INTOXICANTS: Under Section 4890 R.S. Mo. 1939, territories cannot be annexed or added to another one, in order to be taken outside the scope of said section.

June 17, 1947

FILED
13

Mr. Robert M. Buerkle
Prosecuting Attorney
Cape Girardeau County
Jackson, Missouri

Dear Sir:

Your opinion request of recent date, regarding the construction to be placed upon Section 4890, R. S. Mo. 1939, under the facts peculiar to the situation outlined in your request, reads as follows:

"My office has had several inquiries in regard to the right of citizens of the City of Cape Girardeau, Missouri, to now obtain a liquor license for the sale of intoxicating liquor by the drink. The reason that this question now arises is that Cape Girardeau in the last official census in 1940 had a population of 19,600 and last month, by special election, extended the city limits of the city so as to take into the city a considerable area. The new area brought into the city has a population which when added to the 1940 population of the City of Cape Girardeau would no doubt give the City of Cape Girardeau a population of greater than 20,000. The question has been asked me as to whether the known population of the area recently voted into the city, said population figure being arrived at by the use of the 1940 census, could be added to the last official census of the City of Cape Girardeau and thus qualify the city as a city having a population of greater than 20,000.

"The City of Cape Girardeau has long since gone over the 20,000 mark and if a census were held today would no doubt exceed 20,000 without the addition of the new area. However, of course, by Section 4890 of the 1939 Revised Statutes of Missouri 'the population of said cities to be determined by the last census of the United States

completed before the hold of said election.' It would appear to me that this section of the statute could be construed so as to include a city in the class of Cape Girardeau which has recently or since the last census extended the city limits because now to arrive at the population of the City of Cape Girardeau you would refer to the 1940 census of the city itself and also the 1940 census of the area recently included within the city. I would be glad to have your opinion on this matter at your earliest opportunity."

Section 4890 R. S. Mo. 1939, reads in its pertinent part as follows:

> "Provided, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold, in any incorporated city having a population of less than twenty thousand (20,000) inhabitants, until the sale of such intoxicating liquor, by the drink at retail for consumption on the premises where sold, shall have been authorized by a vote of the majority of the qualified voters of said city. Such authority to be determined by an election to be held in said cities having a population of less than twenty thousand (20,000) inhabitants, under the provisions and methods set out in this act. The population of said cities to be determined by the last census of the United States completed before the holding of said election.
>
> "Provided further, that for the purpose of this act, the term 'city' shall be construed to mean any municipal corporation having a population of five hundred (500) inhabitants or more."

In construing a statute two general, but paramount, rules of construction must be given consideration and effect. It is

generally acknowledged that the primary rule in construing statutes is to ascertain and give effect to legislative intention; Meyering v. Miller, 51 S. W. (2d) 65, 330 Mo. 885. A second rule, and an equally important one, is that in arriving at legislative intent, laws should be interpreted to further ends of justice and public welfare, and not be given any unreasonable effect, Bowers v. Missouri Mutual Ass'n., 62 S. W. (2d) 1058.

With the two rules, referred to above, in mind let us turn to the section of the statute, quoted supra, and see what the legislature did say, what tests the legislature laid down, what the reasonable construction of the statute is and what an unreasonable construction of the statute might lead to, under the facts stated in your opinion request.

In part, the statute enacted by the legislature states, that no license shall be issued for the sale of intoxicating liquor in any incorporated city having a population of less than twenty thousand (20,000) inhabitants, and more than five hundred (500) inhabitants, until the same shall have been authorized by a vote of the people. Whether or not a city has a known population is to be determined by the last census of the United States completed before the holding of said election.

The only test for determining population, announced by the statute is the last United States census. If the legislature had intended that any other test was to be used, the legislature could easily have so stated. It is a known fact that each ten years a federal census is conducted and the findings disclosed. The last federal census was conducted in the year 1940. As stated in your opinion request, at the time of the taking of that census, the census of 1940, Cape Girardeau had a population of less than twenty (20,000) thousand inhabitants. Therefore, under the statute, Section 4890, if at any time the city of Cape Girardeau had desired to sell intoxicating liquor, other than malt liquor, by the drink for consumption on the premises where sold, such desire of the inhabitants had to be declared and evidenced by a vote on that proposition. Apparently, no such decision was ever made by the inhabitants of Cape Girardeau. Subsequent to the 1940 census the city of Cape Girardeau annexes, by legal means, a contiguous strip of land containing persons, whose total population when added to the population of Cape Girardeau exceeds the statutory limit of twenty (20,000) thousand persons. At first impression, it might appear that the problem presented is whether or not such an addition or combining of populations can be made to take a city outside the limitations of the statute. However, further reflection reveals that the true problem is not one of combining populations, but of determining what the statute states as the

procedure for obtaining intoxicants by the drink in a given community or city, and what tests are used to arrive at the conclusion. After examining the statutes, the cases, textbooks and digests, the writer was unable to find any authority that would allow the two areas referred to in your letter to be combined. In other words, no authority was found for deviating from the directions of the statute. On the contrary, reason and justice make the application of the terms of the statute preferable. In the Missouri Digest Volume 13, Intoxicants, Key 30, are a number of cases dealing with approximately the same question as is presented by your opinion request. None are directly in point, but all indicate that where change in the status of a political subdivision is contemplated, concerning intoxicants, the courts of this state favor the status quo unless the contemplated change is specifically authorized by statute. In State ex rel. v. Robinson, et al, 129 Mo. Appeals 147, l. c. 158, the attitude of the court regarding the resubmission of the local option status where a city had voted dry and subsequently added territory which wished to vote upon the question again within the statutory limitation of four years, is reflected:

> " * * * *This being true by every principle of natural justice as well as the entire analogy of American institutions, the inhabitants of the municipality are in duty bound to abide for four years the policy adopted in the election in which each and every one of its qualified voters either participated or had the right so to do, and voluntarily waived the same. And this is true notwithstanding the fact that a large number of persons have taken up their abode within the town since that time, for those persons came to Granby voluntarily and assumed the obligations of citizenship of their own volition and free will, knowing full well the state of the law on the subject. In this view, we have one set of inhabitants, those who resided there at the time of the election, impliedly accepting the law by participating, or waiving their right to participate in the election, and a second set, those who have taken up their abode there since its adoption, impliedly accepting the law by voluntarily becoming citizens of a community in which they knew full well the law obtained. * * * * * * * *"

As stated above, the writer realizes that the case quoted from is not directly in point, but the writer does believe that the case indicates that the attitude of the courts is to follow the law literally and to never enlarge a statute by judicial

legislation when dealing with liquor problems and if possible the courts prefer to maintain the status quo.

Turning now to the problem of whether or not the two territories, Cape Girardeau and the recently annexed land, can be combined, the writer was unable to find any direct authority either in support of such a procedure or in derogation of such a step. However, the arguments against such a procedure are to be marshalled. The only test laid down in the statute, Section 4890, for determining the population is the last federal census, not one word is stated about additional territory, natural increment by birth or movement of population or any other exception that the legislature might have expressly enacted. Certainly, no one can say that the legislature did not realize that there might be borderline cases at the time the federal census was taken and that the birth rate of the next year or two might populate the city to a total exceeding twenty (20,000) thousand inhabitants, yet not one word was stated in the statute regarding the procedure in such an event. Let us consider that if your proposal of combining two territories is to be approved what is to prevent a city of 19,999 at the time the census was taken from determining that their city is without the limits of the statute upon the birth or addition of two more persons. Yet the statute is absolutely silent regarding either possibility. What would be reasonable or just about permitting one city to propel itself outside the limitations of the statute by the addition of territory with the accompanying population yet denying to another city the recognition of its natural increment? There simply is no equality in such a situation. The legislature provided a very precise and clear method of determining whether a city with over five (500) hundred population and less than twenty (20,000) thousand population wish to permit the sale of intoxicants for consumption upon the premises where sold. Further the legislature stated clearly that the determination of the population was to be made by applying the last United States census. Legislative knowledge of territorial annexation and natural increment by birth or movement of population cannot be denied. Yet chargeable with that knowledge the legislature laid down the rule and the test, and with the attitude of the courts favoring the status quo, it is impossible for this office to legislate concerning the problem, or to read into the statute a procedure permitting a factual situation to take a city without the statutory limitations of which the legislature had knowledge but about which the legislature made no provision.

That the legislature of the state of Missouri does realize that

changing conditions may make alterations under the law advisable is found in the language of Section 7522, R. S. Mo. 1939, wherein the legislature provided that cities of certain size and under special charters might take a census to determine certain rights under the law dependent upon population. In part, Section 7522, provides:

> "Any such city may at any time, by ordinance and at the expense of the city, cause an enumeration of its inhabitants to be made, and its population ascertained, and such census, when so taken, shall have like force and effect as a state or national census to authorize such city to proceed in securing such other incorporation as its population may entitle it to under the laws and Constitution of this state, and for any other purpose that the laws may require, or have any other act or thing to be done making the population a basis thereof;
> * * * * * * * * *"

Needless to say, we believe, that that section applies to only cities of the fourth class and under special charters. Yet, with the knowledge that under certain conditions it would be advisable to permit a city to take a census, the legislature failed to provide for such a procedure in Section 4890, R. S. Mo. 1939.

Further, it is a cardinal principle of statutory construction that the expression of one thing is to the exclusion of all others. The legislature in Section 4890, R. S. Mo. 1939, stated that population was to be determined by the last United States census, no other method is provided for by said section. Applying that principle of exclusion we must conclude that the legislature contemplated only the statutory method of determining whether or not any given city came within or without the statutory limitations per its terms.

CONCLUSION

Therefore, this office is of the opinion that under the provisions of Section 4890, R. S. Mo. 1939, the legislature did

not provide for the addition or annexation of two territories whereby the statutory limitation might be exceeded, but expressly provided that only cities having more than five (500) hundred population and less than twenty (20,000) thousand population may vote upon the proposition of liquor by the drink, and that the only test to be used is the population of the city at the time of the last United States census, regardless of subsequent addition of territory or increase in population by birth or movement. Further, that the courts favor the status quo, when dealing with intoxicants or their use.

Respectfully submitted

WM. C. BLAIR
ASSISTANT ATTORNEY GENERAL

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

WCB:MA