



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**PRICE DANIEL
ATTORNEY GENERAL**

December 7, 1950

Hon. Coke R. Stevenson, Jr.
Administrator
Texas Liquor Control Board
Austin, Texas

Opinion No. V-1126.

Re: Constitutionality of
Section 37 of Article
666-17, Vernon's Penal
Code, providing for
restrictions on the
extension of credit
to retail liquor
dealers by whole-
salers.

Dear Mr. Stevenson:

Your letter requesting the opinion of this of-
fice is quoted as follows:

"Because the question has been raised
a number of times as to the constitutional-
ity of the provisions of Section 17(37) of
Article I of the Texas Liquor Control Act,
I am herewith requesting your honored opin-
ion regarding same as set out below:

"(37). It shall be unlawful for any
Wholesaler, Class B Wholesaler, Class A
Winery or Wine Bottler to sell any alcoholic
beverage, nor shall any Package Store Per-
mittee, Wine Only Package Store Permittee, or
other retailer purchase any alcoholic bever-
age, except for cash or on terms requiring
payment by the purchaser as follows: On pur-
chases made from the first to fifteenth day
inclusive of each calendar month, payment
must be made on or before the twenty-fifth
day of the same calendar month; and, on pur-
chases made from the sixteenth to the last
day inclusive of each calendar month, pay-
ment must be made on or before the tenth day
of the succeeding calendar month. Every de-
livery of alcoholic beverage must be accom-
panied by an invoice of sale giving the date
of purchase of such alcoholic beverage. In

the event any Package Store Permittee, Wine Only Package Store Permittee or other retail dealer becomes delinquent in the payment of any account due for alcoholic beverages purchased, (that is, if he fails to make full payment on or before the date hereinbefore provided) then it shall be the duty of the Wholesaler, Class B Wholesaler, Class A Winery or Wine Bottler to report that fact immediately to the Board or Administrator in writing. Any Package Store permittee, Wine Only Package Store Permittee or other retail dealer who becomes delinquent shall not be permitted to purchase alcoholic beverages from any Wholesaler, Class B Wholesaler, Class A Winery or Wine Bottler until said delinquent account is paid in full, and the delinquent account shall be cleared from the records of the Board before any Wholesaler, Class B Wholesaler, Class A Winery or Wine Bottler will be permitted to sell alcoholic beverages to him. Any Wholesaler, Class B Wholesaler, Class A Winery or Wine Bottler who accepts post-dated checks, notes or memoranda or who participates in any scheme, trick, or device to assist any Package Store Permittee, Wine Only Package Store Permittee or other retail dealer in the violation of this Section shall likewise be guilty of a violation of this Section. The Board shall have the power and it shall be its duty to adopt rules and regulations giving full force and effect to this Section."

The liquor business, unlike most private enterprises, is regulated by the various States under their police powers. Article 666-2, Vernon's Penal Code, (Art. I, Texas Liquor Control Act) provides that "This entire Act shall be deemed an exercise of the police power of the State for the protection of the welfare, health, peace, temperance, and safety of the people of the State, and all its provisions shall be liberally construed for the accomplishment of that purpose." A person may not engage in the liquor business as a matter of right but only when permission to do so is granted by the State. Permission when granted, is in the nature of a revocable personal privilege. As provided in Section 13(b) of Article I of the Texas Liquor Control Act (Art. 666-13, V.P.C.):

"Any permit or license issued under the terms of either Article I or Article II of this Act shall be purely a personal privilege, revocable in the manner and for the causes herein stated, subject to appeal as herein-after provided, and shall not constitute property, . . ."

In Texas Liquor Control Board v. O'Fallon, 189 S.W.2d 885, 887 (Tex.Civ.App. 1945), the court said:

"A permit, or license, to sell liquor is a mere personal privilege, under the terms of the act itself; all such permits are revocable for causes therein stated, subject to appeal as provided by the act. Such permit, or license, does not constitute property. The acceptance constitutes an expressed agreement and consent on the part of the permittee, or licensee, that the Board or any of its authorized representatives, or agents, may perform any duty therein imposed upon them."

In Texas Liquor Control Board v. Warfield, 122 S.W.2d 669, 670 (Tex.Civ.App. 1938), the court said:

"A package store permit to purchase specified liquor from designated parties and to sell same under the conditions and in the manner prescribed in the Act is neither a contract nor a right of property in the sense in which those terms are used in our Constitution. It is no more than a temporary license to do that which would otherwise be unlawful and may be revoked by the authorized agent of the state whenever it is ascertained that the law has been violated."

A State has the power to regulate liquor traffic and may go so far as to prohibit it. State Board of Equalization of California v. Young's Market Co., 299 U.S. 59 (1936); Mahoney, Liquor Control Commissioner, v. Joseph Triner Corp., 304 U.S. 401 (1938). In the Young's Market case the court held that a provision of the California law imposing a fee of \$500 for the privilege of importing beer into the State was not discriminatory against a wholesaler of imported beer. The court said at page 63:

"It might permit the manufacture and sale of beer, while prohibiting hard liquors

absolutely. If it may permit the domestic manufacture of beer and exclude all made without the State, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee? Moreover, in the light of history, we cannot say that the exaction of a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing the liquor traffic."

In discussing a constitutional question in the Mahoney case, the Supreme Court said at page 403:

"The sole contention of Joseph Triner Corporation is that the statute violated the equal protection clause. The state officials insist that the provision of the statute is a reasonable regulation of the liquor traffic; and also, that since the adoption of the Twenty-first Amendment, the equal protection clause is not applicable to imported intoxicating liquor. As we are of opinion that the latter contention is sound, we shall not discuss whether the statutory provision is a reasonable regulation of the liquor traffic."

In Cartlidge v. Rainey, 168 F.2d 841, 843 (C.C. A. 5th, 1948), the Court discussed the reasonableness of the provision in the Texas Liquor Control Act which permits only licensed common carriers to engage in the interstate transportation of liquor. The court said:

"The effect of the Texas Liquor Control Act is to confine the business of transporting intoxicating liquors through the state to those who are licensed as common carriers. The regulation is reasonable, and appropriate to the end in view, and we are not authorized to hold it invalid."

It is our opinion that the provision of the statute in question is not unreasonable. The provision (Section 17(37) of Article I of the Liquor Control Act) is one for the purpose of maintaining the independence of the wholesale and retail levels of the liquor industry

in Texas. As said in Texas Liquor Control Board v. Continental Distilling Company, 199 S.W.2d 1009, 1014 (Tex. Civ.App. 1947, appeal dismissed 332 U.S. 747, 1947):

"The Legislature, in enacting the Texas Liquor Law (Art. 666 P.C.), expressly determined that the liquor traffic in this State would be best controlled by keeping the various levels of the liquor industry independent of each other, . . ."

Statutes of other States provide for restrictions on the extension of credit by wholesalers to retailers, as does Section 37 of Article 666-17, V.P.C. These provisions have been upheld by the courts of such States.

In James J. Sullivan, Inc. v. Cann's Cabins, Inc., 36 N.E.2d 371, 372 (Mass.Sup. 1941), the Supreme Court of Massachusetts upheld the constitutionality of provisions of a Massachusetts statute which made it unlawful for any licensee to lend or borrow money or receive credit, directly or indirectly, to or from any manufacturer, wholesaler or importer of alcoholic beverages, and for any such manufacturer, wholesaler or importer to lend money or otherwise extend credit, except in the usual course of business and for a period not exceeding ninety days, directly or indirectly, to any such licensee or to acquire, retain or own, directly or indirectly, any interest in the business of any licensee. The court said:

"The prohibition of the statute is not limited by the nature of the thing for which payment is to be made. It is not limited to credit for liquors sold. Its purpose appears to have been to avoid the evils believed to result from the control of retail liquor dealers by manufacturers, wholesalers, or importers through the power of credit. Those evils do not as a rule depend upon the nature of the consideration out of which the credit arose. They depend upon the power of creditor over debtor."

In Sepe v. Daneker, 68 A.2d 101, 102-105 (R.I. Sup. 1949), the Supreme Court of Rhode Island had before it practically the same question that we are now discussing. The court upheld the constitutionality of the provisions of the rules of the Liquor Control Administration

of the State of Rhode Island. We quote the following from the opinion of the court:

"The pertinent portions of rules 53 and 54 as set out in the statement of facts are as follows: '53. No alcoholic beverages shall be sold by any manufacturer or wholesaler to any retailer, nor shall any retailer purchase any alcoholic beverages except for cash or on terms requiring payment by the purchaser within thirty days from date of delivery. * * * No manufacturer or wholesaler shall sell, except for cash, any alcoholic beverages to any retailer with knowledge that such retailer is in arrears for the payment of alcoholic beverages, as provided by this rule; . . . 54. Written notice shall be given by the manufacturer or wholesaler by registered mail to each licensee in default of payment within five (5) days after the default occurs, containing the date of delivery, the amount of indebtedness in default, and the following statement: Rule No. 53 of the Liquor Control Administration prohibits you from accepting delivery of any alcoholic beverages from any manufacturer or wholesaler except for cash, until you have paid in full, the amount of the default shown in the notice. Each manufacturer and wholesaler shall notify the Liquor Control Administration of each default within five days, and shall file with him a copy of each written notice required to be mailed to the licensee within five days after default occurs.' . . .

"In support of his principal contentions on the issue of the constitutionality and invalidity of the rules the complainant relies on the law as set out in cases, both federal and state, of which *Lawton v. Steele*, 152 U.S. 133, 14 S. Ct. 499, 38 L. Ed. 385, is an example. In so doing he has overlooked or disregarded the nature of the business in which he himself is engaged. The cases above referred to, in their general references to the public interest and to arbitrary and unreasonable interference by way of unnecessary restrictions on private business, will be found on examination to apply to the ordinary private enterprises not requiring a license.

"The complainant, however, is engaged in the business of selling at retail alcoholic beverages under a duly granted license. That license he holds subject to the laws of this state and to the rules and regulations of the liquor control administration. It has been decided that, generally speaking, a licensee takes his license subject to such conditions as the legislature sees fit to impose. *Child v. Bemus*, 17 R.I. 230, 21 A. 539, 12 L.R.A. 57. Further in *Tisdall Co. v. Board of Aldermen*, 57 R.I. 96, at page 103, 188 A. 648, at page 652, this court stated: 'But it is well settled in this State and elsewhere that the business of the sale of intoxicating liquor is so clearly and completely subject to exercise of the police power of the State that it may even be entirely prohibited by the State * * * or it may be permitted subject to such restrictions and burdens, however great, as the State Legislature may deem it advisable to impose,' . . . 'it has been universally held that such regulation is especially within the province of such police power, which even extends to the prohibition of such sale; and the courts have always been particularly liberal in sustaining the constitutionality of such regulation.' It also is settled in this state that a liquor license is not a property right. *Casala v. Dio*, 65 R.I. 96, 13 A.2d 693.

". . . Keeping in mind the nature of the business in which the complainant is engaged and the limitations imposed thereon by established law we find that his contention is not sound. It appears to be his position in substance that rules 53 and 54 are not in the public interest generally and that they constitute an arbitrary deprivation of his property rights contrary to the due process clause of section 1 of Article XIV of the amendments to the constitution of the United States.

"However, it is well settled that the privileges or immunities referred to in that section do not include the business of selling intoxicating liquor. In *Crowley v. Christensen*, 137 U.S. 86, at page 91, 11 S.Ct. 13, at

page 15, 34 L.Ed. 620, the court, in discussing the nature of that business, said: 'The manner and extent of regulation rest in the discretion of the governing authority. . . . It is a matter of legislative will only.' See also Bartemeyer v. Iowa, 18 Wall. 129, 85 U.S. 129, 21 L. Ed. 929; State v. Almy, 32 R.I. 415, 79 A. 962. The amendment though broad and comprehensive was not designed to interfere with the proper exercise of the police power by the State. Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923. We have hereinbefore referred to the fact that there is no property right in a liquor license. Further the rules in question apply alike to all retail licensees and are not discriminatory."

In view of the above it is our opinion that Section 37 of Article 666-17, V.P.C., providing for restrictions on the extension of credit to retail liquor dealers by wholesalers, is constitutional.

SUMMARY

Section 37 of Article 666-17, V.P.C. (Sec.17(37), Art. I, Texas Liquor Control Act), providing for restrictions on the extension of credit to retail liquor dealers by wholesalers, is constitutional.

APPROVED:

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CBK:mw

Yours very truly,

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