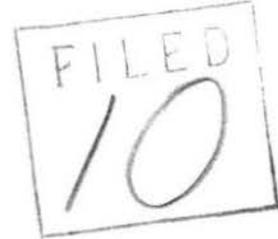


LIQUOR CONTROL ACT: Intoxicating malt liquor is excepted from provisions of Sec. 13-a and may be sold by the drink providing other qualifications of act are complied with

September 4, 1934.



Hon. C.D. Bray, City Attorney,
City of Campbell,
Campbell, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

"****In view of these provisions, can a person legally engage in said business by obtaining a license from the state and county but not from the city? Would he not be violating the state law by so doing because the state law says he must have a license from the city. It is mandatory, not optional.

Assuming that the city had failed, neglected, or even refused to license said business, or failed, neglected or refused to pass an ordinance providing for such license, would this fact bar a prosecution by the state for engaging in said business without having first obtained the city license? Please keep in mind the state law says he must have the city license. No exceptions or exemptions in any contingency."

Section 22 of the Liquor Control Act of the State of Missouri provides in part as follows:

"Malt liquor containing alcohol in excess of three and two-tenths (3.2%) per cent by weight and not in excess of five per cent (5%) by weight, manufactured from pure hops and/or pure extract of hops and/or pure barley malt and/or wholesome grains or cereals and wholesome yeast and pure

water, may be sold by the drink at retail for consumption on the premises where sold, when the person, partnership or corporation desiring to sell said malt liquor by the drink at retail for consumption on the premises where sold shall have been licensed so to do by the incorporated city and county in which he proposes to operate his business, and has procured a license so to do from the State Supervisor of Liquor Control."

Section 25 of the Liquor Control Act of the State of Missouri provides:

"The Board of Aldermen, City Council or other proper authorities of incorporated cities may charge for licenses issued to manufacturers, distillers, brewers, wholesalers and retailers of all intoxicating liquor, within their limits, fix the amount to be charged for such license, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquor within their limits, not inconsistent with the provisions of this act, and provide for penalties for the violation thereof."

It will be noticed that in Section 25, supra, the Legislature of the State of Missouri said in effect that cities may charge for licenses, etc. In the case of State ex rel. Kyger v. Holt County Court, 39 Mo. l.e. 524, the Court said in construing the word "may":

"Quite a list of authorities, touching the proper construction of the word 'may' as used in statutory enactments, has been presented in the petitioner's brief, all of which have been carefully examined. These authorities are uniformly to the effect that the word is only to be construed as mandatory for the purpose of sustaining or enforcing a right, but never to create one."

It is apparent from a consideration of Section 25 that the Legislature merely intended to give cities the power to charge for licenses, and did not intend in any way to make it mandatory upon them to do so. In other words, Section 25 is directory only

and cannot be construed to be mandatory.

Section 22 of the Liquor Control Act requires as conditions precedent to the legal sale of intoxicating malt liquor that the vendor shall obtain a license from the city, county and state. It is apparent from the face of the Act, therefore, that if the vendor fails to obtain any one or more of these licenses, he is guilty of a violation of the Liquor Control Act of Missouri and is subject to prosecution therefor.

Section 43 of the Liquor Control Act provides:

"Any person violating any of the provisions of this act, except where some penalty is otherwise provided, shall upon conviction thereof be adjudged guilty of a misdemeanor."

However, Section 22 must be construed in connection with Section 25, and, if the city fail to provide for a license, the failure of the vendor to have such license could not be construed to be a violation of the Act. In other words, Section 22 only makes it mandatory to have county and city licenses if the county and city provide for same.

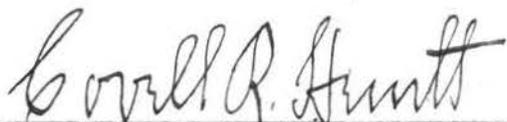
The City of Campbell is a city of less than 20,000 inhabitants. Therefore, by Section 13-a of the Liquor Control Act of Missouri, intoxicating liquor may not be sold by the drink until such sale shall have been authorized by a vote of the majority of the qualified voters of said city; however, the Legislature saw fit to except intoxicating malt liquor from the provisions of this section so that under the Liquor Control Act of Missouri intoxicating malt liquor may be sold by the drink at retail for consumption on the premises where sold, provided the other qualifications of the Act are complied with.

If the City of Campbell has failed or neglected to pass an ordinance providing for the license as required under Section 22 heretofore referred to, it is our opinion that since Section 25 of the Act granting to cities the power to charge for such licenses is a directory statute only and not mandatory, it is not a violation of the Liquor Control Act to sell intoxicating malt liquor by the drink in the City of Campbell without a license from said city, provided the required licenses are obtained from the state and county.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:



(ACTING)

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