STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

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ATTORNEY GENERAL OPINION NO. 79-22

The Honorable Franklin D. Gaines
State Senator
Third Floor, State Capitol
Topeka, Kansas 66612

Re: Intoxicating Liquors and Beverages--Licensing and Regulation of Clubs--Sales of Liquor by the Drink

Synopsis: It is constitutionally permissible for the legislature to define statutorily an "open saloon," so as to authorize the sale of alcoholic liquor by the drink in private clubs licensed and regulated pursuant to K.S.A. 41-2601 et seq. A statutory definition of "open saloon" that excludes such private clubs from its purview would not be in derogation of or circumvent the mandates of Article 15, Section 10 of the Kansas Constitution, as the prohibitory provisions thereof have been construed by the Kansas Supreme Court in State ex rel Schneider v. Kennedy, 225 Kan. 13 (1978).

* * *

Dear Senator Gaines:

You have requested our opinion "on the question of whether the sale of liquor by the drink in private clubs without liquor pools would in any way violate the open saloon provision of the Kansas Constitution."

Article 15, Section 10 of the Constitution of the State of Kansas reads as follows:

> "The legislature may provide for the prohibition of intoxicating liquors in certain areas. Subject to the foregoing, the legislature may regulate, license and tax the manufacture and sale of intoxicating liquors, and may regulate the possession and transportation of intoxicating liquors. The open saloon shall be and is hereby forever prohibited." (Emphasis added.)

The constitutional provision referenced in your inquiry is the emphasized portion of the foregoing quoted language. Perhaps it is stating the obvious to note that our constitutional prohibition against open saloons has been the subject of much public debate and legislative consideration throughout its history. Most recently, public attention was focused on the enactment of the 1978 Legislature (see L. 1978, ch. 186) which amended various sections of the Kansas Liquor Control Act (K.S.A. 41-101 et seq.) and the laws regulating and licensing private clubs (K.S.A. 41-2601 et seq.), to authorize the sale and consumption of alcoholic liquor on the premises of class B clubs which are licensed food service establishments. As you are well aware, this enactment was held violative of Article 15, Section 10 of the Kansas Constitution by the Kansas Supreme Court in State ex rel Schneider v. Kennedy, 225 Kan. 1 (1978), with the Court's formal opinion appearing at 225 Kan. 13 (1978). We find this decision most helpful in responding to your inquiry.

Implicit in the question presented for our consideration is a determination of the limits of legislative prerogative to enact laws respecting subjects specifically addressed by our Constitution. In this regard, the Court in Kennedy stated:

> "It is fundamental that our state constitution limits rather than confers powers. Where the constitutionality of a statute is involved, the question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby." (Citations omitted.) 225 Kan. at 20.

Article 15, Section 10 of the Kansas Constitution prohibits "open saloons," thereby precluding any legislative enactment in contravention thereof. However, our Constitution is silent as to the definition of an "open saloon," which fact was recognized by the Court's opinion in Kennedy. 225 Kan. at 21. Thus, the 1978 legislation which was presented to the Court for its review created the issue of "whether the legislature has the power to enact controlling definitions of constitutional prohibitions." 225 Kan. at 21. In addressing this issue, the Court quoted its prior opinion in State v. Nelson, 210 Kan. 439 (1972), as follows:

> "'Although a constitution is usually a declaration of principles of fundamental law, many of its provisions being only commands to the legislature to enact laws to carry out the purposes of the framers of the constitution, it is entirely within the power of those who establish and adopt the constitution to make any of its provisions self-executing. . . Prohibitory provisions in a constitution are self-executing to the extent that anything done in violation of them is void.
>
> "'It is the function and duty of this court to define constitutional provisions. The definition should achieve a consistency so that it shall not be taken to mean one thing at one time and another thing at another time. It is the nature of the judicial process that the construction becomes equally as controlling upon the legislature of the state as the provisions of the constitution itself.' (p. 445.) (Emphasis added.)" 225 Kan. at 21, 22.

Based on the foregoing principles of judicial construction of constitutional provisions, the Court held: "Our court must necessarily determine the scope and content of the open saloon prohibition." (Emphasis added by the court.) 225 Kan. at 22. In doing so, it concluded:

> "We hold an open saloon is any establishment open to the public, without discrimination, where alcoholic beverages are dispensed or sold and served for consumption on the premises. Thus, under this definition, a food service establishment which is open to the public and dispensing or selling alcoholic beverages for consumption on the premises is an open saloon." 225 Kan. at 24.

Considering your request in light of this decision, the question arises whether the legislature, in carrying out its constitutional authority to "regulate, license and tax the manufacture and sale of intoxicating liquors," can define an "open saloon" for such purposes. The Kennedy decision itself addresses this question:

> "It is true. . . that the legislature may enact legislation to facilitate or assist in the operation of a prohibitory provision provided the legislation adopted is in harmony with and not in derogation of the provisions of the constitution. . . . However, this does not give the legislature carte blanche to circumvent the mandates of the constitution." 225 Kan. at 22.

In our view, the Kennedy case has clearly defined the provisions of our Constitution regarding the prohibition of open saloons. However, from our reading of this case, the Court also has made it clear that the legislature has the authority, either explicitly by definitional statute or implicitly in its statutory regulation of the sale and consumption of intoxicating liquors, to define an open saloon, so long as such definition "is in harmony with and not in derogation of" the constitutional provisions regarding the open saloon, as construed by the Court, and does not "circumvent the mandates of the constitution." The Kansas Supreme Court in Kennedy has not construed our constitutional mandates as prohibiting any establishment which sells liquor by the drink. Rather, the Court, in effect, has established three essential elements of an open saloon, all of which must be present for an establishment to be violative of the constitutional proscription. That is, an open saloon is an establishment: (1) which is open to the public, without discrimination; (2) wherein alcoholic beverages are dispensed or sold; and (3) wherein such alcoholic beverages are served for consumption on the premises of the establishment. Thus, any legislative enactment defining "open saloon" in order to "facilitate or assist in the operation of" the constitutional prohibition must be measured against these definitional elements.

It is within this context that we have considered your inquiry, and it is our opinion that it is constitutionally permissible for the legislature to define statutorily an "open saloon," so as to authorize the sale of alcoholic liquor by the drink in a private club licensed and regulated pursuant to K.S.A. 41-2601 et seq. In our judgment, a statutory definition of "open saloon" that excluded these private clubs from its purview would not be in derogation of or circumvent the mandates of Article 15, Section 10 of the Kansas Constitution, as the prohibitory provisions thereof have been construed by the Kansas Supreme Court in Kennedy.

In forming this opinion we have measured the definitional provisions of K.S.A. 1978 Supp. 41-2601, as well as the succeeding licensing and regulatory provisions of the so-called Private Club Act, against the elements of the definition of "open saloon" pronounced in Kennedy. As a result, it is apparent to us that, even without an amendment to permit the sale of liquor by the drink, the constitutional validity of such clubs presently utilizing a liquor pool arrangement to furnish alcoholic beverages to its members depends on whether they are "open to the public, without discrimination." That conclusion is predicated on our determination that the other two definitional elements of "open saloon" are present in the private clubs now existing in compliance with current statutory provisions. That is, alcoholic beverages are "served for consumption on the premises" of such private clubs, and even though alcoholic beverages are furnished to the members of these clubs through a liquor pool arrangement, they are, nonetheless, "dispensed."

It should be reiterated that the Court did not include within its definition only those establishments where alcoholic beverages are "sold"; it included establishments "where alcoholic beverages are dispensed or sold." (Emphasis added.) 225 Kan. at 24. Thus, in our judgment, within the context of present statutes regulating the consumption of alcoholic beverages in private clubs, it makes no difference to a determination of whether such clubs are "open saloons" if the alcoholic beverages consumed on the premises are "dispensed" through a liquor pool arrangement or "sold" by the drink.

Therefore, whether private clubs wherein alcoholic beverages are dispensed or sold and served for consumption on the premises constitute open saloons depends on whether such clubs are "open to the public, without discrimination." We have reached the conclusion that, within the parameters of existing regulatory statutes, they are not. Again, the opinion in Kennedy has persuaded us to this conclusion.

In defining "open saloon" in the Kennedy case, the Court held that "'open' connotes public as opposed to private and restrictive." 225 Kan. at 24. The Court went on to state:

> "The legislative interpretation of 'open saloon' in the Private Club Act of 1965 discloses, in substance, that the legislature construed the term 'open' to be within the parameters of the court's interpretation of the term in this opinion." Id.

Further, in discussing the 1978 legislation under review as being an "end run" around the constitutional prohibition against open saloons, it was noted:

> "For 30 years the legislature followed its definition of an 'open saloon' as set forth in K.S.A. 41-803 in 1949. It distinguished private consumption and sale of intoxicating liquor by the drink from public consumption and sale in the Private Club Act of 1965. That definition of an 'open saloon' and the enactments which followed are reasonably within the parameters of the construction given the term 'open saloon' in the Kansas Constitution by the Supreme Court in this opinion." (Emphasis added by court.) Id. at 25.

Finally, at page 26 of its opinion, the Court stated:

> "[B]y amending the Private Club Act of 1965 (K.S.A. 41-2601 et seq.), which authorized private and restrictive consumption of liquor by the drink on certain premises, the legislature, in substance, did an about face and converted private to public by authorizing new class B clubs which were open to the general public to sell liquor by the drink for consumption on the premises." (Emphasis added by court.)

From the foregoing quoted excerpts from Kennedy, we have concluded that the Supreme Court views private clubs that are licensed and regulated pursuant to K.S.A. 41-2601 et seq. as being private and restrictive and not open to the public. That was not at issue in the case, and the foregoing language must be viewed as dicta, albeit we believe it provides persuasive evidence that the Supreme Court would not deem such clubs to be indiscriminately open to the public.

Further, we have not found any other case squarely on point to this issue. Even though provisions of the Private Club Act were placed at issue in Tri-State Hotel Co. v. Londerholm, 195 Kan. 748 (1965), we do not view that case as being precisely determinative of the question discussed here. In Tri-State, certain sections of the Private Club Act which authorized the establishment and maintenance of liquor pools were challenged on various constitutional grounds, including the claim that these sections were "nothing less than a scheme, subterfuge and device for the unlawful sale of alcoholic liquor and violate Article 15, Section 10 of our Constitution prohibiting an 'open saloon' as defined in K.S.A. 41-803." Id. at 754. In rejecting such claim, the Court did not address the question of whether clubs serving alcoholic beverages pursuant to the Private Club Act are truly private and restrictive. The decision there was that the liquor pool arrangement did not constitute "sale of alcoholic liquor by the drink"; therefore, by virtue of the Private Club Act and the rules and regulations adopted thereunder "the legislature did not authorize an 'open saloon.'" Id. at 757.

Assuming that the definition of "open saloon" declared in Kennedy was as applicable at the time of the Tri-State decision as it is today, then an argument can be made that Tri-State implicitly found that clubs licensed and regulated under the Private Club Act are not open to the public. We find merit in that argument, but are reluctant to state unequivocally that Tri-State stands for that proposition.

Consideration of the private and restrictive nature of clubs subject to K.S.A. 41-2601 et seq. requires a factual determination, and our opinion is not only based on our understanding of the previously discussed decisions in Kennedy and Tri-State, but also reflects our view of the pertinent regulatory statutes. We have concluded from our examination of the Private Club Act that the legislature has prescribed sufficient criteria to remove private clubs from the realm of places that are open to the public without discrimination. In our judgment, the act prescribes adequate limitations and restrictions on membership in such clubs to warrant the conclusion that they are, in fact, private.

Since, in our opinion, K.S.A. 41-2601 et seq. authorizes and provides for the licensing and regulation of clubs which are in fact private and not open to the general public without discrimination, any such club which operates in compliance with said requirements does not constitute an "open saloon," even if the legislature were to authorize the sale of liquor by the drink therein.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

W. Robert Alderson

W. Robert Alderson
First Deputy Attorney General

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