INTOXICATING LIQUOR: Interpretation of Section 44-a-9, page 283, Laws of Missouri, 1935.

July 11, 1938

7-13

FILED
27

Mr. Melvin Englehart,
Prosecuting Attorney,
Madison County,
Fredericktown, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated May 26, 1938 for an official opinion from this department which is as follows:

> "I would like to have an opinion from you interpreting the meaning of the following statement found in the above described Section: (Any room, house, building, boat, vehicle, structure of any kind where intoxicating liquor is sold, manufactured, kept for sale, or bartered, in violation of this Act; etc.)
>
> To prove a prima facie case under the above provisions, is it necessary that the State show that the intoxicating liquor is sold, manufactured, kept for sale, and bartered; or, is proof of either sale, manufacture or bartering, sufficient?
>
> I am filing a petition in the Circuit Court of this County under this section, and if you have any authority on the above question, I would appreciate very much securing it."

Section 44-a-9, Session Laws of Missouri, 1935, page 283, reads as follows:

> "Any room, house, building, boat, vehicle, structure or place of any kind where intoxicating liquor is sold, manufactured, kept for sale or bartered, in violation of this act and all intoxicating liquors and all property kept and used in maintaining such a place and any still, doubler, worm, worm tub, mash tub, fermenting tub, vessel, fixture or other property of any kind or character used or fit for use in the production or manufacture of intoxicating liquor is hereby declared to be a public and common nuisance, and any person who maintains or assists in maintaining such public and common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars or by imprisonment for not less than thirty days nor more than one year or both."
> * * * * * * * * * * * * *

This section is in the disjunctive for the reason that the words "manufactured, kept for sale, and bartered," are entirely different charges and are not synonymous. If an information is drawn charging that the defendant sold, manufactured, kept for sale, or bartered, it would be objectionable on account of more than one count in the same charge, and also for the reason further that the defendant would be compelled to defend upon four separate offenses.

In the case of State v. Coffee, 35 S.W. (2d) 969, the defendant was found guilty in the lower court upon an information charging him with working and permitting those in his employ to labor on Sunday. In that case the court held that the information charging him with working and

permitting those in his employ to labor on Sunday, the two offenses were conjunctive and were not repugnant and were synonymous. The court, in affirming the judgment of the lower court, said:

> "It is urged that the information charges two separate and distinct offenses in the same count, and should have been quashed for duplicity. The information is based on section 3596, R.S. Mo. 1919, which provides that 'every person who shall either labor himself, or compel or permit his apprentice or servant * * * to labor or perform any work other than the household offices of daily necessity, or other works of necessity or charity * * * on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars.' It is evident that the information follows the language of the statute. It charges defendant with both laboring himself and permitting his servants to work on Sunday. It is well settled, as urged by defendant, that an information charging two separate and distinct offenses in one count is bad for duplicity. State v. Huffman, 136 Mo. 58, 37 S.W. 797; State v. Young (Mo. App.) 215 S.W. 499. However, it is equally well settled that, where a statute enumerates offenses in the alternative and provides one and the same punishment therefor, if such offenses are not repugnant, an information charging all of such offenses conjunctively in one count is not open to the objection of duplicity or multifariousness."* * * * * * * * *

In the case of State v. Tiemann, 253 S.W. 453, the

defendant was charged in the same information with failure "to maintain and provide for his lawful children under the age of sixteen years". In this case the court held that where a statute denounces various distinct acts as criminal in the disjunctive, the words of the statute must be used so as to apprise accused of the specific crime charged, and unless so charged the information would be fatally defective, since the word "provide" includes many things which the father would not be required to furnish in order to exempt him from criminal prosecution and the word "maintain" is synonymous with "provide." But in view of the words "maintain" and "provide" being held synonymous terms, the court further said:

> "* * * In State v. Thierauf, 167 Mo. 429, 67 S.W. 292, it is held that ordinarily, in charging a statutory offense, the words of the statute must be used, so as to apprise the defendant of the specific crime with which he is charged, and it is there stated that:
>
> 'When a statute denounces various distinct acts as criminal in the disjunctive, as this act does, then it is the constitutional right of the defendant 'to demand the nature and cause of the accusation against him.''
>
> The word 'provide,' as used in the information and in some statutes, has a broad meaning, and may include many things which the father would not have to furnish in order to exempt him from criminal prosecution. He would only be guilty, under the statute in question, for failure to provide the 'necessary' food, clothing, or lodging. There was no attempt to follow the statute in this case, or to use words of similar import and meaning in order to describe the offense, and to apprise the defendant of the charge he had to meet."

In the case of State v. Bragg et ux., 220 S.W. 25, l.c. 27, it was held:

> "* * * As said in State v. Cameron, 117 Mo. 371, 375, 22 S.W. 1024, 1025:
>
> 'Where a statute in one clause forbids several things or creates several offenses in the alternative, which are not repugnant in their nature or penalty, the clause is treated in pleadings as though it created but one offense; and they may all be united conjunctively in one count, and the count is sustained by proof of one of the offenses charged.'
>
> This rule, however, does not apply when the disjunctive words are mere synonyms having the same meaning and used to describe or characterize the same act or thing, nor to words which are merely different names for the same thing. Thus it was held in State v. Larger, 45 Mo. 510, not to be bad pleading to charge that defendant abandoned his wife and failed to 'maintain or provide' for her, since the words 'maintain' and 'provide' mean substantially the same thing, and that a failure to do one is a failure to do the other. So in State v. Nelson, 19 Mo. 393, the indictment charged defendant with permitting a gambling device adapted and designed for the purpose of playing games of chance for money or property, and this was held good. In State v. Moore, 61 Mo. 276, the court ruled that--
>
> 'An indictment for arson is not fatally defective for describing the property burned as a 'house or building,' the words being evidently used in a synonymous sense, and to designate the same object.'

> It was ruled by this court in State v. Keithley, 142 Mo. App. 417, 423, 127 S.W. 406, that the terms 'bawdy-house' and 'assignation house' mean the same thing, and are synonymous words, designating the kind of house the keeping or maintaining of which is made an offense. This assignment of error is overruled."

There can be no question but that Section 44-a-9, supra, would be considered a disjunctive statute for the reason that the words "sold, manufactured, kept for sale, or bartered," are not of the same nature in any respect and describes the commission of a separate form of violation of the intoxicating liquor act.

CONCLUSION

In view of the above authorities, it is the opinion of this department that Section 44-a-9, Session Laws of Missouri, 1935, page 283, describes four separate crimes in violation of the Intoxicating Liquor Act, and in order to prove a prima facie case under the act it would only be necessary to allege one of the four violations in the information and introduce evidence proving one of the four violations as set out in the information, and as said before if all four violations are charged in one count of the information, it would be objectionable for duplicity or multifariousness.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:DA