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1. LIQUOR CONTROL, DEPARTMENT OF—MANDATORY DUTY TO ENFORCE PROVISIONS SECTION 13206 G. C.—SALE OF INTOXICATING LIQUORS PROHIBITED WITHIN TWO MILES AGRICULTURAL FAIR—VIOLATORS—ARREST.
2. SALE 3.2 BEER WITHIN DESIGNATED DISTANCES OF NAMED INSTITUTIONS AND WITHIN TWO MILES OF AGRICULTURAL FAIR NOT A VIOLATION OF SECTION 13206 G. C.
3. SALE OF INTOXICATING LIQUORS—PROHIBITED WITHIN DISTANCE ONLY OF SUCH INSTITUTIONS ENUMERATED IN SECTION 13206 G. C.

SYLLABUS:

1. It is the mandatory duty of the Department of Liquor Control to enforce the provisions of Section 13206, General Code, which prohibit the sale of intoxicating liquors within two miles of where an agricultural fair is being held, by causing the arrest of all persons found violating such provisions.

2. The sale of so-called 3.2 beer within the designated distances of the institutions named in Section 13206 of the General Code and within two miles of the place where an agricultural fair is being held is not a violation of said section.

3. Section 13206 of the General Code does not prohibit the sale of intoxicating liquors within any distance of state institutions which are not enumerated in said section.

Columbus, Ohio, August 16, 1946

Hon. Robert M. Sohngen, Director, Department of Liquor Control
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion wherein you inquire whether the Department of Liquor Control is required:

“1. Under Section 13206 to require all taverns operating on a permit and all liquor stores operated by the state of Ohio within the two mile area to close while the State Fair and other County Fairs are being held throughout the state of Ohio.

2. If so, whether or not Section 13206 is applicable to those permit places selling 3.2 beer.

3. Is the statute applicable to those state institutions not named in the statute?"

Section 13206, General Code, to which you refer, reads as follows:

"Whoever sells intoxicating liquors or keeps a house of ill-fame at or within twelve hundred yards of the administration or main central building of the Columbus state hospital, Dayton state hospital, Athens state hospital, Toledo state hospital, soldiers' and sailors' orphans' home, or any other orphans' home in this state, or within two miles of the boundary line of the boys' industrial school, south of Lancaster, Fairfield county, or within two miles of the place where an agricultural fair is being held, or within one mile of a county children's home of a county of the state situated within one mile of an incorporated village or city in which the sale of intoxicating liquors is prohibited by an ordinance of such village or city, shall be fined not less than twenty-five dollars nor more than one hundred dollars, or imprisoned not more than thirty days, or both. The place wherein such intoxicating liquors are sold shall be shut up and abated as a nuisance by order of the court upon conviction of the owner or keeper thereof."

It will be noted that there is nothing contained in the above section which in any manner defines the powers and duties of your department. Therefore, your first question wherein you inquire whether your department is required, under said section, to cause all taverns and liquor stores operated by the state within the two mile area designated therein to close while agricultural fairs are being held, would, if specifically answered, be answered in the negative.

However, your attention is directed to Section 6064-8, General Code, which defines the powers of the Department of Liquor Control. In said section it is provided:

"The department of liquor control shall have all the powers and duties vested in and imposed upon a department. In addition thereto, the department shall have and exercise the following powers: * * *

4. *To enforce the provisions of the liquor control act and the rules, regulations, and orders of the board of liquor control and the penal laws of this state relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquors.* * * *"
(Emphasis added.)

Clearly, Section 13206, General Code, is a penal statute relating to the sale of intoxicating liquor. Said section in plain unmistakable language declares the sale of intoxicating liquors within two miles of the place where an agricultural fair is being held, to be a criminal offense, subject to fine or imprisonment, or both. Consequently, there can be no doubt as to the power of the Department of Liquor Control to enforce the provisions of the latter section.

It will be noted that the above section confers upon the Department of Liquor Control power to enforce the penal laws, etc. Ordinarily a "power" is defined to be a liberty or authority and generally connotes ability or capacity to do an act.

However, if an act is authorized to be done by a public officer and the doing of such act is for the benefit of others it is obligatory on such officer to perform the act. In this connection it is stated in 32 O. Jur. 938:

"Powers conferred on public officers are generally construed as mandatory even though the language may be permissive where the public is concerned in their execution or where they affect the rights of third persons."

In *Broun v. City of Charleston*, 116 W. Va. 51, it is stated:

"Where statute confers power on municipality to be exercised for public good, exercise of power is not merely discretionary, but imperative, since words council 'shall have power to' mean duty and obligation."

Likewise in *Maryland v. Miller*, 194 Fed. 775, it is declared:

"* * * a legislative delegation of 'power and authority' to a municipal corporation, to be exercised for the public benefit or protection, is not permissive merely, but imperative, and imposes a duty and obligation on the municipality for the nonexercise or negligent exercise of which, resulting in private injury, it is liable in damages."

And in *Angel v. Methodist Protestant Church*, 62 N. Y. S. 410, it is stated:

"Generally, permissive words used in statutes conferring power and authority upon public officers or bodies will be held to be mandatory where the act authorized to be done concerns the public interest or the rights of individuals."

Obviously, the General Assembly in enacting Section 13206, General Code, intended the provisions thereof to operate for the public good. Whether the statute has or will accomplish the purpose of its enactment might be debatable, however, since the General Assembly is presumed to have acted wisely in the enactment of the laws passed by it and to have had a definite purpose in each enactment, the wisdom or lack of wisdom manifested by that body when it determined that the statute in question would operate for the benefit of the public may not be taken into consideration.

Furthermore, in the instant case the statute reads: "the department shall have *and exercise* the following powers." Since the word "shall" when used in a statute indicates an intention that the provisions thereof are mandatory, the clear import of the term "shall exercise" is that it shall be the duty to exercise. It would therefore appear and it is accordingly my opinion that it is the mandatory duty of the Department of Liquor Control to exercise the powers granted to it with respect to the enforcement of the penal laws of the state relating to the sale of intoxicating liquors and since, as above pointed out, Section 13206, General Code, is a penal law relating to the sale of intoxicating liquors, it is the mandatory duty of your department to enforce the provisions thereof. Your question, however, is whether it is the duty of the department to require taverns and liquor stores to close while fairs are being held. Since Section 6064-8, General Code, requires the department to enforce the provisions of Section 13206, General Code, which section merely prohibits the sale of intoxicating liquors and does not require the closing of establishments where intoxicating liquors are customarily sold, it is apparent that the duty of the enforcement officers of your department is to arrest and bring to trial all persons found to be violating the provisions of the latter section and consequently any attempt on the part of your department to close such establishments would be without authority in law.

Your question concerning the sale of intoxicating liquors in liquor stores operated by the state is answered by the well established doctrine that the state is not bound by the terms of a general statute unless such statute in express terms includes the state.

In the early case of *State, ex rel. Parrott, et al. v. Board of Public*

Works, 36 O. S. 409, this doctrine was definitely laid down by the Supreme Court of this state. In said case it was held:

“The state is not bound by the terms of a general statute, unless it be so expressly enacted.”

The court in its opinion stated:

“The doctrine seems to be, that a sovereign state, which can make and unmake laws, in prescribing general laws intends thereby to regulate the conduct of subjects only, and not its own conduct.

* * * Indeed, the doctrine of the common law expressed in the maxim, ‘The king is not bound by any statute, if he be not expressly named to be so bound’ (Broom Leg. Max. 51), applies to states in this country as well.”

And in *State, ex rel. v. Chappeller*, 39 O. S. 207, this doctrine was reiterated when the court declared:

“The answer is that the state is not liable to contribute to the payment of county officers or their assistants, except where such liability is created by statute. The state can, no doubt, through its legislature, subject itself to the provisions of a general law, but it must be by express enactment. ‘The state is not bound by the terms of a general statute unless it be so expressly enacted.’”

See also, *State, ex rel. v. Brown*, 112 O. S. 590 and *State, ex rel. v. Merrell*, 126 O. S. 239.

Therefore, since Section 13206, General Code, does not in express terms include the state of Ohio or any of its departments, sales of intoxicating liquors made by the state in state operated stores do not fall within the prohibitory provisions of the statute.

Your second question is answered by Section 6064-1 of the General Code under the provisions of which intoxicating liquor is defined as “all liquids and compounds containing more than 3.2 per centum of alcohol by weight and are fit to use for beverage purposes.”

Since the penal section prohibits the sale of intoxicating liquors, and so-called 3.2 beer is not defined in the law as intoxicating liquor, it would follow that the sale thereof is not prohibited by said section.

I come then to a consideration of your third question. Under the law of Ohio all crimes are statutory. In other words, no act, however

offensive or atrocious the same may be, can be punished criminally except in accordance with the terms of a valid statute. Furthermore, it is a well established rule that all penal statutes must be strictly construed. A statute defining a crime can not be extended beyond the express terms thereof.

In *State v. Meyers*, 56 O. S. 340, it was held:

“A statute defining a crime or offense cannot be extended, by construction, to persons or things not within its descriptive terms, though they appear to be within the reason and spirit of the statute.”

Similarly, in *Board of Education v. Boal*, 104 O. S. 482, it was held:

“Where a statute defining an offense designates one class of persons as subject to its penalties, all other persons are deemed to be exempted therefrom.”

In view of the above, it would follow that the sale of intoxicating liquors within twelve hundred yards of state institutions not named in Section 13206, General Code, is not prohibited under the terms of said section.

In specific answer to your questions, you are therefore advised that in my opinion:

1. It is the mandatory duty of the Department of Liquor Control to enforce the provisions of Section 13206, General Code, which prohibit the sale of intoxicating liquors within two miles of where an agricultural fair is being held, by causing the arrest of all persons found violating such provisions.

2. The sale of so-called 3.2 beer within the designated distances of the institutions named in Section 13206 of the General Code and within two miles of the place where an agricultural fair is being held is not a violation of said section.

3. Section 13206 of the General Code does not prohibit the sale of intoxicating liquors within any distance of state institutions which are not enumerated in said section.

Respectfully,

HUGH S. JENKINS,
Attorney General.