LIQUOR: If applicant for a non-intoxicating beer license pays proper fee to county and meets other license requirements, the county court must issue a license.

January 19, 1940 1/20

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Hon. Andrew Howard
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Sir:

We have received your letter of January 6, 1940, which reads as follows:

> "The Christian County Court is confronted with the following described problem which has placed it in an embarrassing position. The County Court refused to issue a county license for the retail sale of non-intoxicating beer to an applicant for the reasons that they have received a number of complaints from citizens of the community as to the manner in which the applicant's place of business has been operated, that it is a congregating place for drunks, and that a number of fighting and disturbance cases have originated there, and that it has a bad influence on a number of the young people of the county who go there. The County Court was complimented by a number of people on its action in the matter, and the Judges considered that they had made a wise decision. However, the applicant came back in with his State Permit from the Supervisor of Liquor Control, stated that the liquor inspector for this district as a patron of his had complimented him highly on the manner in which his place of

> business was operated, and tendered the money for a County License and insisted that he could force the County Court to issue a license regardless of what its judgment might be in the matter.
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> "I would very much appreciate a legal opinion from you on this question: Can a County Court refuse to issue a county license for the retail sale of non-intoxicating beer in the county, if the applicant has a permit for same from the Supervisor of Liquor Control?"

It is a well recognized principle of law that when the Legislature provides a uniform system for the regulation, control and licensing of the liquor traffic, the only existing rights and powers are those contained in any such uniform legislative system. In other words, the only authority any political subdivision, such as a county or city, might have to regulate and control the sale of intoxicating liquor must be delegated by the Legislature in its uniform system. This rule is thus expressed in 33 C.J. 521, as follows:

> "In respect to the enactment of ordinances prohibiting or regulating the traffic in liquors, municipal corporations have been consistently held to have only such powers as are expressly conferred upon them by their charters or by statute, or such as are necessarily or fairly implied in or incident to the powers expressly granted, * * *."

The Supreme Court of Missouri has also said that the powers of county courts are limited and defined by statutes and the acts outside of and beyond statutory authority are void.

The Supreme Court of Missouri, in the case of Morris v. Karr, 114 S.W. (2nd) 962, said at l.c. 964:

> "In Sturgeon v. Hampton, 88 Mo. 203, at page 213, the rule was early announced which has been generally recognized in this state as follows: 'The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.'"

The laws governing the sale of non-intoxicating beer are contained in Section 13139-e, Laws of Missouri, 1935, page 396. This section reads in part as follows:

> "The County Court in each county of this state or the corresponding authority in the City of St. Louis is hereby authorized to make a charge for licenses issued to retail dealers in non-intoxicating beer, the charge in each instance to be determined by the County Court or the corresponding authority in the City of St. Louis by order of record, but said charge shall in no event exceed the amount provided for in this section for state purposes. The Board of Aldermen, City Council or other proper authorities of incorporated cities, towns and villages including the City of St. Louis may charge for licenses issued to manufacturers, brewers, wholesalers, and retailers of non-intoxicating beer within their limits, which charge for licenses shall not exceed one and one-half times the amount charged for a

> state license, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of non-intoxicating beer within their limits, not inconsistent with the provisions of this Act, and provide penalties for the violation thereof. No municipal corporation shall increase any occupation tax which it now levies upon any holder of any permit required by this article in excess of the amount of such tax imposed upon merchants and dealers in the same or similar lines of business and not holding any such permit."

It will be noted that the only power given to the counties in the above statute is to collect a fee from each liquor dealer; that the amount of this fee shall be such as the county court may determine, provided it is not in excess of the amount required to be paid to the state for a state license. No other powers are given to the counties. In cities, the board of aldermen or city council are given the right to "make and enforce ordinances for the regulation and control of the sale of non-intoxicating beer within their limits", but this same right is not given to the counties. Apparently, the Legislature only intended that the county receive fees and should not have the right to exercise a discretion as to whom a license to sell non-intoxicating beer should be granted.

Section 25 of the laws dealing with the sale of intoxicating liquor, Laws of Missouri, 1935, page 276, is in practically the same wording as Section 13139-3, quoted above.

Section 25 was touched upon by the Springfield Court of Appeals in the recent case of State v. Skinner, 119 S.W. (2nd) 82. In that case, the defendant was convicted of having sold intoxicating liquor without first

having obtained a county license. It appeared that he had paid the proper license fee to the county, but the county court had thereafter returned the fee to the defendant and had refused to retain it. The court said at l.c. 83:

> "We consider the case under the points as presented by the defendant. Under the first point he says: 'The Court erred in refusing to quash the information and abate the cause, for the reason that said information does not charge the defendant with violation of any law known to the State of Missouri. That there is no enforcement or penal section for the alleged violation; that under the law the County Court has no discretion in the matter of issuing licenses, and has no authority to issue a license to sell intoxicating liquors, but can only collect a fee as prescribed by statute. A County Court has no power except that conferred by statute.'
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> "We think there is no merit to the above assignment for under the provision of Section 25, Laws of Missouri, 1935, page 276, Mo. St. Ann. Sect. 4525g-29, p. 4689, counties are authorized to charge for licenses and may issue a license upon the payment of such charges. Section 43 on page 282, Laws of Missouri, 1935, Mo. St. Ann. Sect. 4525g-48, p. 4689, provides a penalty for violating said act. It was not error to refuse to quash the information.
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> "The second assignment briefed by the defendant is that the court erred in refusing to permit the defendant to show that he had paid the fee to the

> County Treasurer of said County, and that the County Court had no authority to exercise any discretion about the issuing of the license, and that the only requirement was the collection of said fees. The defendant cites and relies on two cases under this point, which cases are State ex rel. Fitzpatrick v. Meyers, 80 Mo. 601, and State ex rel. Cornelius et al. v. McClanahan et al.,221 Mo. App. 399, 278 S.W. 88, 89.
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> "We think if it be conceded that the defendant made an application for a license and tendered the proper fee, and the license or permit was not issued, that is no defense to a prosecution for selling liquor without a license. Two early cases within this state dealing with questions very similar to this held against defendant's contention here. If a license is a prerequisite to selling liquor, there is no authority for such sale until a license be obtained, regardless of what attempts have been made to obtain such license. State v. Huntley, 29 Mo. App. 278; State v. Myers, 63 Mo. 324. The defendant had a remedy to force the issuance of a license by a mandamus proceeding if he had fully complied with the law, but because he thought he had complied with the law did not authorize him to sell liquor without a license, and it was not error to overrule the instruction in the nature of a demurrer to the evidence."

The above case does not define or outline in any way the powers of a county court in issuing or refusing licenses. All it decides is that a liquor dealer must

have the license or otherwise he will violate the law in making sales. However, the court did indicate that mandamus might be used to compel the issuance of a license if the law has been complied with. This indicates that the county court is vested with no discretion in the matter because otherwise mandamus would not lie. It is a general rule requiring no citation of authority that the courts will never compel an act to be done if there is a discretion involved in the doing of the act. It is only a purely ministerial act, calling for no discretion, which can be compelled by writ of mandamus.

You state further that the Supervisor of Liquor Control has issued a license to the person you have in mind and further, that you have received a number of complaints from citizens of the community as to the manner in which the applicant's place of business is being operated; that the place is a congregating place for drunks and that said premises are generally conducted in a disorderly manner. In this connection, the proper procedure would be to advise the Supervisor of Liquor Control of the facts and he, in turn, is empowered by virtue of Section 13139-z-24 of the Non-Intoxicating Liquor Laws, Laws of Missouri, 1935, page 402, to call a hearing, upon giving ten days' notice to the licensee, and revoke the license if the evidence warrants, on the ground that the licensee "has not at all times kept an orderly place or house".

CONCLUSION.

It is our opinion, therefore, that the Legislature has vested the county courts with the authority only to receive fees from liquor dealers in connection with non-intoxicating beer licenses, and that no discretion is given to this court to determine whether or not each applicant is a fit person to sell non-intoxicating beer; that if any such applicant has a license from the Supervisor of Liquor Control of the State of Missouri and pays to the county the proper amount that it is mandatory on the county court to issue a county license. If, however, any such licensee

does not at all times maintain an orderly house, the matter can be presented to the Supervisor of Liquor Control who has authority to revoke the permit upon giving ten days' notice in writing.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

W.J. BURKE
(Acting) Attorney General

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