The term "clear proceeds" as used in Section 7, Art. IX, Constitution of Mo. 1945, has been defined heretofore by the courts as follows. In *State ex rel. v. Warner*, 197 Mo. 650, l.c. 660-661, the Supreme Court of this state defined "clear proceeds" in the following manner:

"*State ex rel. Clay County v. Railroad*, 89 Mo. 562, was an action under a statute providing for a penalty for not ringing a bell or sounding a whistle at a certain public crossing. That statute gave one-half the penalty to the informer and the other half went to the county, and the same statute has been brought forward in later revisions as live law. (See R.S. 1899, sec. 1102.) A defense was interposed that the penalty under the Constitution belonged to the school fund, and, hence, the statute was void. It will be instructive to read that case in connection with the point now under consideration in the case at bar. Because, it will be observed, the Constitution refers to the 'clear proceeds' of fine and penalties, and the learned judge who wrote that opinion construed 'clear proceeds' to mean, as applied to that case, the one-half given by the statute to the county. It will not be space misapplied, nor labor lost, to quote from that case, thus:

"It is only the "clear proceeds of the penalties" collected in the several counties for breaches of the penal laws of the State that belong (with the other funds specified) to the several counties under this constitutional provision. The Legislature, in imposing penalties for violation of its laws, may, in its discretion, for the purpose of securing the enforcement of said laws, the collection of the penalties imposed, and

paying the expenses thereof, give a part thereof to an informer, and in such case what is thus realized constitutes the "clear proceeds of said penalties," within the meaning of section 8, article 11, of the Constitution, supra. (Barnett v. Railroad, 68 Mo. 56.) It follows, therefore, that section 806 is not unconstitutional, as claimed by defendant."

Also in State v. DeLano, 49 S.W. 808-809, 80 Wis. 259, l.c. 260-261, the court held the "clear proceeds" as used in a similar provision to mean the amount left of such fines after making authorized deductions. In that case the deductions authorized were for an informer. In so holding the court said:

"Winslow, J. The defendant claims that ch. 351, Laws of 1891, is unconstitutional and void, because--First, it contravenes that part of sec. 2, art. X, of the constitution of Wisconsin, which provides that 'the clear proceeds of all fines collected in the several counties for any breach of the penal laws . . . shall be set apart as a separate fund, to be called the "school fund."' Second, it contravenes sec. 6, of art. I, of the constitution, which provides against the infliction of excessive fines and cruel and unusual punishments.

"* * * Really the question simply is, What is the meaning of the words 'clear proceeds,' as used in the constitution? That it does not mean 'entire' proceeds is, we think, too clear for argument. 'Clear' implies that something is to be or may be deducted, so that the balance is 'clear' from all charges or demands. It seems to us that the word 'clear' is here used in the sense that it is frequently used colloquially when we speak of the 'clear profit' in a business transaction, meaning the 'net profit' after all expenses or losses are deducted. Obviously, if this is the meaning of the word in this connection, it was contemplated that there would be power resting somewhere to provide for and define what deductions from the gross fine could properly be made. If that power exists, and we hold that it does, it must rest in the legislature, as said by

Mr. Justice Lyon in State ex rel. Guenther v. Miles, 52 Wis. 488.

"This view of the intent of the framers of the constitution in using the words 'clear proceeds' is strengthened when we consider that the system of paying a moiety of fines in many penal actions to informers was in frequent use in England from very early times, and has been quite generally adopted in this country. Bac. Abr. tit. 'Actions Qui Tam;' 3 Bl. Comm. 160.

"It is not unreasonable to suppose that the words 'clear proceeds' were intended to provide for just this contingency, so that the legislature might authorize a part to be paid to the informer for the purpose of securing a better enforcement of the law. It is quite evident that, if it is not made an object for some one to prosecute, many salutary laws would never be enforced, because no one would be interested in seeing them enforced."

Therefore, under Section 4916, supra, no one can question the fact that the proceeds from the sale of such contraband liquor shall be applied against the payment of fine and costs assessed by the court and the 'clear proceeds,' which means balance of the amount of money received from the sale of contraband liquor after the payment of fine and costs assessed against a defendant, shall go into the county school fund as provided in Section 7, Art. IX, Constitution of Mo. 1945.

CONCLUSION

Therefore it is the opinion of this department that while Section 4917, Senate Bill No. 110, passed by the 65th General Assembly requires any residue from sale of contraband liquor, after payment of fine and costs assessed by the court, shall be placed in the General Revenue Fund of the State of Missouri, only such provision with respect to placing said residue from sale of said intoxicating liquor in the General Revenue Fund of the State, infringes the provisions of Section 7, Art. IX, Constitution of Mo. 1945, and therefore any fine and costs assessed against any defendant must first be paid out of the proceeds from the sale of any contraband liquor as provided in Section 4916, supra, and

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thereafter the "clear proceeds," which means the residue of amount received from sale of such contraband liquor after payment of fine and costs assessed, shall be placed in the county school fund to conform with the provision of Sec. 7, Art. IX, Constitution of Mo. 1945.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

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