

INTOXICATING LIQUORS:--Provision of ordinance of incorporated city under special charter which excepts licensing and sale of malt liquors in original package at retail liquor stores is invalid, same being inconsistent with state law.

September 18, 1941

Mr. R. B. Taylor
City Attorney
Chillicothe, Missouri



Dear Sir:

We are in receipt of your request for an official opinion under date of August 13, 1941, as follows:

"There are several liquor stores in Chillicothe licensed by the State to sell intoxicating liquor in the original package, not to be consumed on the premises. The State license is \$50.00. The City of Chillicothe licenses these stores and charges one and one-half times the state license, or \$75.00 per year. However, the city makes an exception in its ordinance as to malt liquors. That part of the City ordinance relating to license to sell intoxicating liquor in the original package, except malt liquors, reads as follows:

'Ordinance No. 397. An Ordinance Providing for the Licensing and Regulation of the Sale of Intoxicating Liquor in the City of Chillicothe, Missouri: And Providing for the Punishment of the Violation Thereof.

'Section 1. Required to Take Out License.--It shall be unlawful for any person, firm, partnership or corporation to manufacture, sell or expose to sale in the City of Chillicothe, Missouri, intoxicating liquor, as herein defined, in any quantity, without first having obtained a license from the City therefor.

'Section 2. Amount of License.--Amount of such license shall be as follows:
* * * *

'(f) For the privilege of selling at retail, intoxicating liquor in the original package, excepting malt liquors, the sum of 75.00 dollars.'

"This ordinance was passed in 1940.

"Chillicothe is a city under special charter.

"Amendments to City Charter, approved March 17, 1873, (Acts 1873, page 229) provides:

'Section 3. The City Council shall have sole and exclusive power to license, tax and regulate dram-shops and tippling houses, * * * * within the corporate limits of the city.'

"The liquor stores above referred to contend that the city has no right by ordinance to make an except of malt liquors and that they have the right to sell malt liquors in the original package. The City Council has asked that I obtain an opinion from your office as to their power to except malt liquors by ordinance in licensing liquor stores to sell intoxicating liquor in the original package."

Section 3 of an Amendment to the City Charter of Chillicothe, was passed by the Legislature and approved March 17, 1873, (Laws of Missouri 1873, page 229) as follows:

"Section 3. The City Council shall have sole and exclusive power to license, tax and regulate dram-shops and tippling houses, * * * within the corporate limits of the city."

Ordinance No. 397 of the City of Chillicothe, passed in 1940, as stated in your letter, provides in Section 2 thereof with reference to liquor licenses.

"(f) For the privilege of selling at retail, intoxicating liquor in the original package, excepting malt liquors, the sum of 75.00 dollars."

Under the State Liquor Control Act intoxicating liquor is defined by Section 4894 R. S. Missouri 1939 to include malt liquors and other liquors as follows:

Section 4894. Definition of "intoxicating liquor".-"The term "intoxicating liquor" as used in this act, shall mean and include alcohol for beverage purposes, alcoholic, spirituous, vinous, fermented, malt, or other liquors, or combination of liquors, a part of which is spirituous, vinous, or fermented, and all preparations

or mixtures for beverage purposes, containing in excess of three and two-tenths (3.2%) per cent of alcohol by weight."

Section 4901 R. S. Missouri 1939 provides with reference to sale of intoxicating liquor in the original package and the license therefor as follows:

Section 4901. Liquor in original package shall not be consumed on the premises-- license costs.--"Intoxicating liquor shall be sold at retail in the original package upon a license granted by the supervisor of liquor control, and said intoxicating liquor so sold shall not be consumed upon the premises where sold, nor the original package opened on said premises of the vendor, except as otherwise provided in this act. For every license issued hereunder, for sale at retail in the original package, there shall be paid by the licensee to the supervisor of liquor control, the sum of fifty (\$50.00) dollars per year."

The State Liquor Control Act therefore provides that "intoxicating liquor " may be sold at retail in the original package in certain qualified stores and said act defines "intoxicating liquor " to mean and include "malt liquors" as well as other liquors. Section 4901 R. S. Missouri 1939 also provides with reference to 5% malt liquors:

"The phrase "original package" shall be construed and held to refer to any package containing three or more standard bottles of beer."

Section 4904 R. S. Missouri 1939 with reference to the powers granted to incorporated cities to regulate and license the sales of intoxicating liquor, provides as follows:

"In addition to the permit fees and license fees and inspection fees by this act required to be paid into the state treasury, every holder of a permit or license authorized by this act * * * shall pay into the treasury of the municipal corporation, wherein said premises are located, a license fee in such sum, (not exceeding one and one-half times the amount by this act required to be paid into the state treasury for such state permit or license), as the law-making body of such municipality, including the city of St. Louis may by ordinance determine."

"The board of alderman, city council or other proper authorities of incorporated cities, may charge for licenses issued to manufacturers, distillers, brewers, wholesalers and retailers of all intoxicating liquor, located within their limits, fix the amount to be charged for such license, subject to the limitations of this act, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits, provide for penalties for the violation of such ordinances, where not inconsistent with the provisions of this act."

The above statute applies to the City of Chillicothe as well as to other incorporated cities. The City of Chillicothe is a city of less than 20,000 population which has not voted as provided by the State Liquor Control Act for the sale of intoxicating liquor by the drink for consumption on the premises where sold. Therefore, as further provided by Section 4901, R. S. Mo., 1939, intoxicating liquor other than malt liquor having an alcoholic content not in excess of 5% by weight can legally be sold only in the original package in said city:

Section 4901. " * * * Provided, that a licensee authorized to sell malt liquor, at retail by the drink for consumption on the premises where sold, shall not be permitted to obtain a license for the sale of intoxicating liquors, other than malt liquor, in the original package, except in cities where the sale of all intoxicating liquors, by the drink at retail for consumption on the premises where sold, is permitted by law."

Section 4941 R. S. Missouri 1939 provides:

"The provisions made by this act for local option shall be held to be applicable only to sales for consumption on the premises where sold, and shall not be construed to prevent the sale of intoxicating liquor in the original package and not to be opened or consumed on the premises where sold, nor to prevent the sale, at retail by the drink for consumption on the premises where sold, of malt liquor containing not to exceed five (5%) per cent of alcohol by weight, under license issued in accordance with the provisions of this act."

By this statute local option powers of incorporated cities are generally limited to the determination by vote of the question whether intoxicating liquor containing alcohol in excess of five (5%) per cent by weight, shall be sold by the drink at re-

tail for consumption on the premises where sold.

Section 7442 R. S. Missouri 1939 provides:

Ordinances to conform to state law.

"Any municipal corporation in this State, whether under general or special charter, and having authority to pass ordinances regulating such matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some provision of its city charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

The Missouri courts hold that municipal corporations may not enact ordinances inconsistent with general laws and policy of the state and ordinances inconsistent therewith are invalid. State ex rel. vs. Anderson (App.) 101 SW (2d) 530; Ex-parte Tarling 241 SW 929. In the recent cases of Kroger Grocery and A. & P. Tea Co. v. City of St. Louis, 106 SW (2d) 435; and Bardenheier Liquor Co. v. City of St. Louis, 135 SW (2d) 345 the Supreme Court held certain intoxicating liquor licensing ordinances of that City, operating under special charter, invalid because they were out of harmony with the state law. A municipal corporation is but a creature or political sub-division of the state, possessing only such powers as are conferred upon it by express or implied provisions of law, and with any reasonable doubt as to whether it has a given power resolved against it. State ex rel. City of Blue Springs v. McWilliams 335 Missouri 816, 74 SW (2d) 363; State ex rel. City of Hannibal v. Smith 335 Missouri 825, 74 SW (2d) 367; Taylor v. Dimmitt 336 Missouri 330, 78 SW (2d) 841; In the case of State ex rel. Spencer v. Anderson, supra, the court said;

"The charter of a municipal corporation as distinguished from our State Constitution, constitutes a grant and not a limitation of power, with the obvious consequence that a municipal corporation can enact no ordinance inconsistent or out of harmony with the general laws and policy of the state which creates it, unless the power it seeks to exercise has been either expressly granted to it by the state or else is fairly and necessarily to be implied from those powers which have been expressly granted."

September 18, 1941

Cases cited, City of St. Louis v. Dreisohner, 243 Missouri 217, 147 SW 998; Carpenter v. Reliance Realty Co., 103 Missouri App. 480, 77 SW 1004. Section 3 of the Amendment to the Special City Charter of the City of Chillicothe contains no special provision granting that City the authority to except malt liquors from licensing and sale in retail liquor stores and the city council of said city should have confined and restricted its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject. Section 7442, supra.

The State Liquor Control Act when passed superseded any regulatory authority over dram-shops and tippling houses granted to the City of Chillicothe under the old special charter insofar as same was inconsistent with or contrary to the new act.

CONCLUSION

It is, therefore, the opinion of this department that that part of sub-section (f) of Section 2 of Ordinance No. 397 of the City of Chillicothe which excepts malt liquors in the original package from sale in package liquor stores in that City is invalid as it is inconsistent with the State Liquor Control Act on the same subject and contrary to the general law of the state. Package liquor stores meeting the requirements of the State Liquor Control Act in that City should be given the privilege and licensed by ordinance to sell intoxicating liquor, which includes malt liquor, at retail in the original package, under the authority granted the City by Section 4904, R. S. Missouri 1939.

Respectfully submitted,

ERNEST HUBBELL

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APPROVED:

VANE C. THURLO
(Acting) Attorney-General