

### **Intoxicating Liquors—Alcoholic Content.**

Manufacture, introduction and sale of intoxicating liquors enumerated and defined in prohibitory and prohibitory enforcement laws are prohibited regardless of quantity or amount of alcohol contained therein.

December 30th, 1918.

Mr. Joseph C. Tope,  
County Attorney,  
Terry, Montana.

Dear Sir:

I am in receipt of your letter requesting my opinion as to whether or not beer containing less than two per cent of alcohol, and near beer and other beverages containing less than two per cent of alcohol, may lawfully be manufactured, introduced, sold, given away, bartered or disposed of after the prohibitory law is in effect, that is after December 30th, 1918.

Section 1 of the prohibitory law, Chapter 39, Session Laws 1915, Chapter 175, Session Laws 1917, absolutely prohibits the manufacture, introduction, sale, giving away, bartering or disposal of ardent spirits, or any compound thereof capable of being used as a beverage, or any ale, beer, wine or intoxicating liquor of any kind.

Section 2 of the prohibitory enforcement law, Chapter 143, Session Laws 1917, provides that the phrase "intoxicating liquors" shall be held and construed to include whiskey, brandy, gin, rum, wine, ale and any spirituous, vinous, fermented or male liquors and liquor or liquid of any kind or description, whether medicated or not, and whether proprietary, patented or not, which contains as much as two per centum of alcohol measured by volume, and which is capable of being used as a beverage.

In many of the states the prohibitory provisions and the regulations for the enforcement of the prohibitory provisions are all contained and embraced in one act, but in this state the prohibitory provisions are contained in Chapter 38, Session Laws 1915, Chapter 175, Session Laws 1917, while the regulations for the enforcement of the prohibitory act are contained in Chapter 143, Session Laws 1917, a separate and distinct act, but nevertheless the provisions of the two acts must be construed together. Chapter 143, Session Laws 1917, the

enforcement law, was not intended by the legislature to be in any way amendatory of Chapter 39, Session Laws 1915, the prohibitory law, but merely as supplemental thereto by providing rules and regulations whereby the prohibitory law might properly enforced.

It doubtless will be contended by those desiring to manufacture, introduce and sell in this state, beer, near beer and other beverages containing alcohol, that the words "which contains as much as two per centum of alcohol, measured by volume, and which is capable of being used as a beverage," used in Section 2 of Chapter 143, defining "intoxicating liquors," limits, restricts and qualifies the classes of liquors specifically enumerated and preceding it to such liquors or liquids as contain two per cent or more of alcohol measured by volume, and that therefore, beer, near beer, or any other liquor, intended to be or capable of being used as a beverage, which contains less than two per cent of alcohol, measured by volume, is not "intoxicating liquor" as defined in such section. In other words that the manufacture, introduction or sale of either whiskey, brandy, gin, wine, beer, or any other of the liquors specified and enumerated in such section, is not prohibited when the same does not contain as much as two per centum of alcohol measured by volume. Such a contention, however, is without merit.

Section 1 of Chapter 39, Session Laws 1915, Section 1, Chapter 175, Session Laws 1917, enumerates and specifies certain liquors the manufacture, introduction and sale of which is absolutely prohibited, including in such enumeration "intoxicating liquors of any kind" without in any manner defining such term. Section 2 of Chapter 143, Session Laws 1917, then defines the words "intoxicating liquors" as used in Chapters 39 and 175.

By Section 1 of Chapters 39 and 175, specifically enumerating the same, the prohibition is made to apply to the following classes of liquors: First, ardent spirits, or any compounds thereof capable of being used as a beverage, without regard to the quantity or amount of alcohol contained therein; second, ale, regardless of the quantity or amount of alcohol contained therein; third, beer, without regard to the quantity or amount of alcohol therein; fourth, wine, without regard to the quantity or amount of alcohol contained therein; and, fifth, intoxicating liquors of any kind. And by Section 2 of Chapter 143, the fifth class of prohibited liquors enumerated in Section 1 of Chapters 39 and 175, "intoxicating liquors of any kind" is defined as being: First, whiskey; second brandy; third, gin; fourth, rum; fifth, wine; sixth, ale; seventh, spirituous liquors; eighth, vinous liquors; ninth, fermented liquors; tenth, malt liquors; and eleventh, "liquor or liquid of any kind or description, whether medicated or not, and whether proprietary, patented or not, which contains as much as two per centum of alcohol measured by volume, and which is capable of being used as a beverage."

Section 1, Chapter 175, absolutely prohibits the manufacture, introduction or sale of "beer" without regard to its alcoholic content, and to now say that Section 2 of Chapter 143, by the words "and which

contain as much as two per centum of alcohol," etc., refers back and relates to "beer" would be to say that Section 1 of Chapter 39, and Chapter 175 has been amended by Section 2 of Chapter 143, which clearly the legislature never intended.

Considering the prohibitory and prohibitory enforcement laws together, and the decisions construing similar laws, I am satisfied that the words "which contain as much as two per centum of alcohol," etc., were not intended to qualify the several different kinds of liquors specified and enumerated in Section 1 of Chapter 39, Chapter 175, or specified and enumerated in Section 2 of Chapter 143, but were only intended to qualify the last class of liquors enumerated and specified in Section 2 of Chapter 143, "liquor and liquid of any kind or description," etc.

Sawyer vs. Botti (Iowa), 124 N. W. 787;  
Marks vs. State (Ala.), 48 South 864;  
State vs. Heimrich (Wash.), 161 Pac. 79;  
Brown vs. State (Ariz.), 152 Pac. 578;  
Townley vs. State (N. J.), 18 N. J. S. 318;  
State vs. Terry, 61 Atl. 148; 64 Atl. 113.

This to my mind seems to be clearly and plainly apparent from the very words used in Section 2. The words are not "whiskey, brandy, gin, rum, wine, ale and any spirituous, vinous, fermented or malt liquors of any kind or description, whether medicated or not," etc., but they are "whiskey, brandy, gin, rum, wine, ale, and any spirituous, vinous, fermented or malt liquors and *liquor* or *liquid* of any kind or description, whether medicated or not," etc. By inserting the words "*and liquor or liquid*" it is apparent that the legislature intended to refer to and include a class of liquors or liquids different from the classes already enumerated and specified and that it was the latter class only which was to be qualified by the words "which contains as much as two per centum of alcohol measured by volume, and which is capable of being used as a beverage." Otherwise there would have been no reason to insert the words "and liquor or liquid." Again, some meaning must be given the words "capable of being used as a beverage." Whiskey, brandy, gin, rum, wine and ale are all liquors which are beverages, regardless of their alcoholic content, consequently the words "capable of being used as a beverage" could not possibly have been intended to apply to them, but must have been intended to apply to some class of liquors or liquids containing alcohol, other than those enumerated and specified and which are always beverages.

I am, therefore, of the opinion that none of the liquors specified and enumerated in Section 1 of Chapters 39 and 175, and in Section 2 of Chapter 143, that is, neither ardent spirits, or any compound thereof, capable of use as a beverage, nor whiskey, brandy, gin, rum, wine, ale, beer, spirituous liquor, vinous liquor, fermented liquor, nor malt liquor can lawfully be manufactured, introduced or sold in this state even though the same contains less than two per centum of alcohol measured by volume, but that the manufacture, introduction and sale

thereof is absolutely prohibited regardless of the amount of alcohol contained therein, and it therefore follows that "beer" being specifically enumerated in Section 1 of Chapter 39 and 175, and being a "malt liquor" specifically enumerated in Section 2 of Chapter 143, its manufacture, introduction and sale is absolutely prohibited regardless of the amount or quantity of alcohol contained therein.

So far as "near beer" and other liquors intended for or capable of use as a beverage, are concerned, whether they may be manufactured, introduced or sold in this state depends altogether on whether they contain as much as two per centum of alcohol measured by colume, and whether they fall within any of the prohibited classes. As I have said, it is my opinion that the words "which contains as much as two per centum of alcohol," etc., qualify only the last class of liquors enumerated in Section 2 of Chapter 143, "liquor or liquid of any kind or description," etc., and do not qualify the other classes of liquors enumerated. In Section 2 of such chapter, spirituous liquors, vinous liquors, fermented liquors and malt liquors, without regard to the quantity or amount of alcohol contained therein are "intoxicating liquors" the manufacture, introduction and sale of which is absolutely prohibited.

"Spirituous liquor" is that which is in whole or in part composed of alcohol extracted by distillation, whiskey, brandy and rum being examples; vinous liquor, *ex vi termini*, means liquor made from the juice of the grape, or it may include wines made from fruits or berries, by a like process of fermentation; fermented liquor is a liquor produced by fermentation and not by distillation; "male liquor" means a liquor which is a product of a process by which grain is steeped in water to the point of germination, the starch of the grain being thus concerted into saccharine matter which is kiln dried, then mixed with hops, and, by further process of brewing, made into a beverage, the term embraces porter, beer and the like. *Marks vs. State*, 48 South, 864; *Wollen & Thornton Intex. liquors*; *Black Intox Liquors*; *Standard Dict.*; *Webster's New Inter. Dict.*

I am therefore of the opinion that any spirituous, vinous, fermented or malt liquor, no matter by what name the same may be designated, cannot be lawfully manufactured, introduced or sold in this state, even though the same contains less than two per centum of alcohol. "Near beer" is a malt liquor and therefore falls within the prohibition. *Ex parte Lockman (Ida.)*, 110 Pac. 253.

Respectfully,  
S. C. FORD,  
Attorney General.