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INTOXICATION—PROSECUTION UNDER MUNICIPAL ORDINANCE—LANGUAGE SIMILAR TO THAT CONTAINED IN SECTION 3773.22 RC—NOT A PROSECUTION IN NAME OF MUNICIPAL CORPORATION UNDER PENAL ORDINANCE WHERE A STATE STATUTE IS IN FORCE UNDER WHICH OFFENSE MIGHT BE PROSECUTED—SECTION 3375.50 RC PROVIDES FOR DISTRIBUTION OF PORTION OF CERTAIN FINES AND PENALTIES—TO COUNTY LAW LIBRARY ASSOCIATION—GENERAL ASSEMBLY FAILED TO PROVIDE PENALTY FOR VIOLATION OF SECTION 3773.22 RC.

SYLLABUS:

A prosecution for intoxication under a municipal ordinance containing language similar to that contained in Section 3773.22, Revised Code, is not a "prosecution in the name of a municipal corporation under a penal ordinance thereof, where there is in force a state statute under which the offense might be prosecuted" within the meaning of Section 3375.50, Revised Code, providing for distribution of a portion of certain fines and penalties to a county law library association, in view of the fact that the General Assembly has failed to provide any penalty for the violation of Section 3773.22, Revised Code.

Columbus, Ohio, April 1, 1954

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

In your letter of recent date you propound the following question:

> The penalty clause for the offense of being intoxicated as provided in Section 3773.22, Revised Code (Section 13194, G.C.), has been omitted from the penalties provided for violation of different sections of Chapter 3773. as contained in Section 3773.99, Revised Code. What is the effect of this omission of the penalty clause on the enforcement of Section 3773.22, Revised Code? Does the omission of this penalty clause render Section 3773.22, Revised Code, a nullity, in so far as prosecutions or collections of fines and costs thereunder are concerned?

It appears from a letter to you from the Judge of the Tiffin Municipal Court, attached to your request, that the judge has determined that,

even giving due consideration to the "savings clause" contained in Section 1.24, Revised Code, such "savings clause" cannot be construed as writing a penalty into Section 3773.22 where none actually is present. The exact question he presents is whether or not prosecutions under a city ordinance containing language similar to Section 3773.22 would be considered "as cases which could also have been prosecuted under a statute, insofar as this would affect the distribution of fines and court costs."

Section 1901.31, Revised Code, provides in part as follows:

> "* * * The clerk of a municipal court shall receive and collect all costs, fees, fines, penalties, bail and other moneys payable to the office or to any officer of the court and issue receipts therefor, and shall each month disburse the same to the proper persons or officers and take receipts therefor, provided that fines received for violation of municipal ordinances shall be paid into the treasury of the municipal corporation whose ordinance was violated and to the county treasury all fines collected for the violation of state laws, subject to sections 3375.50 and 3375.53 of the Revised Code. * * *"

Section 3375.50, Revised Code, provides for certain payments by the clerk of the municipal court monthly to the board of trustees of the law library association in the county in which such municipal corporation is located. Among other moneys required to be so paid are "All moneys collected by a municipal corporation accruing from fines and penalties and from forfeited deposits, forfeited bail bonds, and forfeited recognizances taken for appearances, by a municipal court, * * * for offenses and misdemeanors *brought for prosecution* in the name of a municipal corporation under a penal ordinance thereof, *where there is in force a state statute under which the offense might be prosecuted,* * * *."

(Emphasis added.)

As heretofore noted, the Judge of the Tiffin Municipal Court has determined that in the absence of a penalty for violation of the terms of Section 3773.22, no prosecution can be had under this section. Assuming this interpretation to be correct, obviously, there would not be "in force a state statute under which the offense might be prosecuted" within the meaning of Section 3375.50, Revised Code.

We are faced, therefore, with the rather anomalous situation in which the decision of the trial judge with respect to any attempt to prosecute under the provisions of Section 3773.22 is final, but where

your office, as to matters of distribution of fines and court costs is likewise charged with a determination of this identical question in auditing the records of the various municipal courts in this state. The end result of a situation where you were in disagreement with the judge as to whether criminal prosecution may be had under Section 3773.22 is difficult to foresee. It is my opinion, however, for the reasons hereinafter stated, that the judge is entirely correct in his determination that criminal prosecution cannot be had for violation of the provisions of Section 3773.22.

Prior to recodification, Section 13194, General Code, provided that whoever is found in a state of intoxication or whoever, being intoxicated, shall disturb the peace and good order, or shall conduct himself in a disorderly manner, shall be fined not less than five dollars nor more than one hundred dollars. In the process of recodification, Section 13194, General Code, but without the penalty, became Section 3773.22, Revised Code, and the legislature while providing penalties for violation of other sections of Chapter 3773., failed to provide any penalty for the violation of Section 3773.22.

It has been contended by some that Section 1.24, Revised Code, wherein it is stated that "it is the intent of the General Assembly not to change the law as heretofore expressed by the section or sections of the General Code in effect on the date of enactment of this act" would have the effect of continuing the penalty provided in Section 13194, General Code, in force and effect as a sort of an appendage to Section 3773.22, Revised Code. I gravely doubt that a general expression of "intent" can be construed as providing a penalty to a criminal statute when none otherwise is provided. This, I believe, is particularly true in view of the well recognized and long established principle that criminal statutes must be strictly construed in favor of the defendant and against the state and that all doubt thereto must be resolved in favor of the defendant.

I believe that this position is given full support by the holding of the Ohio Supreme Court in the case of State vs. Williams, 104 Ohio St. 232, the first paragraph of the syllabus of which reads:

> "Although, where the general statutes of the state have undergone 'revision and consolidation' by codification, there is a presumption that the construction thereof should be the same as prior thereto, yet where the language of the revised section is plain and unambiguous, it is the duty of the court to give it the

effect required by the plain and ordinary signification of the words used whatever may have been the language of the prior statute."

I quote from the opinion of Matthias, J. beginning at page 239:

"* * * It is urged, and this was the view of the trial court, that the original act may be looked to in the construction of Section 13190, General Code, and therefrom it is concluded that it was the legislative intent that Section 13190 includes not only the officers specified therein, but also the secretary because he was named in the original act.

"This is stretching a rule of construction to the breaking point. It is erroneous to treat the new statute as the act merely of the codifying commission. It was duly enacted by the general assembly, and the provisions previously in force were repealed. The rule frequently announced and applied in numerous cases is that where the general statutes of the state are revised and consolidated there is a strong presumption that the same construction which the statute received before revision should be applied to the enactment in its revised form though the language may have been changed, and the same construction will prevail unless the language of the new act requires a change of construction to conform to the manifest intent of the legislature. State ex rel. H. P. Clough Co., v. Commissioners of Shelby Co., 36 Ohio St., 326; Allen v. Russell, 39 Ohio St., 336; Heck v. State, 44 Ohio St., 536; State, ex rel. Baumgardner, v. Stockley, 45 Ohio St., 304, 308; State v. Toney, 81 Ohio St., 130, and B. & O. Rd. Co. v. Nobil, 85 Ohio St., 175.

"This, however, is a rule of construction to be employed where the language used is of doubtful import. The principle is well established, and is supported by this court in each of the cases above cited, that where the language is clear, plain and easily understood, the court is not warranted in inserting in a statute, and *particularly a criminal statute,* a provision which would extend its scope and make it applicable to those not included within its terms. *It is elementary that such a provision is always to be strictly construed.* * * *" (Emphasis added.)

In specific answer to your question, it is my opinion that a prosecution for intoxication under a municipal ordinance containing language similar to that contained in Section 3773.22, Revised Code, is not a "prosecution in the name of a municipal corporation under a penal ordinance thereof, where there is in force a state statute under which the offense might be prosecuted" within the meaning of Section 3375.50,

Revised Code, providing for distribution of a portion of certain fines and penalties to a county law library association, in view of the fact that the General Assembly has failed to provide any penalty for the violation of Section 3773.22, Revised Code.

Respectfully,
C. William O'Neill
Attorney General