

### Intoxicating Liquors—Prohibition—Percentage of Alcohol, Legislation For.

A bill of the Legislature designed to permit the manufacture and sale of liquor containing a certain percentage of alcohol would be unconstitutional.

March 5, 1919.

Hon S. V. Stewart, Governor,  
Capitol Building,

Dear Sir:

My attention has been directed to H. B. No. 430, introduced by Representative Franklin, and which, having passed both houses, has been transmitted to you.

I desire to earnestly protest against this bill being permitted to become a law, and submit, for your consideration the following:

1. Chapter 39, Session Laws 1915, being also Chapter 175 Session Laws 1917, which was approved and adopted by the electors of this State at the general election held in November, 1917, prohibits the introduction, manufacture, sale, etc. of "ardent spirits, ale, beer, wine or intoxicating liquor or liquors of any kind." "Near beer" no matter how small a percentage of alcohol it contains, is nothing more nor less than beer. It is made from the same materials, and by the same process, the only difference being that the alcoholic content is reduced. Even though it contains but one-half of one per centum of alcohol, it is nevertheless "beer". Wine is fermented liquor, regardless of how small or how great its alcoholic content. Consequently H. B. 430 is nothing more nor less than an amendment of the referendum act, Chapter 39, Session Laws 1915. By the approval of the referendum act the people of this state indicated positively their desire that beer and wine, regardless of its alcoholic content, should be placed under the ban. The effect of this bill is to remove the ban if the beer or wine does not contain in excess of one-half per centum of alcohol.

In construing a provision of the Constitution of Arizona, which is very similar in phraseology to the referendum act, the Supreme Court of Arizona said:

"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. \* \* \* It is not a regulatory provision but one of outlawry. It is one of suppression and not one of supervision."

And the same is true of our referendum act, yet this bill will have the effect of changing such act from one of outlawry to one of regulation, from one of suppression to one of supervision. I submit that if the people of this State desire this referendum act changed in such a manner that they, at least, should have the right to have such ques-

tion submitted to them in the same manner as the referendum act was submitted to them, and that no change should be effected in the referendum act without their approval being first obtained.

2. Fermented liquors and malt liquors, in all of the laws of practically all of the states, whether such laws be license laws, local option laws or prohibitory laws, have been treated, regarded and classified as intoxicating liquors, regardless of their alcoholic content. I have had the prohibitory and local option laws of practically all of the states examined, and we have failed to find any prohibitory law of any state which permits the sale of fermented or malt liquors containing a limited amount or percentage of alcohol. The laws of our own state have always regarded malt and fermented liquors as being intoxicating liquors, regardless of their alcoholic content. Section 4063 of the Political Code of 1895 and Sections 2759 and 2760 of the 1907 Code, with reference to licenses required from those engaged in the business of selling "spirituous, malt or fermented liquors or wines" regardless of their alcoholic content, to pay a license; Section 3186, Political Codes of 1895, now Section 2047 of the 1907 Codes, with reference to local option, prohibited, within any local option county, the sale of "alcoholic, spirituous, malt or intoxicating liquors," without regard to the percentage of alcohol contained. Section 82, Revised Codes of 1895 now Section 8146, Revised Codes, prohibited the selling, giving away, or furnishing of "spirituous or malt liquors, cider, wine," on any general, special or municipal election day. And other sections of our laws, beginning with those enacted by the first Territorial Assembly, have treated and classified fermented and malt liquors as being intoxicating liquors regardless of whether they contained alcohol or not. Unquestionably when the people approved the referendum act they understood that the word "intoxicating liquor" contained therein embraced and included all malt and fermented liquors which had always been classed and regarded in this state as intoxicating liquors, and it was their intention that such liquors, whether or not they contained alcohol, should be placed under the ban and prohibited.

Why fermented and malt liquors, regardless of whether or not they contain alcohol, have always been classified and regarded as intoxicating liquors is easily understood when the laws with reference to licenses, local option and prohibition, and the decisions of the court in cases involving violations of such laws, are examined. Early in the history of license laws for the purposes of regulation it was found that to attempt to draw a line of distinction between intoxicating liquors and non-intoxicating liquors by simply requiring licenses to be paid for selling "intoxicating liquors," or for selling liquors containing in excess of a certain percentage of alcohol, not only left the door open to all kinds of subterfuges, but compelled the state, in each instance where a prosecution was instituted, to prove either that the liquor was in fact intoxicating, or to prove that it contained in excess of a certain percentage of alcohol, the result being, as was well said in the case of *Ex parte Lockman* (Idaho) 110 Pac. 253, that in one case one person would be convicted for selling a certain liquor, while in another case a person would be acquitted for selling the same kind of liquor. After

a few years experience with laws of this character, it was found that by classifying and regarding all "spirituous, vinous, fermented and malt liquors," without regard to their alcoholic content, as intoxicating liquors the doors were shut against these subterfuges and the law applied to all alike so that if one person was convicted in one case for selling a certain kind of liquor another person in another case would likewise be convicted. When local option laws and prohibitory laws were first enacted the legislatures, profiting by the experience had with license laws, instead of simply using the words "intoxicating liquors," or defining intoxicating liquors as those containing percentage of alcohol, enumerated the liquors prohibited as spirituous, vinous, fermented and malt liquors, or words of similar import. In a few of the states the prohibitory laws as first enacted, used the words "intoxicating liquors," but owing to the difficulty of enforcing such laws and the difficulty in securing convictions for violations thereof, soon amended such laws so as to prohibit the introduction or sale of spirituous, vinous, malt and fermented liquors.

3. A law which permits fermented or malt liquors containing a certain percentage of alcohol to be sold affords all kinds of opportunities for violating the prohibitory laws. Many decisions can be found referring to the evil that results from such laws. In the case of Purity Extract and Tonic Co. vs. Lynch (Miss.) 56 South. 316, the court said:

"The prohibition law cannot be made effective unless it excludes all subterfuges."

While in the same case, on appeal to the Supreme Court of the United States, Judges Hughes in rendering the opinion said:

"It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of the laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of malt liquors. In thus dealing with a class of beverages which, in general, are regarded as intoxicating, it was not bound to resort to discrimination with respect to ingredients and processes of manufacture, which, in the endeavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law."

In the case of State vs. Daunenber (N. C.) 66 S. E. 301, where the question involved was whether "near beer" was an intoxicating liquor and came under the ban of the prohibitory law, the Supreme Court of the state said:

"It appears from the evidence in this record that, although when this beer properly made is a non-intoxicating beverage, the sale of it furnishes opportunities for the violation of the state prohibition law; that it is made by those who make beer, sold by those who sell beer, drunk by those who drink beer; and that 'it looks like beer, smells like beer and tastes like beer.'"

In the City of Lawrence vs. Monroe (Kansas) 10 L. R. A. 520, it was said that a law permitting the manufacture and sale of liquors containing a limited amount of alcohol furnished opportunities to deceive officers as to the character of the drink sold so that intoxicating liquor may be sold under the guise of near beer; and in many cases, it is said that one of the reasons for prohibiting the sale of fermented and malt liquors, even though the alcoholic content be slight, is, that it fosters and creates a taste for alcohol in the young people of this state. If this bill should become a law the officers of this state will be greatly handicapped in enforcing the prohibitory law. The opportunity will at all times be present for the sale of fermented and malt liquors in fact intoxicating, and the officers will not only have great difficulty in preventing such violations, but will also have great difficulty in securing convictions of persons violating the same, as it will always be a question of fact for the jury to determine whether or not the liquor allaged to have been sold contained in excess of the specified quantity of alcohol.

4. I have very grave doubt of the constitutionality of H. B. 430. As I have said before, it in effect operates as an amendment of the Referendum Act, and it also operates as an amendment of Section 2 of Chapter 143, Session Laws 1917, the Enforcement Act. Such section defines the phrase "intoxicating liquors," used in the Referendum Act, as being "whiskey, brandy, rum, gin, wine, ale and any spirituous, vinous, fermented or malt liquor, etc. In order to ascertain what liquors are intoxicating and what are not intoxicating it will be necessary to read the Referendum Act, Section 2 of Chapter 143, and this bill, and consider this bill as amending such Referendum Act and such section. Yet the bill nowhere mentions either the referendum act of such section, and neither does it attempt to set either of them out at length. I am of the opinion that it unquestionably violates the Section 25 of Article 3 of the Constitution which requires a law sought to be amended to be re-enacted and published at length.

5. In the case of State vs. Centennial Brewing Co., only very recently decided by our Supreme Court, the referendum act, and Section 2 of Chapter 143, Session Laws 1917, were construed, and we now know not only the meaning of these laws but we also know exactly what liquors are and what are not under the ban. If this bill should become a law it will nullify this decision of the Supreme Court and we will be forced to again present the whole question to the court before we will know just how these laws are to be construed and what liquors are and what liquors are not under the ban.

In view of the foregoing I sincerely trust that you will not permit this bill to become a law.

Respectfully,

S. C. FORD,

Attorney General.