

FICTITIOUS NAME - Use of fictitious name as a violation  
of criminal law.

February 5, 1937.

Hon. Conn Withers,  
Prosecuting Attorney of Clay County,  
Liberty, Mo.

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Dear Sir:

We have your letter of February 2, 1937, requesting our opinion supplementing our opinion to Hon. James S. Rooney, former prosecuting attorney of Clay County, of January 13, 1937, your letter being in the following terms:

"By letter dated January 13, 1937, you gave an opinion in answer to a request by Mr. Rooney, dated November 28, 1936, Mr. Rooney, who was my predecessor in office, as appears by your opinion did not inform you of one fact which raises the most question as to whether or not the matter mentioned in your Opinion of said date constitutes a violation of the criminal statute, namely, that the name "New Butler Cafe" was used as soon as the purchase was made from John Butler by Cowling and as soon as this purchase was made all signs and literature, bills of fare, etc., bore immediately beneath the name "New Butler Cafe" the words "Cowling and Richner, proprietors", so that all published material and signs showed who were actually proprietors of the place, thereby giving direct notice in all such places of the true names of the persons doing business.

I would appreciate your advice as to whether or not this additional fact varies the conclusion set out in your Opinion of January 13, 1937."

We do not believe that it can be doubted that even under the supplementary facts mentioned in your letter, that there is a technical violation of R. S. Mo. 1929, section 14342. Business is being transacted and done in the name of "New Butler Cafe", and this name is not the true name of the persons doing the business, even though their names appear on published material and signs as the proprietors. There is no exemption in the Act for persons doing business under fictitious name because of the fact that the names of individuals

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are noted as proprietors of such business.

Almost all of the cases which we have examined dealing with the Missouri Statutes and the statutes of other states on this subject involved civil suits where the defense was raised that the plaintiff was operating under a fictitious name in violation of a statute. The most helpful Missouri case is *Ditzell v. Shoecraft*, 219 Mo. App. 436, 274 S. W. 880 (1925) from which we quoted in our opinion of January 13, 1937.

A representative case from another jurisdiction, is *Hayes v. Providence Citizens' Bank & Trust Co.*, 218 Ky. 128, 290 S. W. 1028 (1927) in which the court, construing a statute similar to the Missouri statutes under consideration, said:

"The primary purpose of the statutory provision was to enable persons dealing with other persons under trade or assumed names to know or be able to ascertain the name or names of the persons with whom they were dealing. \* \* \* after all, the fundamental purpose of the enactment was to enable one to identify the individual who was the owner of the business with which he proposed to deal, to the end that he might exercise his judgment in determining whether he was dealing with a responsible person. \* \* \*

There is nothing inherently vicious in doing business under an assumed name. Such manner of doing business was lawful before the statute was passed. The statute does not undertake to prohibit that mode of doing business, but only seeks to regulate the manner in which such mode of business should be carried on. The statute being penal in its nature and in derogation of the common law, it should not be construed so as to include within its purview cases which do not clearly come within it."

If Messrs. Cowling and Richner are the sole proprietors of the New Butler Cafe, so that no one extending credit to their business could be misled as

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to the identity of its owners, then it may well be that the statute was not necessary to give persons dealing with them the protection of knowing with whom they were dealing, but since the language of the statute is so plain in requiring registration of any fictitious name, we believe that the statute is being violated when the proprietors of this business fail to register the name under which they are operating.

In conclusion, it is our opinion that any person engaging in or transacting any business in this state under a name other than the true name of such person, without registering as required by R. S. Mo. 1929, section 14342-14346, is guilty of a misdemeanor, and as such subject to prosecution and fine or imprisonment, even though in connection with such fictitious name the name of the proprietor of such business appears on published material and signs, but in our opinion if the names of all the proprietors of such business appear in all cases where such fictitious name is used and in conjunction therewith, this fact would doubtless make a conviction more difficult, and if a conviction were had, would doubtless go far toward mitigating the fine or sentence.

Very truly yours,

EDWARD H. MILLER,  
Assistant Attorney General.

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney General.