

BEER: Right of the Food & Drug Commissioner to revoke permits by a summary procedure.

13139 # Laws 338.23

August 22nd, 1933



Dr. E. T. McGaugh,  
State Health Commissioner,  
Jefferson City, Missouri.

Dear Sir:

We acknowledge your letter of August 21st, 1933 requesting an opinion from this Office. Your request was as follows:

"There has been complaints from the breweries of the State that some breweries, or wholesalers, are, in and outside the State entering in to the retail business. It is claimed that the breweries or their agents are leasing buildings, furnishing the entire equipment for operating a bar for the sale of beer, the operator having no financial investment. If this is carried out, the saloon business will revert back to where it was before prohibition.

I would like an opinion whether or not, under the law, we can take any action. Has the Health Department any police powers in such circumstances? Can we revoke the permit when we are convinced that the above conditions are true? "

On page 258, Laws of Missouri 1933, Section 13139c provides in part as follows:

"It shall be unlawful for any person in this State to manufacture, or brew, or sell, any non-intoxicating beer without first having applied for, and secured, a permit from the Food and Drug Commissioner authorizing such brewing, manufacture and sale, thereof, \* \* \*".

The legal description of the statutory prescribed permit holders is fourfold and set out in Section 13139e which provides as follows:

"Before any permit required by this article shall be issued, the annual fee required therefor shall be paid into the State Treasury, and the receipt for such payment filed in the office of the Food and Drug Commissioner. Annual fees required for permits authorized by this article shall be as follows:

"(a) For a permit authorizing the manufacture, and the sale by the manufacturer of non-intoxicating beer brewed or manufactured in this state, (\$500.00) five hundred dollars.

(b) For a permit authorizing the sale in this state by any distributor, or wholesaler, other than the manufacturer or brewer thereof, of non-intoxicating beer, (\$50.00) fifty dollars.

(c) For a permit authorizing the sale of non-intoxicating beer for consumption on premises where sold, (\$10.00) ten dollars.

(d) For a permit authorizing the sale of non-intoxicating beer by grocers and other merchants and dealers, for sale in the original package direct to consumers, but not for resale, (\$5.00) five dollars. "

Section 13139ee further authorizes the manufacturer or distributor in possession of (a) and (b) permits respectively, to have certain specific statutory powers as follows:

"A permit to brew or manufacture and sell non-intoxicating beer in this state shall be construed to authorize the sale, by the holder of such permit, of non-intoxicating beer to distributors or wholesalers for resale to retailers only, and/or the sale of non-intoxicating beer by the holders of such permits, direct to retailers. A permit authorizing any distributor or wholesaler to sell non-intoxicating beer in this state shall be construed to authorize the sale thereof only to holders of permits authorizing the sale of non-intoxicating beer to consumers, not for resale, but shall not be construed to authorize the sale by any such distributor or wholesaler of non-intoxicating beer direct to consumers."

Section 13139h limits the powers of the holders of all permits issued under this Article by certain general provisions applicable to all permit holders and then by a special provision applicable only to manufacturers and distributors identified as (a) and (b) permit holders in the Act, which special limitation is as follows:

"Provided no permit shall be issued under this act to any person other than a native born, or naturalized, citizen of the United States of America,' and provided further, no manufacturer or distributor, to whom, or to which, this act applies, shall have any interest, directly or indirectly, in the business of any person, firm, company, or corporation, applying for, securing, or holding, a permit under either sub-paragraph 'c' or sub-paragraph 'd' of Section 13139e of this Act."

The Supreme Court said in the case of State v. Bixman, 62 S. W. 828, l.c. 831:

"Neither do we assent for a moment to the statement that 'the power of the state to prohibit the sale of beer is not an arbitrary one, but may be exercised only because of the conviction of the people that such sale is hurtful'. The limitation upon legislative power in our constitution does not depend upon the conviction of the people as to the propriety or impropriety of the exercise of that power, save as expressed in the constitution itself. The policy of the law is one thing; the constitutional power of the general assembly to enact it is an entirely different thing. Can it be that because the conviction of the people is that the sale of beer is not hurtful a constitutional barrier has arisen to prevent the lawmaking branch of the government from imposing conditions and restrictions under which the business alone may be conducted? The legislature, in the act before us, has declared that beer can only be sold or manufactured in this state upon condition that it shall be made from certain cereals only, and shall be inspected, and the inspection fees paid to the state therefor. The defendant asserts that its action in so doing is unconstitutional. We answer that under the constitution of the state there is nothing to prohibit the legislature from suppressing the business absolutely. We stand upon firm ground in asserting this prerogative for the legislative department. To deny it is to depart from well-settled principles. Since the decision in Austin v. State,

10 Mo. 591, it has been the established law of this state that the right to sell spirituous or intoxicating liquors is not a natural right, but is a calling which no one has the right to pursue without having first received the privilege or a license so to do from the lawful authorities of the state."

Our Supreme Court in State ex rel. McClung v. Becker, 288 Mo. 607 l.c. 616 stated the law of Missouri relating to license matters thus:

"In the absence of any inhibition, express or implied, in the State Constitution, the Legislature may, either in the exercise of the police power or for the purpose of revenue, levy license taxes on occupations or privileges within the limits of the state."

In the exercise of police power and for the purpose of revenue, the Legislature enacted the recent Beer Bill, which is now the law. By the express terms of the law, permits are granted, upon application to the Food and Drug Commissioner. Upon compliance with the law, permits are granted to manufacturers and distributors of non-intoxicating beer, and this permit allows the permittee to sell and distribute said beer within the limitations of the law providing for the same. A licensed privilege it is, and subject to such reasonable regulations and restrictions as the Legislature prescribed for the protection of the general public.

Our Supreme Court has said in Simmons v. State, 12 Mo. 268, l.c. 271, when speaking of the rights that one holding the privilege has in the exercise of that privilege:

"None of the essential elements of a contract are to be found in the grant of license to practice law: there is no engagement between the State and the applicant for license that he will follow the practice of the law for livelihood; no legal consideration is paid the State for the license. The grant of the license is a mere naked grant of a privilege without consideration, and which the applicant may or may not, at his option avail himself of. Therefore the State may revoke the privilege granted, or may impose such conditions upon its exercise as are deemed proper or demanded by the public interest."

We submit that a permit to do one thing within reasonable legal limitations is not a license to do that thing beyond the limitations. The

object of the Legislature was to take the manufacturers and distributors of non-intoxicating beer out of the retail business by limiting his privilege as it was limited. The limitation was intended to be a regulation upon the licensee's business. If the permittee did not intend to comply with the law he should never have paid for his permit.

There is no provision in the recent beer law for the revocation of the permit once it is granted, but it has been held in this State that absent a provision for revocation in the license act, an exact legal proceeding is not required in revoking a license.

In the case of State v. Ross, 177 Mo. App. 223; 162 S. W. 702, in an opinion by Judge Sturgis, then of the Springfield Court of Appeals, now a Commissioner in our Supreme Court, he said on page 228:

"A license to sell liquor is neither a contract nor a right of property, within the legal and constitutional meaning of those terms. It is no more than a temporary permit to do that which would otherwise be unlawful, and forms a part of the internal police system of the State. Hence the authority which granted the license always retains the power to revoke it, either for cause of forfeiture, or upon a change of policy and legislation in regard to the liquor traffic. And such revocation cannot be pronounced unconstitutional, either as an impairment of contract obligation, or as unlawfully divesting persons of their property or rights."

Again at page 230, Judge Sturgis said:

"The proceeding is an informal and summary investigation rather than a trial."

In the case of State v. Dykeman, 153 Mo. App. 416, 134 S. W. 120, Judge Cox said:

"A license to sell liquor is in no sense a contract with the state, but a mere permit to do an act that would otherwise be unlawful and is subject at all times to the police power of the State Government. The party receiving such a license takes it subject to all the provisions of the law relating thereto, and knows when he secures the license that it may be revoked at any time for the cause mentioned in the statute.

Dr. E. T. McGaugh

-6-

August 22nd, 1933

\* \* \*The proceedings, therefore, are not required to be as formal and exact as would be the case in a judicial trial involving interference with life, liberty, or property."

It is the opinion of this Office that the Food & Drug Commissioner in Missouri is entirely within his statutory powers and duties when he revoked a permit of a manufacturer or distributor of non-intoxicating beer upon discovering that the permittee is not complying with the law, in that he is financially interested, directly or indirectly, in persons, firms or corporations selling non-intoxicating beer under retail permits, this being a direct violation of permits granted to wholesalers and distributors. As the statute does not provide a method of revocation, it is our opinion that it is within your power to revoke the same in a summary manner.

Respectfully submitted,

WM. ORR SAWYERS,  
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK  
Attorney-General

WOS/mh