LIQUOR CONTROL ACT: It is unlawful for holder of permit under Non-intoxicating Beer Act to have or allow another person to have upon premises described in permit, any intoxicating liquor with alcoholic content in excess of 3.2 ny weight, and holder of 3.2 permit is prohibited from obtaining license under Liquor Control Act.

June 14, 1934.

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Honorable E.J. Becker,
Supervisor of Liquor Control,
Jefferson City, Missouri.

Dear Sir:

In connection with recent discussions, we submit to you herewith our opinion on whether or not there is any legal objection to the issuance to and holding by one person at the same time a license to deal with non-intoxicating beer under Laws of Missouri 1933, page 256, and also a license to deal with intoxicating liquors under the Liquor Control Act enacted by the 1933 Special Session of the General Assembly.

There is no provision in the Liquor Control Act dealing in any way with beverages containing an alcoholic content not in excess of 3.2 per cent by weight, and from many provisions throughout such Act it is apparent that the scope of the Act and the jurisdiction of the Supervisor are restricted to intoxicating liquors which are defined as only beverages containing over 3.2 per cent of alcohol by weight. (Liquor Control Act, Sections 2, 17, 21, 22, 37).

It is apparent, therefore, that the Legislature intended to keep intoxicating liquors separate and distinct from non-intoxicating liquors, and the Liquor Control Act can in no way, even by implication, be said to have repealed the Non-intoxicating Beer Act of 1933, for where the Non-intoxicating Beer Act leaves off, the Liquor Control Act begins, and the two acts therefore work together in perfect harmony and both are now valid laws of the State of Missouri.

> "Repeals by implication are not favored. This is now axiomatic in the law in this State. (Manker v. Faulhaber, 94 Mo. 430; State ex rel. v. Macon County Court, 41 Mo. 453; State ex rel. v. Slover, 134 Mo. 10.)
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> A later statute will not repeal a prior one unless there is such repugnancy between them that the two cannot

> stand together or be consistently reconciled. (Glasgow v. Lindell, 50 Mo. 60; Railroad v. Cass Co., 53 Mo. 17; State ex rel. v. Dolan, 93 Mo. 467; Kansas City v. Smart, 128 Mo. 272; State ex rel. v. Walbridge, 119 Mo. 383; State ex rel. v. Wofford, 121 Mo. 61; State ex rel. v. Stratton, 136 Mo. 423). If two statutes can be read together without contradiction or repugnancy or absurdity or unreasonableness, they should be read together and effect given to both. (Ex parte Joffee, 46 Mo. App. 360)."
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> State ex rel. v. Spencer, 164 Mo., l.c. 53-54.

The controversy in the instant case arises by reason of two sections of the Non-intoxicating Beer Act. Section 13139h provides:

> "Before any permit authorized by this article shall be issued and delivered to any applicant therefor, such applicant shall take and subscribe to an oath that he will not allow any intoxicating liquor of any kind or character, including beer having an alcoholic content in excess of 3.2 per cent by weight, to be kept, stored or secreted in or upon the premises described in such permit, and that such applicant will not otherwise violate any law of this state, or knowingly allow any other person to violate any law of this state while in or upon such premises. '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 'a' or sub-paragraph 'd' of section 13139e of this act."

Section 13139z8 provides in part as follows:

> "****It shall also be unlawful for any holder of such permit to keep or secrete, or to allow any other person to keep or secrete, in or upon the premises described in such permit, any intoxicating liquor including beer having an alcoholic content in excess of 3.2 per cent by weight."

It is clear from the provisions set out above that it is unlawful for the holder of a permit to deal with non-intoxicating beer to have or allow any other person to have in or upon the premises described in the permit intoxicating liquor having an alcoholic content in excess of 3.2 per cent by weight. While the General Assembly was by this Act dealing with non-intoxicating beer, nevertheless, an express prohibition was included with reference to intoxicating liquor. In this connection it must be borne in mind that the possession of intoxicating liquor is not a <u>right</u>, but a <u>privilege</u> granted by the State.

The Supreme Court of Missouri en Banc in the case of State v. Parker Distilling Company, 236 Mo. 219, l.c. 274, said:

> "When we bear in mind the foregoing idea, that the liquor traffic in this state has no legal rights, save and except those expressly granted by license and the statute under which it is issued, then we can more clearly see that the state may impose such conditions, burdens and regulations as it may deem wise and proper, and no one who engages therein has a right to complain thereof."

The State of Missouri has the undoubted power to require a person before engaging in the business of selling non-intoxicating beer to obtain a permit so to do. This power is clearly expressed in the case of Ex Parte Flake (Court of Criminal Appeals of Texas), 149 S.W. 146, wherein the Court said (l.c. 153, 154):

> "And when we take into consideration current history, as is authorized by the opinions here recited, we know that men have gone into territory where prohibition has been adopted, selling and pretending to sell malt liquors called 'frosty', 'uno', 'ino', 'tin-top', etc., all of which are fermented malt liquors, which were claimed to be non-intoxicating malt liquors, and under the

> guise of selling these liquors would engage in selling intoxicating liquors. Bottles of liquor were thrown in tubs of ice water, with these labels floating about, and it was found difficult, yea, almost impossible, to detect violations of the local option laws when intoxicating liquors were in fact sold. The control and regulation of this character of business was the intent, object, and purpose of the Legislature in enacting the law requiring a license to be obtained and a large tax or fee paid.
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> But in this case it cannot be contended that a 'harmless beverage' was being dealt with, in intoxicating and 'non-intoxicating malt liquors'. In the case of Ex parte Townsend, 144 S.W. 629, we discussed at length the meaning of malt liquors, and demonstrated that the legal and fixed meaning of 'non-intoxicating malt liquors' was a liquid containing some per cent of alcohol, and it was this ingredient alcohol that gave to the state the right of regulation and control under the police power. *****"

In the case of State v. Bixman, 162 Mo. 1, this court upheld the Inspection Act of 1899, father of House Bill No. 23. This Act included non-intoxicating, as well as intoxicating beer, and hence the decision of the court is pertinent here. The Act was upheld on the theory that the Legislature had the police power to protect the health of the consumers of beer by providing what the ingredients thereof should be. However, the interesting feature of the decision, so far as the problem here before us is concerned, is the citation of the case of Mugler v. Kansas, 123 U.S. 623. The Court said:

> "In the last mentioned case it was said: 'There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional right; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks, nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism and crime existing in the country are, to some degree at least, traceable to this evil.'"

CONCLUSION

In view of the foregoing, it is the opinion of this department that it is unlawful for the holder of a permit under the Non-intoxicating Beer Act to have or allow any other person to have, in or upon the premises described in such permit, any intoxicating liquor having an alcoholic content in excess of 3.2 per cent by weight.

It therefore follows that the holder of a permit to sell such non-intoxicating beer, and operating under the Non-intoxicating Beer Act of 1933, would be prohibited from obtaining any license under the Liquor Control Act of Missouri.

The converse of this proposition is likewise true, i.e., that the holder of a permit under the Liquor Control Act of Missouri would be prohibited from obtaining a permit to sell non-intoxicating beer under the Non-intoxicating Beer Act of 1933.

By reason of these conclusions, it is apparent that if a license be issued contrary to the express provisions of the Non-intoxicating Beer Act of 1933, the officer issuing said license not only condones the violation of the solemn oath made by the permittee to the State of Missouri, but also becomes a party, indirectly, if not directly, to a fraud on the laws of the State of Missouri.

Respectfully submitted,

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APPROVED:

ROY McKITTRICK,
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