Intoxicating Liquors—Extracts—When Prohibited.

When flavoring extracts and essences, toilet and household preparations and medicines containing alcohol are classed as intoxicating liquors under the prohibitory and prohibitory enforcement law of the State.

December 28th, 1918.

Mr. T. H. MacDonald,
County Attorney,
Kalispell, Montana.

Dear Sir:

I am in receipt of your letter requesting my opinion as to whether or not extracts, essences and medicines containing two per cent or more of alcohol are intoxicating liquors and the sale thereof prohibited by our laws.

The question of whether such liquors or liquids are or are not "intoxicating liquors," within the meaning of the terms as used in prohibition laws, has been before the courts many times, the answer given in such case depending entirely on the wording or phraseology of the particular statute under consideration.

Perhaps one of the first, and unquestionably one of the most important cases in which this question was presented was that of the Intoxicating Liquor Cases, 25 Kans. 751, 37 Am. Rep. 284, which required the construction of Sections 1 and 10 of Chapter 128 Session Laws of Kansas 1881, the opinion being written by Mr. Justice Brewer, afterwards for many years an Associate Justice of the Supreme Court of the United States, and the rule or principle there announced, particularly with reference to patent medicines has been almost uniformly approved and adopted by the courts of other states having laws containing similar provisions.

At the time this decision was rendered the two sections of the Kansas law construed were as follows:

> "Section 1. Any person or persons who shall manufacture, sell, or barter any spiritous, malt, vinous, fermented or other intoxicating liquor shall be guilty of a misdemeanor and punished as hereinafter provided; *provided, however, that such liquors may be sold for medicinal, scientific and mechanical purposes as provided in this act.*"

"Section 10. All liquors mentioned in Section 1 of this act, and all other liquors or mixtures thereof, by whatever name called, that will produce intoxication, shall be considered and held to be intoxicating liquors within the meaning of this act.'

There were three separate cases consolidated and considered in this case. The first was that of a conviction for selling brandy, the second that of a conviction for selling an extract or essence, and the third that of selling a compound or preparation commonly known as a "patent medicine."

I the course of the opinion Mr. Justice Brewer said:

"It cannot be doubted but that Section 10 is broad and sweeping enough to bring within the statute every liquid which, by reason of the presence of alcohol, will produce intoxication, and this irrespective of the amount of alcohol contained, or the presence of other ingredients of such a character as to prevent any use of the liquid as a beverage. But, such was not the intent of the legislature in the act, and such cannot therefore be adjudged to be its true import.

"But the legislature never intended such a sweeping prohibition. The use of intoxicating liquors as a beverage was the evil, and the statute must be read in the light thereof. It intended to put a stop to such use, and limit the use to the necessities of medicine. Now the cases before us group themselves into three classes; and the same division is far reaching and of general application. The first embraces what are generally and popularly known as intoxicating liquors, unmixed with any other substances. Thus in one case the sale of brandy is charged. The second includes articles equally well known as standard articles, which, while containing alcohol, are never classed as intoxicating beverages. Their uses are culinary, medical or for the toilet. They are named in the United States dispensatory and other similar standard authorities. The formulae for their preparation are there given; their uses and character are as well recognized and known by their names as those of a horse, a spade, or an arithmetic. The possibility of a different and occasional use does not change their recognized and established character. A particular spade may be fixed up for a parlor ornament, but the spade does not belong there. So, essence of lemon may contain enough alcohol to produce intoxication, more alcohol proportionately than many kinds of wine or beer. It is possible that a man may get drunk upon it, but it is not intoxicating liquor. Bay rum, cologne, paregoric, tinctures generally, all contain alcohol, but in no fair or reasonable sense are they intoxicating liquors or mixtures thereof. The third class embraces compounds, preparations, in which the alcoholic stimulant is present, which are not of established name and character, which are not found in the United States dispensatory, or other like standard authorities, and which may be purely medicinal in

their purpose and effect, or mere substitutes for the usual intoxicating beverages. If not intoxicating liquors they may be 'mixtures thereof' within the scope of the statute. Here belong many of the patent medicines, the bitters, cordials and tonics of the day. Here also are such compounds as that charged in one of the information before us, a compound of whiskey, tolu and wild cherry.

"Now in reference to these several classes, we think these rules may be laid down; the first class is within and the second without the statute, and the court as a matter of law may so declare. It is not necessary, in charging the sale of whiskey or brandy, etc., to allege that it will produce intoxication; nor will it bring the sale of essence of lemon within the statute to allege that such essence will produce intoxication. The courts will take judicial notice of the uses and character of these articles. You need not prove what bread is, or for what purpose it is used. No more need you in respect to whiskey or gin on the one hand, or cologne or bay rum on the other. They are all articles of established name and character. In reference to the third class, the question is one of fact, and must be referred to a jury. If the compound or preparation be such that the distinctive character and effect of intoxicating liquor are gone that its use as an intoxicating beverage is practically impossible by reason of the other ingredients, it is not within the statute. The mere presence of alcohol does not necessarily bring the article within the prohibition. The influence of the alcohol may be counteracted by the other elements, and the compound be strictly and fairly only a medicine. On the other hand, if the intoxicating liquor remains as a distinctive force in the compound, and such compound is reasonably liable to be used as an intoxicating beverage. It is within the statute, and this, though it contains many other ingredients and ingredients of an independent and beneficial force in counteracting disease or strengthening the system. Intoxicating liquors, or mixtures thereof: This, reasonably construed, means liquors which will intoxicate and which are commonly used as beverages for such purposes, and also any mixtures of such liquors as, retaining their intoxicating qualities, it may fairly be presumed may be used as a beverage, and become a substitute for the ordinary intoxicating drinks. Whether any particular compound or preparation of this class is then within or without the statute, is a question of fact, to be established by the testimony and determined by a jury. The courts may not as a matter of law say that the presence of a certain per cent of alcohol brings the compound within the prohibition, or that any particular ingredient does or does not destroy the intoxicating beverage. Of course the larger the per cent of alcohol and the more potent the other ingredients, the more probable does it fall within or without the statute; but in each case the question is one of fact and to be settled as other questions of fact."

In 1909 the Kansas legislature amended Sections 1 and 10 of the 1881 act, the same now appearing as Section 5491 and 5501, Kansas Gen. St. 1915, as so amended the same being as follows:

> "Section 5491. Any person or persons who shall manufacture, sell or barter any spirituous, malt, vinous, fermented or other intoxicating liquors, shall be guilty of a misdemeanor and punished as hereinafter provided."
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> "Section 5501. All liquors mentioned in Section 1 of this act shall be considered and held to be intoxicating liquors within the meaning of this act."

After the passage of the 1901 amendatory act the Kansas court decided the case of State vs. Miller, 92 Kans. 994, 142 Pac. 979. In that case a druggist was charged with selling intoxicating liquor consisting of Jamaica ginger, and the court held that the classification of intoxicating liquors made in the case of Intoxicating Liquor Cases, supra, was abrogated by the amendatory act, and that under such sections as amended Jamaica ginger, and other extracts and essences containing alcohol in sufficient quantities to render the same intoxicating, were intoxicating liquors and came within the prohibition, the court saying:

> "One of the perfectly natural and inevitable consequences of the strict enforcement of the prohibitory law was that persons with alcoholic addictions and others desiring the stimulant effect of alcohol should turn to the nearest substitute for the usual in toxicating agents. In 1881 it was known that persons would use bay rum for purposes of intoxication Intoxicating Liquor Cases, 25 Kan. 751, 762, 37 Am. Rep. 284. Extract of lemon has been used for the same purpose with success. Holcomb v. People, 49 Ill. App. 73. The same is true of essence of cinnamon (State vs. Muncey, 28 W. Va. 494) and Jamaica ginger cases are common in the books. Mitchell vs. Commonwealth, 106 Ky. 602, 51 Sw. 17; Arbuthnot vs. State, 56 Tex. Cr. R. 517, 120 S. 478; Bertrand vs. State, 73 Miss. 51, 18 South 545.
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> "It will not be assumed that the legislature was ignorant of the fact that persons deprived of their usual stimulants would resort to substitutes, or that dealers with an eye to profit would supply customers desiring stimulants with fair substitutes.
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> "In 1909 the small remedial value of alcoholic stimulants as compared with the former popular notion regarding their curative properties had been established. The pathway to inebriety through the use of patent and other medicines, consisting of intoxicating liquor containing some barks or drugs or roots or seeds having more or less medicinal property, had been unmasked. The United State Pharmacopoenia, which lists straight alcohol—the common beverage of a certain class of drinkers—was no longer the touchstone by which to divide medicines from intoxicants. None of the social disasters which had been pre-

dicted as results of the law of 1881 had befallen the state. Fear lest the law might be brought into disrepute by encroachments on the right to use preparations containing alcohol was no longer entertained. Nearly thirty years' experience disclosed that restraints, which year by year had been continually imposed, and which would have been regarded as unnecessary and unreasonable when the law was new and strange, were fit and wholesome and were approved by public sentiment. The progress of events had been such, when the legislature approached the revision of the law in 1909, that the intellectual, moral, social and legal atmosphere had become a wholly different medium from that in which the legislature of 1881 labored. If in the act of 1909, which cut off the sale of intoxicating liquors for even medicinal purposes, the legislature had inserted the following definition: All liquors mentioned in Section 1 of this act, and all other liquors or mixtures thereof, by whatever name called, which will produce intoxication, shall be considered and held to be intoxicating liquors—no one would have regarded the language as unfortunately chosen, or as tending to produce prejudice against the law or as unnecessary or unreasonable because reaching culinary, toilet or medicinal preparations in fact intoxicating and used as substitutes for whiskey. The spirit and internal sense of the law would have been regarded as identical with the ordinary and popular signification of the plain words. The suggested definition is precisely the one contained in the law of 1881.

"Since the court, acting according to its light in 1881, had interpreted the definition contained in the carlier statute to exclude from the class 'intoxicating liquors' a class of liquors which were intoxicating, the legislature repealed the definition and substituted another, which, when read, as it must be with Section 1 of the act of 1909, means and says this: Any spirituous, malt, vinous, or fermented liquor, and any other liquor which is intoxicating in fact shall be deemed and held to be intoxicating liquor. The legislature was not doing an idle thing by repealing one definition and substituting another. It intended to change the law, and the result is that the classification established by the intoxicating liquor cases is abrogated. Liquor belonging to the first class there described, such as whiskey, brandy, gin, wine, beer and the like, are still to be construed as intoxicating. All other liquors belong to the third class, and the rule or test is this: If the liquor be such that the distinctive character and effect of intoxicating liquor is present, it is within the statute. The fact is to be determined by the jury, or by the court when sitting as a trier of the facts.

"The evidence in the case under consideration was amply sufficient to warrant a finding that Jamaica ginger is an intoxicating liquor within the meaning of the statute."

In the case of Carl vs. State (Ala.) reported in 8 South 165, where the defendant, a druggist, was convicted of selling a proprietory medicine, the court used the following language:

> "The evidence shows that the defendant sold a preparation which is styled 'Elixir-Chinchous and Gentian Compound' consisting of herbs and other substances possessing medicinal properties and alcohol. The defense is that it is a proprietory medicine and that he sold it in good faith as a medicine, and that it is not an intoxicant. Whether a compound consisting of drugs, barks, or other medicinal substances, and spirituous liquor, is within the prohibition of the statute depends upon the question whether the liquor sold is, in reality, an intoxicating beverage. If the liquor and other ingredients are used and mixed in such a manner and proportions as to counteract the intoxicating forces and character of the liquor, fairly constituting a medicine, and rendering its use as a beverage practically impossible, it does not come within the statute. On the other hand, if the liquor is the predominant element, or sufficiently restrains its intoxicating qualities so as to render the mixture reasonably susceptible of use as a beverage or for substitution for the ordinary intoxicating drinks, it is within the statutory prohibition. * * * The true inquiry is whether the liquor used is necessary to extract and preserve the medicinal properties of the other ingredients, and its distinctive intoxicating character is so counteracted, or greatly impaired, that its reasonable and ordinary' use will not intoxicate—whether it is in reality, a medicine. If the compound, as one of the medical witnesses testified in respect to the elixir in question, would neuseate before it would intoxicate, it is not desirable and is not reasonably susceptible of being used as a beverage, or as a substitute for the ordinary intoxicating drinks."

While in the case of Wadsworth vs. Dunnam, 13 South 597, another Alabama case, it was said:

> "Given that the particular compound will intoxicate, the question is not what quantity of it is necessary to produce intoxication, or whether the necessary quantity, if great or small, may reasonably be drunk. It is of no consequence that it may require two or eight bottles of this 'gensing cordial' to produce intoxication, if that quantity may be taken without other deleterious consequences than such as are incident to intoxication. If the quantity requisite to a state of intoxication may be safely used, then a compound is 'Reasonably liable to be used as an intoxicating beverage and therefore within the statute."

In Martin vs. State, 48 South 864, intoxicating liquors were defined as follows:

"Intoxicating liquors are any liquors intended for use as a beverage, or capable of being so used, which contain alcohol (no matter how obtained) in such percentage that they will produce intoxication when imbued in such quantities as may practically be drunk."

In the case of Heintz vs. LePage, 62 Atl. 605, a Maine case, it was said:

"Any liquor, containing alcohol, which is based on such other ingredients or by reason of the absence of certain ingredients, that it may be drunk by an ordinary person as a beverage and in such quantities as to produce intoxication in intoxicating liquor. If its composition is such that it is practicable to commonly and ordinarily drink it as a beverage, and to drink it in such quantities as to produce intoxication, then it is intoxicatng liquor."

In the case of State vs. Krnski (Vt.) 62 Atl. 37, the court affirmed a conviction, using the following language:

"The court first took up the question of whether this Jamaica giger was a beverage within the meaning of the law. And in considering this question, after referring to the evidence in respect to its being used as a beverage, the court said, in substance, that the law did not mean that it must be classed among liquors that are ordinarily used as beverages, but that it is sufficient if the liquid is one that may practically be used as a beverage and be drunk for the purpose of intoxication; that if the preparation was a beverage capable of producing intoxication, and one that could be used for that purpose, then it fell within the list of intoxicating liquors, and the sale or keeping for sale is prohibited. The meaning of this is that a preparation of this kind may in some circumstances be classed with intoxicating liquors, and so come within the prohibition although not ordinarily used as a beverage; and the remainder of the charge makes it certain that it must have been so understood by the jury."

In the case of State vs. Kezer, 52 Atl. 116, the defendant was convicted of selling peppermint essence containing fifty per cent alcohol, and the Supreme Court of Vermont, in affirming the conviction, said:

"Though used almost wholly as a carminative, it may be used as a beverage and the sale thereof is in violation of the statute prohibiting the sale of spirituous or intoxicating liquors."

In the case of Mason vs. State (Ga.) 58 S. E. 139, it was said:

"Patent medicines, cordials, bitters, tonics and other articles are to be regarded as intoxicating if they are capable of being used as a beverage and contain such a percentage of alcohol as that, If drank to excess, they will produce intoxication."

In the case of Saulaloski vs. State (Tex.) 143 S. W. 115, it was said:

> "'Intoxicating liquor' is a liquor intended for use as a beverage or capable of being so used, which contains alcohol, either obtained by fermentation or by the different processes of distillation, in such a proportion that it will produce intoxication when taken in such quantities as may practically be drunk."

In West Virginia it is held that whether or not a liquor or liquid is intoxicating liquor depends on whether or not it will produce intoxication in the ordinary and common acceptance of the word, when drank in sufficient quantities. State vs. Henry, 81 S. E. 568.

In Kentucky it is held that any liquor or liquid which contains alcohol and is intended to be or which may be used as a beverage and when so used will produce intoxication, is an intoxicating liquor. Commonwealth vs. Louisville & N. R. R. Co., 130 S. W. 798.

Our prohibitory law, Chap. 39, Session Laws 1915; Chap 175, Session Laws 1917, does not contain any exception which will permit the use of alcohol or intoxicating liquors in culinary, toilet, or household articles or medicines. The only exceptions contained therein are the manufacture or sale of denatured alcohol, wine intended for sacramental purposes, and alcohol intended for scientific or manufacturing purposes.

In defining "intoxicating liquors" the Supreme Court of Arizona said in the case of Cooper vs. State, 172 Pac. 276, where a druggist was convicted of selling Jamaica ginger:

> "The Constitution forbids the sale and disposal of ardent spirits, beer and wine, and of intoxicating liquors of any kind to any person in the State of Arizona. Article 23, Constitution. It contains no exception as that it may be prescribed and sold as a medicine or for medicinal purposes. Neither doctors, nor druggists, nor any one else, may sell or dispose of any of the named or described liquors as such or when compounded as a medicine. It is not a regulatory provision but one of outlawry. it is one of suppression and not one of supervision. The fact that ardent spirits are mixed with other ingredients, and, as thus compounded, labeled Jamaica ginger, and sometimes used for medicinal purposes, does not change the situation, for as we said in Brown vs. State, 17 Ariz. 314, 152 Pac. 578, 'of course the name by which it was called cannot affect its kind or quality. It is the stuff of which it is made, and not its name, that gives or places it among the prohibited articles named in the Constitution."

Liquid extracts, essences, toilet and household preparations and compounds, and medicine of all kinds, containing as much as two per cent of alcohol, if they are "intoxicating liquors" as defined in Section 2 of Chapter 143, Session Laws 1917, cannot be introduced into, manu-

factured or sold in this state, and whether or not such articles do come within such definition is a question of fact depending on the ingredients contained in, and, the use which may be made of each particular article as a beverage.

Our law, Section 2, Chapter 143, Session Laws 1917, defines "Intoxicating liquors" as being whiskey, brandy, gin, rum, wine, ale and any spirituous, vinous, fermented or malt liquor and "liquor or liquid of any kind or description, whether medicated or not, and whether preprietory, patented or not, which contains as much as two per cent of alcohol measured by volume, and which is capable of being used as a beverage."

Liquid extracts, essences, toilet and household preparations and compounds and medicines of all kinds containing alcohol may be divided into three classes. The first class consists of those which do not contain as much as two per centum of alcohol; the second class consists of those which contain as much as two per centum of alcohol but are not capable of being used as a beverage; while the third class consists of those which contain as much as two per centum of alcohol and are capable of being used as a beverage. The first two classes are not "intoxicating liquors" within the meaning of such term as used in such section, and the sale thereof is not prohibited, while the third class are "intoxicating liquors" within the meaning of such term and the sale thereof is prohibited.

Whether or not a liquor or liquid, containing as much as two per centum of alcohol is capable of being used as a beverage depends entirely on whether or not a person may drink enough of it to become intoxicated. If a person can do so then it is an intoxicating liquor and falls within the prohibition; if a person cannot do so then it is not an intoxicating liquor and does not fall within the prohibition. Certain liquors, whether they be extracts, essences, toilet or household preparations or compounds or medicines, may contain ingredients which counteract or impair the distinctive force of the alcohol contained therein to such an extent that no matter what quantity thereof be drunk intoxication will not result, while others may contain ingredients which, while they do not counteract or impair the distinctive force of the alcohol contained therein, will nauseate before an amount sufficient to produce intoxication can be drunk. Such cannot therefore be deemed "intoxicating liquor" and the sale thereof is not prohibited. There are, however, other liquors, extracts, essence, toilet and household preparations and compounds and medicines containing as much as two per centum of alcohol, in which the distinctive force of the alcohol is not counteracted or impaired by other ingredients, and which will not nauseate, no matter what quantity be drunk, and of which sufficient may be drunk to produce intoxication. These are "intoxicating liquors" within the meaning of the term as used in such section and the sale thereof is therefore prohibited.

It is therefore my opinion that any liquid extract, essence, toilet or household preparation or compound, or medicine, which contains as much as two per centum of alcohol, the distinctive force of which is

not counteracted or impaired by other ingredients, and which will not nauseate when drunk to excess or in immoderate quantities, and which when drunk, even though it requires the drinking of an excessive or immoderate quantity, will produce intoxication, is an "intoxicating liquor" and the sale thereof is prohibited.

Respectfully,
S. C. FORD,
Attorney General.