

DEAD ANIMALS - REMOVAL OF: A trucker is not liable for the hauling of swine which are dead of disease under Sec. 12786, R. S. Mo. 1929.

September 14, 1938

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Honorable Fred C. Bollow  
Prosecuting Attorney  
Shelbina, Missouri

Dear Sir:

This is to acknowledge receipt of your request for an opinion from this department under date of September 8th, 1938, which is as follows:

"I have noticed articles in the newspapers where you have handed down an opinion that a party who did not file for nomination at the primary, and who nevertheless received the most votes for the office by the method of having his name written in on the ticket was not in fact nominated, and could only be elected by having his name written in again in the general election. There has been some contention here that this did not apply to such officers as the Justice of the Peace. And while I see no reason why the opinion should not affect all offices, yet I am requesting that I be furnished with a copy of the opinion and a statement from your office whether or not it concerns candidates for the Justice of the Peace. I would like to have your opinion at an early date, so that the County Clerk may be advised as to whether or not such a party is entitled to have his name placed on the ticket at the general election.

"A second problem which I have is based on a proper interpretation of provisions of Section No. 12786 of the Revised

Statutes for 1929. We have a community sale in this community. This sale has no regulations requiring swine to be cholera immunized before they are brought to the sale. And consequently this sale is a means of spreading hog cholera throughout the community.

"I have filed an information against a trader, who sold hogs at the community sale, and am able to prove that at said time they were affected with the disease. I am not able to prove, nor do I allege in my information, that the defendant knew the hogs to be so infected with the disease. And the circumstances are not such as to charge him with that knowledge.

"The method these traders use, if they want to dispose of any hogs which may be sick, is to trade them back and forth between each other so that the man whose name they are last listed in has only owned them a matter of minutes or hours before they are sold, thus he cannot be charged with the knowledge that the hogs were diseased. Therefore the question resolves itself down to one of whether or not knowledge on the part of the defendant that the hogs were diseased, must be alleged and proved to sustain a conviction under the provisions of Section No. 12786.

"A further problem which I have, and which stands or falls upon the contents of the same section of the law, is raised through the fact that a trucker from the State of Iowa comes into this community, and hauls out dead animals over and upon the public highway into the State of Iowa. I am able to prove that in one instance he hauled over the highway swine which had died of disease. But from reading this section of the statute, it occurs to me that possibly the provisions refer only to live swine and not to dead swine.

"I am desirous of stopping this practice, if at all possible; and as this trucker comes into this community sometimes as often as

once or twice a week, I shall urge upon you to forward me this opinion at your earliest convenience. I am awaiting your advices in the matter before proceeding further."

I.

In answer to the first question asked in your request concerning the writing of names on the primary ballot, we are herein enclosing an opinion rendered by this office on August 10, 1938, to Mr. H. D. Allison, County Clerk of Buchanan County, St. Joseph, Missouri. This opinion fully covers the first question asked in your request.

II.

Under your second problem, Section 12786, R. S. Mo. 1929, reads as follows:

"That it shall be unlawful for any person to sell or offer for sale any swine in this state which is infected with hog cholera, or any other disease; or to drive on foot, or haul in any wagon or other conveyance, any such infected swine along, or across, any public highway; or across, or over, any unfenced land in this state; or to suffer any such infected swine to run at large on any common or unfenced lands in this state: Provided, that this section shall not be so construed as to prohibit the movement of such swine under conditions prescribed by the state veterinarian, for the purpose of segregation or quarantine."

All of the cases hold that to obtain a conviction under an information filed under this section, even though this section as now set out does not contain the word "knowingly", nevertheless knowledge must be proved either directly or indirectly. The same rule applies as to cases bottomed on circumstantial evidence.

In the case of State v. Krokston, 187 Mo. App. 67, 1. c. 69, the court said:

"Guilty knowledge does not have to be established by affirmative evidence expressly stating that fact. It may be inferred from other facts shown, provided it can reasonably and clearly be seen to follow therefrom according to the natural, usual, and ordinary experience of men. In such case, the jury can infer knowledge on the part of defendant. Guilty knowledge is a state of the mind and frequently it is impossible to prove it except as a reasonable inference to be drawn from all the facts proved.

Also, at page 71, the court said:

"The only feature of the case resting upon circumstantial evidence is as to the defendant's knowledge that the hogs had cholera, and that does not rest entirely on such evidence. But even if the case be one of circumstantial evidence, we cannot say the defendant's conviction violates the rule, well established in such cases, that in order to justify a verdict of guilty the facts and circumstances must be consistent with each other and with the guilt of defendant and inconsistent with any reasonable theory of his innocence.

"The jury have found the defendant guilty. There was ample evidence to sustain the verdict if believed by them, and no reversible error appears in the case. The judgment must, therefore, be affirmed."

In the case of Wells v. Welch, 205 Mo. App. 136, 224 S. W. 120, 1. c. 122, the court said:

"It is now urged that these errors are harmless on the theory that our statute (Laws 1917, page 133) makes every vendor

of hogs an absolute warrantor against hog cholera or any other disease, latent or otherwise, affecting the animals sold. We concede that this statute, though criminal, may be the basis of a civil action for damages. That statute among other things makes it 'unlawful for any person to sell or offer to sell any swine in this state which is infected with hog cholera, or any other disease.' Section 1. By its third instruction the court told the jury that all the plaintiffs needed to prove to recover was that these hogs were infected with cholera, or other fatal disease, at the time of the sale. Under this instruction, and such is plaintiff's contention here, the vendor of hogs is made liable if such hogs subsequently prove to have had a disease, however incipient or latent at the time, and regardless of the vendor's knowledge, or means of knowledge, of such disease, and regardless of his good faith and exercise of care in avoiding the sale of diseased hogs. This we think is a too drastic construction of the statute. For instance, the same statute makes it a misdemeanor to drive on foot or haul in a conveyance any such infected swine along a public highway. The plaintiffs did this very thing with these hogs in taking them home, and, should they be indicted for violating this statute, they would be surprised to know that their ignorance of the hogs being diseased, which they established in this case, would be unavailing as a defense to the criminal charge. Also by another section of the same act it is made a misdemeanor for the owner of diseased hogs to fail to give immediate notice to owners of adjoining premises of such fact. Suppose the disease is incipient only, and so latent that the owner by due care does not know of the infection, is he nevertheless guilty of failing to notify another of that of which he is excusably ignorant? It is true that prior statutes somewhat similar (sections 4864 and 4863)

used the word 'knowingly' or 'willfully' in describing the offense, but such does not prove that the element of knowledge and intent is not necessarily implied here. \* \* \*

"We are not holding that a vendor of hogs can recklessly shut his eyes to conditions and symptoms which if investigated would disclose that his hogs are infected or likely to be so, or that he can be indifferent or careless as to their being diseased, and thus hide behind the shield of ignorance. A vendor cannot claim ignorance when reasonable care and caution would disclose the truth."

In the case of State v. Miller, 258 S. W. 34, the court in holding that circumstantial evidence was sufficient to prove knowledge of the disease of hogs, said:

"This is a prosecution under an indictment, based upon section 4264 of the Revised Statutes of 1919, for selling and hauling in a wagon along and across a public highway 20 hogs charged to have been infected with cholera. The defendant, a farmer living north of Mexico, in Audrain county, met, at Mexico, on December 6, 1921, Charles T. Powell, a local buyer and shipper of live stock, and agreed with him for the sale of 20 hogs located on defendant's farm. Two days afterwards, pursuant to the agreement, defendant delivered the hogs to Powell at Mexico, hauling them to Mexico in a wagon along the public highway. The evidence showed that the hogs were infected with cholera at the time they were sold. The crucial issue at the trial was whether or not the defendant had knowledge of the infected condition of the hogs at the time he sold them. The cause was tried to a jury. Though proof was made of both the offending acts charged in the indictment, to wit, (1) the selling of the hogs and (2) the hauling of the hogs across and along the public highway, only

one of the offending acts, to wit, the selling of the hogs, was submitted to the jury by the instructions. The jury found the defendant guilty, and assessed his punishment at a fine of \$10. The defendant appeals.

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"The defendant complains of the following instruction given for the state:

"'In determining whether the defendant knew at the time of the sale of the hogs to Powell that they were infected with hog cholera, if you find they were so infected, you are instructed that his knowledge, if any, thereof need not be proven by direct and positive evidence, but it may be lawfully and properly inferred by you from all the facts and circumstances in evidence having reference to and bearing upon and tending to prove such knowledge, provided such evidence is sufficient to satisfy you of such knowledge beyond a reasonable doubt.'

"It is insisted that this instruction is erroneous in that it omits essential elements necessary to make circumstantial evidence sufficient foundation for a conviction, such as that the circumstances relied upon should be consistent with each other and with defendant's guilt, and such as to exclude to a moral certainty every other reasonable hypothesis but that of guilt. The instruction is in form and substance practically identical with instructions approved by our Supreme Court in numerous cases.

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"Under this state of facts we cannot say that there was such a failure of proof of knowledge on the part of defendant of the infected condition of his hogs at the

time he sold them as will authorize this court to disturb the verdict of the jury. State v. Underwood, 263 Mo. 677, loc. cit. 685, 173 S. W. 1059.

"Finding no error in the record, the Commissioner recommends that the judgment of the circuit court be affirmed."

### CONCLUSION

In view of the above authorities, it is the opinion of this department that, under the facts set out in your second problem, knowledge on the part of the defendant that the hogs were diseased must be alleged and proven to sustain a conviction under the provisions of Section 12786, supra.

### III.

You further ask whether or not Section 12786, supra, refers to the hauling of live swine or dead swine.

In construing the intention of the Legislature in the construction of a statute, one must investigate into the purpose of the legislation and also should take into consideration all of the clauses and words set out in said section. Also in construing the intention of the Legislature in the construction of a statute, one must read separate sections of the act which are *pari materia*. In construing whether Section 12786, supra, refers to dead animals, one must also read Section 12787, R. S. Mo. 1929. This section reads as follows:

"That it shall be the duty of the owner, or other person in charge of any swine which shall die of any disease, to burn the carcass or carcasses on the premises where death occurred within twenty-four hours after its death."

In Section 12786 the Legislature in setting out the prohibition of the hauling of diseased swine, infected with hog cholera or any other disease, specifically sets out the words "drive on foot, or haul in any wagon or other conveyance, any such infected swine along, or across, any public highway." It will be noticed that this part of Section 12786 does not refer to dead animals, but that Section 12787 does refer to swine which shall die of any disease. If it had been the intention of the Legislature to construe Section 12786 to mean dead swine, it would not have been necessary to enact a different section (Section 12787) in reference to dead swine, but could have provided for the burning of the carcass in Section 12786. In construing the purpose of Section 12786 it may be readily seen that this applies to live animals for the reason that it mentions about running at large or on unfenced lands in this state.

In the case of Fischbach Brewing Co. v. City of St. Louis, 95 S. W. (2d) 335, 1. c. 339, the court said:

"A cardinal rule of statutory construction is to give effect to the legislative intent, where ascertainable; another is to favor such a construction which would tend to avoid injustice, oppression, and absurd and confiscatory results and be in harmony with the rule of reason. The benign objectives heretofore pointed out were surely within the legislative intent as shown by all the surrounding circumstances covering the period in which this law was enacted. Rutter v. Carothers, 223 Mo. 631, 643, 122 S. W. 1056."

The penalty imposed for the owner of swine in refusing to burn the carcass on the premises where death occurred within twenty-four hours after its death is as follows (Section 12791, R. S. Mo. 1929):

"Any person who shall violate any of the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than ten dollars, nor more than fifty dollars."

In the case of Holder v. Elms Hotel Co., 92 S. W. (2d) 620, 1. c. 622, 338 Mo. 857, 104 A.L.R. 339, the court said:

"In construing a statute the legislative intent must be kept in mind, if it may be ascertained, and the whole act, or such portions thereof as are in pari materia, should be construed together. (Keeney v. McVoy, 206 Mo. 42, 103 S. W. 946.)"

#### CONCLUSION

In view of the above authorities, it is the opinion of this department in your third problem that Section 12786 only applies to live swine and not dead-swine, but under Section 12787, if the trueker should happen to be the owner of a swine which died of any disease, and he did not burn it on the premises where the death occurred within twenty-four hours after its death, he would be subject to prosecution under Section 12787. This section also could be enforced against any owner of swine which have died of any disease and were not burned on the premises of the owner where the death occurred within twenty-four hours after their death. In this case it would be necessary to allege in the information that the swine died of a disease.

Respectfully submitted

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APPROVED:

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