INTOXICATING LIQUOR: Licensee may employ agent to conduct his business.

December 23, 1942

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Honorable W. G. Henderson
Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Mr. Henderson:

Under date of December 14, 1942, you wrote this office requesting an opinion as follows:

> "I respectfully request an opinion from your office upon the following question:
>
> "When the holder of a license, issued by the Supervisor of Liquor Control, executes a power of attorney to another individual empowering such individual to conduct, manage, or sell the business, to pay all taxes on the same, and to obtain licenses necessary, is it legal for the attorney to continue the business under the same license or should a new license be required in the name of the attorney?

It is first desired to call to your attention some statements of fundamental law applicable to your question. In this connection your attention is directed to the definition of a power of attorney found in Volume 2 of Corpus Juris at page 452:

> "An agent for any purpose may be, and often is, appointed by a writing, called his power or letter of attorney, which is defined as an instrument authorizing a person to act as the agent or attorney of the person granting it."

It is next desired to call to your attention the following brief extract from Volume 2 of American Jurisprudence, page 29, paragraph 26:

> "Attorneys in fact created by formal letters of attorney are merely special kinds of agents. In matters with respect to the extent of their authority and the manner in which they exercise it, they differ little, if any, from other agents. * * * * * *"

Also the following statement from Volume 37 of Corpus Juris at page 243 from paragraph 100:

> "Unless prohibited by statute, a licensed person or firm may exercise the privilege conferred by the license through clerks or agents; but under some statutes, a separate license must be obtained for each agent."

The qualifications required of an applicant for a license to deal in intoxicating liquors are set out in Section 4906 R. S. Mo., 1939:

> "No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village: and no person shall be granted a license or permit hereunder whose license as such dealer has been revoked, or who has been convicted, since the ra-

> tification of the twenty-first amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor, or who employs in his business as such dealer, any person whose license has been revoked or who has been convicted of violating such law since the date aforesaid: Provided, that nothing in this section contained shall prevent the issuance of licenses to nonresidents of Missouri or foreign corporations for the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors, to, by or through a duly licensed wholesaler, within this state."

and by the provisions of Section 4893 R. S. Mo., 1939, a license to sell intoxicating liquor is not transferable.

The selling of intoxicating liquor is a business which a person may not engage in as a matter of right but may only engage in such business in accordance with the laws regulating such privilege which have been enacted governing the selling of liquor. A careful search of the Liquor Control Act does not reveal any prohibitions against a licensee having an agent to operate his business, and no Missouri cases have been found dealing with this question. However, cases from other states have been found. In the case of Rana v. State, 11 S. W. 692, decided by the Supreme Court of Arkansas, it was recognized by the Court that while possession of liquor raised a presumption that the person in whose possession the liquor was found was the owner, that it would be a valid defense to a charge of illegal possession, that the liquor was held by an authorized agent of someone who was duly licensed. In the Alabama case of Barnard v. State, decided by the Supreme Court of Alabama, reported in Vol. 48 So. Rep. at page 483, the Court specifically recognized the right of an unlicensed agent to have possession of the liquor of his licensed

principal. From this case the following quotation is taken:

> "From the whole arrangement between the parties, read from their writings, Barnard was an employe of the licensee to conduct the business until the agreed purchase price was paid, and was to be paid a monthly salary for his services. The provision for Barnard's engagement as manager of the business was induced by an idea of securing Barnard in the payment of the purchase price, due from Lenzer, for the stock, and was entirely consistent with the protection the parties desired and agreed to afford Barnard in the premises. That consideration or inducement did not render the business any the less Lenzer's business of retailing the stock. And the provision in the mortgage that possession should be with Barnard until the purchase price was paid obviously from sales to be effected from the stock was, for like reason, an element not only of security to Barnard, the seller to Lenzer, but was also, consistent with the ample authority conferred by Lenzer on Barnard as general manager of the business. Had the stock been burned without Barnard's misconduct, manifestly the loss would have been Lenzer's. It was his property, subject to the liability fastened upon it by his purchase from Barnard. For purposes of taxation it was Lenzer's property, not Barnard's, and might have been the subject of levy and sale under execution for legal liabilities not canceled by the adjudication of Lenzer's bankruptcy. Under the circumstances here present, we think Barnard's relation to the business of retailing, conducted as shown in the record, was that of an employe of the licensee, and within the protection of the license to Lenzer to retail liquors."

The Michigan case of Wiemer, Prosecuting Attorney, v. Knappen, Circuit Judge, decided by the Supreme Court of Michigan and reported in 134 N. W. Rep. at page 481, is another case recognizing the right of a liquor licensee to have his business conducted by an agent. The strongest case we have been able to find is the case of State v. Dudley from the appellate court of Indiana, reported in Volume 71 of N. E. Rep. at page975, from which case the following quotation is taken:

> "The appellee was indicted for selling intoxicating liquor without a license. Upon trial by the court he was acquitted. The evidence consisted of an agreed statement of the facts, from which it appeared, among other things, that the appellee, at the time of the sale in question, was carrying on the saloon in the city of Wabash, Wabash county, where the sale was made by him as an employe of one Morrow, owner of the saloon and of the liquor sold, under a written contract of employment between Morrow and the appellee. The sale was made in September, 1903. Morrow was duly licensed to sell liquors at that place for one year from January 20, 1903, he being then, and for more than three months prior to that date, a bona fide resident of Noble township, Wabash county, Ind. He sold intoxicating liquors under the license until March 1, 1903. About that time he removed to the city of Peru, Miami county, Ind., where he was living at the time of the trial, having continuously lived there from about March 1, 1903. The appellee had no license, and the sale in question was made in pursuance of the employment under the written contract above mentioned, which was entered into April 1, 1903.
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> "The only question presented for decision is whether or not license to sell intoxicating liquor at retail under the statutes of this state will protect an employe of the licensee from liability

> for sales made by him as such within the period for which the license was granted, but after the licensee has permanently changed his residence to a county in this state other than that in and for which the license was granted. It has been held in a number of cases that, while a license to sell intoxicating liquors is not transferable by assignment or otherwise, a licensed retailer of intoxicating liquors may employ an agent to conduct and carry on the business, and that such an agent would not be liable to prosecution for selling without license. Pickens v. The State, 20 Ind. 116; Runyon v. The State, 52 Ind. 320; Keiser v. The State, 58 Ind. 379; Heath v. The State, 105 Ind. 342, 4 N. E. 901. * * * * * "

This case further holds that an agent may not conduct the business of a licensee who has lost his qualifications to hold the license.

In none of these cases are the statutes which were construed identical with the Liquor Control Act of Missouri, but in the Dudley case, supra, there was a requirement of residence and all of the cases were dealing with the subject of intoxicating liquor. Further, the following brief quotation is taken from Volume 33 of Corpus Juris at page 535, paragraph 99:

> "A licensed vendor of intoxicating liquors may employ an agent to carry on his business, and the agent will be under the protection of the licensee.* * * * * "

The Missouri Liquor Control Act impliedly recognizes that a liquor business may be operated by agent when it authorizes the issuance of a license to corporations. Also Section 4907 R. S. Mo., 1939, recognizes that an agent

may sell liquor for a licensed principal by the following language:

> "No person or corporation, or any employee, officer, agent, subsidiary, or affiliate thereof, shall have more than three licenses, * * * *"

CONCLUSION

From the foregoing, it is the conclusion of the writer that a license to sell liquor should not be required for the duly appointed agent of a properly licensed dealer so long as the dealer retains his qualifications under the Missouri Liquor Control Act. It is desired to call to your attention in this connection that the appointment of an agent might be used as a subterfuge to permit someone not properly qualified to engage in the liquor business. In such an event it is believed the appointment of the agent or attorney in fact would be no protection.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

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ROY McKITTRICK
Attorney-General