

LIQUOR: Liquor licensees authorized to sell intoxicating liquor by the drink may also sell 3.2% beer under the same license.

December 28, 1939

Honorable Walter Pierce
Supervisor of Liquor Control
Jefferson City, Missouri

Attention: Mr. Wallace I. Bowers
Chief Clerk

Dear Sir:

We have received your recent request for an opinion which reads as follows:

"We respectfully request an opinion on the following question:

'May a person licensed to sell all kinds of intoxicating liquor by the drink also sell 3.2% beer under his liquor by drink permit? Section 22 of the Liquor Control Act specifically states that a 5% beer licensee may sell non-intoxicating beer without an additional permit, provided, of course, that said non-intoxicating beer is not sold on Sunday or Election Day.'

"For your information, we have assumed that the liquor by drink licensee had this privilege, but there has never been an official ruling on it."

Section 22 of the Liquor Laws, Laws of Missouri, 1935, p. 274 provides in part as follows:

"* * * Provided, however, that no licensee holding a license to sell malt liquor containing alcohol in excess of three

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and two-tenths per cent (3.2%) by weight or any other kind or character of intoxicating liquor, shall sell, give away or otherwise dispose of, or suffer the same to be done in; upon or about his premises any non-intoxicating beer in any quantity, either in the original package or by the drink, on the first day of the week commonly called Sunday. * * * * *

Paraphrasing the above, the legislature has said that no licensee holding a license to sell 5% beer or any other kind of intoxicating liquor whatsoever, shall sell, give away or otherwise dispose of on his premises any 3.2% beer in any quantity, either in the original package or by the drink on the first day of the week, commonly called Sunday.

Therefore it appears that the legislature has at least implied that dealers in intoxicating liquor may sell and handle 3.2% beer, otherwise it would never have prescribed a day of the week when such dealers could not sell non-intoxicating beer. It is a rule that that which is clearly implied by a statute is as much a part of the statute as if the same were expressed in words. In the case of *Bowers v. Missouri Mut. Ass'n*, 62 S. W. (2d), 1058, the Supreme Court of Missouri announced this rule as follows, l. c. 1063:

"* * * In *Coonce v. Munday*, 3 Mo. 373, 375, it is said: 'It is a rule that that which is clearly implied by a statute, is as much a part of the statute as if the same were expressed in words'. In that case it was held that a provision that no execution should issue from the circuit clerk's office on a transcript of the judgment of a justice of the peace until one had been issued by the justice implied that it could then issue. See, also, *State ex rel. McCaffery v. Mason*, 155 Mo. 486, 500, 55 S. W. 636; *State ex rel. Johnston v. Caulfield et al.*, 245 Mo. 676, 150 S. W. 1047."

Therefore the implication in Section 22 that dealers licensed to sell intoxicating liquor may also sell 3.2% beer by providing against such sales on Sundays constitutes a direct statutory authorization to sell non-intoxicating beer

"as if the same were expressed in words".

This right was specifically recognized by the Supreme Court in the case of *Hann v. Fitzgerald*, 119 S. W. (2d) 808. The action in that case was instituted by 300 saloonkeepers of St. Louis, all of them licensed to sell all kinds of intoxicating liquor by the drink, to enjoin the State Supervisor of Liquor Control, the Board of Police Commissioners, the Chief of Police, Chief of Detectives of the City of St. Louis and their subordinates from enforcing the Sunday provisions of the Intoxicating Liquor Act, and thereby prohibiting such saloonkeepers from selling 3.2% beer on Sunday. The saloonkeepers admitted they had no right to sell intoxicating liquor on Sunday, but insisted they had the legal right to sell 3.2% or non-intoxicating beer on that day of the week. The court said at l. c. 810:

"It is argued that the act undertakes to regulate both the sale of intoxicating liquor and the sale of non-intoxicating beer on Sunday, and for that reason the act contains more than one subject. We do not think so. The legislature intended by Sec. 22 of the act to prohibit the saloonkeeper from selling intoxicating liquor on Sunday while pretending to sell only non-intoxicating beer on said day. In other words, said section is not a regulation of the sale of non-intoxicating beer. It is a regulation of the conduct of those licensed to sell intoxicating liquor and does not violate Sec. 28, Art. 4 of the constitution, Mo. St. Ann. Const. art 4, Section 28."

We note also from your request that the Department of Liquor Control has always assumed that the liquor by the drink licensees had this privilege. Departmental construction of statutes are always entitled to a great weight. The Supreme Court of Missouri recently restated this rule in the Case of *In Re Bernays' Estate*, 126 S. W. (2d), 209, l.c. 217 as follows:

"It is true that the construction of a statute by those charged with its execution, especially when it has long pre-

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vailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

CONCLUSION

We conclude therefore, that liquor licensees licensed to sell all kinds of intoxicating liquor by the drink are also authorized to sell 3.2% beer under such permits.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney-General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

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