



STATE OF KANSAS

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February 15, 1980

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ATTORNEY GENERAL OPINION NO. 80- 52

Mr. Dan E. Turner
Topeka City Attorney
City Building
215 East 7th Street
Topeka, Kansas 66603

Re: Intoxicating Liquors and Beverages--
Cereal Malt Beverages--Retailers' Licenses

Synopsis: In determining whether an organization that conducts a dance where there is "free beer" distributed must acquire a cereal malt beverage license, a case-by-case determination of the acquisition of the beer to be distributed must be made. When the proceeds derived from the cover charge go to pay for the beer, irrespective of the professed "free beer," then a license shall issue. When no part of the proceeds inure to the payment of the beer, then truly distributed "free," no license need issue.

* * *

Dear Mr. Turner:

You inquire as to whether or not an organization that conducts a dance where there is made a cover charge to enter the premises and where "free beer" is then distributed to the entrants, must obtain a cereal malt beverage license in order to dispense such beverage.

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You advise that the Code of the City of Topeka provides:

"No person shall sell or dispense
any cereal malt beverages at retail
without first having secured a
license for each place of business
such person desires to operate within
the corporate limits of the City of
Topeka, Kansas, as herein provided. . . ."

In addition, K.S.A. 1979 Supp. 41-2702 states in part: "No retailer shall sell any cereal malt beverages without having first secured a license for each place of business as herein provided."

The question to be answered is under what circumstances a retail sale occurs such that the licensing provisions of the cereal malt beverage licensing law must apply. This law (K.S.A. 41-2701 et seq.) was first enacted in 1937 as a comprehensive act regulating the sale of cereal malt beverages. The Act specifies inter alia the information each license must set forth, and the fees therefor; the Act sets forth grounds for eligibility and prescribes certain restrictions on the hours and conditions of sale of cereal malt beverages and permits cities and counties to "prescribe hours of closing, standards of conduct and rules and regulations concerning the moral, sanitary and health conditions of the places licensed;" and the Act prescribes grounds for revocation and suspension and imposes certain restrictions upon brewers, manufacturers, distributors, agents and wholesalers.

To determine those circumstances where a retail sale occurs, we must first look at certain definitions. Webster's Collegiate Dictionary (1977) at page 1019, defines a sale as "the transfer of ownership of and title to property from one person to another for a price." The Act also sets out certain definitions. K.S.A. 1979 Supp. 41-2701 states:

"'Retailer' means any person who sells
or offers for sale any cereal malt
beverages for use and consumption and
not for resale in any form."

The Kansas Supreme Court, in Warren v. Fink, 146 Kan. 716 (1937), defines a sale as follows:

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"We think the real test of a retail sale of tangible personal property is a sale to one who uses or consumes the property, irrespective of whether the property is used or consumed in the place of business or in the home of the purchaser."

The Court in an earlier case, Dry Goods Co. v. Carson, 59 Kan. 295 (1898), states that "[a] sale is, of course, an absolute transfer of the property to the vendee." Id. at 299. Additionally, it is important here to define what might be a "conditional sale" under law. The Kansas Supreme Court in Brown v. Tri-State Ins. Co., 177 Kan. 7 (1954), cites with approval the following:

"In Teidman, on Sales, 300, Sec. 201, it is stated:

"'No particular words or forms of expression are really necessary for the creation of a conditional sale. Any words, which indicate an intention to annex a condition to the sale, will be sufficient . . .'"
Id. at 10.

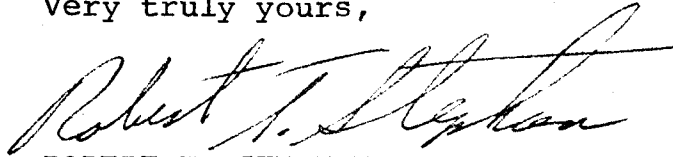
Further, in Brown, supra, at 10, the court states: "In a conditional sale, the conditions upon which the passing of title may be made to hinge are infinite in variety and depend solely upon the will of the parties."

Thus, it is clear that a sale under these definitions only occurs when some part of the entrance fee paid by the dance participant goes to offset the cost of the beer being dispensed. When the "free beer" is paid for by some part of the entry ticket, such that there is a direct relationship for payment of the beer, a sale as legally defined occurs. Hence a transfer of ownership of the property has occurred under these facts necessitating the acquisition of a retail license. When no part of the "cover charge" is used to pay for the beer being consumed or to reimburse the funds from which the beer is purchased, or when the beer is contributed by a third party without receipt of consideration, then no transfer of ownership occurs for a price and hence no retail sale is consummated. Under these facts no retail license is required.

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Thus, in determining whether an organization that conducts dances where there is "free beer" distributed must acquire a cereal malt beverage license, a case-by-case determination of the acquisition of the beer to be distributed must be made. When the proceeds derived from the cover charge go to pay for the beer, irrespective of the professed "free beer," then a license shall issue. When no part of the proceeds inure to the payment of the beer, then truly distributed "free," no license need issue.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Robert E. Duncan, II
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RTS:WRA:RED:gk