Opinion No. 151.

Liquor Control Board—Licenses, revocation or suspension thereof, duty and authority of board—Boards and Commissions, Licensees, conviction of violation of act—Bartender, conviction of violation of act.

Held: 1. That the board without a hearing may revoke or suspend the license of a licensee for a violation of the provisions of either the Liquor Control Act, or the Montana Beer Act, upon conviction of the licensee or his agent, servant, employee or bartender, if the act of the latter was done in the court of his employment.

2. That it is the duty of the board, upon receiving information of the violation of the provisions of either act, whether such information comes from a record of conviction filed with the board, or otherwise, to investigate in order to determine if the facts are sufficient to bring the case within the authority of the board to revoke or suspend the license.

November 9, 1943.

Mr. T. H. MacDonald, Administrator
Montana Liquor Control Board
Helena, Montana

Dear Mr. MacDonald:

You have requested my opinion on the following questions:

1. May the board revoke the license of a licensee on the conviction of the bartender forthwith and without a hearing?

(a) In the case of a sale of liquor as defined by the Retail Liquor Act, liquor being defined in Code Section 2815.168 as "Liquor" means all kinds of liquor sold by and/or in a state liquor store. (Beer is not sold in liquor stores.)

(b) May such license be revoked forthwith in the case of the sale of beer by a bartender?

(1) If the record of conviction is silent as to whom the bartender worked for or where the beer was sold and if the owner is not made a party to the offense?

(2) In any event, on the mere conviction of the bartender?

2. May the board proceed to a hearing of such a case where the conviction is for the sale of BEER, under Chapter 84, Laws of 1937, in any event, either under the Beer Act or under the Liquor Act?

You advise that in the specific case one was convicted of the crime of selling beer to a minor; that the transcript of the docket was silent as to whom the party was working for, or where the sale was made. That "from extraneous sources," you have the information that the party convicted was working for a licensee whose premises were located a few miles east of Wolf Point. You further advise that upon consideration of the docket record, your board was of the opinion that as the sale was not made by the licensee and the licensee was not made a party defendant, the board was without authority to revoke or suspend the license.

The Montana Liquor Control Board is a creature of the statute and has only such powers and authority as is given it by statute, or necessarily implied therefrom. (Guillot v. State Highway Commission, 102 Mont. 149, 56 Pac. (2nd) 1072.) The particular statute giving the Liquor Control Board the authority to revoke or suspend a license upon conviction of the licensee is Section 2815.45, Revised Codes of Montana, 1935. This statute is as follows:

"If any of the licensees herein described shall be convicted of any violation of any of the provisions of this act, or if the board shall find, upon such examination, that such licensee has violated any of the provisions of this act, the board may, in its discretion, and in addition to the penalties hereinbefore prescribed, revoke such license, or may suspend the same for a period of not more than three (3) months."

This section is found in Chapter 254, of the Political Code under the title "Montana Beer Act." The Montana Beer Act was enacted by the Legislative Assembly of 1933, and appears as Chapter 106, Laws of 1933. It deals only with the regulation and control of sale of beer. The administration of the act was placed in the Board of Equalization. At the same session of the legislature, Chapter 105 was enacted and was designated, "State Liquor Control Act of Montana." This act deals with the regulation and control of intoxicating liquor, and placed the administration of the act in the State Board of Examiners, as the "Montana Liquor Control Board." The two boards were separate and distinct, the one having exclusive control of the sale of beer, the other exclusive control of the sale of liquor. This arrangement continued until 1937, when the legislature enacted Chapter 30, Laws of 1937, by which it created a new board known as the "Montana Liquor Control Board," but consisting of three members to be appointed by the Governor, thus taking the administration of the act from the Board of Examiners. The act also placed the control of the sale of beer and the administration of the Montana Beer Act in the Montana Liquor Control Board. (Section 7, Chapter 30, Laws of 1937). Your board, therefore, is charged with the administration of both the Montana Beer Act and the Liquor Control Act, and has all the powers, duties and authority given under each act, and those necessarily implied therefrom.

Section 2815.48, Revised Codes of Montana, 1935, (The Montana Beer Act) defines a common nuisance, and provides that any person who maintains such common nuisance shall be guilty of a misdemeanor and subject to fine and imprisonment as therein provided. This section then provides:

". . . Any person whomsoever, whether a licensee or not, who shall without the corporate limit of any city or town, permit minors to congregate and sell or give away to said minors beer or other liquors shall be deemed guilty of maintaining a nuisance and shall be subject to all the provisions of this section."

This appears to be the only prohibition against the sale of beer to minors.

Section 2815.115, Revised Codes of Montana, 1935 (The Liquor Control

Act), after providing certain exceptions, provides:

". . . no person shall sell, give, or otherwise supply to any person under the age of twenty-one years, or permit any person under that age to consume liquor."

And Section 11 of Chapter 84, Laws of 1937 provides:

"No licensee shall sell, deliver or give away, **or cause to be sold, delivered or given away** any liquor to:

1. Any minor actually under the age of twenty-one (21) years, unless such minor is accompanied by his parent or guardian." (Emphasis mine.)

And Chapter 124, Laws of 1941, which amends Section 11048.1, Revised Codes of Montana, 1935, provides:

"Any person who shall sell, give away or dispose of intoxicating liquors to any person under the age of twenty-one (21) years, shall be guilty of a misdemeanor . . ."

Hence, it is now unlawful for any person to sell, give away or cause to be sold, delivered or given away, or dispose of intoxicating liquors to any person under the age of twenty-one years, whether accompanied by parent or not except under certain circumstances set forth in the statute.

A study of these enactments, the amendments and changes developed in the course of years, shows clearly the gradual development of the legislative grant to deal in the sale, disposition and consumption of intoxicating liquors and beer in this state. It is likewise clear that the legislature by its latest enactments, intended that both the original beer act and the liquor act shall be considered as one act and administered for the same purpose and with the same result in view. This purpose and result is clearly expressed by the legislature in the preamble to Chapter 84, Laws of 1937, namely, "for the protection, health, welfare and safety of the people of the state."

It would therefore seem to follow, that upon the conviction of a licensee for a violation of any provision of either act, the board would have authority to suspend or revoke the license as in the statute provided. In my opinion, a certified copy of the record of conviction of such licensee would be sufficient to authorize the board to revoke or suspend such license. This applies even though the conviction was for selling or giving beer, in view of the provisions of Section 2815.48, supra, providing the act was done outside the corporate limits of a city.

The above, we must note, applies in the case of a conviction of a licensee. Your question concerns a case where the bartender, or servant or employee of the licensee has been convicted. In considering such a case, we are at once confronted with the general principle of law that the principal or master is not criminally liable for the acts of the servant or agent, although done in the course of his employment, unless it be shown such acts were done under express authorization of principal or master, or the latter knowingly assented to or acquiesced in the agent's acts. (State v. Woolsey, 80 Mont. 141, 157, 259 Pac. 826. State v. Lund, 93 Mont. 169, 184, 18 Pac. 2d) 603. 16 C. J. 123.)

A review of the authorities, however, indicates that this principle of law does not apply in cases of illegal sales of intoxicating liquors. In an exhaustive annotation in 139 A. L. R., the authorities both pro and con are collected and digested. On page 308, this author says:

"While an employer is not ordinarily criminally responsible for the unlawful acts of his employees, unless he consents to, approves, or participates in, such acts, there is considerable conflict of authority as to the application of this rule to violations of regulations as to the sales of intoxicating liquors. Such conflict may be attributed in part, but by no means altogether, to the variations in the particular statutes involved."

And again, at page 309 of this note, it is stated:

"However, most of the statutes regulating the sale of intoxicating liquors contain no express stipulations as to the criminal liability of an employer for unlawful sales made by their employees or agents in the course of their employment. While the construction placed upon such statutes by the courts has been a factor in many cases in the determination of any employer's criminal re-

sponsibility for such violations, in some cases the courts have not indicated that their decisions were influenced by, or based upon, such construction.

"Decisions (of which the following are illustrative) holding that an employer is criminally responsible for unlawful sales of intoxicating liquors by his employee within the scope of his employment are based largly upon the doctrine that in statutory crimes intent is not an ingredient of the offense unless provision in that regard is incorporated in the statute." (Citing cases from Arkansas, Colorado, District of Columbia, Kentucky, Maryland, Minnesota, New York, North Carolina, Oregon, West Virginia, Louisiana, Illinois, Indiana, Michigan, Missouri, Vermont, Washington, South Dakota, Wisconsin and England.)

In Whartman's Criminal Law, Eleventh Edition, Vol. 2, at page 2042, the rule is stated as follows:

"The general rule is that a liquor dealer is liable criminally for the acts of agents in making sales of intoxicating liquors, violation of the law, because a sale by the servant or agent is a sale by his principal." (Citing cases.)

In the case of State v. Brown (1914) 73 Or. 325, 144 Pac. 444, cited in the above annotation, it was held that under a statute declaring that any person selling intoxicating liquor to a minor should be deemed guilty of misdemeanor, and another statute declaring that all persons concerned in the commission of a crime, whether they directly commit the act, or aid and abet its commission, though not present, were principles, a proprietor was criminally responsible for the act of his bartender in selling intoxicating liquor to a minor, although such sale was made in the absence of the defendant, without his knowledge, and contrary to express orders given by him in good faith from time to time to the bartender forbidding him to sell liquor to minors. The court pointed out that the statute did not prescribe guilty knowledge or intent as an element of the crime.

In view of the fact that the criminal laws of Oregon, as pointed out in the statement above, concerning criminal responsibility of a principal for acts of an agent are similar to such laws of this state, (Section 10732, Revised Codes of Montana, 1935), and further in view of the fact that the decision in that case seems to be based upon such sound reasoning as applied to present legislation on intoxicating liquor, I deem it pertinent to quote here from such decision. The court said:

"On the postulate that the bartender was an employee of the defendant in the conduct of a licensed business, the defendant is directly concerned in the traffic. It is he who of all others makes it possible for the bartender to commit the act forbidden by the statute. He furnishes the liquor to sell and the place in which it is sold. He employs agents for that purpose who carry on the business for him. Responsible to the state under his license, he must take the risk of the business and at his peril see that his employees obey the law. If he would derive profit from the venture in the hands of his employee, he must accept the hazard with the benefit. . . . Here was a sale. From whom? To whom? The answer is plain that it was from the defendant to the minor. It involves a passing of property from the former to the latter for a valuable consideration. The bartender is not shown to have had any interest in the property. The defendant derived whatever profit accrued from the transaction. Having engaged himself with the bartender in the business, he is liable like the bartender and with him for an act done in pursuance of the undertaking. The reason is found in the fact that intent is not made an element of the statutory offense, so that the defendant is liable in like manner as his agent employed to conduct the business . . . The traffic in intoxicating liquors has always been more or less under the ban of the law of the state, and there are no intendments in its favor. Under statutes like ours, the defendant's directions to his employees, in reality, amount only to self-serving declarations of his good intent; but this court is already committed to the doctrine that intent is a negligible and immaterial circumstance in such cases."

In the case of Carroll v. State (1885), 63 Md. 551, 3 A. 29, the court said:

"If intent is not an ingredient in the offense, it logically follows that it must be immaterial whether such orders are given or not, for he who does by another that which he cannot lawfully do in person must be responsible for the agent's act. In fact it is his act. If the principal makes such sale at his peril, and is not excusable because he did not know or was deceived, for the reason that he was bound to know, and if he was not certain, should decline to sell or take the hazard, it cannot be that by setting another to do this work and occupying himself elsewhere and otherwise he can reap the benefit of his agent's sales and escape the consequences of the agent's conduct. It would be impossible to effectually enforce a statute of this kind if that were allowed, and no license would even be suppressed. The law would soon become a dead letter."

It may be noted that our statutes, both the Beer Act and the Liquor Control Act, Section 2815.30, Revised Codes of Montana, 1935, and Chapter 84, Laws of 1937, provide that before any person may sell or possess for sale intoxicating liquor or beer, he must obtain a license therefor, which license must be issued in the name of the applicant, and may not be transferred, except with consent of the board. And Section 8, of Chapter 84, specifically provides that, "Every license issued under the provisions of this act is separate and distinct, **and no person except the licensee therein named shall exercise any of the privileges granted thereunder. . . .**"

It is therefore doubtful, if a bartender, not possessing a license to sell liquor, may lawfully do so under the license of the owner or proprietor. This particular question not being here involved, I do not express an opinion thereon. At any rate, under the provisions of our statutes applicable to the sale of beer and intoxicating liquor, the language of the Supreme Court of Colorado, in the case of McCutchoen v. People, 69 Ill. 601, seems applicable. The court there said:

"The agent had no license to sell to anyone, and it is only lawful for him to do so in the name and by the authority of his principal, and the presumption must be deemed conclusive the agent or servant acted in the scope of his authority in making the sale."

(See also the following cases: Ex parte Norris, 6 NWS St. Rep. 47 (14 Eng. & Amp. Dig. p. 42, note g.) Hershorn v. People, 113 Pac. (2d) 680; O'Donnell v. Com. 108 Va. 882, 62 S. E. 373.)

It may also be noted that none of our statutes prohibiting the sale of intoxicating liquor or beer to minors, make intent an ingredient of the crime. It is true that the statute here in question, specifically provides for revocation upon "conviction of the licensee." But a review of the authorities, as pointed out in the annotations in A. L. R., supra, shows that many of the decisions holding the licensee liable for sales by his bartender or agent, are not based upon a strict construction of the statute.

But regardless of the decisions of other courts, the board has ample authority under its rules and regulations to suspend or revoke a license for a violation of either the Beer Act or the Liquor Act, without a hearing. It was so decided by our Supreme Court in the case of State ex rel. Stewart v. District Court, 103 Mont. 487, 63 Pac. (2d) 141, decided December 15, 1936. In that case, the Board of Equalization, which then under the statute, administered the Beer Act, suspended certain licenses. No hearing was had before the board, but the board acted only upon the information it had obtained. In the Supreme Court the contention was made that under the provisions of the Beer Act licenses may be suspended only for violation of the act itself.

In its opinion, the court referred to subdivisions (a) and (b) of Section 2815.12 to the effect that the board may do all things necessary or advisable for the purpose of carrying into effect the provisions of the act and regulations made thereunder, and may make such regulations as are necessary and feasible for the purpose of carrying into effect the provisions of this act, and such regulations shall have the full force and effect of law. The Court then referred to Resolution Number 1 of the board which reads as follows:

"It shall be unlawful for any licensee authorized to manufacture, import or sell beer to violate any of the laws of this state or of the

United States or any city ordinance relating to beer or intoxicating liquor and that any violation of this or any other rule or regulation of this board relating to the 'Montana Beer Act' or the violation of any law of this state or of the United States or any city ordinance relating to beer or intoxicating liquor or by licensee shall be sufficient grounds for revocation or suspension of the license."

The Court said, page 500, Montana Report:

"The form of application for license contained in substance the provisions of this regulation, which was signed by these various licensees. Likewise the applicant consents to the examination of his books, records and stock in trade at any time, and to examination of his premises by peace officers."

And continuing, the Court said at page 501, Montana Report:

"It was contended on the argument of the cause that under the provisions of the Act licenses may be suspended only for violations of the Act itself. Section 2815.45 provides for the cancellation or suspension of licenses when 'the board shall find, upon such examination, that such licensee has violated any of the provisions of this Act.' The only examination elsewhere referred to in the Act is that found in the above quotation from Section 2815.30. Manifestly, in section 2815.45 reference is made to some examination elsewhere provided for. The rule of construction has long been adopted by this court that a relative cause must be construed to relate to the nearest antecedent that will make sense. (Citing cases.) Accordingly, we hold that the examination referred to in Section 2815.45 is that mentioned in Section 2815.30."

"The Act provides that the regulations shall have the force and effect of law. (Sec. 2815.12). Hence the board is authorized to cancel or suspend licenses upon the violation of any valid regulation."

With reference to the right of the board to cancel or suspend a license without a hearing, the Court said, page 501:

"Lastly it is argued that the board could not cancel or suspend a license unless some testimony was produced before it, sufficient to warrant such action at the hearing. The board is authorized by statute to make examinations, and on the hearing it disclosed the fact that it had made such an examination which was to its satisfaction sufficient to warrant action unless otherwise explained. In view of the statutory provisions this case is ruled by that of City of Miles City v. State Board of Health, 39 Mont. 405, 102 Pac. 696. . ."

In the Miles City case referred to, Section 1566 of the 1921 Codes, now Section 2651, Revised Codes of Montana, 1935, concerning the duty and authority of the Board of Health was considered. This provision is similar to Section 2815.45, supra. And the court in the Stewart case, supra, on the question of the board's right to cancel or suspend a license without a hearing, quotes from the Miles City case, as follows:

"This section does not contemplate a public trial, but rather an ex parte investigation and the legislature, being the respository of the police power of the state, could designate the State Board of Helath as its agent, and prescribe the manner in which such police power should be exercised."

Regulation Number One, of the Rules and Regulations of the Montana Liquor Control Board, in effect since August 20, 1942, is similar, if not the same, as Resolution Number One considered by the court in the case hereinabove referred to. It may also be noted that in every regulation of the board now in effect, where penalties are provided for violations, violations of either the Beer Act or the Liquor Act are referred to.

Regulation Number Six provides in part as follows:

"No retail licensee shall give or otherwise supply beer or liquor to any minor under the age of 21 years. . ."

It is therefore clear, under the general rule of law relating to violations of statutes concerning intoxicating liquor, and the weight of authority, the board may, without a hearing, revoke or suspend a license upon conviction

of a licensee or his agent, bartender or employee of a violation of either the Beer Act or the Liquor Act. It is likewise clear that the board may, of its own motion, after investigation made disclosing facts which in its judgment are sufficient to warrant such action, revoke a license where said licensee, his agent, bartender or employee, has violated any provision of either the Beer Act or the Liquor Act, or any valid rule or regulation of the board. Keeping in mind, therefore, Regulation Number Six, supra, such revocation or suspension may be effected in cases where beer or intoxicating liquor is sold or otherwise supplied to a minor under the age of twenty-one years, by the licensee or his agent, bartender or employee.

It may be well to note here that under Section 38, Chapter 84, Laws of 1937, the duty to revoke or suspend is made mandatory while under Section 2815.45, it is descretionary.

In view of my conclusions, it might not be amiss to here suggest that the board instruct its enforcement officers that where violations are discovered and prosecutions instituted, both the licensee and the agent be made parties defendant.

Inasmuch as under the statutes your board is charged with the administration and enforcement of both the Liquor Act and the Beer Act, it would be my opinion that when the board obtains information, either through record of conviction or otherwise, that any provision of either act has been violated, it is the duty of the board to investigate to determine if the facts are such that the authority of the board to revoke or suspend may be exercised. The board may not close its eyes and fail to act, merely because the specific information supplied it, outside its own investigation, is not in its judgment sufficient to authorize it to perform its statutory duty.

It is therefore my opinion:

1. That board has authority, and it is its duty to revoke or suspend a license, without hearing, upon a conviction of the licensee, or his agent, bartender or employee, of a violation of either the Beer Act or the Liquor Act.

2. Where the board has information that a violation of the Beer Act, the Liquor Act, or any valid rule or regulation of the board, has occurred, it is its duty to conduct an investigation to determine the facts, and if the facts disclose, to its satisfaction, that such violation has occurred, to revoke or suspend the license of the licensee, without a hearing.

Sincerely yours,
R. V. BOTTOMLY
Attorney General