

LIQUOR: Boats operating on navigable streams within this state cannot be licensed to sell intoxicating liquor and, therefore, all such sales are illegal.

November 17, 1939



Honorable Walker Pierce  
Supervisor of Liquor Control  
Jefferson City, Missouri

Dear Sir:

We have received your recent letter which reads as follows:

"I am enclosing herewith copy of a letter I have recently received from Conn Withers, Prosecuting Attorney of Clay County.

"Will you please give me your opinion with reference to the matters inquired about in Mr. Withers' letter."

The letter from Conn Withers, Prosecuting Attorney of Clay County, Missouri, a copy of which you attached, reads as follows:

"As has been mentioned to you before there is a boat in the Missouri River operated by one Henry Katheter which is tied up to the bank on the Clay County side and which dispenses 5% beer under a license for that purpose.

"Henry has sought advice from a great many persons, to my personal knowledge, concerning his rights to handle beer and liquor on the boat which is on a navigable stream under the general supervision of the War Department. I also know that he has been variously advised and he says he can sit six lawyers down at a table and get six different answers concerning what he should or should not do.

"I have always found that Henry complies when his position is made clear to him so he knows just what he is required to do.

"He has a copy of an opinion of the Attorney General addressed to Mr. Bowers to the effect that the Liquor Department has no right to issue licenses for the sale of intoxicating liquors of any form on a navigable stream, but Kansas City lawyers have advised that he has the right to sell strong beer and whiskey on the stream so long as he is free from the bank. Others have advised that he has a right to sell 5% beer under license issued to him even though tied at the bank. He has asked me to request a ruling as to just what his situation is to avoid any criminal liability.

"The questions are these:

"1. When tied to the bank, even though afloat in the stream, may he sell 5% beer on Sundays or after the usual hours?

"2. If he were to cast off from the bank to make excursion trips up and down the stream would he be free from criminal liability as:

"a. Should he sell 5% beer after usual hours?

"b. Sell spiritless liquor by the drink?

"His boats are licensed by the War Department and he is a licensed pilot and master and he has been advised that he could sell anything he wanted to if he were afloat in the stream without being tied to the bank."

On March 10, 1937, this office addressed an opinion to Wallace I. Bowers, Chief Clerk of the Department of Liquor Control on the question of whether or not the Liquor Department might issue either a 5% or 3.2% beer permit or license to owners of boats operating on navigable streams in this state. A copy of that opinion is attached hereto.

In said opinion of March 10, 1937, we arrived at the conclusion that the Legislature never contemplated the licensing of persons for the sale of either intoxicating liquor or non-intoxicating beer on boats or vessels operating on navigable streams in this state, and that it would, therefore, be a violation of law to issue such licenses. The reasoning in that opinion is based on the fact that there is no apparent legislative intention that boats operating on navigable streams can be so licensed. The Legislature provided that the premises of each applicant shall be described with particularity, that no person shall sell intoxicating liquor in any place other than where he is licensed and also that each licensee shall pay the county and incorporated areas certain fees. Further, that while the Legislature specifically provided that the cars of railway companies might be licensed to sell intoxicating liquor, no mention whatsoever was made as to the licensing of boats operating on navigable streams, and that, therefore, no such license could be issued.

The exact question presented here is whether the operator of a boat on a navigable stream may sell 5% beer on Sunday or after the hours prescribed by statute when any such boat is either tied to the bank or when it is cast off from the bank. In other words, the question is whether 5% beer can be sold between the hours of 1:30 a.m. and 6 a.m. on week days, and during all the hours of Sunday.

The attached opinion holds that the Supervisor of Liquor Control is without authority to license boats used in navigable streams and we believe the views therein expressed are correct.

Furthermore, it is illegal for any person to sell intoxicating liquor within the confines of the State of Missouri unless the person is properly licensed by the Supervisor of Liquor Control, as is also shown by the attached opinion. The Supreme Court of Missouri has, on a number of occasions, said that the liquor traffic is not a lawful business except as authorized by express legislation, and that the Legislature may lay down such restrictions as it might desire.

In the case of State v. Parker Distilling Company, 139 S.W. 453, 236 Mo. 219, the court said:

" \* \* \* The manner and extent of regulation rests on the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. \* \* \* "

"Those authorities also establish the fact that the liquor traffic is not a lawful business, except as authorized by express legislation of the State; that no person has the natural or inherent right to engage therein; that the liquor business does not stand upon the same plane, in the eyes of the law, with other commercial occupations. It is placed under the ban of law, and it is thereby differentiated from all other occupations, and is thereby separated or removed from the natural rights, privileges and immunities of the citizen."

In the case of Hann v. Fitzgerald, 119 S.W. (2nd) 808, 1.c. 810, it is said:

"The right to sell intoxicating liquor is not a natural right. The state may impose limitations, conditions, burdens and responsibilities upon those engaged in the traffic."

In the case of State v. Kennedy, 123 S.W. (2nd) 118, l.c. 122, the court said:

"The question of the control and regulation of the liquor traffic is one that calls for and has received the careful consideration of the Legislature. Arguments as to the wisdom of the measures adopted address themselves to the law-making body, not to the courts."

Therefore, the state, through its Legislature, has the full right to regulate and control the liquor traffic, and no intoxicating liquor can be sold, under any conditions, unless done so pursuant to law, that is, during the times and in such manner as is by law allowed, and that only after the person selling is properly licensed to do so.

The only remaining question is whether the state laws apply to boats operating or situated upon navigable streams within this state.

In the case of Shannon v. Streckfus Streamers, 131 S.W. (2nd) 833, handed down by the Court of Appeals of Kentucky on June 13, 1939, rehearing denied on October 17, 1939, the question of the application of state laws to navigable streams was fully discussed. In that case, the Streckfus Steamers, Incorporated, a Delaware corporation with its principal office in St. Louis, Missouri, operated a number of excursion steamers on the Mississippi and Ohio Rivers. During the summer of 1936, it operated five boats carrying excursions from various towns in Kentucky on the Mississippi and Ohio Rivers and returning to the point of origin. The Kentucky statutes

provided a graduated excise tax to be imposed on the sale of admission to places of amusement and entertainment. Pursuant to this act, the company paid, under protest, the sum of \$1,058.10 in such taxes and brought this suit to recover the same. It was alleged that the boats were licensed by and operated under permits and certificates of the United States and that they were engaged particularly in the coasting trade of the United States, and claimed that it was exempt from all license taxes because it interfered with commerce and traffic on navigable streams, the regulation of which is confided exclusively in Congress. In holding that the company was liable for the tax to the State of Kentucky, and in brushing aside all questions relating to the non-applicability of state laws to navigable streams, the court said:

"Whether or not the use of the boats on the occasions involved is to be deemed as operating only 'floating dance halls' or as mere pleasure rides, as respectively argued, it is clearly embraced within the terms of the statute as 'places of amusement and/or entertainment.' The question is whether there is immunity by virtue of being interstate commerce or coastwise navigation under the exclusive dominion of the United States.

"The sovereign power and jurisdiction of this commonwealth extends to and over the waters of the Ohio river to the low water mark on the northern side, except so far as Kentucky may have ceded or surrendered jurisdiction to the United States for national purposes. Sections 186m and 199, Kentucky Statutes; *McFall v. Commonwealth*, 59 Ky. 394, 2 Metc. 394; *Handly's Lessee v. Anthony*, 5 Wheat. 374, 375, 5 L. Ed.

113; *Indiana v. Kentucky*, 136 U.S. 479, 10 S. Ct. 1051, 34 L. Ed. 329. By the treaty between France, Spain and England in 1763, the middle of the Mississippi river was the boundary between the British and French territories and became the boundary between Missouri and Kentucky when the former state was admitted into the Union in 1820. *State of Missouri v. State of Kentucky*, 11 Wall. 385, 20 L. Ed. 116.

"The place of operations of these boats and the service rendered were within the territorial limits of Kentucky and under the protection of her laws and amenable thereto, subject always to the paramount powers of the United States to regulate commerce as embraced in the Constitution of the United States, U.S.C.A., Article 1, Section 8. But it must not be forgotten that the jurisdiction of the national government over a navigable stream is exclusive only so far as that jurisdiction or power extends and that it is not without some limitation - clear examples being the cognizance by the states of criminal offenses or torts on the stream. As 'subjects over which the sovereign power of a state extends are objects of taxation' (*McCulloch v. Maryland*, 4 Wheat. 316, 429, 4 L. Ed. 579), the tax sought to be recovered was legally collected unless restrained by provisions of the federal constitution as being a burden upon interstate or coastwise commerce, for the lack of state power so to do is undisputed.

"We do not conceive the character of the operations or service taxed to be interstate. There was no transportation from one point in Kentucky to a point out of the state, or vice versa,

or any disclosure that in the course of the trips the boats actually crossed a boundary line. *City of Vicksburg v. Streckfus Steamers, Inc.*, 167 Miss. 856, 150 So. 215; *Streckfus Steamers v. Fox, D.C.*, 14 F. Supp. 312; *Willamette Iron Bridge Company v. Hatch*, 125 U.S. 1, 7, 8 S. Ct. 811, 31 L. Ed. 629, 631. Nor does the fact that the appellee is a foreign corporation, having its boats registered in St. Louis, seem to have any bearing on the question. The power of a state to tax tangible property, or the exercise of a franchise of a corporation or person, may rest on the situs within the state. *Commonwealth v. Lee Line Company*, 159 Ky. 476, 167 S.W. 409. It is the character of service, and not the character of the carrier, that determines whether transportation is interstate or domestic. *People ex rel. Pennsylvania R. Co. v. Knight*, 171 N.Y. 354, 360, 64 N.E. 152; affirmed, 192 U.S. 21, 24 S. Ct. 202, 48 L. Ed. 325.

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"We consider now the plea of immunity because the boats were operated in coastwise traffic. The power of Congress to regulate commerce includes the navigation of public waters in coasting trade without interference by state laws. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23; *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678. Coasting trade embraces commercial intercourse between places in the same district or state on a navigable river. *Ravesies v. United States, C.C.*, 37 F. 447; *North River Steamboat Company v. Livingston*, 3 Cow. 713, 747; Title 46, Chap. 12, Section 251, United States Code, 46 U.S.C.A. para. 251. That the object may be to serve the pleasure of passengers and the journey from and to the same port would seem to make no difference in the classification. *London Guarantee & Accident*

Company v. Industrial Accident Commission, 279 U.S. 109, 49 S. Ct. 296, 73 L. Ed. 632. It has been said that the enrollment of a vessel ascertains her ownership and gives her national character while the licensing of a boat gives her the authority to carry on coasting trade, and together they entitle the owner to raise questions under the laws of the United States, and particularly the commerce clause of the constitution. Conway v. Taylor, 66 U.S. 603, 17 L. Ed. 191.

"The City of Vicksburg, Mississippi, collected from the appellee herein a daily privilege license tax upon each pleasure excursion boat on the Mississippi river taking passengers from the city and returning them thereto. There were two suits to recover money paid under the ordinances, which were in all respects like the case at bar. In the first case, City of Ficksburg v. Streckfus Steamers, Inc., 167 Miss. 856, 150 So. 215, 218, the court regarded the touching of the boat at a point on the Louisiana shore as a subterfuge to give the trip an interstate character, and held that the question was whether or not the excursion trips should be deemed interstate because of the fact that the boats were at times on the Louisiana side of the thread of the river. It was held: 'The term interstate commerce means, as its language imports, not only interstate movement, but interstate business. There was none here involved.'

"The court, therefore, held that there could be no recovery of the tax paid and, in effect, that the imposition of the license was valid. The second case brought up an identical ordinance for a subsequent year. The Streckfus Steamers

pleaded, among other claims of immunity that it was authorized and empowered to operate its vessels in the coasting trade of the United States as passenger excursion boats, that it was carrying on business on a free navigable stream, and that the ordinances were, therefore, void as to it. But it offered no evidence upon the pleas and on the appeal it was held not entitled to raise any question of interference with the power of Congress over navigation and that the question could not be determined. *Streckfus Steamers v. Kiersky*, 174 Miss. 125, 163 So. 830. The same ordinances were attacked in a direct proceeding in the United States Court. The District Court and the Circuit Court of Appeals decided the case adversely to *Streckfus Steamers* upon procedural grounds. *Streckfus Steamers v. Mayor & Board of Aldermen of City of Vicksburg, D.C.*, 10 F. Supp. 259; *Id.*, 5 Cir., 81 F. 2d 298.

"The taxing authorities of the State of West Virginia undertook to collect from the appellee company licenses on refreshments and gaming devices operated on its boats, and a retail sales tax covering the sale of articles thereon, as well as a privilege or occupation tax, known as a 'gross sales tax' on the receipts of the company arising from excursions on the Ohio river within the territorial limits of the State of West Virginia, in all respects like those involved here. It includes the sale of excursion tickets. The boundary of West Virginia, like that of Kentucky, extends to the low water mark of the Ohio river on the opposite shore. *Streckfus Steamers* brought a suit in equity in a United

State court to restrain the collection of those taxes. A District Court of three judges, one of whom was a member of a Circuit Court of Appeals, who wrote the opinion, held that the plaintiff was liable for the payment of these taxes, excluding only the tax imposed upon the sale of excursion tickets in the towns and cities of Ohio. *Streckfus Steamers v. Fox*, D.C., 14 F. Supp. 312, 315. Said the court:

"The taxes here sought to be levied by the state of West Virginia are in no sense a tax upon navigation nor tax, impost, or duty for navigation; they are business, license, and sales taxes imposed upon transactions conducted within the limits of the boundaries of the state of West Virginia, and we know of no reason why they cannot be imposed, whether the business taxed be conducted upon the land or upon a steamboat on a navigable stream within the boundaries of the state. Certainly there is nothing in the Northwest Ordinance, the declarations of either the state of Virginia or West Virginia, or the Constitution and laws of the United States that prohibits the levying of these taxes when they do not in any way affect the right of navigation or subject the exercise of the right to a condition. \* \* \*

"A tax upon the sale of beer upon a steamboat on a river is not a tax upon the right to navigate the river, and the various activities carried on by the boats while conducting the excursions are taxed incident to the entertainment and pleasure of the excursionists and not to the navigation of the boats. The waters of the

Ohio river are none the less 'free' because a business conducted on a steamboat, while navigating the river, is taxed.'

\* \* \* \* \*

"We think it safely may be said that unless it is clearly shown that there is some particular, direct and substantial - not merely incidental or fortuitous - interference with a federal right, a state is free to exercise its taxing power. Section 374, Cooley, Taxation. We are of the opinion that the excise tax under consideration did not burden the coast-wise traffic in which these excursion boats were engaged. As held in *Streckfus Steamers v. Fox*, supra, the tax is not upon navigation but a sales tax upon the business of affording entertainment conducted within the state and enjoying the protection of state laws. It is an excise tax for revenue only. Hence, that the imposition and collection of the tax were authorized."

#### CONCLUSION

It follows, therefore, that the Liquor Control Act is as applicable to navigable streams within this state as are other state laws including the criminal statutes. No one would argue that a person could not be punished under the state laws for a murder committed on a boat on a navigable stream in this state, whether the boat was tied to the bank or afloat in the stream at the time the crime was committed. Since the Legislature has never said that a boat in a navigable stream can be licensed, it follows that no intoxicating liquor can be sold on such boats at any time, either during the hours designated by law or during such times when the sale thereof,

even by a fully licensed person, is prohibited. The Liquor Control Act and also the act governing the sale of 3.2% beer or non-intoxicating beer provides that every person selling such liquor must be licensed by the Supervisor of Liquor Control, and in the absence of the license, no such liquor can be legally sold in the State of Missouri.

Both this opinion and our opinion of March 10, 1937, a copy of which is attached hereto, deals only with boats on navigable streams which are being used as boats and as a means of conveyance. We have made no attempt to determine whether boats or structures resting on a navigable stream, but which are attached to the shore by some permanent means and which are not being used in river traffic, can be licensed by the Supervisor of Liquor Control.

Respectfully submitted,

J. F. ALLEBACH  
Assistant Attorney General

APPROVED:

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W. J. BURKE  
(Acting) Attorney General