

INTOXICATING LIQUORS: Answering five questions regarding Senate Bill No. 30.

May 24, 1935



Hon. E. J. Becker  
Supervisor, Liquor Control  
Capitol Building  
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

"In confirming our conversation of today, we are requesting an opinion upon the following subject:

"Section 21, lines 41 to 46, inclusive, of the old liquor control act provides for a non-resident wholesale permit. We are quoting this section, as this section was not repealed by the legislature in Senate bill 30 it is, therefore, still in effect.

'The sum of five hundred (\$500.00) dollars for handling intoxicating liquor of all kinds, for a period of one (1) year; **Provided**, however, the payment of one license by any non-resident liquor dealer, shall include the right to solicit business in this state by as many agents as he may wish to employ.'

"Section 21-A-2 of Senate bill 30 states in brief, that it shall be unlawful for any firm, partnership, etc. residing without this state to solicit, receive or take

orders within this state except thru a duly licensed wholesale liquor dealer who shall in this case be the agent of the non-resident firm or corporation.

"Under section 21, a non-resident wholesaler shipped into this state both to the wholesaler and retailer, when he shipped to the retailer he obtained the state stamp directly from this office. On liquor shipped to a wholesaler within this state, he did not affix the stamp. Does section 21-A-2 of Senate bill 30, prevent this department from furnishing non-resident permit holders state stamps? Does this section further mean, that the non-resident wholesaler does not have to have a permit in order to ship to the licensed wholesalers within this state?

"For example, we have 48 non-resident wholesale permits issued through out the country, of these 48 wholesalers 21 have obtained \$500.00 permits covering the full year, the remaining 27 have permits for \$250.00, expiring June 30. What effect does section 21-A-2 of Senate bill 30 have on these non-resident wholesale permits?

"Is it your opinion that section 21 is still valid and that a non-resident wholesaler must have a non-resident permit in order to sell to the licensed wholesaler in this state, also does section 21-A-2 prevent the non-resident wholesaler shipping directly to the retailer?

"As nearly one-third of our non-resident permits are issued in the city of Chicago, we are being besieged with letters demanding that they be refunded the unused portion of their permits. The state of Indiana had exactly this same occurrence, they ruled that a non-resident wholesaler could not sell directly to the retailer, and called in all non-resident permits and refunded the unused portion. Of course, we cannot do this due to the fact that we do not have any fund from which we can make refunds. We realize that

the two sections mentioned above can be interpreted many ways, so we are more or less helpless unless we get a strict interpretation from your office.

"We will be pleased to have your opinion as rapidly as possible."

We will answer your questions in the order in which you ask them.

I.

STATE SUPERVISOR OF LIQUOR CONTROL  
MAY FURNISH NON-RESIDENT PERMIT  
HOLDERS STATE STAMPS.

You ask if Section 21-a-1 of Senate Bill No. 30 prevents your department from furnishing non-resident permit holders state stamps? Nothing is found in said section to prevent you from selling non-resident permit holders state stamps to be affixed to containers containing intoxicating liquors. Subsection "c" of Section 21-a-1 found in Senate Bill No. 30, at page 9 reads as follows:

"(c) The amounts required to be paid by this section shall be evidenced by stamps or labels purchased from the Supervisor of Liquor Control, and affixed to the container of such spiritous liquors. The person who shall first sell such liquor to any other person, firm or corporation in this state shall be liable for such payment and shall purchase, affix and cancel the stamps or labels required to be affixed to such container."

The above section requires that the person who shall first sell intoxicating liquor to any person, firm or corporation in this state shall purchase, affix and cancel the stamps or labels required to be affixed to such container.

In our opinion, the above section would apply to an out-state liquor dealer who first sells intoxicating liquor to a wholesale liquor dealer in this State. Furthermore, Section 41-a of the Liquor Control Act makes it unlawful for any person to transport intoxicating liquor into this State upon which the required inspection, labeling or gauging fee or license has not been paid. Said section reads as follows:

"Any person who shall haul or transport intoxicating liquor, whether by boat, airplane, automobile, truck, wagon, or other conveyance, in or into this state, for sale, or storage and sale in this state, upon which the required inspection, labeling or gauging fee or license has not been paid, shall upon conviction thereof, be deemed guilty of a misdemeanor."

Since the above section makes it unlawful for any person to transport intoxicating liquor into this State, unless the required license fee has been paid, and subsection "c" of Section 21-a-1 requires that the gallonage license fee be evidenced by stamps or labels affixed to the container of such spiritous liquors, it is our opinion that the stamps must be affixed by the outstate permit holder before he transports any spiritous liquor into this State, and that the Supervisor of Liquor Control should sell said outstate liquor dealer the necessary stamps to be so affixed.

## II.

A NON-RESIDENT WHOLESALE LIQUOR DEALER MUST HAVE A LICENSE TO SHIP INTOXICATING LIQUOR TO A LICENSED WHOLESALE LIQUOR DEALER IN THIS STATE.

Section 21 of the Liquor Control Act, passed by the 57th General Assembly in Extra Session, 1933-1934, reads in part as follows:

"\* \* \* For the sale of intoxicating liquors by every person residing without this state, who shall solicit, receive or take

orders for the sale of intoxicating liquors within this state, by a wholesale liquor dealing agent, as herein defined, the sum of one hundred (\$100.00) dollars, for handling intoxicating liquor containing not in excess of five (5%) per cent of alcohol by weight; the sum of two hundred (\$200.00) dollars for handling intoxicating liquor containing not in excess of twenty-two (22%) per cent of alcohol by weight; the sum of five hundred (\$500.00) dollars for handling intoxicating liquor of all kinds, for a period of one (1) year; Provided, however, the payment of one license by any non-resident liquor dealer, shall include the right to solicit business in this state by as many agents as he may wish to employ. \* \* \*

The above section was not expressly repealed by the 58th General Assembly. The Legislature did, however, amend the Liquor Control Act by repealing certain sections of the act and adding numerous sections thereto. Section 21-a-2 was added by the present General Assembly and reads in part as follows:

\* \* \* It shall be unlawful for any person, firm, partnership or corporation residing without this state to solicit, receive or take orders for the sale of intoxicating liquor within this state except by or thru a duly licensed wholesale liquor dealer who shall be considered for the purpose of this Act as the agent of said non-resident person, firm, partnership or corporation or to haul or transport intoxicating liquor, or cause to be hauled or transported intoxicating liquor, in any manner whatsoever in or into this state, for sale, or storage and sale in this state, unless the same has been ordered by such duly licensed wholesale liquor dealer. \* \* \*

Section 30-d was also added by the present 58th General Assembly and reads in part:

"It shall be unlawful for any person in this state holding a license or permit to sell beer or malt liquors or holding any retail liquor dealer's license or permit, \* \* \* to purchase from any brewer, manufacturer, or distiller, any intoxicating liquor, manufactured outside of this state, except through a wholesaler or distributor, in this state holding, and operating under, a license or permit issued by the Supervisor of Liquor Control. It shall also be unlawful to sell, or offer for sale, any beer, malt liquor, or other intoxicating liquor, purchased in violation of the provisions of this section. \* \* \*"

As stated above, Section 21 of the Liquor Control Act has not been expressly repealed and is still in force and effect unless it has been repealed by necessary implication.

Repeals by implication are not favored, however, when there is a plain repugnancy between a former and a latter law -- the latter will repeal the former by implication to the extent of the repugnancy.

In State ex rel. v. Wells, 210 Mo. loc. cit. 620, the Court quoting with approval Anderson's Law Dictionary said:

"\* \* \* 'A repeal by implication must be by necessary implication. It is not sufficient to establish that the subsequent law or laws cover some, or even all, of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy.' (Anderson's Law Dict., p. 879.)"

That part of Section 21, which provides that the payment of one license by a non-resident liquor dealer shall include the right to solicit business in this State by as

many agents as he may wish to employ, is plainly in conflict with Section 21-a-2, which makes it unlawful for any person, firm, partnership, or corporation residing without this State to solicit or take orders within this State except by or through a duly licensed wholesale liquor dealer, and with Section 30-d which makes it unlawful for any person in this State holding a license or permit to sell beer or malt liquors, or holding any retail liquor dealer's license or permit, to purchase from any brewer, manufacturer or distiller, any intoxicating liquor manufactured outside of this State except through a wholesaler or distributor, in this State, holding and operating under a license or permit issued by the Supervisor of Liquor Control.

There is nothing in Section 21-a-2 or Section 30-d, or in any other section of Senate Bill No. 30, which is inconsistent with or repugnant to that part of Section 21, which requires every person residing without the State who shall solicit, receive or take orders for the sale of intoxicating liquors within this State to obtain a license from the Supervisor of Liquor Control. Section 21, supra, requires all outstate dealers who solicit, receive or take orders for the sale of intoxicating liquor within this State, whether they be retailers, wholesalers, or distillers to obtain a license from the Supervisor of Liquor Control.

In view of the above, it is our opinion that Section 21-a-2 and Section 30-d have repealed by implication that part of Section 21, which provides that payment of one license by any non-resident liquor dealer shall include the right to solicit business in this State by as many agents as he may wish to employ but has not repealed that part of Section 21 which requires an outstate liquor dealer to obtain a license from the Supervisor of Liquor Control before receiving, soliciting or taking orders for the sale of intoxicating liquors within this State.

### III.

A NON-RESIDENT WHOLESALE LIQUOR DEALER CAN ONLY SOLICIT AND RECEIVE OR TAKE ORDERS FOR THE SALE OF INTOXICATING LIQUOR WITHIN THIS STATE THROUGH A DULY LICENSED WHOLESALE LIQUOR DEALER.

As pointed out above, Section 21-a-2 and Section 30-d have repealed by implication that part of Section 21,

which provides that the payment of one license by a non-resident liquor dealer shall include the right to solicit business in this State by as many agents as he may wish to employ. Now under the provisions of Section 21-a-2, no person, firm, partnership or corporation residing without this State can solicit, receive or take orders for the sale of intoxicating liquor within this State except by or through a duly licensed wholesale liquor dealer within this State, or haul or transport intoxicating liquor into this State for sale or storage and sale in this State unless the same has been ordered by such duly licensed wholesale liquor dealer.

It is therefore the opinion of this office that a non-resident liquor dealer can only solicit, receive and take orders for the sale of intoxicating liquor within this State by or through a duly licensed wholesale liquor dealer.

#### IV.

A NON-RESIDENT WHOLESALE LIQUOR  
DEALER CANNOT SHIP INTOXICATING  
LIQUOR INTO THIS STATE DIRECT TO  
A RETAILER.

Section 21-a-2, supra, clearly makes it unlawful for any person, firm, partnership or corporation residing without this State to solicit, receive or take orders for the sale of intoxicating liquor within this State except by or through a duly licensed wholesale liquor dealer, or to haul or transport intoxicating liquor or cause to be hauled or transported intoxicating liquor into this State for sale or storage and sale in this State, unless the same has been ordered by a duly licensed wholesale liquor dealer. This section applies to all non-resident persons whether they be wholesalers or not.

It is therefore our opinion, in view of the above section, that a non-resident wholesale liquor dealer cannot ship intoxicating liquor into this State direct to a retailer.

V.

**NON-RESIDENT PERMIT-HOLDER IS NOT ENTITLED TO A REFUND FOR THE UNUSED PORTION OF HIS PERMIT.**

You state that many non-resident permit-holders are demanding that they be refunded the amount of the unused portion of their permits. It is true that a non-resident permit-holder's privilege to solicit business in this State by as many agents as he may wish to employ has been repealed by Section 21-a-2 which allows him only to solicit business by or through a duly licensed wholesale liquor dealer in this State. However, a licensee always takes his permit subject to the contingency that the law may be changed to render his privilege less valuable.

33 Corpus Juris, page 634, in regard to this general proposition of law reads as follows:

"A licensee takes his permit subject to the contingency that there may be changes in the laws, adopted in the exercise of the police power, which will render his privilege less valuable or his responsibilities greater; and the fact of his holding a valid license, or of his having paid money for it, does not exempt him from the operation of statutes or ordinances subsequently passed imposing additional burdens upon licensed dealers, or subjecting their business to new restrictions or limitations. A license granted to sell liquor in a county is no defense to a prosecution for selling therein after the taking effect in the county of a general prohibitory law."

Black on "Intoxicating Liquors", Section 128, page 168, states the law as follows:

"The fact that a person has been licensed to sell intoxicating liquors does not give him a vested right in

the continuance of his traffic in such liquors, in any such sense that it cannot lawfully be abridged or abrogated by subsequent legislation enacted in the exercise of the police power, and for the benefit of the interests of society. 'The license being a mere privilege to carry on a business subject to the will of the grantor, it is not property, in the sense which protects it under the constitution. The revocation of the license does not deprive the citizen of his liberty or his property without due process of law.' \* \* \*"

In any event said non-resident permit holders would not be entitled to any refund on their permits for the reason that the Legislature has not provided for the repayment of same.

In the case of Minneapolis Brewing Co. v. Village of Bagley, 170 N. W., loc. cit. 705, the Court said:

"It is well-settled law that where license fees are paid voluntarily by the applicant for a license, without mistake of fact, the municipality receiving the same, in the absence of a statute otherwise providing, is not liable for a return of the money, even though exacted under an unconstitutional statute, or otherwise be not a legal demand. 23 Cyc. 152; 25 Cyc. 631; 15 R. C.L. 315; Custin v. City of Viroqua, 67 Wis. 314, 30 N. W. 515; Michel Brewing Co. v. State, 19 S. D. 302, 103 N. W. 40, 70 L. R. A. 911; Levy v. Kansas City, 168 Fed. 524, 93 C.C.A. 523, 22 L.R.A. (N.S.) 862. \* \* \* \* \* The fact that there may be a moral obligation supporting the claim does not change the rule. The money in such case after reaching the public treasury can be withdrawn only when legislative authority exists therefor, and considerations of a moral character should be addressed to that department of state affairs. Such is the law of this state. \* \* \*"

In the case of People v. Bisson, 169 N. Y. S.,  
loc. cit. 988, it was said:

"Putnam, J. The order of the state excise authorities acting under the powers conferred by this statute has been held constitutional. 180 App. Div. 464, 167 N. Y. Supp. 801; 222 N. Y. 387, 118 N. E., 789. Relator, however, points out a distinction. After he had prepaid the tax for a year's traffic, the state has nevertheless suspended such traffic without providing any compensation, or for reimbursement by the return of the proportionate unexpired part of the excise year. \*\*\*\*"

"Obviously this suspension and stoppage of relator's privileges involved him in losses, since the Newton Law aforesaid contemplates a suspension for the period of the war. On the other hand, through the stay granted with this writ, relator was enabled to continue his traffic from August 11th up to the 30th of September, the close of the excise year. Whether or not relator should have a proportionate return of the tax money prepaid for the time that relator was prevented from engaging in the traffic in liquors we need not inquire. We recognize that a certificate which is thus should carry with it a right to a just rebate if the state stop or suspend its operation without fault of the certificate holder.

"(2) We are agreed, however, that the rights conferred under such liquor tax certificate were not paramount to this exercise of the state's police power to suspend the privileges thereunder, even if the provisions for reimbursement were not full and complete. \*\*\*\*"

In the case of Neumer v. Jackson County, 271 Mo.  
loc. cit. 601, 602, the Court said:

"III. The only other theory which might be urged as a basis of recovery is that a dramshop licensee upon the surrender of his license is entitled to a rebate for the unexpired portion of the license.

"It would appear, however, that the great weight of authority is to the effect that a recovery can not be had under those conditions, in the absence of a statute so authorizing.

"The rule here applicable is stated in 15 R. C. L. 315, as follows: 'It seems to be well settled that ordinarily a licensee does not, on the voluntary surrender of his license, become entitled to the return of the license fee, in proportion to the unexpired term, in the absence of statutory enactment to the contrary.'

"To the same effect are the following authorities: Joyce on Intoxicating Liquors, sec. 330; 1 Woollen & Thornton on the Law of Intoxicating Liquors, sec. 500; case note to Allsman v. Oklahoma City, 16 L. R. A. (N.S.) l. c. 515, and cases therein cited."

It is therefore the opinion of this department that non-resident permit-holders are not entitled to a refund of the amount of the unused portions of their permits, due to the fact that they are now under the provisions of Section 21-a-2 prevented from soliciting business in this State, except by or through a duly licensed wholesale liquor dealer.

Yours very truly,

J. E. TAYLOR  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

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