

August 16, 1934.

You request an opinion whether or not a party (hereinafter designated as the "salesman") is required to secure a wholesale beer license in order to do business as he is now doing, or whether he is violating Chapter 106, Laws of the Twenty-Third Legislative Assembly and Chapter 46, Laws of the Twenty-Third Legislative Assembly, Extraordinary Session.

I have examined the opinion of counsel accompanying the files in this case, in which they conclude that the salesman is not violating the law and that no wholesale beer license is required of him. There are certain facts in addition to those contained in the opinion referred to, and of which we are advised by you, that should be considered.

You advise that the beer sold by the brewery is charged to the salesman and paid for by him at the end of the month, the price paid being the regular wholesale price at the brewery. The salesman sells to retailers, delivers beer in his own truck and collects for same. The brewery does not charge the sales to the retailer. Neither does the salesman appear to have or exercise authority to make representations or warranties for the brewery or to incur obligations binding upon the brewery. He has one contract with the brewery and distinct arrangements with his customers. The customers and the brewery do not appear to contract with each other. Much of the customary authority of a salesman representing a principal appears to be lacking in this arrangement.

Although the arrangement is designated as an agency contract it would appear to more closely resemble a direct sale to the salesman and a re-sale by him to the retailer. Speaking of such a qualified form of "agency" Mecham's Sales says: "It is also entirely consistent with the arrangement that the "agent" is to sell the goods at a price or upon terms or conditions fixed by the proprietor or manufacturer. A person so situated is often, in popular language said to have obtained the "agency" for the goods, when all that is meant is that he has obtained a more or less exclusive right to buy and resell them in a prescribed territory. The transaction is simple enough, but the reports show many

Opinion No. 591

**Beer—Wholesaler—Salesman
—Agency—Licenses.**

HELD: Where a beer "salesman" buys beer on his own account and pays the brewery directly; sells to retailers and delivers to them from his own truck and collects from the retailers; does not purport to bind the brewery in such transactions; and where the brewery and the retailers do not appear to contract with each other, such "salesman" is an independent tradesman rather than an agent of the brewery and he must pay the wholesale beer license.

cases in which the parties have, perhaps, deceived themselves and have certainly attempted to deceive others by calling that, an "agency" which had no resemblance to an agency in fact, but was simply a sale of a proprietary article with a right of re-sale under terms and conditions fixed by the proprietor." (Mechem on Sales, Sec. 44. See Mechem on Agency, Sec. 49.) A leading case is *Arbuckle Brothers v. Kirkpatrick*, 39 S. W. 3.

It may be true that the salesman does not maintain a warehouse or distributing center. It may be that, therefore, he does not come within the definition of a wholesaler. If such be the case, it would appear that he is buying and selling beer contrary to the laws of the State of Montana. If, on the other hand, he does maintain a headquarters and it is reasonable to assume that he does have some headquarters where dealers may be telephoned and where books of accounts are kept, he must then be considered as a wholesaler and, upon securing a wholesale license, is authorized to transact business.

The fact that the salesman uses his own trucks for deliveries, that the merchandise received is charged to him, that the payments are made by him, and that he does not purport to bind a principal would seem to me to be the factors which would determine his status as an independent tradesman rather than as an agent of the brewery.