

resale to retail liquor dealers in the state.

2. There is no prohibition in the Montana Liquor Control Act against wholesale of intoxicating liquor to the Montana Liquor Control Board by a wholesale liquor dealer operating and making such sale within the State of Montana, providing such wholesale dealer does not possess the liquor within the state.

3. Under the laws of Montana, intoxicating liquor may be sold only at state liquor stores to permittees or licensees at retail posted prices and from the stock in the store.

4. No licensee or permittee, or other person or concern, may sell intoxicating liquor within the state at wholesale, except to the Montana Liquor Control Board.

5. A licensee may possess and sell at retail on his licensed premises intoxicating liquor purchased at a state liquor store.

6. A permittee—individual or special—may purchase intoxicating liquor at a state liquor store, and possess the same for the purposes only as specified in Section 2815.77, Revised Codes of Montana, 1935, as amended by Chapter 3, Laws of 1937.

August 22, 1946.

Hon. John B. Tansil
United States District Attorney
for the District of Montana
Butte, Montana

Dear Mr. Tansil:

You have submitted for my opinion the following questions:

1. Does the Montana Liquor Control Act authorize a person or concern within the State of Montana to buy intoxicating liquor for the purpose of resale to retail liquor dealers in the state—in other words, to engage in Montana in the business of a wholesale liquor dealer?

2. Do the state liquor laws authorize the sale of liquor at wholesale to the Montana Liquor Control Board by a wholesale liquor dealer

Opinion No. 196.

Liquor Control Act—Retail Liquor Dealers—Montana Liquor Control Board.

Held: 1. The Montana Liquor Control Act does not authorize a person or concern within the State of Montana to buy intoxicating liquor for the purpose of

operating and making such sale within the State of Montana?

You advise:

"The Federal Alcohol Administration Act provides that a basic permit may be issued to a person or concern only upon satisfying the District Supervisor of the Alcohol Tax Unit that the business operation to be carried on is not in violation of state laws.

"As a result of applications for wholesale basic permits pending before the District Supervisor, this office has been requested to advise said Supervisor concerning the legality or illegality of wholesale liquor operations proposed to be conducted within this state under basic permits which provide: 'This permit is conditioned upon compliance by you with . . . the laws of all states in which you engage in business.' Further reference is made to Section 204, Title 27, U. S. C. A."

Your first question must be answered in the negative. Prior to 1933, and by virtue of the National Prohibition Act and state statutes enacted to conform to the federal act, the sale, manufacture, transportation, importation, exportation and possession of intoxicating liquors, with certain exceptions pertaining to possession and use by physicians and religious organizations, was prohibited. After the repeal of the federal act, the State of Montana—through its legislature, deeming it advisable to permit the sale and possession of intoxicating liquor within the state—enacted Chapter 105, Laws of 1933. The purpose and intent of the legislature in enacting this act is clearly expressed in the words of the title as follows:

"An Act to Limit, Regulate and License the Manufacture and Sale of any and all Liquors or Beverages that may hereafter be Manufactured, Sold or Dispensed in the State of Montana."

Under this act, the administration was placed in the Montana Liquor Control Board, created by the act, and consisting of the State Board of Examiners. The act provided for the purchase by the board, of liquor through state liquor stores to be established by the board in the several cities

of the state. Under the system thus set up, sales could be made only by the vendors of these stores from stock in these stores and to permittees holding permits issued under the provisions of the act. The board was given authority to make rules and regulations necessary for the proper administration of the act, but the legislature specifically provided such rules and regulations should not be "inconsistent with this Act." (Par. 4, Section 8, Chapter 105, Laws of 1933.)

That it was the express intention of the legislature that liquor be sold only to individuals for their personal use and not for re-sale, or other disposition, except as to liquor authorized to be sold to druggists, ministers and others for special purposes, is clear from the express provisions of Paragraph 1 of Section 23 of the Act, which provides:

"Liquor purchased by any person pursuant to a permit held by him may be kept, had, given, and consumed, **only in the residence in which he resides**, except as otherwise provided by this Act and the regulations made thereunder." (Emphasis mine.)

This is further emphasized by the provisions of Section 2815.77, Revised Codes of Montana, 1935, as amended by Chapter 3, Laws of 1937, defining the classes of permit which may be issued under the act.

It is further clear, under this act, sales of liquor could be made only at state liquor stores by the duly appointed vendors. From the many references to sale of liquor in the several provisions of the act, it is clear the legislature did not intend sales should be made by others than the vendors, and at any place except state liquor stores. For instance, in Section 10 of Part II, it is provided:

"The Board shall establish and maintain at county seats stores to be known as 'State Liquor Store' for the sale of liquor in accordance with the provisions of this act . . ." (Emphasis mine.)

And in Section 11, Part II, it is provided:

"The sale of liquor at each State Liquor Store shall be conducted by a person appointed under this Act to be known as a 'Vendor' . . ."

Numerous other provisions concerning the sale of liquor mention sale by the vendor. No place in the act do we find any authority in the board itself to make sales of liquor from the warehouse or from the state stores.

To control and regulate the liquor traffic further and to eliminate certain illegal traffic in liquor, the Twenty-Fifth Legislative Assembly of 1937 enacted Chapter 84, Laws of 1937, by which—in addition to sale at the stores to permittees—the sale of liquor at retail was permitted by licensees under licenses issued by the board in accordance with specific conditions set forth in the act.

The purpose and intent of the legislature in extending the further privileges in the purchase, sale and possession of intoxicating liquor, as set forth in Chapter 84, and to confine it to retail sales and purchases, is best shown by the preamble to the act which is as follows:

“It is hereby declared as the policy of the state that it is necessary to further regulate and control the sale and distribution within the state of alcoholic beverages, and to eliminate certain illegal traffic in liquor now existing, and to insure the entire control of the sale of liquor in the Montana Liquor Control Board, it is advisable and necessary, in addition to the operation of the state liquor stores now provided by law, that the said board be empowered and authorized to grant licenses to persons qualified under this act, to **sell liquor purchased by them at state liquor stores at retail posted prices** in accordance with this act and under rules and regulations promulgated by the said board, and under its strict supervision and control, and to provide severe penalty for the sale of liquor except by and in state liquor stores and by persons licensed under this act. The restrictions, regulations and provisions contained in this act are enacted by the legislature for the protection, health, welfare and safety of the people of the state.” (Emphasis mine.)

That only sales at retail are contemplated or permitted under the act is shown by the provisions of Sections 2 and 3 of Chapter 84, which provides:

“Section 2 (Paragraph 4) ‘License means a license issued by the Montana liquor control board to a qualified person, under which it shall be lawful for the licensee to sell and dispense liquor at retail as provided in this act.’

“Section 3. The Montana liquor control board is hereby empowered, authorized and directed to issue licenses to qualified applicants as herein provided, whereby the licensee shall be authorized and permitted to sell liquor at retail and upon the issuance of such license the licensee therein named shall be authorized to sell liquor at retail but only in accordance with the rules and regulations promulgated by the said board and the provisions of this act. Qualified applicants shall include persons, hotels, clubs, fraternal organizations and railway systems.” (Emphasis mine.)

Chapter 84, Laws of 1937, is a separate act dealing principally with the sale of liquor to and by licensees. However, it does not expressly repeal Chapter 105, Laws of 1933, but on the contrary, by Section 40 of Chapter 84, it is provided:

“All acts and parts of acts in conflict hereto are hereby repealed, but this act shall not be construed to repeal or amend any provision or section of the state liquor control act of Montana, except insofar as the same is in conflict with this act.”

Thus, the two acts must be read and considered together as the entire law on the subject of purchase, sale and possession of intoxicating liquor in this state.

Reading the two acts together, it will be seen—while the liquor control board has authority to purchase liquor at wholesale, either within or without the state, for sale at retail through its state stores and to an individual permittee or a licensee—there is no authority for purchase or sale at wholesale by a permittee, licensee, or any individual, association or corporation. Section 17 of Chapter 84, provides:

“It shall be unlawful for any licensee to sell or keep for sale and/or have on his premises for any purpose whatever, any liquor except that purchased from the state liquor

store, and any licensee found in possession of, or selling and keeping for sale, any liquor which was not purchased from a state liquor store, shall, upon conviction, be fined not less than five hundred dollars (\$500.00) nor more than fifteen hundred dollars (\$1500.00), or by imprisonment for not less than three (3) months nor more than one (1) year, or both such fine and imprisonment, and if the board shall be satisfied that any such liquor was knowingly sold or kept for sale within the licensed premises by such licensee, or by his agents, servants or employees, it shall be mandatory that said board immediately revoke the license of said licensee."

The act is silent as to the quantity of liquor which any permittee or licensee is permitted to purchase. However, under the provisions of Section 9 (j) of Chapter 105, Laws of 1933, the board is given power to prescribe "... the kinds and quantities of liquor which may be purchased under permits of any class, including the quantity which may be purchased at any one time or within any specified period of time." It would, therefore, appear the legislature left this matter within the discretion of the board. However, in view of the definite provisions of the statute and the policy expressed in the titles to the act—namely, that purchase and sale shall be at retail only—it would follow a licensee or permittee could not purchase or sell at wholesale, liquor which he purchased under his license or permit, from the state store, regardless of the quantity he may legally purchase.

It may be contended that, because of the authority granted the board, both under Chapter 105, Laws of 1933, and Chapter 84, Laws of 1937, to make rules and regulations, the board would have authority by regulation or rule to permit a licensee to purchase liquor from the board for resale at wholesale to another retail dealer, or to an individual.

While the board is given authority to make rules and regulations, such rules and regulations must be in conformity with the provisions of the acts. If the acts do not authorize sale of liquor at wholesale by a licensee or permittee, it is clear the board would have no authority to permit such, for

the simple reason such a rule or regulation would not be "in accordance with the provisions of the acts."

In its definitions of terms used in Chapter 84, Laws of 1937, the legislature in paragraph 9 of Section 2 defines the term "rules and regulations" as used in the act as follows:

"'Rules and regulations' means rules and regulations made and promulgated by the Montana liquor control board in accordance with the provisions of this act." (Emphasis mine.)

Section 22 of Chapter 84, Laws of 1937, provides:

"For the purpose of the administration of this act the board shall make, promulgate and publish such rules and regulations as the said board may deem necessary for carrying out the provisions of this act and for the orderly and efficient administration hereof, and except as may be limited or prohibited by law and the provisions of this act, such rules and regulations so made and promulgated shall have the force of statute . . ." (Emphasis mine.)

I have shown the purchase and sale of liquor under the provisions of the acts are definitely limited to purchase and sale at retail. Therefore, a rule or regulation of the board permitting purchase or sale at wholesale would be contrary to the provisions of the acts and hence of no effect.

With reference to the power of the board to make rules and regulations under the provisions of the liquor control law, our Supreme Court in the case of *McFatrige et al. v. District Court, et al.*, 113 Mont. 81, 122 Pac. (2d) 834, at pages 88 and 89 of the Montana Report, said:

"The board has undertaken to supplement the law by rules and regulations of its own adoption, vesting in itself the discretionary power it has attempted to exercise. This, of course, it cannot do. The board is an administrative body, functioning as a bureau of the executive department of the state government. It has no lawmaking power. Any attempt to create for itself authority and discretion not given by the legislature must fail. The board is au-

thorized to make rules and regulations, but these must be limited in their purpose and effect as aid in the administration of the law. This is very clearly expressed in section 22 of the Act, which says that 'for the purpose of the administration of this Act the board shall make, promulgate and publish such rules and regulations as the said board may deem necessary for carrying out the provisions of this Act and for the orderly and efficient administration hereof.' It is further provided that 'except as may be limited or prohibited by law and the provisions of this Act, such rules and regulations so made and promulgated shall have the force of statute.' The last quoted language can mean no more than that the rules and regulations adopted shall be binding and enforceable in all matters to which they pertain and with statewide application, the same as if prescribed by statute. The power to enact statute law was not, and could not, be delegated to the board. The provisions in the regulations adopted by the board by which the discretionary power here in question is assumed and created for itself by the board, are all void and of no effect. All these articles of regulations undertake to widen the scope of the law and extend the powers of the board to matters beyond the purview of the legislative enactment."

A rule or regulation of the board permitting purchase or sale of liquor at wholesale would clearly "widen the scope of the law and extend the powers of the board to matters beyond the purview of the legislative enactment."

That the legislature never intended to permit the wholesale of liquor either by the board or anyone else is further made clear by the provisions of Section 14, Chapter 84, Laws of 1937, as follows:

"The board is hereby authorized to sell through its stores all kinds of liquors, wine and cordials kept in stock, to licensees licensed under this act at the posted price thereof in the store in which said liquor is sold. All sales shall be upon a cash basis. The posted price as used herein shall mean the retail price of such liquor as fixed and determined by the Montana Liquor Control Board and in ad-

dition thereto an excise tax as in this act provided." (Emphasis mine.)

And further by the title to Chapter 84, Laws of 1937, which reads "An Act to Regulate, License and Authorize the Sale of Liquor at Retail."

After a careful study of Chapter 105, Laws of 1933, and Chapter 84, Laws of 1937, known as the Montana Liquor Control Law, it is my opinion that—in view of the express provisions of these acts and the definite policy, intent and purpose of the legislature so clearly expressed—the Liquor Control Board alone has power and authority to purchase liquor at wholesale, but has no power or authority to sell liquor at wholesale; liquor may be sold only to permittees or licensees at retail and through the state stores by the vendor from the merchandise kept in stock at such stores and at the retail posted price for personal consumption by permittees or resale at retail by licensees at their established premises.

II.

As to your second question, I have to advise that I do not find any provision of our liquor laws which prohibits the sale of liquor at wholesale to the Liquor Control Board by a wholesale liquor dealer operating and making such sale within or without the State of Montana. However, it is pertinent to note here that under the state liquor law it is unlawful for any person, except the Liquor Control Board, permittees and licensees having possession for personal use or sale at retail, to have possession of liquor within the State of Montana. Section 45 (1) of Part IV of Chapter 105, Laws of 1933, provides:

"Except as provided by this Act, no person shall, within the state, by himself, his clerk, servant, or agent, expose or keep for sale, or directly or indirectly or upon any pretense, or upon any device, sell or offer to sell, or in consideration of the purchase or transfer of any property, or for any other consideration, or at the time of the transfer of any property, give to any other person any liquor or beer." (Emphasis mine.)

Basic permits are issued under the provisions of Section 204 of Title 27, U. S. C. A. This section authorizes the issuance of such permits to any

person, unless the Secretary of the Treasury finds, among other things, "that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted."

Section 203 of Title 27, U. S. C. A. makes certain acts unlawful except under a basic permit. Among these, and which is pertinent to the question here considered, is the following:

"(c) It shall be unlawful, except pursuant to a basic permit issued under this chapter by the Secretary of the Treasury

"(1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages; or

"(2) for any person so engaged to receive or to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so purchased."

The provisions of this section do not apply to any agency of a state or political subdivision thereof or any officer or employee of such agency.

It would appear, therefore, that the only necessity for a person or concern to have a basic permit would be to purchase for resale at wholesale distilled spirits, etc., or to receive or sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, etc.

I have advised hereinabove that the Montana liquor laws do not authorize sale of liquor at wholesale within the state, except to the Liquor Control Board for sale through its state stores to permittees and licensees. I have also advised that it is unlawful for any person to have possession of intoxicating liquor except such as is purchased through the state stores as provided under the Liquor Control Act. It, therefore, follows that a person or concern having a basic permit issued by the federal government, who possesses intoxicating liquor, or who purchases intoxicating liquor, either through state stores or elsewhere, for the purpose of resale, either at wholesale or retail, except sales to the Liquor Control Board, or sale or possession by permittees and licensees as provided

in the act, is violating the liquor laws of the state.

It is therefore my opinion:

1. The Montana Liquor Control Act does not authorize a person or concern within the State of Montana to buy intoxicating liquor for the purpose of resale to retail liquor dealers in the state.

2. There is no prohibition in the Montana Liquor Control Act against wholesale of intoxicating liquor to the Montana Liquor Control Board by a wholesale liquor dealer operating and making such sale within the State of Montana, providing such wholesale dealer does not possess the liquor within the state.

3. Under the laws of Montana, intoxicating liquor may be sold only at state liquor stores to permittees or licensees at retail posted prices and from the stock in the store.

4. No licensee or permittee, or other person or concern may sell intoxicating liquors within the state at wholesale, except to the Montana Liquor Control Board.

5. A licensee may possess and sell at retail on his licensed premises intoxicating liquor purchased at a state liquor store.

6. A permittee—individual or special—may purchase intoxicating liquor at a state liquor store, and possess the same for the purposes only as specified in Section 2815.77, Revised Codes of Montana, 1935, as amended by Chapter 3, Laws of 1937.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General