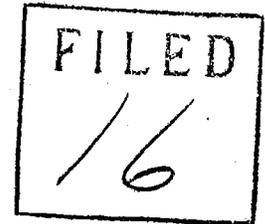


- LIQUOR CONTROL: (1) 3.2% nonintoxicating beer may not be sold to minors;
- (2) 3.2% nonintoxicating beer may be sold on Sunday but Sec. 4742, R. S. 1939, may be invoked against the act of selling same.

October 28, 1946



Honorable G. R. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Sir:

Your letter of recent date, which reads as follows:

"The question has been raised in this county about the sale of 3.2% beer on Sunday. Also of the question of sale to minors of 3.2% beer.

"The second question seems to be fully answered in House Bill No. 106 of the 63d General Assembly of Missouri which plainly says that non-intoxicating beer shall not be sold to minors.

"I have not found any bill of the 63d General Assembly which covers the question of the sale of 3.2% beer on Sunday.

"Section 4742 Revised Statutes of Missouri, 1939 is broad enough to cover about everything, and I am wondering if that statute can be invoked against the selling of 3.2% beer on Sunday.

"And also Section 4391 provides against the selling of intoxicating liquor on Sunday.

"In State v. Barnett, 111 Mo. App. 688, the court holds that a person who was

prosecuted for selling liquor without a liquor license may have been successfully prosecuted under the Sunday law section.

"The road houses and beer selling places are getting out of hand and this gives the officers considerable trouble."

presents three questions: One, whether or not the statutes of this state forbid the selling of 3.2% nonintoxicating beer to minors; secondly, whether or not there is any direct prohibition in the statutes against the sale of 3.2% nonintoxicating beer as such on Sunday; and, thirdly, whether or not Section 4742, R. S. Mo. 1939, can be invoked against the selling of 3.2% nonintoxicating beer on Sunday.

Limiting our answer to those specific questions, which we believe are presented in your letter, in the resolution of the first question listed above, we find Section 4995A, Laws of Missouri, 1945, effective July 1, 1946, provides as follows:

"No person or his employee shall sell or supply non-intoxicating beer or permit same to be sold or supplied to a habitual drunkard or to any person who is under or apparently under the influence of alcoholic beverages. Non-intoxicating beer shall not be given, sold or otherwise supplied to any person under the age of twenty-one years, but this shall not apply to the supplying of non-intoxicating beer to a person under said age for medicinal purposes only, or by the parent or guardian of such person or to the administering of said non-intoxicating beer to said person by a physician."

It is apparent from that section that the sale or supply of nonintoxicating beer to a person under the age of twenty-one years is prohibited with, however, the express exceptions contained in the provisions of the statute.

In answer to the second question, there is nothing in the statutes of Missouri directly prohibiting the sale of

3.2% nonintoxicating beer as such on Sunday. However, Section 4995, Missouri R. S. 1939, prohibits the sale of nonintoxicating beer between certain hours of the day. Said section provides as follows:

"No person having a license under the provisions of this Act, shall sell, give away or otherwise dispose of, or suffer the same to be done, upon or about his premises, any nonintoxicating beer in any quantity between the hours of one-thirty o'clock A. M., and six o'clock A. M., and any person violating any provision of this section shall be deemed guilty of a misdemeanor and shall be punished by imprisonment in the county jail for a term of not more than one year, or by a fine of not less than Fifty Dollars (\$50.00) nor more than One Thousand Dollars (\$1000.00) or by both such fine and jail sentence."

In other words, there is nothing in the Liquor Control Act which either expressly or impliedly prohibits the selling or supplying of 3.2% nonintoxicating beer as such on Sunday.

This leads to your third question, which presents the proposition as to whether or not Section 4742, Mo. R. S. 1939, can be invoked to prevent the sale of 3.2% nonintoxicating beer on Sunday. Section 4742, Mo. R. S. 1939, provides as follows:

"Every person who shall expose to sale any goods, wares or merchandise, or shall keep open any ale or porter house, grocery or tippling shop, or shall sell or retail any fermented or distilled liquor on the first day of the week, commonly called Sunday, shall, on conviction, be adjudged guilty of a misdemeanor and fined not exceeding fifty dollars."

The specific answer to your third question is found in a Springfield Court of Appeals case, handed down January 11, 1946, and reported in 192 S. W. (2d) 68, State v. Hattie Malone.

In that case the defendant was convicted, under Section 4742, Mo. R. S. 1939, of selling 3.2% nonintoxicating beer on a Sunday. On appeal, the Springfield Court of Appeals affirmed the conviction of the lower court and sustained the prosecuting attorney's invocation of Section 4742, Mo. R. S. 1939, under which the information in said case was drawn and the conviction obtained. In the course of the opinion, the court said:

"The object of Section 4742 is to enforce a cessation from labor on one day in seven in order to promote the health, peace and good order of society. The fact that the same day is also observed as a day of rest and devotion by the members of many religious organizations does not make such statute a religious regulation or duty. It is a valid exercise of the police power of the state. * * *

"Section 4742 does not condemn the sale of fermented liquors because they contain or do not contain alcohol, or because they are intoxicating or non-intoxicating. It is the sale on Sunday that is condemned, because that day is designated by statute as a day of rest. A sale of tobacco (State vs. Ohmer 34 Mo. App. 115) is as much a violation, under this statute, as the sale of a gallon of alcohol. Merely to keep a dramshop open on Sunday without any sales or intent to sell violates this statute, City of Louisiana vs. Anderson, 73 S. W. 875, 100 Mo. App. 541. A 'liquor' may be intoxicating or nonintoxicating (Webster's International Dictionary, Funk & Wagnall's New Standard Dictionary) and where that word is used in a statute, it does not necessarily exclude nonintoxicating beverages or liquors. * * *

"There is as much labor involved in selling a bottle of buttermilk (which by the way is a fermented liquor) as there is in selling a bottle of intoxicating or nonintoxicating beer. The act of selling and not the quality of the article sold is the thing Section 4742 condemns.

"* * * Clearly the purpose of this enactment was to control by licensing, and other wise, those who deal in this commodity at all hours on all days. * * But a license does not permit one to sell on Sunday. State vs. Ambs, 20 Mo. 214. Lambert vs. State 3 Mo. 492. The privileges secured by a license do not include the right to disregard any valid existing law. * * *

* * * * *

"We believe that each of these statutes can still be given force and effect without violence to either and that Article 2 of Chapter 32 does not, by implication, repeal Section 4742. * * *"

(Underscoring ours.)

It is apparent from the above quoted decision that the section of the statutes, Section 4742, Mo. R.S. 1939, is directed, not at the selling of intoxicating or nonintoxicating liquor, but, as the court so clearly states, is directed at the act of making the sale, that is, the labor involved in the consummation of the exchange of commodities or objects on a Sunday. Other cases hold that a license to sell spirituous liquors does not authorize persons so licensed to sell after 9 o'clock on Sunday morning, contrary to the provisions of the act concerning crimes and punishment, R.S.No. 1835, page 209, Article 3, Chapter 31, Lambert v. The State, 3 Mo. 492; Colun v. The State, 3 Mo. 495; Brud v. State, 3 Mo. 496. There seems to be sufficient authority for the invocation of Section 4742, Mo. R. S. 1939, against the act of selling 5.2% nonintoxicating beer on Sunday, but keep in mind that Section 4742 is not directed at either intoxicating or nonintoxicating beer,

but is directed, under the decision of the Court of Appeals, cited and quoted from supra, at the act of selling, not at the object sold.

Conclusion

Under the authority cited, supra, it is the opinion of this department that 3.2% nonintoxicating beer is prohibited from being sold to minors by reason of Section 4995A, Laws of Missouri, 1945. Secondly, that there is no restriction in the Liquor Control Act against the sale of 3.2% nonintoxicating beer as such on Sunday. Thirdly, that Section 4742, Mo. R. S. 1939, may be invoked against the selling of 3.2% nonintoxicating beer on Sunday when it is directed at the act of selling, and not at the object sold.

Respectfully submitted,

WM. C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WCB:EG