INTOXICATING LIQUOR: LICENSE (IN RE: LICENSE FOR ARDENT SPIRITS.)

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Honorable Phil Donnelly
House of Senate
Jefferson City, Missouri

Dear Sir:

Your Committee asked this department for an opinion on Section Twenty-three of Committee Substitute for Senate Bills Nos. 6, 21, 22, 23, 24 and 25, 57th General Assembly (Extra Session). This is the first opportunity the department has had to comply with that request for your Committee. The department was busy with other matters for the Committee on yesterday.

This department is of the opinion it is advisable to revise Section Twenty-three of Committee Substitute for Senate Bills Nos. 6, 21, 22, 23, 24 and 25, as same was printed; and, accordingly, the Department submitted to your Committee on December 18, a proposed substitute for said Section Twenty-three.

This department desires to call the attention of your Committee to two decisions of our Supreme Court upon the question of license for the sale and the manufacture of spiritous and malt liquors.

The first case is State v. Bixman, 162 Mo. page 1., and it is the opinion upholding the State Beer Inspection Act, passed in 1899. In this case, the validity of the Statute was attacked on the ground it was a tax on property and also invalid because the amount of the inspection fees was measured by the amount of beer inspected. The Court held the inspection fees were not a tax on property.

On the question of right of State to measure the license fees by amount of beer inspected, the Court said in 162 Mo. l.c. 30:

"Learned counsel strenuously urge that this case cannot be a tax or burden placed upon the business, in contradistinction to a tax upon a property, as we have hereinbefore decided, because, they say, an occupation tax involved two elements - payment of a fixed amount for a fixed time, and a permit to carry it on for a fixed time. This assumes that in some way the Legislature is restricted to this exact method, but we hold that it is competent for the Legislature to fix the amount in proportion to the business done or the output sold as in this case. This is a matter for the lawmaking power to determine, and, as we have already said, it does not follow that a license must issue for a fixed period. The imposition of the tax is one thing; the license, another. Certainly, a statute providing for licensing the manufacture and sale of beer, and containing the inspection features of the act before us, and requiring the payment of the fees prescribed therein as a condition precedent for the carrying on business under such license, would be a valid exercise of police power and such is the effect of this law when considered with the other statutes in <u>pari materia</u>. Much indignation is expressed in one of the briefs that the Legislatute has assumed to itself to prescribe the cereals which shall be used in the manufacture of beer, especially in excluding wheat and corn. Counsel must assume that the two cereals make a perfectly innocuous beer. As to this we need only say that the Legislature can absolutely prevent the brewing of beer or other intoxicating liquor as it sees fit, and in the exercise of its police power it may exclude any cereal that in its judgment would

> be deleterious to the health of the people of this State, and, if there be a doubt as to the noxious character of the cereal, then the legislative determination of the fact is conclusive. This court cannot say, as a matter of judicial knowledge, that the fusel oil, resulting from the oily substance in corn, is not deleterious in beer made from corn. In the course of the argument, it appeared that, in a congressional investigation of food products, Mr. Adolphus Busch, a brewer,of great experience, testified that he never used corn in making beer; that corn andbarley did not make a high grade of beer; that fusel oil was not a particularly healthy article. However, the sale of intoxicating liquors is not a natural right,and the State may prescribe how they shall be made for sale, if at all. "

In the above opinion, the Court held, the Legislature could fix the amount of license in "proportion to the business done or output sold."

This case was decided in 1901. In 1902, the Act providing for inspection of ardent spirits was before our Court and is reported in 170 Mo. page 81. In this case, State v. Bengsch, 170 Mo. l.c. 112, the writer of the opinion said relative to right of State to levy a tax the amount thereof dependent on the amount of goods sold:

> "But pursuing other branches of the subjectmatter presented by the record, we come to the ruling made in Walton v. Missouri, 91 U. S. 275; where it was settled that a tax the amount of which is dependent on the amount of the property sold, is in fact, a tax on the property itself. Such being the case, the act under review must be held to impinge on the provisions of section 3. Article X. of our Constitution, which declares concerning taxes, that: 'they shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax.'
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> "In City v. Spiegel, supra, where it was held that a license fee was a tax, such tax was held invalid as not conforming to the constitutional provision above quoted, in that it discriminated in favor of a

> meatshops in one portion of the city, and against others in another portion thereof; imposing in the first instance a tax of $25. and on the second tax $100."

Section 4. of said Act reads as follows:

> "Section 4 of the act has these provisions: 'There shall be paid for the right and privilege to manufacture for sale in this state distilled liquors including whiskey, brandy, rum, gin, and distilled spirits of all kinds, wines of any kind and every class of vinous liquors, and for the right or privilege to sell all such distilled or vinous liquors or products, brought or shipped into this state for the sale herein, a special license tax of 10 Cents for every gallon and at a like rate for any other quantity or fractional part of a gallon contained in a receptacle of any kind or character whatever'".

The Court first held the indictment not sufficient under the said section 4. (170 Mo. l.c. 104).

Next the court held The Title of the Act was sufficient and said the following would be sufficient title for an act for sale and manufacture of liquors and license therefor:

> "An Act relating to the manufacture and sale of distilled and vinous liquors", 170 Mo. l.c. pages 105-107.

Next the writer of the opinion held the license fee for privilege of selling fixed at so much per gallon was a tax on property for two reasons: first, - the writer of the opinion pointed to the title of the Act which reads as follows: "A state license tax on distilled liquors." The writer of the opinion further held that the license fee was shown to be a tax because the emergency clause provided as follows:

> "There being a deficiency in the revenues of the State creates an emergency" (170 Mo. l.c. page 107.

The writer of the opinion further held, when it is ascertained a license fee is imposed mainly for revenue, as he held was the case in 170 Mo. l.c. 109, such license fee is a tax. (170 Mo. l.c. page 109), and again in same opinion the writer thereof on page 112 holds the case of Welton v. Missouri, 91 U. S. 275, settled the question that a tax the amount of which is dependent on the amount of prâperty sold is in fact a tax on the property itself. The case cited was a peddler's license tax and had no relation to the licensing of intoxicating liquor. The peddler's business was one that could only be regulated not prohibited as liquor can be.

The writer of this opinion held - first, the act was a tax because of the title, and the emergency clause both treated the Act as a tax measure. Second, that the license fee was a tax on property. Third, that it failed to tax liquor manufacturer making liquor out of state and shipping same into the state. But the members of the Court were badly divided. Two judges concurred with the writer of the opinion in all his conclusions. One judge concurred in holding the Act unconstitutional, and concurred for that reason in result. One judge, in addition to the other two and the writer of the opinion,agreed to first and tenth paragraph of the opinion, which dealt respectively with the insufficiency of the information and the invalidity of the Act, because it required manufacturer for sale in Missouri to pay ten cents per gallon, yet manufa cturer in this state who sold in another state was exempted from paying the ten cents per gallon and hence the Act violated equal protection clause of the Federal Constitution. Another judge agreed the information was insufficient and the act unconstitutional because the title was insufficient and not appropriate to an act laying a license tax. Another judge wrote an opinion and held the whole act showed it was a property tax.

This department submits to you the above two opinions for your consideration in connection with the proposed legislation relating to license fees for manufacture and sale of ardent spirits. Permit this department to make the suggestion that the mistakes made in the title and the emergency clause of the case reported

in 170 Mo. page 81, be avoided when the Committee Substitute for Senate Bills 6, 21, 22, 23, 24 and 25, is put into final shape.

This department submitted to your Committee on yesterday a proposed substitute for Section 23 of the above named Committee Substitute for Senate Bills 6, 21, 22, 23, 24 and 25.

Joyce on "Intoxicating Liquor" says:

> "The legislature in the exercise of its power to impose a tax upon the liquor traffic and to classify for that purpose may provide that the amount of the tax is to be determined on the basis of the amount of business done, and such a law is not subject to the objection that it is not uniform."

Mr. Joyce cites the following cases as supporting the above quoted excerpt from his work.

> Parrish v. Gurth, 26 La. Ann. 140;
> Ex Parte Marshall, 64 Ala. 260;
> Albertson v. Wallace, 81 N.C. 479;
> Albrecht v. State, 8 Tex. App. 216.

We are submitting herewith the form of Substitute for Section 23 of Committee Substitute of Senate Bills 6, 21, 22, 23, 24 and 25, providing for inspection and gauging of intoxicating liquors and fees for said services fixed at same amount on the gallonage basis as is provided in said Section 23 as same now appears in the above mentioned Committee Substitute for Senate Bills.

Your Committee now has before it the two forms of Section covering license fees to be charged by the State for intoxicating liquors, to-wit: One in the form of occupation tax and the other in the form of inspection fees.

Very respectfully,

APPROVED:

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ECC/AJ