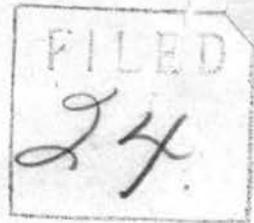


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INTOXICATING LIQUOR: Intoxicating liquor in interstate commerce "across" the State of Missouri from Illinois to Oklahoma cannot be seized for not bearing Missouri revenue stamps.

November 16, 1948



12-17

Honorable William Lee Dodd
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion, which reads:

"I will appreciate your opinion upon the following proposition: Is it unlawful for persons to transport and possess intoxicating liquors in the state of Missouri that were purchased from dealers in the state of Illinois and consigned to points in the state of Oklahoma. Several Oklahoma truck drivers travel across this part of the state loaded with intoxicating liquors. They have a bill of lading with them showing that the intoxicating liquor was purchased in the state of Illinois, the number of cases, date of the sale and the destination points in the State of Oklahoma. But there are no Missouri stamps showing the Revenue for Missouri being paid. There is no evidence that they intend to sell or dispose of the liquor in this state.

"Will you please let me have your opinion as to whether the laws of the State of Missouri are being violated."

After examining the Liquor Control Act of the State of Missouri, it is believed that only three sections thereof can in any light be considered as pertinent. Section 4932, R.S. Mo. 1939, refers to the transportation of nonlicensed liquor, and provides as follows:

"Any person who shall haul or transport intoxicating liquor, whether by boat, airplane, automobile, truck, wagon, or other conveyance,

in or into this state, for sale, or storage and sale in this state, upon which the required inspection, labeling or gauging fee or license has not been paid, shall upon conviction thereof, be deemed guilty of a misdemeanor." (Underscoring ours.)

Section 4931, page 1055, Laws of Missouri, 1945, concerns carriers furnishing bills of lading or receipts, when requested, on liquor shipped into this state, and provides specifically as follows:

"Every railroad, express or transportation company, or other common carrier or contract hauler, shall, when requested, furnish to the supervisor of liquor control a duplicate bill of lading or receipt, showing the name of the consignor and consignee, date, place received, destination and quantity of intoxicating liquors, received by them for shipment to any point within this state. Upon failure to comply with the provisions herein, said railroad, express or transportation company, or other common carrier or contract hauler, shall forfeit and pay to the state of Missouri the sum of fifty dollars for each and every failure, to be recovered in any court of competent jurisdiction. The supervisor of liquor control and the director of revenue are each hereby authorized and empowered to call upon the prosecuting attorneys of the respective counties or the circuit attorneys or the attorney general to bring any proceeding hereunder on the relation of the supervisor of liquor control or the director of revenue, as the case may be, to the use of the State of Missouri. The penalties collected shall be disposed of as provided by section 7, article IX, of the Constitution of Missouri, and section 10376, Revised Statutes of Missouri, 1939, as amended." (Underscoring ours.)

The last section believed possibly to be related to the problem is Section 4884, page 1045, Laws of Missouri 1945, wherein it is stated:

"No person shall possess intoxicating liquor within the state of Missouri unless the package in which such intoxicating liquor is contained and from which it is taken for consumption has upon it, while containing such intoxicating liquor, stamps of the director of revenue evidencing payment of the fees and charges required by this act. Provided further, that nothing in this act shall be so construed as to prevent the natural fermentation of fruit juices in the home for the exclusive use of the occupants of the home and their guests." (Underscoring ours.)

Regulation No. 7, subsections (d) and (e), pages 111, 112, of the Rules and Regulations of the Supervisor of Liquor Control, 1946, make approximately the same provisions and restrictions as the statutes quoted supra, and read:

"(d) Liquor Not Stamped--Contraband.--Any spirituous liquor or wine shipped into, sold or offered for sale in this State without such excise or inspection stamps or labels of appropriate number and denomination being affixed thereto, shall be deemed to be contraband and shall be by the Supervisor or his inspectors seized and disposed of as such.

"(e) Unstamped Liquor--Possession Of.--No person other than a licensed distiller, rectifier or wine manufacturer shall possess in this State any spirituous liquor or wines without the proper number and amount of Missouri excise or inspection stamps or labels being affixed to the containers thereof."

It is apparent from a reading of the statutes quoted above that they concern liquor that is brought into this state "for sale, or storage and sale in this state." Such is not the situation as stated in the letter requesting this opinion. There it is stated that the liquor is transported "across" the state of Missouri. There is no statement that such liquor, while transported across the state of Missouri, is offered for sale or stored and offered for sale in Missouri, therefore, Section 4932, supra, in the opinion of the writer,

does not apply. Section 4884, quoted above, does not apply for the reason that by its very terms it is necessary that the liquor must be taken from the container before any violation of the act can occur. This appears when the statute is read with the underlined part in mind. Section 4931, supra, is dependent upon a request being made upon the carrier, otherwise there is no duty upon the carrier to furnish, without a request, the bills of lading or receipts provided for in said section. Furthermore, it would seem that this section does not cover an individual operating his own private conveyance in hauling liquor "across" the state of Missouri.

It, therefore, is the opinion of this department that the Liquor Control Act of the State of Missouri does not contain any provision which would enable the Department of Liquor Control to seize liquor being transported from Illinois "across" Missouri to Oklahoma. As long as such liquor is not offered for sale or stored and offered for sale, in this state, there is no violation of Section 4932, supra. Nor is there any violation of section 4884, where the liquor is not taken from the original container.

From the facts stated in your request, it appears that the liquor is being carried in Interstate commerce. "Interstate Commerce" is defined in C. J., Volume 33, page 475, as follows:

"Interstate traffic. Traffic that is moved from one state or territory into or through some other state or territory."
(Underscoring ours.)

When that definition is applied to the liquor moved, as stated in your request, such liquor is being moved in interstate commerce. The protection afforded by the Commerce Clause of the Constitution of the United States applies unless such commerce is in violation of state law; *Duckworth v. State*, 148 S.W. (2d) 656; *Barnett v. State ex rel Milner*, 9 So. (2d) 267, l.c. 268; *McCanless v. Graham*, 146 S.W. (2d) 137, l.c. 138. If the transportation of liquor in interstate commerce is not violating the law of the state in which said liquor is being transported the protection afforded by the commerce clause applies. When the liquor is being transported in violation of

a state law the Twenty-first Amendment to the Constitution of the United States, as implemented by the Webb-Kenyon act, removes such liquor from the protection of the commerce clause. The Twenty-first Amendment reads as follows:

"The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." (Underscoring ours.)

The Webb-Kenyon act reads as follows: (U.S.C.A. Vol. 27, Section 122, (1935) found in the pocket supplement to said volume)

"The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited." (Underscoring ours.)

The operation and effect of the above quoted act is discussed in the case of Haumschilt v. State, 221 S. W. 196, where the Supreme Court of Tennessee had before it a case in which whiskey was being purchased in Missouri, loaded into an automobile by the purchaser who intended to take it to Mississippi. In order

to reach his destination, the purchaser passed through the State of Tennessee, and distinguishing that case from the present problem, Tennessee had a law prohibiting the transportation of intoxicating liquor. At l.c. 197, the Court stated:

"The Webb-Kenyon Act divests intoxicating liquors of their interstate character, as we understand it, when they are being shipped into a state to be received, possessed, sold or in any manner used in violation of the law of that state. In other words, such liquors, when in transit to such a state, are not legitimate articles of commerce, and are subject to the laws of the states into which they are brought or through which they pass. That the law of the state controls in such cases fully appears from *Austin v. State*, 101 Tenn. 563, 48 S.W. 305, 50 L.R.A. 478, 70 Am. St. Rep. 703, and the Supreme Court decisions therein reviewed."

Also, in *State v. Frazee*, 97 S. E. 604, 605, the court in applying the Webb-Kenyon Act, said:

"Thus is withdrawn from the shipment or transportation of intoxicating liquors the immunity of interstate commerce, and expressly forbidden the shipment or transportation into a state of liquors intended to be received or possessed there in violation of the law of such state. In *Clark Distilling Co. v. Western Maryland Ry. Co.*, supra, 242 U. S. 325, 37 Sup. Ct. 185, L.R.A. 1917B, 1218, Ann. Cas. 1917B, 845, the court said:

"The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that * * * there is no possible reason for holding that to enforce

the prohibitions of the state law would conflict with the commerce clause of the Constitution.' The Webb-Kenyon Act 'did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.'"

Under the holdings of the cases quoted and cited above it is the opinion of this department that the Webb-Kenyon act removes the protection afforded by the commerce clause and destroys the interstate character of intoxicating liquors only when they are shipped or transported in violation of a state law. Unless such transportation or shipment of liquors does violate a state law, that is the law of the state in which they are being transported or shipped, the liquor retains its interstate character and remains free from seizure by reason of the commerce clause. Support for this reasoning is found in *McCanless v. Graham*, 146 S.W. (2d) 137, at l.c. 138, where the Supreme Court of Tennessee stated:

"We are further of the opinion, as was the chancellor, that the seizure was illegal because appellee was engaged in interstate commerce. Under the decisions of the Federal courts alcoholic beverages retain their interstate commerce character until they actually enter the forbidden state. *United States v. Gudger*, 249 U.S. 373, 39 S.Ct. 323, 63 L.Ed. 653; *Collins v. United States*, 5 Cir., 263 F. 657; *Whiting v. United States*, 49 App. D.C. 225, 263 F. 477; *Preyer v. United States*, 4 Cir., 260 F. 157; *Surles v. Commonwealth*, 172 Va. 573, 200 S.E. 636."

The case of *Barnett v. State ex rel Milner*, 9 So. (2d) 267, l.c. 268, discusses the problem that confronts Missouri, and holds as follows:

"We quote from 15 C.J.S., Commerce, p. 452, Sec. 99, as follows: 'As noted supra Sec. 6, the Twenty-First Amendment limits and qualifies the commerce clause of the constitution; and while it does not entirely remove intoxicating liquors from the protection of the commerce clause, it does have this effect as to their importation into a state in violation of its laws. In view of this amendment, or both the amendment and the Webb-Kenyon Act, many state

laws pertaining to intoxicating liquors have been held not invalid as violating the commerce clause of the federal constitution. However, the amendment recognizes no right in the state to enact laws concerning liquor shipped through the state; and a state law is invalid as imposing a direct burden on interstate commerce to the extent that it applies to interstate shipments through the state of liquors not to be delivered or used therein.'

"The purpose being to prevent the breakdown of state prohibition laws by importations of liquors into the state through interstate commerce, these laws are generally held to mean that intoxicating liquors remain the subject of interstate commerce until they enter the state where they are to be used or disposed of in violation of the state law.

"The late case of *Duckworth v. State of Arkansas*, 314 U.S. 390, 62 S.Ct. 311, 86 L. Ed. 294, 138 A.L.R. 1144, recognizes the right of the state to enact reasonable police regulations safeguarding the movement of intoxicating liquors in interstate commerce through the state, to the end that such liquors shall not be bootlegged in transit.

"We have found no authority for the holding of the trial court. However desirable it may be to anticipate and shut off the movement of liquors into a sister state, especially a border state, in violation of its laws, the law of the land does not render such liquors contraband while passing through this state, and authorize the seizure and condemnation of liquors and transporting vehicle under our statutes. *Moragne v. State*, 200 Ala. 689, 77 So. 322, L.R.A. 1918E, 948; *Hill v. State*, 27 Ala. App. 573, 176 So. 805, certiorari denied 235 Ala. 8, 176 So. 806; *McCanless v. Graham*, 177 Tenn. 57, 146 S.W. 2d 137; Opinion of

Attorney General, Quarterly Report, Vol. XXIII, page 241; State Board of Equalization of California v. Young's Market Co., 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38; Inianapolis Brewing Co. v. Liquor Control Commission, 305 U.S. 391, 59 S.Ct. 254, 83 L.Ed. 243; United States v. Gudger, 249 U.S. 373, 39 S.Ct. 323, 63 L.Ed. 653."

As stated before, there is no statute in Missouri which makes the transportation or shipment of liquor a violation of Missouri law, even though unstamped. Lacking such a violation, it is the opinion of this department that, under the cases cited and quoted from above, the liquor moved "across" Missouri from one state to another, even though intended to be used in violation of another state's law, and not bearing Missouri stamps, retains its interstate characteristics and is free from molestation or seizure by Missouri authorities.

Some solution of this problem may be made and it is the opinion of this department that, that solution is legislative by necessity. The case of Duckworth v. State, 148 S.W. (2d) 656, describes the method used by the state of Arkansas, where a permit is required by regulation, to transport liquor in or into the state of Arkansas. That some conditions may be placed upon the transportation or shipment of liquor is upheld by that case, where at l.c. 658 the court answers the following inquiry:

"Counsel for appellant say: 'One question, and one only, is presented: that is, Does the state have power to regulate a shipment of liquor which is merely passing through Arkansas in interstate commerce'?"

"Our answer is that the state does have such right."

The Duckworth case was approved in Johnson v. Yellow Cab Co., 137 Fed. (2d) 274, l.c. 275.

Again at l.c. 660, the court, in interpreting the decision of Ziffrin Inc. v. Reeves, 1939, 308 U. S. 132, 60 S. Ct. 163, 167, 84 L. Ed. 128, stated:

"It is our view that the Ziffrin case is not altogether in point with the contro-

versy here. The Ziffrin corporation proposed to transport into Illinois liquors manufactured in Kentucky. The Supreme Court of the United States predicated its holding upon the fact that inasmuch as Kentucky had the right to prohibit the manufacture, transportation, and sale of whiskey, it had, as an incident to its power to prohibit, the right to designate the agencies of transportation, as a class, and to prohibit transportation by any other class. This, it was thought, was not a burden upon interstate commerce. Expressed differently, Illinois had no fundamental right to receive liquors from Kentucky; and lacking that right it could not complain of conditions under which limited transportation was permitted.

"In the case at bar the commodity originated in Illinois, and its destination was Mississippi. Arkansas was a mere transportation conduit through which it passed. Appellant might have received a permit if he had applied for it; but, more than eighteen months after this court had held such transportation to be unlawful, he arrogated to himself the right to disregard reasonable legal prerequisites, and now complains that our decision places a burden on interstate commerce.

"If we concede that some burden has been placed upon such commerce, the answer is that it may be done."

Some legislation might be enacted providing that it was unlawful to possess unstamped liquor within the state of Missouri and that possession of unstamped liquor was evidence of an intent to sell same within the state. Also, legislation might be patterned after the federal law which is dependent upon the quantity. That is, where one possesses more than a certain amount of unstamped liquor it would raise a presumption that such liquor was held for the purpose of sale in violation of the State law. These are merely suggestions

and cognizant of the difficulties to be encountered in proposing any salutary reform to the Liquor Control Act they can be considered merely as such.

CONCLUSION

Under the cases and statutes quoted and cited above, it is the opinion of this department that there is no method provided by law for Missouri authorities to seize liquor being transported from Illinois "across" Missouri into Oklahoma, even though such liquor does not bear Missouri revenue stamps. As long as such liquor is not sold or offered for sale, or removed from the container for consumption, within the State of Missouri, there is no violation of any Missouri law, as such liquor is in interstate commerce, and not being shipped in violation of any Missouri law.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General

WCB:LR