

No. 453

**MONTANA LIQUOR CONTROL BOARD—LIQUOR—  
BEER, Hours of sale of—CITIES & TOWNS—ALE—  
PORTER—STOUT**

- Held:**
1. Beer containing not more than three and two-tenths percent (3.2%) of alcohol by weight may be sold during all hours by licensed liquor dealers, except in cities and incorporated and unincorporated towns which have enacted ordinances restricting the sale between designated hours.
  2. Beer containing between three and two-tenths and four percent of alcohol by weight may not be sold in this state at any time.
  3. Beer, designated as ale, porter and stout, containing more than four percent (4%) of alcohol by weight may be sold only during the hours prescribed by Section 12, Chapter 84, Laws of 1937.

July 25, 1942.

Mr. D. W. Doyle  
County Attorney  
Pondera County  
Conrad, Montana

Dear Mr. Doyle:

You have requested my opinion on the following:

"Is it illegal to sell beer which contains more than 1% of alcohol by weight in a licensed beer parlor or retail liquor store between the hours of 2:00 A. M. and 8:00 o'clock A. M. in an unincorporated town?"

Section 12 of Chapter 84, Laws of 1937, provides:

"No liquor shall be sold, offered for sale or given away upon any premises licensed to sell liquor at retail during the following hours:

"(a) Sunday, from two a. m. to one p. m.;

"(b) On any other day between two a. m. and eight a. m.;

"(c) On any day of a general or primary election during the hours when the polls are open, excepting bond elections. When any city, or incorporated or unincorporated town has any ordinance further restricting the hours of sale of liquor, such restricted hours shall be the hours during which the sale of liquor at retail shall not be permitted within the jurisdiction of any such city or town."

Section 2 of Chapter 84, *supra*, defines certain words and phrases used in the act, and provides, as pertinent here, as follows:

"The following words and phrases used in this act shall be given the following interpretation: . . .

"7. 'Liquor' means all kinds of liquor sold by and/or in a state liquor store."

It will be noted, then, the "liquor" which may not be sold during the specified hours must be interpreted to mean "liquor" as that word is defined in the act. Inasmuch as "beer," containing not more than three and two-tenths percent (3.2%) of alcohol by weight, is not sold in state liquor stores, I am of the opinion the act does not prohibit the sale of beer during the hours specified.

That the legislature did not intend to restrict the sale of beer between the hours specified is further fortified by the fact the Legislative Assembly of 1941 refused to enact an amendment to Section 12 of Chapter 84, Laws of 1937, restricting the sale of beer within the same hours provided for the sale of liquor. (See Senate Bill No. 25, House Journal, Twenty-seventh Legislative Assembly, page 567.)

Prior to 1933, it was unlawful to manufacture, sell or possess intoxicating liquor or beer in this state. The Legislative Assembly of 1933, in conformity to the acts of Congress repealing the National Prohibition Act and legalizing the sale, manufacture, and possession of beer and liquor, enacted Chapter 105 and 106, Laws of 1933. Chapter 105 dealt entirely with intoxicating liquor, while Chapter 106 dealt with the sale, manufacture and possession of beer.

Section 4 of Chapter 106, Laws of 1933, provided as follows:

"Beer containing one-half of one percent ( $\frac{1}{2}\%$ ), or more, of alcohol by volume and not more than three and two tenths percent (3.2%) of alcohol by weight, or beer of an alcoholic content declared by the Congress of the United States to be non-intoxicating, is hereby declared to be non-intoxicating and may be manufactured and/or sold or transported in and into this state, or possessed therein, in the manner and under the conditions prescribed in this Act and not otherwise."

And Section 5 of the act provided:

"It shall be unlawful to manufacture or sell, or dispose of, or possess for the purpose of sale, beer of any kind or character of an alcoholic content greater than herein prescribed, or other than in the manner permitted by this Act."

Section 4, *supra*, was carried into the Revised Codes of 1935 as Section 2815.13 and Section 5 as Section 2815.14, without change. However, in 1937, the legislature amended Section 4 of this act (Section 2815.13, Revised Codes of Montana, 1935) and changed the wording thereof to such an extent as to evince clearly a different meaning and intent. The amended statute is Chapter 89, Laws of 1937, and is as follows:

"Beer containing one-half of one percent ( $\frac{1}{2}\%$ ) or more, of alcohol by volume and not more than three and two-tenths percent (3.2%) of alcohol by weight, is hereby declared to be non-intoxicating and such beer and other beer permitted by the congress of the United States may be manufactured and sold; provided that beer containing not more than four percent (4%) of alcohol by weight may be manufactured and/or sold or transported in and into this State or possessed therein in the manner and under the conditions prescribed by the laws of this State and not otherwise. The sale of beer by the Montana liquor control board is hereby prohibited, save and except ale, porter and stout containing more than four percent (4%) of alcohol by weight."

It will be noted the original act (Section 4, Chapter 106, Laws of 1933), in prescribing the character or content of beer which may be sold, designated beer containing one-half of one percent or more of alcohol by volume and not more than three and two-tenths percent of alcohol by weight, or beer of an alcoholic content declared by Congress to be non-intoxicating, and made no exception or proviso. However, by the laws of 1937 amendment to Section 2815.13 (Section 4, Chapter 106, Laws, 1933), the legislature made an exception and provided, "beer containing not more than four percent (4%) of alcohol by weight may be manufactured and/or sold or transported in and into this State or possessed therein in the manner and under conditions prescribed by the laws of this State and not otherwise."

The legislature then has said beer with an alcoholic content of not more than 3.2% may be sold, but beer of not more than 4% alcoholic content may be sold only under conditions and in the manner prescribed by law. In other words, beer of an alcoholic content between 3.2% and 4% may be sold only under conditions and in the manner prescribed by law. The legislature has not seen fit to prescribe the conditions and the manner in which beer between 3.2% and 4% may be sold. Hence, such beer may not be sold in this state.

However, the legislature has prescribed the maner and conditions under which beer of an alcoholic content more than 4% may be sold. Section 2815.13, Revised Codes of Montana, 1935, as amended by Chapter 89, Laws of 1937, provides:

"The sale of beer by the Montana liquor control board is hereby prohibited, save and except ale, porter, and stout containing more than four percent (4%) of alcohol by weight."

Hence, beer of this alcoholic content may be sold only by the Montana Liquor Control Board.

Going back, then, to the definitions under the Montana Liquor Control Act (Chapter 84, Laws of 1937), "liquor" is defined:

"'Liquor' means all kinds of liquor sold by and/or in a state liquor store."

We have pointed out beer of an alcoholic content of more than 4% by weight may be sold by the Montana Liquor Control Board. Applying, then, the definition of "liquor" to the provisions of Section 12 of Chapter 84, Laws of 1937, restricting the hours during which "liquor" may be sold, it follows beer designated as ale, porter and stout, containing more than 4% of alcohol by weight, may not be sold within the designated restricted hours.

It is therefore my opinion:

1. Beer containing not more than three and two-tenths percent (3.2%) of alcohol by weight may be sold during all hours by licensed liquor dealers, except in cities and incorporated and unincorporated towns which have enacted ordinances restricting the sale between designated hours.

2. Beer containing between three and two-tenths (3.2%) and four per cent (4%) of alcohol by weight may not be sold in this state at any time.
3. Beer, designated as ale, porter and stout, containing more than four percent (4%) of alcohol by weight may be sold only during the hours prescribed by Section 12, Chapter 84, Laws of 1937.

Very truly yours,

HOWARD M. GULLICKSON  
Attorney General