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Article 7

Labor Law - The Regulation of Picketing - Peaceful Picketing and Unfair Labor Practices

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RECENT DECISIONS

Criminal Law—Criminal Responsibility of Proprietor of Tavern for Illegal Sales of Operator in Proprietor's Absence.—Defendant, a tavern keeper holding a Retail Class B liquor license, had in his employ a bartender, who was licensed as an operator pursuant to Sec. 66.05 Wisconsin Statutes. He was convicted of violation of Sec. 176.05(3) Wisconsin Statutes requiring taverns to be closed for business between 1 A.M. and 8 A.M. of each day, and was fined $1.00 and costs. On June 13, 1942, at 2:08 A.M., the bartender had sold liquor while the defendant was absent from his establishment. Defendant, on appeal, contended that he was not criminally responsible for the act of his bartender when he was not present at the time of the act, because Sec. 176.05(11) Wisconsin Statutes imposes upon the operator licensee the responsibility for acts of all persons serving as waiters or in any other manner any fermented malt beverages or intoxicating liquor to customers; that in the absence of the proprietor licensee the operator licensee on the premises assumes the responsibility and control. It was held that a sale of liquor by a licensed operator during the proprietor licensee's absence does not relieve the proprietor, since intent is not the controlling element and the licensing of an operator in the proprietor licensee's employ is a method of further regulation and not a means of relieving the proprietor licensee from liability. *State* v. *Grams,* 6 N.W. (2d) 191 (Wis. 1942).

Since the middle of the 19th century courts in England and America have repeatedly held that criminal intent, or "mens rea" is not required to convict a person of offenses which imperil or jeopordize the public welfare,—crimes that are police offenses of a regulatory nature with punishment less severe than prison sentences. Crimes that do not require "mens rea" include such offenses as illegal sales of intoxicating liquor; sales of impure or adulterated food or drugs; sales of misbranded articles; violations of anti-narcotic acts; criminal nuisances; violations of traffic regulations; violations of motor-vehicle laws; and violations of general police regulations, passed for the safety, health, or well-being of the community. Cases on this subject are legion. The following decisions illustrate the point: A butcher was found guilty of a crime who sold adulterated food without knowledge of the fact that the food was diseased. *Hobbs* v. *Winchester Corporation,* 2 K.B. 471. In 1861 a defendant was convicted for being a common seller of intoxicating liquor although he neither knew nor supposed the beverage to be intoxicating. *Commonwealth* v. *Boynton,* 2 Allen 160 (Mass.). Defendant company was held responsible for permitting its cars to be run without rear lights, as required by statute, with no proof of guilty knowledge. *Provincial Motor Cab Co.* v. *Dun-*

ning, 2 K.B. 599. A seller was convicted for the sale of oleomargarine though he had no knowledge that he was selling oleomargarine. *State* v. *Rogers,* 95 Maine 94, 49 Atl. 564 (1901). And, when in violation of a statute the defendant unknowingly employed a child under the age of fourteen, it was held knowledge was not an essential ingredient of the crime and defendant might be punished for the act alone. *Kendall* v. *State,* 148 N.E. 367.

The promiscuous and unregulated sale of intoxicating liquor is so obviously contrary to public safety and morals that the legislatures of the states have acted on their police power in restricting traffic in liquor. *Weinberg* v. *Kluxnesky,* 236 Wis. 99, 294 N.W. 530 (1940). The public safety and welfare so far outweigh the right of an individual to absolvence from punishment for a crime committed without intent that decisions are accepted as correct and necessary which hold against the defendant proprietor for sales of intoxicating liquor, even when he is not present at the time of the sale. In *State* v. *Holm,* 201 Minn. 53, 275 N.W. 401 (1937), the court said that proof that the sale with the liquor dealer's knowledge or consent is unnecessary to sustain conviction of a dealer for selling intoxicating liquor to a minor, it being sufficient if the sale is shown to have been made by the dealer's employees or servants. The same principle underlying such decisions was expressed by the Supreme Court of South Dakota in *State* v. *Schull,* 279 N.W. 241 in the following language: "In the prohibition or punishment of particular acts, the state may in the maintenance of a public policy provide that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance. Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon the achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se.*" Regulations prohibiting the sale of intoxicating liquor to minors (the violation for which defendants were punished in the cases cited above) and regulations requiring retail establishments of the Class B type to be closed during certain hours as in *State* v. *Grams,* supra, appear to come within the same category.

Certainly the desire and necessity of protecting the public furnishes sufficient ground for the court's decision holding the proprietor of a tavern responsible for the conduct of his business, whether he is present or not, and the Wisconsin court obviously was motivated by this consideration, as was the court in *State* v. *Sobelman,* 199 Minn. 232, when it said statutes are to be so construed as to suppress the mischief and advance the remedy, to promote rather than defeat the purpose of the legislation.

However, when consideration is given to the agency aspect of *State* v. *Grams,* supra, some doubt might arise as to the soundness of the decision. Reference is made in the decision to several Wisconsin cases, holding the proprietor for acts of his agent, during the absence of the owner. *Conlin* v. *Wausau,* 137 Wis. 311, 118 N.W. 810, was decided in 1908; *Reismier* v. *State,* 148 Wis. 593, 135 N.W. 153, in 1912; and *Olson* v. *State,* 143 Wis. 413, 127 N.W. 975, in 1910. At the time these cases were decided employees of the proprietor were not required to be licensed, so obviously the only way to control the sale of intoxicating liquor was to hold the owner of the establishment as principal for the wrongful acts of his agent.

In 1933 Wisconsin passed the law requiring an operator's license for "any person who shall draw or remove any fermented malt beverage for sale or consumption from any barrel, keg, cask, bottle or other container in which fermented malt beverages shall be stored or kept on premises requiring a Class B license, for sale or service to a consumer for consumption in or upon the premises where sold." Sec. 66.05 (10) (a) (6) Wis. Stat., 1941. The requirements for an operator are the same as for a proprietor licensee as to character, citizenship and residency. Sec. 66.05 (10) (i) (1) and Sec. 66.05 (10) (g) (1) Wis. Stat., 1941. And, under Sec. 66.05(10)(i)(2) it is arguable that both the operator and proprietor are on a par as to responsibility since it says "there shall be upon premises operated under a Class B license, at all times, the licensee or some person who shall have an operator's license and who shall be responsible for the acts of all persons serving as waiters, or in any other manner, any fermented malt beverages to customers. No person other than the licensee shall serve fermented malt beverages in any place operated under the Class B license unless he shall possess an operator's license, or unless he shall be under the immediate supervision of the licensee or a person holding an operator's license, who shall be at the time of such service upon said premises." Sec. 176.05(11), entitled "Restrictions on Premises Under Retail "Class A" or "Class B" license, contains almost word for word the same language as Sec. 66.05(10)(i)(2). It is conceivable that the legislature meant that in the absence of the proprietor licensee the operator licensee is no longer his agent and that the operator assumes responsibility for his own acts and those of others working under him and that the proprietor licensee would not be responsible for violations committed in his absence.

However, when various other sections of the Wisconsin Statutes are examined, they compel the conclusion that the intent of the legislature was to place primary emphasis and responsibility on the proprietor licensee and not on the operator licensee. For instance: A retailer (who is the proprietor licensee) shall mean any person who shall sell, barter,

exchange, offer for sale or have in posession with intent to sell any fermented malt beverages [Sec. 66.05(10)(a)(4)], while an operator shall be one who merely draws or removes any fermented malt beverage for sale or consumption [Sec. 66.05(10)(a)]. The license fee for a Class B retail license shall be determined by the city, village or town in which said licensed premises are located but shall not exceed $100 per year [Sec. 66.05(10)(g)(2)], while the fee for an operator is not to exceed $5.00 per year [Sec. 66.05(10)(i)(3)], thereby implying that an operator's position and a proprietor's as to accountability for offenses on the premises are not comparable. The proprietor licensee is required by Sec. 66.05(10)(g)(4) to display a sign disclosing the brand of beer served, and shall not substitute any other brand for that so designated. No similar duty is placed on the operator. Certainly, then, the proprietor licensee is the one on whom falls the responsibility for keeping the premises closed during the hours designated in Sec. 176.06(3), and is the one who is to be in active control and supervision of his premises, to such a degree that he cannot escape punishment because the operator was also licensed. As said in *Hershorn* v. *People,* 113 P. 2nd 680 (1941), "Hershorn cannot escape guilt by attempting to shift the crime to his employee and must stand or fall with those who acted for him. So long as he has the management, direction and supervision of the business and place in which liquor was being sold, he assumes the risk of criminal liability when his agents, working under the circumstances disclosed by the evidence, sold liquor" contrary to statute. Even in Sec. 176.05(11) the language implies that the requirement is primarily directed toward the proprietor licensee by the very wording of the statute.

Not only the language of the statute, but the safeguard of public morals and public policy suggest that any attempt to relieve the proprietor of responsibility for acts done in his establishment and to weaken the long line of decisions which hold him for acts done in his absence and against his instructions be frowned upon. Were the operator licensee alone responsible for a sale of liquor after hours, an unscrupulous proprietor might hire equally unscrupulous operators to serve liquor after 1 A.M. in a Class B retail establishment, take a chance on not being apprehended at once, reap a nice profit for after-hour sales, and in turn promise to pay the operator's fine if and when he be arrested. After the removal of the first operator, he might be followed by a second and a third,—thus allowing a scheme for putting money into the pocket of the proprietor unlawfully, while he went "Scott free," except for the possible payment of an occasional fine, in fulfillment of his part of an illegal bargain. Needless to say, such procedure would defeat the purpose of the legislation and would be cer-

tainly contrary to proper conceptions of correct control and regulation of the liquor business.

With a decision such as *State* v. *Grams,* supra, as law, proprietor licensees will find it behooves them to hire only honest, reliable operators who will obey all provisions of the law, in order to protect themselves from prosecution.

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Federal Procedure—Applicability of Discovery Procedure under Federal Rules to the United States.—In an action by the United States, the General Motors Corporation and others were charged with engaging in conspiracy in restraint of trade and commerce. The defendants answered and filed forty-five interrogatories under Rule 33 of the Rules of Federal Procedure, 28 U.S.C.A. following Sec. 723c, which they asked the government to answer. It was contended by the Government that Rule 33 "substitutes interrogatories for a bill of discovery"; that the United States has never consented to be a defendant in such a bill, or to answer interrogatories; and that the rule substantially changes legal rights. The court *held* that while an action does not lie against a sovereign except by consent and while the United States could not be compelled to make discovery in an action brought for that purpose, still the government in bringing a civil action against an individual may be subjected to the ordinary rules governing procedure in the court in which the suit is brought and that, accordingly, the Government could be required to answer the interrogatories. *United States* v. *General Motor Corporation,* 2 F.R.D. 528 (N.D. Ill. E.D. 1942).

In the instant case, the court pointed out that although Rule 33 does not specifically include the United States as subject to it, the fact that Rule 37(f) which provides that the payment of attorney's fees imposed for failure to answer interrogatories are not to be imposed on the United States, shows that Rule 33 was meant to apply to the United States. It might further be pointed out that a reading of the Federal Rules as a whole indicates that they were meant generally to apply to the Government as well as any other party to a civil action. Rule 12 specifically extends the time within which the United States may plead to sixty days. Rule 4 makes an exception of the United States in the procedure of service of process on the United States. And most imperative is Rule 81 wherein all the exceptions to the Rules are cited: and nowhere in Rule 81 is the United States exempt from the general application of the Rules. And furthermore, the cases have consistently held that in a civil action the United States takes the same position as any other private suitor. *United States* v. *National*