

BEER BILL:

Various questions answered.

8-3.
July 28, 1933

Dr. M. O. Raine
Food and Drug Supervisor
Jefferson City, Missouri



Dear Doctor Raine:

A great many inquiries have reached this office growing out of the recent passage of House Bill Number 23, known as the "Beer Bill". In order to expedite present and future handling of the questions presented we are addressing this letter to you which contains the substance of such inquiries and our answers thereto, so that a copy of same may be mailed out to the present inquirers as well as those asking similar questions in the future.

The questions and our answers are as follows:

1. Can wine containing only 3.2 per cent alcohol by weight or 4 per cent alcohol by volume, be legally sold in the State of Missouri?

Section 4481 Revised Statutes Missouri, 1929, provides in part:

"It shall be unlawful for any person, firm, association or corporation, his, its, or their agents or employees to manufacture, sell, possess, give away or transport, intoxicating liquors within, import the same into, or export the same from the State of Missouri, excepting as hereinafter provided* * * *."

The exception made is not material to the question under consideration.

Section 4496 Revised Statutes Missouri 1929, reads as follows:

"The phrases, "intoxicating liquor", or "intoxicating liquors", whenever used in this article, shall be construed to mean and include any distilled, malt, spirituous, vinous, fermented or alcoholic liquor, all alcoholic liquids whether proprietary, patented or not, which contain one-half of one per centum of alcohol by volume and which are potable or capable of being used as a beverage: Provided, however, that when the above mentioned phrases, "intoxicating liquor", or "intoxicating liquors", are hereafter defined in the laws of the United States, then such definition by congress shall supersede and take the place of the definition of said phrases in this section and shall apply to the provisions of this article with the same force and effect as if the same were written herein."

The proviso attached to Section 4496 has been held unconstitutional by the Supreme Court of this state in State v. Berry, 253 S. W. 712. Unless the intoxicating liquor as defined in Section 4496 has been, by legislation, removed from the operation of Section 4496, then that section applies to wine containing one-half of one per centum of alcohol by volume, it being a matter of common knowledge that wine is potable and capable of being used as a beverage.

House Bill Number 23 Laws 1933, page 256, deals only with beer. Section 13139 a, Laws 1933, page 257, reads as follows:

"Beer having an alcoholic content of not less than one-half of one per cent by volume nor exceeding 3.2 per cent by weight, is hereby declared to be non-intoxicating beer, and may be lawfully manufactured and sold, or sold, in this state by any holder of a permit issued by the Food and Drug Commissioner of this state, authorizing such manufacture and sale, or sale, and may be lawfully transported, sold and consumed, in this state, and may be lawfully shipped into, or out of, this state subject to such inspection fees, and/or taxes, and under such regulations as may be provided by law, and such manufacture, sale, transportation, and consumption, shall be exempt from the provisions of Chapter 31, Revised Statutes of Missouri, 1929; and exempt, also, from any of the provisions of said chapter and of any other law of this state in conflict with the provisions of this article. All beverages having an alcoholic content of less than one-half of one per cent by volume shall be exempt from the provisions of this article but subject to inspection as provided in Article 8 of this chapter."

By Section 13139z2, page 265, the phrase "non-intoxicating beer" is defined as:

"The phrase "non-intoxicating beer" as used in this article shall be construed to refer to and to mean any beer manufactured from pure hops or pure extract of hops, and pure barley malt or other wholesome grains or cereals, and wholesome yeast, and pure water, and free from all harmful substances, preservatives and adulterants, and having an alcoholic content of more than one-half of one per cent ($\frac{1}{2}$ of 1%) by volume and not exceeding 3.2 per cent by weight."

By no stretch of the imagination can wine be said to come within the definition of non-intoxicating beer.

We are of the opinion that a sale of wine containing 3.2 per centum alcohol by weight or 4 per cent alcohol by volume would be a violation of the criminal laws of the State of Missouri, except where such sale is made for medicinal or sacramental purposes under a permit so to do.

2. Can one person have more than one license?

Section 13139h, page 259, provides in part:

"* * * No manufacturer or distributor to whom, or to which, this act applies, shall have any interest, directly or indirectly, in the business of any person, firm, company, or corporation, applying for, securing, or holding, a permit under either sub-paragraph "c" or sub-paragraph "d" of section 13139e of this act."

The foregoing portion of Section 13139h prevents a manufacturer or brewer from having any interest, directly or indirectly, in the owning or operation of the business where non-intoxicating beer is sold for consumption on the premises or where non-intoxicating beer is sold by grocers, merchants or dealers in the original package direct to consumers and by the quoted part of such section a distributor, which includes wholesaler, within the meaning of subdivision B of Section 13139e, is likewise barred from having any interest, directly or indirectly, in the business where non-intoxicating beer is sold for consumption on the premises and in any business where the sale of non-intoxicating beer is made by grocers, merchants or dealers in the original package to consumers, so that a manufacturer or brewer could not have a license to sell to consumers nor could such brewer or manufacturer have a permit to sell as a grocer, merchant or dealer, nor could a distributor or wholesaler have or be interested in a permit to sell to consumers nor could he have or be interested in a permit to sell as a grocer, merchant or dealer in the original package.

A permit authorizing a distributor or wholesaler to sell non-intoxicating beer is construed in Section 13139e to,

"sell non-intoxicating beer in this state* * * only to holders of permits authorizing the sale of non-intoxicating beer to consumers, not for resale, but shall not be construed to authorize the sale by any such distributor or wholesaler of non-intoxicating beer direct to consumers."

Here again a wholesaler is prohibited from selling to consumers and such wholesalers could only sell to consumers on a permit, therefore a wholesaler could not be issued a permit to sell to consumers.

Subdivision B, of Section 13139e, page 258, reads as follows:

"(b) For a permit authorizing the sale in this state by any distributor or wholesaler, other than the manufacturer or brewer thereof, of non-intoxicating beer, (\$50.00) fifty dollars."

This subdivision prohibits the issuance of a permit to a manufacturer or brewer to sell as a distributor or wholesaler.

We think it is the intent of subdivision B of Section 13139e to prohibit the issuance of a permit to a manufacturer or brewer to sell as a distributor or wholesaler.

Section 13139e sets up four classes of business in connection with the making and sale of non-intoxicating beer, but there is no restriction in the act against the person holding a permit under subdivision C of Section 13139e also holding a permit under subdivision D of Section 13139e, and we think one person would be entitled to be issued a permit to do the business permitted under each of the subdivisions.

3. Can a permittee licensed under subdivision C of Section 13139e sell beer in what is defined as the "original package" or can

such permittee sell non-intoxicating beer to be taken from the premises of the permittee?

Section 13139e provides as follows:

"Before any permit required by this article shall be issued, the annual fee required therefor shall be paid into the State Treasury, and the receipt for such payment filed in the office of the Food and Drug Commissioner. Annual fees required for permits authorized by this article shall be as follows:

(a) For a permit authorizing the manufacture, and the sale by the manufacturer, of non-intoxicating beer brewed or manufactured in this state, (\$500.00) five hundred dollars.

(b) For a permit authorizing the sale in this state by any distributor or wholesaler, other than the manufacturer or brewer thereof, of non-intoxicating beer, (\$50.00) fifty dollars.

(c) For a permit authorizing the sale of non-intoxicating beer for consumption on premises where sold, (\$10.00) ten dollars.

(d) For a permit authorizing the sale of non-intoxicating beer by grocers and other merchants and dealers, for sale in the original package direct to consumers, but not for resale, (\$5.00) five dollars."

Section 13139u provides:

"Any permit issued under the provisions of this article authorizing the sale of non-intoxicating beer for consumption on the premises described in such permit, shall be construed to authorize the sale

of such non-intoxicating beer by the bottle, by the glass, on draught, and in the original package."

Section 13139z12 provides:

"The phrase "original package" as used in this article shall be construed and held to refer to any package containing three, six, twelve, or twenty-four small standard beer bottles, and any package containing three, six or twelve large standard beer bottles, when such bottles contain non-intoxicating beer as defined by this article."

While subdivision C of Section 13139e above quoted seems to warrant the issuance of a permit to sell for consumption on the premises only, yet a later section, 13139u, above quoted, permits the permittee under Section 13139e, subdivision C, to sell in the original package which means the original package as it is defined in Section 13139z12. In order to give effect to both subdivision C of Section 13139e and Section 13139u, the holder of a permit to sell for consumption on the premises is entitled to sell beer in the original package as the term "original package" is defined in the bill, because the law says so. We cannot disregard a positive declaration in the law as to what or how a permittee may sell under Subdivision C, as against some theory or notion as to the purpose of the act. Such original package or packages can not be broken or the contents consumed on the premises of the permittee under subdivision C of Section 13139e and the package must be taken from the premises where sold.

We realize that this holding, in part, modifies the effect of subdivision D of Section 13139e, but we further are of the opinion that a permit issued under subdivision D Section 13139e would not authorize the permittee to sell for consumption on the premises.

4. Can a license or permit issued under Subdivision C of Section 13139e, to sell to consumers, be transferred from town to town or in other words can a permittee sell non-intoxicating beer to customers at more than one location on the same license?

Subdivision C. of Section 13139e authorizes the issuance of a permit,

"* * * authorizing the sale of non-intoxicating beer for consumption on the premises where sold* * *."

Section 13139h requires the applicant for a permit to take and subscribe an oath that he will not allow any intoxicating liquor to be kept, stored or secreted in or upon the premises described in such permit.

Section 13139i requires the permits issued by virtue of the act to be prepared by the Attorney General of the state, the forms prepared by the Attorney General require a description of the premises where non-intoxicating beer is sold to consumers.

Section 13139p requires the Food and Drug Commissioner to keep a record of the names and places of business of all persons engaged in the brewing, manufacturing or sale of non-intoxicating beer.

Section 13139u provides that any permit issued under the provisions of House Bill Number 23 authorizing the sale of non-intoxicating beer for consumption on the premises described in such permit, shall be construed to authorize the sale of such beer by bottle, glass draught and in the original package. Certain inspections of beer and the premises where sold are required to be made by the Food and Drug Commissioner, and necessarily there would have to be a record of the description of such premises in the office of the Food and Drug Commissioner before he or his appointees would know what premises to inspect or where the beer to be inspected could be found.

We therefore are of the opinion that a license or permit issued under Subdivision C of Section 13139e

can not be transferred from town to town and that a permit issued under Subdivision C of Section 13139e authorizes the sale of non-intoxicating beer at one location only.

5. Can persons who have a permit to sell on the premises to consumers serve beer to persons seated in cars parked at the curbing of a sidewalk on the streets in front of their respective places of business, and can the persons seated in such cars drink the beer so served publicly?"

As we have above indicated, persons who have a license to sell to consumers must describe the premises where such beer is to be sold for consumption. We think it was the purpose of the act that the beer should be sold on the premises described which would mean, ordinarily, that the beer should be sold within the four walls of the building, or part thereof, occupied by the permittee but we do not find any provision in the law making it a violation of such law to sell beer in the glass or in opened bottle to persons seated in cars at the curbing in front of the building occupied by the permittee who is entitled to sell for consumption. This matter might be regulated by local city ordinances. It is no offense to drink non-intoxicating beer publicly. The bill was drawn on the theory that beer containing no more than 3.2 per cent alcohol was non-intoxicating. Therefore the bill contains no regulations as to locations where the beer might be sold or the persons to whom it can be sold. The theory being that since the beer is non-intoxicating it is entitled to be sold to any person and to be drunk anywhere, including public places.

6. Is the holder of a permit to sell on certain described

premises to consumers required to sell something to eat along with and as a part of the sale of beer on draught or in bottles?

There is no such requirement in the law. The beer provided for in House Bill Number 23 may be sold by persons holding permits to sell it for consumption, either with or without selling food along with the beer.

7. Can beer be served over counters or bars to persons standing at such counter or bar?

Section 13139z7 Laws 1933, page 266, is as follows:

"It shall be unlawful for any person holding a permit authorizing the sale of non-intoxicating beer for consumption in or upon the premises described in such permit, to serve any such non-intoxicating beer over, or to allow any person to drink any such non-intoxicating beer at, any bar or counter, or to drink any such non-intoxicating beer while standing at or near any bar or counter in or upon such premises. But this section shall not be so construed as to prevent the holder of any such permit from serving non-intoxicating beer to customers at tables or counters upon which food is served to customers while seated at such tables or counters within or upon said premises."

Under the above section the only way beer can be served over or on a bar or counter is that the customers be seated at such bar or counter, then the customer may be served over the bar or counter with or without the serving of food. The other permissible manner of sales

is at or on tables where persons are seated and in both instances the tables and counters must be used for the serving of food to customers on the premises, but the food need not be bought or sold with the beer.

8. Can brewers or their agents sell or give away taps, vents, or other equipment for the vending of beer?

We find nothing in House Bill Number 23 to prevent such selling or giving away on the part of a brewer or his agents.

9. Can a city in this state charge a distributor of beer a license for operating his truck into such city while the distributor is making distribution or delivery of sales of beer?

While constructions of the ordinances of the cities in this state do not come within the scope of the official duties of any officer to whom this office is authorized to give advice, yet we may say in passing that House Bill Number 23 does not authorize any city in this state to impose a license charge or fee that such city was not entitled to charge or collect prior to the passage of House Bill Number 23.

10. Can a permittee be prosecuted criminally for failure to file the reports required to be filed by House Bill Number 23?

Section 13139q requires the holders of permits under the act to file certain reports at stated times, with the Food and Drug Commissioner. Nothing is contained in the latter section, either expressly or by implication, which would make a permittee criminally liable, either for a felony or misdemeanor, on failure to file such reports. The Legislature failed to make the violation of this section a crime.

11. Is it a criminal offense for a permittee to fail to pay the tax levied or the fee required for inspection, as provided in the act?

Section 13139f and Section 13139g deal with the matter of inspections and inspection fees, and nothing is contained in either of those sections, either expressly or impliedly, making it a felony or a misdemeanor for a permittee to fail to pay the inspection fee required to be paid. This, however, does not mean that such fees may not be collected by a proper proceeding. Though the Legislature has not made it a crime to fail to pay such fees, as a practical matter, it may be reached under Section 13139w. It is our understanding that payment of the inspection fee is required by your department before approval is placed on the package. The Legislature, in Section 13139w has made it a misdemeanor for persons to sell or offer to sell beer which has not been inspected and upon which the certificate of the Commissioner has not been placed. There is no general section in the beer law making the violation of its provisions a misdemeanor. The violations of various sections are made crimes. Section 13139y provides that, "Any person convicted of the violation of any provision of this article, the violation of which is by this article defined as a misdemeanor, and for which no specific punishment is in this article provided, shall upon conviction thereof be punished as otherwise provided by law."

Sections 13139f and 13139g and 13139q do not provide that the violation of those sections shall be a misdemeanor or a felony.

Section 4474 R.S.Mo. 1929, provides as follows:

"The terms 'crime', 'offense,' and 'criminal offense,' when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine or both, may by law be inflicted."

The violation of those three sections cannot be termed a crime, offense, or criminal offense because nowhere in the Act is any punishment, either by imprisonment or fine, or both, provided for in case of their violation.

Dr. M. O. Raine

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It is, therefore, the opinion of this Department that a person may not be prosecuted criminally for failure to make the reports required in Section 13139q, or for failure to pay the fees required in Sections 13139f and 13139g.

The requested form of information for the prosecution of a person for selling at wholesale without a permit so to do, as well as requested form of information for the prosecution of the holder of a permit to sell packages, not having thereon the certificate of the Food and Drug Commissioner, are transmitted herewith. These are forms only and such changes as are necessary to conform to the facts should be made.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

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