

Intoxicating Liquors—Cities—Ordinance Prohibiting Sale.

A city or town has no authority to pass an ordinance prohibiting the sale or disposal of intoxicating liquors.

December 31st, 1918.

Hon. T. V. Kilduff, Mayor,
Columbia Falls, Montana.

Dear Sir:

I am in receipt of your letter of the 24 inst., asking whether or not an incorporated city or town may pass an ordinance prohibiting the sale of intoxicating liquors.

Ordinarily the Attorney General is not permitted to officially advise other than state and county boards and officers, but as this is a question in which the state is directly interested by reason of its prohibitory law and the law for the enforcement thereof, and as doubtless many other cities and towns will desire to know just what ordinances may be passed relative to intoxicating liquors, I believe that I may officially advise you regarding the same.

Subdivision 19 of Section 3259 grants to incorporated cities and towns the power "to license, tax and regulate * * * saloons within the city or town; * * *." The words used are "To license, tax and regulate."

In Vol. 2 Dillon on Municipal Corporations, Sec. 674, it is stated with reference to intoxicating liquors:

"The power conferred upon cities and towns is usually Regulative and not prohibitive in its nature, and is usually embraced in the term 'to regulate, restrain, license or tax' the business, or in some one or more of these or similar terms importing regulation rather than prohibition. Under a power which is plainly regulative only, total or absolute prohibition is not authorized, either expressly or in fact as a result of the exaction of prohibition conditions."

This principle has been sustained in numerous decisions. In *Tim vs. Common Council (Mich.)*, 112 NW. 942, it is said that the power to "regulate" the sale of intoxicating liquors is not power to prohibit their sale. In *Churchill vs. Common Council (Mich.)* 116 NW. 558 it is said that the word "regulate" in the Detroit city charter, authorizing the common council to regulate the sale of intoxicating liquors, does not give the power to prohibit the sale of liquors. In *State ex. rel. McMonies vs. McMonies (Neb.)* 106 NW 545, it is said that the power given a municipality to "regulate" does not authorize it to suppress or prohibit, as the very essence of regulation is the existence of something to be regulated. In *Pacific University vs. Johnson (Ore.)* 84 Pac. 704, it is said that "to regulate" means to prescribe the manner in which a thing licensed may be conducted, a license itself being the permit of authority to conduct and carry on. While in *Madder vs. State*, 75 Pac.

1023, it is said that the words "restrain in" and "regulate" are not synonymous with the word "prohibit", and the power or right to "regulate" does not give authority to "prohibit."

In some of the states, for instance in Kansas and Oklahoma, the prohibitory and prohibitory enforcement laws authorize and empower cities and towns to prohibit the sale of intoxicating liquors, but our laws contain no such provisions

As the word "prohibit" is not contained in subdivision 16 of Section 3259, the power thereby granted to incorporated cities and towns is regulative and not prohibitive, and I am, therefore of the opinion that a city or town has no power to pass an ordinance prohibiting the sale of, giving away or disposal of intoxicating liquors.

Respectfully,

S. C. FORD,

Attorney General.