

Intoxicating Liquors—Physicians—Prescriptions.

When physicians may write prescriptions for medicine containing alcohol; and sales of alcohol by druggists for scientific and manufacturing purposes.

January 2nd, 1919.

Mr. Lester Loble,
County Attorney,
Helena, Montana.

Dear Sir:

I am in receipt of your letter of the 28th inst., submitting the following questions:

"1. Will it be lawful for a druggist to fill a prescription for a dentist or doctor or their patients, if the prescription contains over two per cent of alcohol?"

"2. Will it be lawful for a druggist to sell pure alcohol to a doctor, dentist, or any other person, to be used for medicinal or antiseptic purposes? If so, under what restrictions or regulations?"

"3. What standard will be established, or who will be the judge with reference to the question as to what liquids are capable of use as a 'beverage' in instances of compounds repulsive to ordinary tastes, but yet capable of being drunk by degenerates, such as perfumes, shampoo, castoria, liniment, flavoring extracts, etc.?"

Our prohibitory law, Sec. 1 of Chap. 39, Session Laws 1915, Sec. 1 of Chap. 175, Session Laws 1917, absolutely prohibits the manufacture, introduction, sale, exchanging, giving away, bartering or disposal of "ardent spirits, or any compound thereof capable of use as a beverage, ale, beer, wine and intoxicating liquors of any kind," but contains a

provision excepting from the provisions of such act the manufacture or sale of denatured alcohol, wine intended for sacramental purposes, and alcohol intended for scientific or manufacturing purposes. This provision seems to be perfectly clear and plain. Denatured alcohol, that is methyl alcohol, commonly called wood alcohol, amyl alcohol and ethyl alcohol, to which has been added a substance or substances rendering the same incapable of being used as a beverage, is excepted from the provisions of the act as not being an intoxicating liquor. Wines, but no other intoxicating liquor, intended for sacramental purposes, is excepted. Alcohol, that is ethyl alcohol and amyl alcohol when intended for use for scientific and manufacturing purposes, is excepted, but is not excepted when intended to be used for any other purpose, neither is any other kind of intoxicating liquor excepted for either scientific or manufacturing purposes. The prohibitory laws of many of the states excepts ethyl alcohol or intoxicating liquors for 'medicinal' purposes as well as for scientific and manufacturing purposes, but our law does not contain in the exception the word "medicinal," the exception being for scientific and manufacturing purposes only.

The Arizona Constitution contains a provision prohibiting the sale and disposal of ardent spirits, ale, beer, and wine and intoxicating liquors of any kind to any person, there being no exception contained in such provision, and in sustaining the conviction of a druggist who sold a medicine or preparation containing alcohol, the Supreme Court of Arizona said:

"The Constitution forbids the sale and disposal of ardent spirits, ale, beer and wine and of intoxicating liquors of any kind to any person in the State of Arizona. Article 23 Constitution. It contains no exceptions, as that it may be prescribed and sold as a medicine, or for medical 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 of supervision. The fact that ardent spirits are mixed with other ingredients, and, as thus compounded, labelled 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 its place among the prohibited liquors named in the Constitution.'

Cooper vs. State (Ariz.) 172, Pac. 276.

In the case of *Brown vs. State (Neb.)* 2 N. W. 214, construing the license laws of Nebraska, the court used this language:

"The question brought here by this record for decision is whether a druggist is within the operation of our general license law—in other words, whether a person carrying on the business of selling drugs and medicines is at liberty to retail intoxicat-

ing liquors without first procuring the ordinary license to do so. The statute by which we must be governed in the decision of this question, after providing for licensing the vending of such liquors at retail, and how and from whom the license may be obtained, further provides as follows: 'Any person who shall vend, or retail, or, for the purpose of avoiding the provisions of this chapter, give away, upon any pretext, malt, spirituous or vinous liquors, or any intoxicating drink, without first having complied with the provisions of this chapter, and obtained a license as set forth herein, shall, for each offense, be deemed guilty of a misdemeanor,' etc.

This language is general, and comprehends all persons whomsoever, no matter what their particular calling or business may happen to be. None are exempted from its operation. It applies to him who deals in drugs just as clearly as it does to the keeper of a boarding-house, a saloon or restaurant, or hotel.

"The legislature not having signified their intention to make an exception in favor of the defendant's business, the courts certainly cannot do so."

In the case of *Carson vs. State*, 69 Ala. 235, the court held as follows:

"It is contended, under this state of facts, that if the appellant gave or sold the bitters in question as a prescription, and in good faith, he would not come under the prohibition of the statute, and should be acquitted, and the correctness of this view is directly raised by the charges requested by and given at the instance of the appellant.

"We know of no principle of law which would authorize us to incorporate so important an exception into the statute. The facts of the case may have constituted a good reason why the grand jury should have refused to find a bill, but there is no exception made in the statute in favor of physicians, druggists, or any other person whomsoever, and this court cannot engraft one in their favor without exercising legislative power, which it does not possess. The question presented is not a novel one, though not before decided in this state. Mr. Wharton states the rule to be, that 'That unless there is an express exception in the statute, the fact that the liquor was bought for *medicine* is no defense.' 3 Whart. American Law, Sec. 2439."

While in the case of *Carl vs. State*, 89 Ala. 93, the same court said:

"And where there is no exception, taking out of the general operation of the statute sales in good faith for medicinal purposes, the fact that the liquor was sold in good faith as a medicine does not operate to acquit the defendant of a violation of the statute, though it be in reality a medicine."

This question has been before the Massachusetts court on more than one occasion. In the case of *Commonwealth vs. Kimball*, 24 *Pack.* 366, the court said:

"If it were sufficient to avoid the prohibition of the statute for the purchaser to say that the spirit were intended for medicine, it would, in effect, repeal the statute. The decisive answer is what the legislature has made no such exception"

While in the case of *Commonwealth vs. Ramsdell*, 130 *Mass.* 68, the same court said:

"If the construction of the statute upon which these instructions are based is the correct one, then every sale, by a druggist or other person, of any medicine or compound or preparation in which spirituous or intoxicating liquor enters as one of the ingredients, in however small a quantity, is within the prohibition of the statute. The statute forbids the sale, without due authority, of spirituous or intoxicating liquors. Such liquors are frequently used in the preparation of medicines and of articles of food. It is not a reasonable construction to hold that the statute prohibits the sale of every medicine or article of food in the preparation of which liquor is used. In order to determine whether the statute applies to a sale, the true test is to inquire whether the article sold is in reality an intoxicating liquor. If it is, the sale is illegal, although it is sold to be used as a medicine, or it is attempted to disguise it under the name of a medicine, or it is a mixture of liquor and other ingredients. *Commonwealth vs. Hallett*, 103 *Mass.* 452."

See also:

State vs. Brown, 31 *Me.* 522;
Woods vs. State, 36 *Ark.*;
Flower vs. State, 39 *Ark.* 209;
Chew vs. State, 43 *Ark.* 361;
King vs. State (Miss.), 6 *South* 188;
State vs. Wharton et. al. (Tenn.), 3 *SW.* 490;
City of Saline vs. Seitz, 16 *Kans.* 143;
Commonwealth vs. Hallett, 103 *Mass.* 452;
Gault vs. State, 34 *Ga.* 533;
Noecker vs. People, 91 *Ill.* 494;
State vs. Dalton (N. C.), 8 *SE.* 145;
State vs. Gray (Conn.), 22 *Atl.* 675;
Commonwealth vs. Pierce, 16 *NE.* 705.

The question of what medicines are intoxicating liquors, as such term is defined in Sec. 2, Chap. 143, Session Laws 1917, is fully covered by an opinion given to Mr. T. H. MacDonald, County Attorney of Flathead County, on December 28th, 1918, in which opinion I held substantially as follows:

That a medicine containing less than two per cent of alcohol measured by volume, is not an intoxicating liquor; that a medicine containing two per centum or more of alcohol measured by volume, the dis-

tinctive 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 so drunk will produce intoxication, is an intoxicating liquor.

I am, therefore, of the opinion that a physician may not lawfully give any person a prescription for a medicine, and a druggist may not lawfully sell any person, even on a physician's prescription, a medicine containing two per cent or more of alcohol, measured by volume, unless such medicine is rendered non-intoxicating by other ingredients therein which counteracts or impairs the distinctive force of the alcohol, or if the distinctive force of the alcohol be not so counteracted or impaired, unless the other ingredients contained therein renders the medicine so nauseating that a person will become nauseated before he can drink a sufficient quantity thereof to produce intoxication.

The practice of medicine, surgery, dentistry and dental surgery, are sciences, 3 Words and Phrases, 2nd Ed. 1112-1114. Section 1 of Chap. 39, Session Laws 1915, Sec. 1, Chap. 175, Session Laws 1917, permits the sale of alcohol for scientific purposes. Alcohol used by a physician, surgeon or dentist for antiseptic and sterilizing purposes, and for other purposes connected with this profession, and not for selling or prescribing to patients, is used for a scientific purpose.

I am therefore, of the opinion that a druggist may lawfully sell to physicians, surgeons and dentists alcohol to be used by them in the practice of such sciences. I am also of the opinion that a druggist may sell to any person, to hospitals and schools, alcohol to be used for scientific purposes, and also for manufacturing purposes. Our law contains no regulations governing the sale of alcohol for scientific and manufacturing purposes, other than above referred to, but undoubtedly the next session of the legislature will be asked to enact such a law. However, druggists selling alcohol to any person should be cautious and, before selling the same, should satisfy themselves beyond doubt that the same is intended in good faith to be used for either a scientific or a manufacturing purpose, and not as a beverage.

The foregoing fully answers your first two questions, while your third question is fully answered by the opinion rendered the county attorney of Flathead County and hereinbefore referred to.

Respectfully,
S. C. FORD,
Attorney General.