

OFFICERS: Common Law powers of statutory officers.

August 13, 1942

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

This is in response to your oral request as follows:

"Has the Supervisor of Liquor Control any common law powers to impose requirements for qualification for an applicant for a liquor license, in addition to those prescribed by statute?"

At the outset, in order to determine the extent of the Supervisor's authority, it is necessary to consider the nature of his office and the manner of its creation.

The legislature of this State has authority to create the office of Supervisor of Liquor Control. The general rule is stated as follows in 46 Corpus Juris, p. 933, Section 29:

"Subject to limitations and restrictions imposed by constitutional provisions, the power to create an office is vested in the legislative department of the government, * * * *"

In State ex rel. v. Smiley, 263 S. W. 825, 1. c. 826, 827 (1) 304 Mo. 549, the court said:

"It is well settled that only the Legislature has the power to create a public office (other than a constitutional office) as an instrumentality of government, and this power it cannot delegate. State v. Butler, 105 Mo. 91, 73 Atl. 560, 24 L. R. A. (N.S.) 744, 18 Ann. Cas. note, 489. * * * *"

Pursuant to that authority, the legislature created the office of Supervisor, in what is now Section 4875, R. S. Missouri, 1939. Further, the Legislature prescribed the extent of the Supervisor's power in passing upon the qualifications of an applicant for a license to sell intoxicating liquor, in Section 4906, R. S. Missouri, 1939. The question here is: Does the Supervisor



of Liquor Control have common law authority to impose upon an applicant for a liquor license, requirements in addition to those set out in said Section 4906. This section is as follows:

"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town, city or village; and no person shall be granted a license or permit hereunder whose license as such dealer has been revoked, or who has been convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, of a violation of the provisions of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."

The General Assembly by Section 645 R. S. Mo. 1939, has provided for the application of the common law in this State in the following language:

"The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First

and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this state, or the statute laws in force for the time being, shall be the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that the same may be in derogation of, or in conflict with, such common law, or with such statutes or acts of parliament; but all such acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof."

In speaking of the application of the common law to public officers and their duties, we find the principle stated in Mechem Public Officers, Sections 501 and 502, which principle, we think, is followed in this state. Said Section 501 provides in part as follows:

"Under our political system, as has been already stated, the entire source of public governmental authority is found in the people themselves. Either directly or through their chosen representatives, they create such offices and agencies as they deem to be desirable for the administration of the public functions, and declare in what manner and by what persons they shall be exercised. They prescribe the quantum of power to be attached to each department, and the conditions upon which its continuation depends. Their will, in these respects, finds its expression in their constitutions and laws.

"The right to be a public officer, then, or to exercise the powers and authority of a public office, must find its source in some provision of the public law."

Section 502 provides in part as follows:

"Where the office is a new one, or one unknown to the common law, the nature and extent of the authority and the terms, manner and conditions of its exercise must be set forth, in some express enactment, with sufficient clearness and fullness to enable it to be interpreted and executed with reasonable certainty."

By the principles here announced, it will be seen that in case of an office unknown to the common law, such as the Liquor Supervisor of this state, the powers and duties of the officer acting in that capacity must be expressed in the statute creating the office.

In the case of *State of Missouri ex rel, v. Berryman et al.*, 142 Mo. App. 373, the court had before it a question similar to the one here. In that case, a city, by ordinance, had attempted to impose requirements on an applicant for a dramshop license, additional to those required by statute. At l. c. 382 the court, quoting from *St. Louis v. Kalme*, 180 Mo. 322, 79 S. W. 140, stated as follows:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) Those essential to the declared objects and purposes of the corporation -- not simply convenient, but indispensable.* * *"

In that case the court finally held that the city exceeded its authority when it attempted to impose additional requirements upon the applicant for the dramshop license. That is consistent with the general rule stated in 33 Corpus Juris, Intoxicating Liquors, p. 531, Section 85:

"* * * In any case, however, the officer or board cannot exercise authority in regard to the grant of licenses without a statute or ordinance giving him the right to issue such licenses and prescribing the essential elements of the procedure to be followed, or exceed the terms of the statute or ordinance in respect to the kinds of licenses to be issued, although it is proper and permissible to invest him with a measure of discretion in passing upon applications for license, not amounting to an arbitrary power to grant or refuse."

The same volume, on the same subject, at p. 542, Section 124, states:

"Except in so far as they may be vested with a measure of discretion, officers charged with the grant of licenses must keep strictly within the limits of their powers and authority as prescribed by the statute.* * *"

The Supervisor was created by statute. Therefore, the extent of his authority is governed solely by statute. Inasmuch as his office was unknown to the common law, he has no common law authority.

An example of a common law officer, having common law authority and duty, is a sheriff. State on inf. of McKittrick v. Williams, 144 S. W. (2d) 98, 104 (17), 346 Mo. 1003.

CONCLUSION

In view of the above authorities, it is the opinion of

Governor Donnell

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this department that the Supervisor of Liquor Control has no common law power or authority to impose upon an applicant for a liquor license, any requirements for qualification in addition to those prescribed by statute.

Respectfully submitted

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