

Approved \_\_\_\_\_

*As corrected*  
*2/7/85*  
Date

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS

The meeting was called to order by Senator Edward F. Reilly, Jr. at  
Chairperson

11:00 a.m./<sup>XX</sup>p.m. on February 6, 1985 in room 254-E of the Capitol.

All members were present except: Senator Vidricksen and Senator Walker *were excused.*

Committee staff present: Arden Ensley, Revisor of Statutes  
Fred Carman, Assistant Revisor of Statutes  
Russell Mills, Legislative Research  
Emalene Correll, Legislative Research  
June Windscheffel, Committee Secretary

Conferees appearing before the committee:

Senator Reilly welcomed the group from "Close Up, Kansas."

The Chairman said that Staff has a report to make on the opinion that was requested involving the language "incapacitated" in SB126. Arden Ensley explained the Attorney General's opinion, No. 84-109, dated October 18, 1984, which he said distinguished between incapacitated by reason of consumption of alcohol and in an incapacitated person. In accordance with the AG's opinion an incapacitated person is a person who lacks the capacity to manage ones' personal financial resources or to meet essential requirements for such person's physical health or safety or both. Attachment #1.

The Chair ruled that the motion made by Senator Morris and 2d by Senator Anderson concerning amending the minimum fine of \$100 and a maximum of \$250, (Minutes of February 5), that in view of consideration of action that language remains intact. Senator Morris moved that SB 126 be reported favorably for passage as amended. 2d by Senator Strick. Motion carried.

SB128 - limitations on sales practices relating to alcoholic beverages - also known as the "drink or drown proposal." The Chairman called upon Arden Ensley to brief the Committee concerning SB128 and HB2790, (HB2790 is the bill referred to in yesterday's Minutes in testimony from Neal Whitaker.) Mr. Ensley explained the bills. (Attachment #2)

Senator Arasmith made the motion to eliminate in Sec. 1, items 3 and 6 in subsection(a) and all of subsection (b) and to make any other technical changes necessary. Also in Sec. 2, to eliminate items 3 and 6 in subsection (a) and to eliminate all of subsection (b) and to make any technical changes necessary. 2d by Senator Hoferer. Motion carried.

Senator Arasmith moved that SB128 be recommended favorably for passage as amended. 2d by Senator Martin. Senator Anderson asked to be recorded as voting "no." The motion carried.

SB129 - restriction, suspension or revocation of driver's license as condition of D.U.I. diversion - was the next item considered. Following a briefing by Mr. Ensley and other Staff Senator Anderson moved that SB129 be recommended favorably for passage. 2d by Senator Morris. Motion carried. The Chairman said he will have Staff look at it.

SCR1612 - constitutional amendment for prohibition of liquor was then referred to the Committee. After Committee discussion the Chair announced that there will be a hearing on SCR1612 on Friday, February 8.

SCR1606 - concerning horse racing with parimutuel wagering by county option. Senator Morris, Chairman of the Sub-Committee which had been appointed to study SCR1606, gave the report of the Sub-Committee. Other members of the Sub-Committee were Senator Arasmith and Senator Martin. The report states that after hearing additional testimony and after discussion by the Members of the Sub-Committee its recommendation is that SCR1606 be amended to include racing by dogs. A copy of the Minutes of the Sub-Committee and the Report of the Sub-Committee are Attachment #3 and #4 of these Minutes and copies were distributed to the full Committee.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS,  
room 254-E, Statehouse, at 11:00 a.m./~~p.m.~~ on February 6, 1985.

Senator Arasmith moved to adopt the Sub-Committee's report. 2d by Senator Martin. Motion carried.

Senator Arasmith moved that the Minutes of February 5, 1985, be approved. 2d by Senator Martin. Motion carried.

The meeting adjourned at noon.



Attachment #1

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3791  
ANTITRUST: 296-5299

October 18, 1984

ATTORNEY GENERAL OPINION NO. 84- 109

John A. Lamb  
Director  
Alcoholic Beverage Control Division  
Department of Revenue  
700 Jackson, 2nd Floor  
Topeka, Kansas 66603

Re: Alcoholic Liquors and Beverages -- Prohibited Acts  
and Practices -- Sale of Liquor to Intoxicated Persons

Synopsis: K.S.A. 41-715 prohibits the dispensing, whether through sale or gift, of alcoholic liquor to persons who are incapacitated or who are physically or mentally incapacitated through the consumption of liquor, and makes a violation of the statute a misdemeanor. As a criminal statute, the language of K.S.A. 41-715 must be strictly construed, and cannot be read so as to include the sale of liquor to a person who is not intoxicated at the time of sale, even if such person is known to have a history of alcohol abuse. Cited herein: K.S.A. 41-715; 59-3002; K.S.A. 1983 Supp. 77-201, Thirty-First; L. 1965, ch. 277, ch. 505; L. 1983, ch. 191.

\* \* \*

Dear Mr. Lamb:

As the director of the Alcoholic Beverage Control Division of the Department of Revenue, you request our opinion on a question concerning the application and interpretation of K.S.A. 41-715.

Mr. John A. Lamb  
Page Two

That statute, which is part of the intoxicating liquor statutes, states in pertinent part as follows:

"No person shall knowingly sell, give away, dispose of, exchange or deliver, or permit the sale, gift or procuring of any alcoholic liquor to or for any person who is an incapacitated person, or any person who is physically or mentally incapacitated by the consumption of such liquor. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than two hundred dollars (\$200) or by imprisonment for not to exceed thirty (30) days, or both such fine and imprisonment in the discretion of the court."

You inquire whether this statute includes within its prohibition the sale of intoxicating liquor to a person who is known to be an alcoholic or an abuser of alcohol, but who is not "incapacitated" at the time of the actual sale. Your inquiry stems from an existing situation in which a retailer is faced with a customer who makes repeated visits, at the beginning of which he is sober, but who becomes more intoxicated with each trip.

The statute in question was enacted into law in 1949 as an original part of the Kansas Liquor Control Act. Until 1965, the statute prohibited the sale, gift, etc. of intoxicating liquor to "mentally incompetent" persons, as well as those who are physically or mentally incapacitated by the consumption of liquor. In that year, the legislature amended the statute to its present form by substituting the phrase "incapacitated person" for "mentally incompetent." L. 1965, ch. 277, §8.

While on the surface this change would appear to alter the meaning of the statute very little, if at all, the significance of the amendment appears when another 1965 enactment of the legislature is considered. In chapter 505 of the session laws of that year, the legislature amended K.S.A. 77-201, which statute contains various definitions of terms that are to be used whenever a statute containing one or more of the terms is construed. Among several additions made by the bill was a definition of the term "incapacitated person," which stated:

"Thirty-first. The term 'incapacitated person' shall mean any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic narcotic drug addiction, chronic intoxication, or other cause to the extent that such person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning either his or her person or estate."  
(Emphasis added.)

Given the inclusion of chronic intoxication within the definition of incapacitated person following the 1965 amendment, in our opinion K.S.A. 41-715 at that time did in fact prohibit the sale of intoxicating liquor to persons who, even though presently sober, were known by the seller to be suffering from chronic alcoholism. In that the statute contains a scienter requirement ("knowingly sell, give away, . . ."), the facts of each particular situation would be critical in determining whether a violation took place.

However, due to further amendments to K.S.A. 77-201, such is not our conclusion today, in 1984. In 1983, as part of a comprehensive overhaul of the guardian and conservator statutes (L. 1983, ch. 191, 823), the legislature substantially changed the definition of "incapacitated person" found in K.S.A. 77-201, Thirty-First. As it now reads in K.S.A. 1983 Supp. 77-201, Thirty-First, the definition states:

"'Incapacitated person' means disabled person as that term is defined in K.S.A. 59-3002 and amendments thereto."

Reference to K.S.A. 59-3002 reveals that in place of the specific listing of incapacitating conditions formerly found in K.S.A. 77-201, Thirty-First, "disabled person" now is defined very generally to mean [at subsection (a)]:

"Any adult person whose ability to receive and evaluate information effectively or to communicate decisions, or both, is impaired to such an extent that the person lacks the capacity to manage such person's financial resources or to meet essential requirements for such person's physical health or safety, or both."

In our opinion, the effect of this latest change is to alter the scope of the prohibition contained in K.S.A. 41-715, for "incapacitated persons" no longer has as a part of its definition the individual who is chronically intoxicated. While this result may not have been intended by the legislature when it made the changes last year to the guardian and conservator statutes, the definition of "incapacitated person" cannot continue to be read to include the chronically intoxicated, as it must be presumed that the legislature intended by its actions to remove such a specific reference. Linson v. Johnson, 223 Kan. 442 (1977), Frontier Ditch Co. v. Board of Agriculture, 1 Kan.App.2d 186 (1977). Accordingly, as K.S.A. 41-715 is a penal statute, and so must be strictly construed, the phrase "incapacitated person" must be read in light of K.S.A. 59-3002, by way of K.S.A. 1983 Supp. 77-201, Thirty-First. While the prohibition could still be applied in the case of a person who is mentally-disabled or senile, the lack of any specific reference to chronic alcoholism or intoxication in any of the three statutes leaves us of the opinion that sale of intoxicating liquor to such a person is not clearly within the terms of the prohibited conduct. As such, a court would not extend the scope of K.S.A. 41-715 to include acts which are not readily found therein. State v. Doyen, 224 Kan. 482 (1978), Mitchell v. Rayl, 8 Kan.App.2d 690 (1983).

Having concluded that the term "incapacitated person" does not prohibit the sale of intoxicating liquor to a person who is not currently intoxicated, even though he or she is known to be in such a condition chronically, it remains to consider whether such persons are included within the phrase "any person who is physically or mentally incapacitated by the consumption of [intoxicating] liquor."

In our opinion, for the same reasons set out above, the plain language of the statute cannot be stretched to make it a criminal offense to serve liquor to those persons who may be incapacitated in the future by consumption of alcohol, but who are not presently so. Clearly, had the legislature wished to include such persons, it could have done so, as have other states. Some representative examples include:

- (1) West's Ann.Cal.Bus. & Prof. Code §25602(a) ("Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverages to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.")

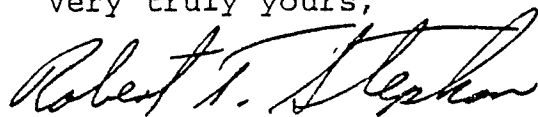
Mr. John A. Lamb  
Page Five

- (2) Ann.L.Mass., ch. 138, §69 ("No alcoholic beverage shall be sold or delivered . . . to a person who is known to be a drunkard, to an intoxicated person, or to a person who is known to have been intoxicated within the six months last preceding.")
- (3) 47 Pa.C.S.A. §4-493(1) ("It shall be unlawful for any licensee . . . to sell, furnish or give any liquor or malt or brewed beverages . . . to any person visibly intoxicated, or to any insane person, or to any minor, or to habitual drunkards, or persons of known intemperate habits.")

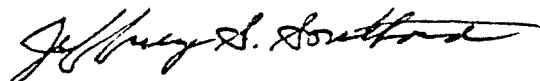
Instead of containing such specific language, the Kansas statute resembles that of Illinois (43 Ill.Anno.St. §131), which prohibits the sale of liquor to "intoxicated persons" and which has been construed as thereby permitting sales to persons who are not intoxicated at the time of purchase. Waynick v. Chicago's Last Department Store, 269 F.2d 322 (7th Cir. 1959). However, it should be emphasized that our conclusion regarding the lack of criminal liability on the part of a seller of intoxicating liquor should not be automatically extended to the area of potential civil liability, especially where, as here, the individual in question spends a considerable amount of time in the seller's place of business in an intoxicated condition, with at least the potential for harming other patrons.

In conclusion, K.S.A. 41-715 prohibits the dispensing, whether through sale or gift, of alcoholic liquor to persons who are incapacitated or who are physically or mentally incapacitated through the consumption of liquor, and makes a violation of the statute a misdemeanor. As a criminal statute, the language of K.S.A. 41-715 must be strictly construed, and cannot be read so as to include the sale of liquor to a person who is not intoxicated at the time of sale, even if such person is known to have a history of alcohol abuse.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard  
Deputy Attorney General

## HOUSE BILL No. 2790

By Committee on Federal and State Affairs

1-26

0017 AN ACT concerning alcohol beverages; limiting sales and dis-  
0018 pensing thereof and providing penalties for violations;  
0019 amending K.S.A. 41-2610 and K.S.A. 1983 Supp. 41-2704 and  
0020 repealing the existing sections.

0021 *Be it enacted by the Legislature of the State of Kansas:*

0022 Section 1. K.S.A. 41-2610 is hereby amended to read as fol-  
0023 lows: 41-2610. It shall be unlawful for a club licensee to:

0024 (a) ~~To~~ Employ any person under the age of ~~twenty-one (21)~~  
0025 21 years in connection with the dispensing or serving of alco-  
0026 holic liquor or the mixing of drinks containing alcoholic liquor.

0027 (b) ~~To~~ Employ knowingly or continue in employment any  
0028 person in connection with the dispensing or serving of alcoholic  
0029 liquor or the mixing of drinks containing alcoholic liquor who  
0030 has been adjudged guilty of a felony or of any crime involving a  
0031 morals charge in this or any other state, or of the United States.

0032 For the purposes of this subsection, the term "morals charge"  
0033 shall include those charges involving prostitution; procuring any  
0034 person; soliciting of a child under ~~eighteen (18)~~ 18 for any  
0035 immoral act involving sex; possession or sale of narcotics, mari-  
0036 juana, amphetamines or barbiturates; rape; incest; gambling;  
0037 illegal cohabitation; adultery; bigamy; or crimes against nature.

0038 (c) ~~To~~ Employ knowingly or to continue in employment any  
0039 person in connection with the dispensing or serving of alcoholic  
0040 liquor or mixing of drinks containing alcoholic liquor who has  
0041 been adjudged guilty of a violation of any intoxicating liquor law  
0042 of this or any other state, or of the United States, during the two  
0043 year period immediately following ~~such adjudging the adjudi-~~  
0044 cation.

0045 (d) ~~To~~ Fail to maintain at the licensed premises a current list



0046 of all club members and their residence addresses.

0047 (e) ~~Do~~ Refuse to allow the director or any of the director's  
0048 authorized agents or any law enforcement officer to inspect the  
0049 current list of the members of the club.

0050 (f) ~~Do~~ Purchase alcoholic liquor from any person except from  
0051 a person holding a valid license to sell alcoholic liquor at retail.

0052 (g) *Sell or dispense any alcoholic liquor or cereal malt bev-*  
0053 *erage to any person for a price less than the cost of the liquor or*  
0054 *beverage to the licensee, for no charge or in an unlimited*  
0055 *quantity for a set price.*

0056 Sec. 2. K.S.A. 1983 Supp. 41-2704 is hereby amended to read  
0057 as follows: 41-2704. (a) In addition to and consistent with the  
0058 requirements of this act, the board of county commissioners of  
0059 any county or the governing body of any city may prescribe hours  
0060 of closing, standards of conduct and rules and regulations con-  
0061 cerning the moral, sanitary and health conditions of places li-  
0062 censed pursuant to this act and may establish zones within which  
0063 no such place may be located.

0064 (b) Except as provided by subsection ~~(g)~~ (h), no cereal malt  
0065 beverages may be sold:

0066 (1) Between the hours of 12:00 midnight and 6:00 a.m.;

0067 (2) on Sunday; or

0068 (3) on the day of any national, state, county or city elections,  
0069 including primary elections, during the hours the polls are open,  
0070 within the political area in which such election is being held.

0071 (c) No private rooms or closed booths shall be operated in a  
0072 place of business, but this provision shall not apply if the li-  
0073 censed premises are also currently licensed as a club under a  
0074 license issued by the director.

0075 (d) Each place of business shall be open to the public and to  
0076 the police at all times during business hours, except that a  
0077 premises licensed as a club under a license issued by the  
0078 director shall be open to the police and not to the public.

0079 (e) No licensee shall permit a person under 18 years of age to  
0080 consume, purchase or possess any cereal malt beverage in or  
0081 about a place of business.

0082 (f) No person shall have any alcoholic liquor in such person's

0083 possession while in a place of business, unless the premises are  
0084 currently licensed as a club by the director.

0085 (g) *No licensee shall sell or dispense any cereal malt beverages for consumption on the licensed premises for a price less*  
0086 *than the cost of the cereal malt beverage to the licensee, for no*  
0087 *charge or in an unlimited quantity for a set price.*

0089 (h) Cereal malt beverages may be sold on premises which are  
0090 both licensed pursuant to the acts contained in article 27 of  
0091 chapter 41 of the Kansas Statutes Annotated and licensed as a  
0092 club by the director at any time when alcoholic liquor is allowed  
0093 by law to be served on the premises.

0094 Sec. 3. K.S.A. 41-2610 and K.S.A. 1983 Supp. 41-2704 are  
0095 hereby repealed.

0096 Sec. 4. This act shall take effect and be in force from and  
0097 after its publication in the statute book.