TAXATION: --Legislature may provide maximum municipal tax for liquor license.

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Senator A. M. Clark
Chairman of Senate Committee
on Criminal Jurisprudence
Jefferson City, Missouri

Dear Senator Clark:

Acknowledgment is herewith made of your request for an opinion of this office on the following subject:

> "In the event that the Legislature by law authorizes incorporated cities, towns and villages to impose license taxes upon the manufacturing, distribution and sale of intoxicating liquors, may the Legislature also limit the amount of such license taxes that such cities, towns and villages may charge?"

Before turning directly to this problem we first direct attention to the status of intoxicating liquor in the State of Missouri. There is no inherent right for the privilege of dealing in intoxicating liquor and it is unlawful to do so without specific legislative authority. In the case of State vs. Ingram and Adams, 118 Mo. App. 323, the following remarks are made, l. c. 327:

> "We find that, notwithstanding the fact that a saloon or other house in which intoxicating liquors are sold was not a nuisance at common law for the reason that it was not unlawful to sell liquors in the absence of statutory restrictions as stated in the text supra, this is not the law in this State, inasmuch as at a very early date our Supreme Court established the doctrine that because of its tendency to deprave public morals, the

> right to sell intoxicating liquors is not a natural privilege, but is a calling which no one has a right to pursue without first obtaining a permit or license from the proper authorities. (Austin v. State, 10 Mo. 591; State v. Bixman, 162 Mo. 1, 62 S. W. 828; Barnett v. Pemiscot County Court, 111 Mo. App. 692, 86 S. W. 575). In view of this doctrine of our Supreme Court, the common law does not prevail here on this question, and we must treat it as a settled principle, at variance therewith, in the jurisprudence of Missouri, that the sale of liquors without a license is therefore unlawful, even in the absence of a statute so declaring.* * * *"

The Supreme Court in the case of State ex inf. vs. Missouri Athletic and St.Louis Clubs, 261 Mo. 527, reviewed the various remarks of the Appellate Courts of our State, stating as follows, l. c. 558, 589:

> "It is scarcely worth while at this day and time to consume space discussing the character of the liquor traffic, except to say that early in our judicial history Judge Napton, who may well be styled the Story of our jurisprudence, said, in Austin v. State, 10 Mo. 591, that 'the sale of intoxicating liquors is by law illegal and is not a privilege of a citizen of this or any other State, and that the right to sell same can only be acquired by complying with the law.' Thirty-five years later, with no adverse intimation in the interim, this court reiterated the doctrine announced in the Austin case, supra, and in a per curiam opinion in State ex rel. v. Hudson, 78 Mo. 302, said, in addition, that 'the license fee exacted of dramshop keepers is not a tax, but a price paid for the privilege of carrying on a business detrimental to public morals, and which the Legislature in the exercise of its police power has the right to prohibit altogether.' And Burgess, J., in State v. Seebold, 192 Mo. l. c. 727, said: 'It is fundamental that no one has a natural right to sell intoxicating liquor, because the tendency of its use is to deprave public morals, and to do so without a license from proper authority is unlawful.' (Citing cases.) So it was held in Higgins vs.

Talty, 157 Mo. 280, that a dramshop license was a mere permit, not a contract, between the State and the licensee, in which the latter has no vested rights, but is subject at all times to the police power and is revocable at any time the State may see proper to do so for any violation of the dramshop law, whether the license so provides or not.

Other opinions of this court and the courts of appeals add such force to the doctrine announced as repetition and unvarying adherence give to any judicial declaration. The last word on the subject has been so aptly said by Woodson, J., speaking for this court, in State v. Parker Dist Co. 336 Mo. l. c. 255, that it may be appropriately incorporated here as follows:

'The 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 the 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.

'The foregoing enunciations of the courts are based upon the well known fact that intoxicating liquors and the traffic therein, have brought intemperance, poverty and misery upon many of our citizens, and have been a fruitful source of crime on every hand.'"

From these citations there can be no doubt as to the statutes of intoxicating liquor in this State. We shall now direct attention to the specific problem.

I.

TAXING POWER OF CITIES IS NOT DERIVED DIRECTLY FROM THE CONSTITUTION BUT IS ONLY SUCH AS IS GRANTED BY THE LEGISLATURE

The primary taxing power being vested in the Legislature it necessarily follows that such taxing power as is vested in municipalities must be derived from the Legislature. The two provisions relative to this matter are Sections 1 and 10 of Article X of the Constitution of Missouri. These read as follows:

> "Section 1.* * * The taxing power may be exercised by the General Assembly for State purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes."

> "Section 10.* * * The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

These provisions are unambiguous in that they authorize the Legislature to delegate the taxing power to counties and municipal corporations "under authority granted", and prohibit the Legislature from directly levying a tax upon the property or inhabitants of lesser governmental agencies for local purposes.

A clause in a liquor control act limiting the maximum or the minimum license fee which the municipality could charge for a license to manufacture and sell intoxicating liquors would be proper. From the request it appears that it is not proposed to actually levy any tax or require any particular sum to be paid, but to leave the imposing of the license fee to the proper municipal authorities. Such a law could not therefore

be construed as levying a tax within the prohibition of Section 10 of Article X supra.

On the other hand, by placing the maximum and the minimum license fee, or either, which may be charged the Legislature is but laying down a rule or regulation to guide the municipal authorities in the exercise of the taxing power.

Such a procedure is not in conflict with the constitutional provisions heretofore referred to and in fact has definite precedent in this state.

II.

LEGISLATURE MAY PRESCRIBE MAXIMUM AMOUNT OF LICENSE FEES TO BE CHARGED BY MUNICIPALITIES FOR MANUFACTURE AND SALE OF INTOXICATING LIQUORS.

By an ordinance enacted in 1881 the City of St.Louis imposed a dramshop license fee of $60.00. On March 24, 1883, an Act of the General Assembly became effective which provided:

> "for every such (dramshop) license there shall be levied a tax not less than $25.00 nor more than $200.00 for State purposes, and not less than $250.00 nor more than $400.00 for county purposes for every period of six months; the amount of tax in every instance to be determined by the court granting the license."

One Troll on July 2, 1895, tendered the license fee of $60.00 prescribed by the city ordinance. The collector of revenue of the City of St.Louis refused the tender demanding $250.00, for the reason that the state law required such fee to be paid. The Relator denied the validity of the act of the General Assembly on the ground that it conflicted with Sections 1 and 10 of the Constitution hereinbefore referred to

> "because instead of leaving it to the local authorities to fix the tax for county purposes the act fixed it between certain limits: 'not less than $250 nor more than $400,' and made it obligatory on the local authorities to levy and collect not less than $250 for county purposes on every license;* * * *"

The foregoing are the facts considered in the case of State ex rel. Troll vs. Hudson, 78 Mo. 302. The Court in passing upon the issue presented stated l. c. 304:

> "The license fee exacted by the general law regulating dramshops and the act amendatory thereof, approved March 24th, 1883, is not a tax within the meaning of sections 1, 3 and 10 of article 10 of the constitution, but is a price paid for the privilege of doing a thing, the doing of which the legislature has a right to prohibit altogether. Such laws are regarded 'as police regulations, established by the legislature for the prevention of intemperance, pauperism and crime, and for the abatement of nuisances,' and are not regarded as an exercise of the taxing power. 'Pursuits that are pernicious or detrimental to public morals may be prohibited altogether, or licensed for a compensation to the public.'" * * *

While it may be stated that this case refers specifically to the fixing of license fees for county purposes, a quick reference to the constitutional provisions involved shows that municipalities and counties are in exactly the same position in respect to these provisions. There can be no distinction drawn between a municipality and a county insofar as the issues herein are concerned.

The foregoing decision is referred to and approved in the case of Gower vs. Agee, 128 Mo. App. 427, 432, and in the case of State vs. Bixman, 162 Mo. 1, 21, 22.

We call your attention to the fact that the Legislature has consistently recognized its authority to control the amount changed by counties for the privilege of conducting dram shops, and when it is seen that counties and municipalities are in the same class no doubt should remain as to the authority of the Legislature to place reasonable limitations upon municipalities in the granting of licenses to sell intoxicating liquor.

III.

THE LEGISLATURE SUPREME IN THE REGULATION AND LICENSING OF MANUFACTURE AND SALE OF INTOXICATING LIQUORS.

Before leaving this subject we desire to call attention to Section 7287 R. S. Mo. 1929, which reads as follows:

> "No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit, or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

In the case of Keane vs. Stradtman, 18 S. W. (2d) 896, this Section was held to apply to all municipal corporations in this State. The provisions of Subdivision 22 of Section 6171 R. S. Missouri, 1929, gives "exclusive power" to cities of the first class to restrain, suppress, regulate and license dramshops. The special charters of various municipal corporations in this state grant exclusive power to regulate, control and license the sale of intoxicating liquor. Such powers have been granted by the State to such cities and unless changed by the Legislature such powers are now in full force and effect. However, the State has exclusive power to regulate and control the licensing and sale of intoxicating liquor. It was held in the case of St.Louis vs. Tielkemeyer, 226 Mo. 130, l. c. 140:

> "It is insisted by appellant that the city ordinance in question is void because inconsistent with the State statute on the same subject.
>
> The city of St.Louis has express authority under its charter 'to license, tax and regulate. . . . saloons, beer houses, tippling houses, dramshops and gift enterprises.' (Art. 3, sec. 26, Clause 5.)
>
> The State, however, has the sovereign power to regulate those matters and its authority being paramount, it follows that a city ordinance is not valid if it is in conflict with the law of the State on the same subject."

As the State has the sovereign power to regulate these matters and its authority is paramount, it follows that a city ordinance is not valid if it is in conflict with the law of the State on the same subject. These "exclusive powers" granted to municipal corporations are construed to be exceptions to a general law passed respecting the licensing, manufacture and sale of intoxicating liquors. In the case of State vs. Binswanger, 122 Mo. App. 78, 81, the Kansas City Court of Appeals said:

> "The city of St.Joseph is a city of the second class* * *By the express terms of Section 5508, Subdivision 21, the Legislature gave to such cities the exclusive power to license, regulate or suppress dramshops. In State v. Kessells, 130 Mo. App. 233, we decided, that such charter expressly excluded the general State law as to dramshops from operation within the limits of such cities. We called attention and gave effect to the well recognized rule of law that a particular provision such as contained in subdivision 21 of section 5508 of the charter of cities of the second class would overcome a general law on the same subject."

After the decision in this case the Legislature enacted what became Section 7225 of the 1909 Revision, and which reads as follows:

> "The provisions of this article shall apply to and be enforced in every incorporated town and city in this state, whether incorporated under special charter or under the general law relating to cities, towns and villages, any ordinance of any city, town or village to the contrary notwithstanding."

A similar provision is found in Section 28 of the Liquor Control Act, Page 88 of the Laws of Missouri, Extra Session, 1933-34. In construing Section 7225 of the 1909 Act the Kansas City Court of Appeals in the case of State ex rel vs. Long, 164 Mo. App, 658, l. c. 665, stated:

> "It seems to us that giving to the county court the right to fix the license for state and county purposes, and the board of aldermen the right to fix the amount in cities of the fourth class for city purposes, are not inconsistent provisions, although the amount thecounty court may assess is limited by the statute. Of course if the aldermen were to assess an exorbitant sum, the ordinance would be unreasonable, and therefore, void.
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> The relator further contends that section 7225 of the Revised Statutes 1909, controls the action of the council in this matter. This section is found in the general dramshop act, and provides that that act shall apply to and be in force in every incorporated town and city in the state, any ordinance of such city to the contrary notwithstanding. This section was enacted in 1907, and the reason for which is apparent. Just before the Legislature convened in 1907, the Kansas City Court of Appeals had held in

State v. Kessler, 120 Mo. App. 233, 96 S. W. 494, and State v. Binswanger, 122 Mo. App. 78, 98 S. W. 103, that the state law was not in force in the city of St. Joseph, and that that city had the exclusive power to regulate and license dramshops. The Legislature enacted this section in order to annul the effect of those decisions and to put the state law in force in every part of the state. It was not intended that the act should in any manner regulate thegranting of licenses by municipalities, as that right and power already existed under their charters, and section 9582 was in full force requiring that all municipal regulations be in conformity to the state law."

Assuming that the Legislature continues to exercise the sovereign power of the State to regulate and license all intoxicating liquor and to delegate such power to every city, town and village within this State, the Legislature may fix the license fees to be charged by each county, city, town and village.

CONCLUSION.

It is therefore our opinion that the Legislature may constitutionally provide a maximum and minimum limitation, or either, on the amount municipal authorities may charge for the privilege of manufacturing, distributing or selling intoxicating liquors.

Respectfully submitted,

FRANKLIN E. REAGAN,
AssistantAttorney General.

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

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