LIQUOR CONTROL: Act does not prohibit sale of liquor in original package over telephone even though seller delivers and collects off the licensed premises.

September 13, 1940

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Dear Sir:

This will acknowledge receipt of your letter of August 15, 1940, which is as follows:

"In order that this office may effectually aid in the matter of enforcement of the 'Liquor Control Act', it is necessary to make this request for an opinion from your office on a matter in which conflicting contentions have been advanced.

"Section 5 of the 'Liquor Control Act' (Laws of 1933, Ex. Sess., page 88) prohibits the sale of intoxicating liquor 'in any other place than that designated in the license.'

"The problem of interpretation arises in connection with sales received over the telephone at the premises of the holder of an original package license and delivery made on such sale in conformity with the order received.

"The following contentions are advanced: one that sales made over the

> telephone with subsequent delivery and payment elsewhere are in violation of law, which provides that persons cannot sell intoxicating liquor in any other place than that designated in the license, and it is contended that the delivery is a part of the sale and that the sale is not at the premises described in the license and therefore unlawful.
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> "On the other hand it is contended that when an order for liquor is received over the telephone and the order therein accepted and there is nothing left to be done except to deliver the goods and collect the money, that then the sale is completed at the time that the order is received and accepted, and delivery and payment is not a part of the sale and therefore not violative of the law since it is not to be considered a sale of liquor off the premises described in the liquor license."

State v. Rosenberger, 212 Mo. 648, was a case under the old Local Option Law. The facts in this case were that the defendant resided in Jackson County, Missouri, and conducted a liquor business there. A resident of Webster County, which had voted for Local Option, ordered a gallon of whiskey from defendant. The whiskey was sent by common carrier (Wells-Fargo Express Company) by defendant to Webster County, Missouri, C.O.D. The person who ordered the whiskey received it from the carrier, paid the price of the whiskey plus the delivery charges to carrier, who, in turn, remitted the purchase price to the defendant.

The defendant was charged with making a sale of whiskey in Local Option territory and was convicted in the trial court. This conviction was reversed and the defendant was discharged on appeal. The Supreme Court held in this

opinion that under these circumstances, the sale took place in Jackson County.

Upon the question of where the sale took place, the court said at l.c. 654:

> "As a general rule the delivery of goods by the vendor to the carrier, when the goods are to be sent that way, is equivalent to delivery to the purchaser, subject only to the right of stoppage in transitu. (2 Kent's Com., 490; State v. Wingfield, 115 Mo. 428; Kerwin & Co. v. Doran, 29 Mo. App. 397; Garbracht v. Commonwealth, 96 Pa. St. 449; Dunn v. State, 8 S.E. 806.) And this is true although the purchase money is afterwards collected by the vendor or agent at the place from which the goods are shipped. (State v. Hughes, 22 W. Va. 743).
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> "But when the goods are shipped upon order C.O.D., as in the case at bar, there is much conflict in the authorities as to where and when the title passes, that is, whether at the point of shipment or at the point of destination, upon payment of the purchase price. In American Express Co. v. Iowa, 196 U.S. l.c. 143, it is said: 'True, as suggested by the court below, there has been a diversity of opinion concerning the effect of a C.O.D. shipment, some courts holding that under such a shipment the property is at the risk of the buyer, and, therefore, that delivery is completed when the merchandise reaches the hands of the carrier for transportation; others, deciding that the merchandise is at the risk of the seller, and that the sale is not completed

until the payment of the price and delivery to the consignee at the point of destination.'

"Among the authorities which hold that a sale C.O.D. is not complete until delivery, acceptance, and payment of the purchase price by the person ordering the goods, may be cited: United States v. Shriver, 23 Fed. 134; United States v. Cline 26 Fed. 515; State v. United States Express Co., 70 Iowa 271; State v. Wingfield, 115 Mo. 428; State v. O'Neil, 58 Vt. 140; State v. Goss, 9 Atl. 829; United States v. Chevallier, 107 Fed. 434; Baker v. Bourcicault, 1 Daly (N.Y.) 23; Crabb v. State (Ga.), 15 S.E. 455; Dunn v. State, 82 Ga. 27; State v. Intoxicating Liquor (Vt.), 2 Atl. 586; Wagner v. Hallack, 3 Colo. 176; O'Neil v. Vermont, 144 U.S. 323; Town of Canton v. McDaniel, 188 Mo. 207. But in 17 Am. and Eng. Ency. of Law (2 Ed.), 301, it is said: 'At least so far as cases dealing with intoxicating liquors are concerned, however, the weight of authority is against the foregoing view, and it is generally held that where intoxicating liquors are ordered to be shipped C.O.D., the sale is completed when the liquor is delivered to the carrier;' citing Pilgreen v. State, 71 Ala. 368; Hunter v. State, 55 Ark. 357; Berger v. State, 50 Ark. 20; Bunch v. Potts, 57 Ark. 257; Com. v. Russell, 11 Ky. L. Rep. 576; Com. v. Kearns, 15 Ky. L. Rep. 332; Current v. Com., 11 Ky. L. Rep. 764; James v. Com., 42 S.W. 1107; State v. intoxicating Liquor, 73 Me. 278; Com. v. Fleming, 130 Pa. St. 138; State v. Flanagan, 38 W. Va. 53; State v. Hughes, 22 W. Va. 743. The same doctrine is announced by the courts of Texas and other States.

"In Com. v. Fleming, supra, it is decided that the term 'C.O.D.' placed upon an express package, means that the carrier is thereby directed to collect the price of the goods at the time of delivering them to the consignee, and to withhold such delivery until payment is made, and is authorized, upon receipt of such payment, to discharge the purchaser of the goods from liability for their price; that 'when, in pursuance of an order for goods, directed by the purchaser to be shipped to him C.O.D., the vendor has delivered them to a common carrier, with instructions to collect their prices from the consignee before delivering them to him, the transaction as a sale is complete so far as the vendor is concerned. In such case, while the title to the goods does not pass to the purchaser if they be not delivered to him by the carrier, that circumstance does not affect the character of the transaction as a completed contract of sale; the seller's right to recover the price, if the purchaser refuses to take the goods, is as complete as if he had taken them without payment.' In that case the facts were that a liquor dealer in a certain county of Pennsylvania received an order for liquor to be shipped to the purchaser in another county of said State, C.O.D., and in pursuance of the order the dealer delivered the liquor to a common carrier in the county where the dealer resided for shipment to the vendee, at the latter's expense, C.O.D. It was held that the delivery to the carrier was a delivery to the purchaser in such a sense as to complete the sale in the county from which the shipment was made. The same doctrine is announced and upheld by a long line of decisions of the courts of Texas; also in State v. Flanagan,

> 38 W. Va. 53; American Express Co. v. Iowa, 196 U.S. 133, and Adams Express Co. v. Kentucky, 206 U.S. 138."

And in this case, the court overruled two previous cases holding to the contrary which we have underlined in the above quotation.

State v. Swift & Company, 273 Mo. 462, was a case in which the defendant was charged with offering for sale and keeping on hand 150 pounds of colored oleomargarine in St. Louis, Missouri. The statute under which defendant was prosecuted was leveled at the sale of oleomargarine colored so as to resemble butter. The facts in this case were that the defendant received an order from the Stocker Brothers' Grocery Company in St. Louis, Missouri, for the 150 pounds of oleomargarine. The defendant's plant was located in Illinois. The oleomargarine was separated by defendant from his general stock, loaded into a wagon belonging to himself and delivered to the Stocker Brothers' Grocery Company in St. Louis, Missouri. The cost of the oleomargarine was charged to the Stocker Brothers' Grocery Company and was later paid. The court held in this case that the sale took place at defendant's plant in Illinois. Upon this question, the court said at l.c. 467:

> "The rule in this State in sales of this character is that where anything remains to be done between the parties before the property is delivered, as separating the specific quantity from a larger amount, or identifying it, the sale is not complete; but after the separation for the purpose of delivery, when there is nothing further to be done except to deliver the goods, the sale is complete and the title passes. (Bank v. Smith, 107 Mo. Ap. l.c. 190; Longsdorff v. Meyers, 171 Mo. App. 255.) The only

thing that was lacking in this case was the separation of the goods from the general stock. After they were separated and segregated by placing them in the wagon for the purpose of delivery it would look as if the contract of sale was complete at that time, and title passed, as would have been the case if Swift & Company had had only five cases of oleomargarine and Stocker Brothers had been in the store at the time, designated the five cases, and agreed upon the terms of purchase.

"It seems to make no difference that the goods were not paid for at the time, but charged to the purchaser's account. It is held usually that where a contract of sale is made for a specific article to be charged for and where there is nothing more to do except deliver it and collect the price, the contract of sale is complete without delivery and without payment. (Commonwealth v. Hess, 17 L.R.A. (Pa.) 176. State v. Davis, 60 S.E. (W. Va.) 584.) In the Hess case the seller conducted a wholesale liquor business at a place where it was lawful to do so, but delivered the liquor in question to the purchaser in territories where it was unlawful, and it was held that the sale was complete at the seller's place of business where the goods were separated from the general stock and the price charged to the purchaser."

In support of this statement, the court cited State v. Davis, 60 S. E. 584 (W. Va.). This case is a liquor case somewhat similar to the Rosenberger case. The facts as stated in the opinion, were as follows:

"'Charles Davis, the defendant, is a resident of the city of Huntington, county of Cabell, and state of West Virginia. He is engaged in the business of selling spirituous liquors, etc., and is duly licensed to sell the same at No. 755 Second Avenue, in said city. And, for a more particular description, his place of business where he keeps and maintains a saloon is the southwest corner made by the intersection of Second Avenue and Wight Street in said city of Huntington; that on the _____ day of October, 1905, and within one year prior to the finding of the said indictment, one Emma McDonald, residing with one Bettie Mead, at No. ____ on Second avenue, in said city, and distant about one square from the said defendant's saloon, gave an order from the house where she resided, over the telephone, to the defendant at his place of business, to forward to her at her place of residence a certain quantity of beer, and that she would, when the beer was delivered to her, pay the price for the same; that, pursuant to said order so made, the defendant had forwarded to her the beer by his porter, and that when the porter delivered it to her she paid him for it. She stated that she had a number of times ordered beer in this way; that same had been sent to her by the defendant, and that when delivered she would pay for it, and she always knew the price of the beer; that one time, or perhaps oftener, she had, when phoning to the defendant for beer, stated to him that she did not have the necessary change, but that she had money of such and such denomination, and that if defendant would send with the beer the requisite change, that, in that manner, she could and would pay for the beer; that

> at such time or times the defendant had sent the necessary change as requested, and that in that way she had paid for the beer.'"

In West Virginia the statute under which defendant was prosecuted was one which prohibited a liquor dealer from selling liquors at any place other than that designated in the license, which is substantially the same as Sections 5 and 20 of the Missouri Liquor Control Act. (Laws 1933-34, p. 80; Laws 1939 p. 822). In this case, the court held under these facts that the sale took place on the premises described in the license. This case seems to be directly in point and has been approved by the courts of this state.

Under the above cases, it would seem that when a person orders intoxicating liquor from a liquor dealer to be delivered to him at his home or to any other place, that the sale takes place and is completed on the premises of the liquor licensee, even though the delivery is made by an employee of the licensee and the purchase price is not actually paid until the liquor is delivered to the purchaser.

What is said here only applies to original package licensees or when the sale is by the original package not to be consumed on the premises.

The statute authorizing sale by drink of intoxicating liquor contemplates that the liquor is to be consumed on the premises where sold. This is to be seen by Section 22, Laws 1935, page 275, where it is provided:

> "* * *For every license issued for the sale of all kinds of intoxicating liquor, as herein defined, at retail by the drink for consumption on the premises of the licensee. * * *"

It would seem that a licensee who holds a retail by the drink license, and delivers same by order off his premises in glasses, would run contrary to Sections 5 and 20 of the Liquor Control Act.

Respectfully submitted,

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APPROVED:

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