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WHAT IS BEER?

What is beer? This is the question which courts and Congress are discussing. To the one familiarly calling it "suds," it is a pleasant, harmless drink. To those who are opposed to all alcoholic beverages, it is only one member of the booze family. It is sometimes called the diamond rattler in the liquor rattlesnake household. Its defenders say that war beer with 2.75% alcohol by weight is non-intoxicating and non-injurious. Alcohol is so diluted they contend, it is impossible to get enough of it in the human system at one time to produce visible signs of intoxication. The human body demands it, its champions say, and the body produces alcohol in small quantities for that need. They claim, therefore, that nature justifies their contention that alcohol is not injurious when used properly.

Beer is an Intoxicant.—Beer is an alcoholic malt beverage.

Alcohol is the determining factor that makes liquor intoxicating. The British Liquor Control Board in November, 1916, appointed an advisory committee to consider the conditions affecting the physiological action of alcohol. This committee, by no means friendly to Prohibition, made its observations from the viewpoint of the control of liquors and how such liquors may be distributed and used with the least possible deleterious effect.

On page 3, the report says:

"Ethylic alcohol.—This is the ingredient of the various beverages known as 'alcoholic liquors,' to which their inebriating properties are almost entirely due. The alcohol in these liquors is, in all cases, produced by the fermenting action of yeast upon sugar * * *. When barley is malted, a ferment is produced, which in the process of brewing, converts the starch of the grain into malt sugar and from this the alcoholic beer is produced by the fermentation with yeast."

Does Beer Intoxicate in the Legal Sense of the Term?—A person is drunk in a legal sense, when so far under the influence of liquor that his passions are visibly excited or his judgment impaired by the liquor.[1]

A man is intoxicated whenever he is so much under the influence of a spirituous or intoxicating liquor that it so operates upon him, that it so affects his acts or conduct or movement, that the public or parties coming in contact with him could readily see and know that it was affecting him in that respect. A man under the influence of liquor to the extent that parties coming in contact with him or seeing him would readily know that he was under the influence of liquor by his conduct, or words, or his movements, would be sufficient to show that such person was intoxicated.[2]

Conditions Determining Intoxicating Effects.—The effect of an alcoholic liquor is not uniform; it varies according to the drinker. The British Liquor Board, in its record, says:

"Not only is there varying susceptibility to alcohol from person to person, and not only does, in one and the same person, the susceptibility differ according to circumstances, digestive and other, under the same dose; but intellectual self-criticism and control are strong in one person, weak in another, and in the same person, while strong in respect of certain kinds of acts, may be weak in respect of certain others."

On page 91, the Liquor Control Board, in discussing "Tolerance," says:

"Moreover, as a result of continual use, some degree of tolerance can be acquired, so that the habitual drinker is often able to consume, without becoming obviously intoxicated, quantities of alcohol which would cause well-marked drunkenness in a person unaccustomed to the drug."

The Age of the Drinker Must be Considered in Determining the Effect of the Liquor.—A young person is more susceptible to the intoxicating effects of alcoholic liquors than an older person. It is not necessary to present any lengthy argument on this point. Legislation for years has recognized

(1) State v. Pierce, 21 N. W. 195, 197, 65 Iowa 85.

(2) Sapp. v. State, 42 S. E. 410, 411, 116 Ga. 182.

the fact that intoxicating liquor has a more definite effect upon a child than a grown person. For this reason, many of the states have prohibited the sale of intoxicating liquors to minors. Other states have prohibited the giving away of intoxicating liquor to people under the age of sixteen years. In still other states the safeguards have been thrown around even the use of alcoholic liquors for medicinal purposes to minors or children. The age of the person and his physical development has a direct relation to the toxic effect of any alcoholic liquors. Horton and Stille, in their work on medical jurisprudence, call attention to the different amounts of alcohol that have produced death in children and grown people. Every standard medical and legal authority on this question recognizes this distinction.

The Amount of Alcohol in the Beverage and the Frequency of the Drink has a Direct Bearing on the Effect.—All are agreed that liquor with a large per cent of alcohol in it will intoxicate. It has been questioned whether a liquor with a small per cent of alcohol in it can produce the same effect if a larger quantity is consumed so that the same amount of alcohol is in the larger volume.

It does take scientific demonstration to conclude that one-third more of volume of 3 per cent beer will produce practically the same effect as a given amount of 4 per cent beer. In other words, if four glasses of 4 per cent beer will intoxicate, five and one-half glasses of 3 per cent will intoxicate, if it can be consumed within the time for the necessary amount of alcohol content ration in the blood to produce intoxication. There is no controversy on the point that a given amount of alcohol in the blood will produce intoxication. There is a division of opinion as to what amount is necessary to produce visible intoxication.

The General Health and Habits of the Drinker have a Bearing on the Effect of the Liquor.—It is generally admitted that an habitual drinker can consume more liquor without showing signs of intoxication than a person not used to drinking. There is no dispute on this point. It logically follows, therefore, that the testimony of an habitual drinker or his experience is not a safe guide in determining the effect of alcoholic liquor. The constant use of the drug alcohol makes him an alcohol drug addict, and he is immune to the normal effect of alcohol on a person free from the habit.

It is not necessary that the amount of alcohol sufficient to cause drunkenness be taken into the stomach at one time.

The rate of absorption of alcohol into the blood is faster for a time than the rate of its destruction (oxidation).

"Ordinary amounts of alcohol in any dilution are quickly absorbed and will usually have disappeared from the stomach in less than half an hour."—*Bastede.*

"The absorption of alcohol occurs rapidly, mainly from the small intestines, and is practically independent of the quantity. Vollmering (1912) is cited as finding absorption practically complete in one hour."—*Sollman.*

But the ***destruction*** (oxidation) of alcohol requires several hours.

"Those who are accustomed to alcohol oxidize it in 7½ hours; whereas, those who have been abstainers require twice that time. Voltz and Districh are cited (1914) as giving a day 2 cc. of alcohol per kilogram of body weight, finding that after 10 hours only 73 per cent of it had been oxidized. About 90 per cent was oxidized in 15 hours and from 18-20 hours were required for the complete oxidation."[3]

Bastede and Sollman agree that alcohol is quickly absorbed, giving as the time of absorption from half an hour to an hour, whereas it is a scientific fact that the *destruction* (oxidation) of alcohol requires several hours. Lusk, in "Science of Nutrition," says: "Those who are accustomed to alcohol oxidize it all in seven and a half hours, whereas those who have been abstainers require twice that time."

(3) (Lusk) Science of Nutrition, 1917, p. 357.

If, therefore, continued drinks of an alcoholic beverage are taken before oxidation of the alcohol in earlier drinks is completed, it would appear that it would be possible to introduce amounts of alcohol that would produce signs of intoxication even with beverages of mild alcoholic strength, especially with persons not accustomed to its use. The more rapid oxidation of alcohol by those accustomed to its use may be one explanation of the fact that alcoholics taking habitually large amounts of "war-beer" (2.75% by weight) show no conspicuous signs of drunkenness.

With regard to this Dr. Harvey, noted food expert, in an affidavit read before the sub-committee of the committee on the judiciary of the United States Senate in the recent hearing on the law enforcement bills, stated:

"The effect of alcohol on the human animal is always toxic, no matter how small the amount nor what its degree of dilution. The visible signs of intoxication are not produced by the last drink, but depend upon all that have preceded it for many hours. Thus, the first drink is as much the cause of the visible intoxication as the last. The effect of alcohol in the liquid drunk is cumulative; it is not necessary in order to produce intoxication that the human stomach should hold at any one time a liquid containing a sufficient amount of alcohol to produce signs of intoxication; the effect of alcohol remains in the human system and the water passes through it; the continued consumption of alcoholic liquors, even with a low per cent of alcohol, will produce intoxication.

"Beer, which is a malt liquor containing 2.75% alcohol by weight, which equals 3.3% alcohol by volume, has a sufficient amount of alcohol to intoxicate an average person in the quantities often consumed. With this amount of alcohol in the liquor many people could consume enough to produce intoxication by the amount which could be held in the stomach at one time. The walls of the stomach are very distensible and greater quantities than a quart of liquid may be consumed by many people within a few moments."

A great deal has been published about the brewers' affidavits and "proofs" that 2.75% beer does not intoxicate. But not so much has been printed about the sworn testimony of chemists and physicians as to the intoxicating qualities of "war-beer" presented at the hearing in Washington.

Dr. William Geagly, assistant for the food and drug department of the State of Michigan testified that he personally had experienced the intoxicating effects of such beer and knew it to be intoxicating by reason of many analyses conducted for criminal cases in the state.

Dr. Abel R. Todd, connected with the Michigan State Food & Drug Department, presented an affidavit to the same effect; and Dr. Howard A. Kelly of Johns Hopkins Hospital, Baltimore, one of the foremost men in his profession, made the following statement: that he has "noted that individual people vary enormously in their susceptibility to alcohol, and that the reason for drinking the beverage is not the bitter nor the malt, but to secure the sensible benumbing effect of the alcoholic drug and that the habitue will drink enough bottles until he secures this effect." He also declared that a half ounce of alcohol contained in the ordinary size bottle of 2.75% beer (by weight) is far more than enough to disturb the balance of judgment of an average, normal, sensitive person taken on an empty stomach. "I consider no beer safe," said Dr. Kelly, "above one-half per cent of alcohol by volume, which would mean about three-fourths of a teaspoonful of alcohol to an ordinary bottle of beer."

Dr. Arthur Dean Bevan of Chicago, president of the American Medical Association, gave the following sworn testimony which was presented to the committee:

"The question as to whether beer containing 2.75% alcohol is intoxicating or not is not a matter of scientific medical opinion, but a matter of common knowledge and [illegible] sense. It is a matter of common knowledge that beer which has been here-

tofore sold in the United States, containing from 3.5 to 4.25% alcohol, is definitely intoxicating, and that an individual can get drunk on a limited number of bottles of such beer. If, for example, the ordinary individual became more or less intoxicated on half a dozen bottles of beer which contained from 3.5 to 4.25% alcohol, it is a perfectly plain common-sense proposition that the same individual would become just as intoxicated by drinking, instead of six, say eight bottles of beer containing 2.75% alcohol. There can be absolutely no doubt but that beer containing 2.75% alcohol is an intoxicating beverage and that an individual can become drunk on the amount that is frequently consumed."

The case was further strengthened by an interesting analysis of beer intoxication presented by Dr. Reid Hunt, professor of pharmacology in the Medical Department of Harvard University, who has acted as expert for the Department of Agriculture and made several studies of the effects of alcohol published in American and European medical journals. After citing the Dodge & Benedict experiments, which gave conclusive scientific proof that even slight quantities of alcohol affected the nervous system and left its reflex on the eye and speech organs and impaired skilled movements, he said:

"If, by the term "intoxicating liquor" is meant a liquor which contains sufficient alcohol to cause, when the liquor is taken in amounts which are not unusually taken by men, distinct effects upon the nervous system, the effect being characteristic of and due to the contained alcohol, I am of the opinion that beer containing 2.75% by weight of alcohol should be classed as an intoxicating beverage."

Why Legislative Bodies Prohibit Non-intoxicating Beverages under Authority to Prohibit Intoxicating Liquors.—Prohibition laws do not define intoxicating liquors so as to makes the definition of the term conform to what is required to produce visible intoxication. It would be impossible to fix such a standard, for the reasons heretofore mentioned. Legislatures define the term "intoxicating liquors" in a form to make effective the purpose of the original prohibition act. In order to do this, the law must prohibit the subterfuge and alcoholic camouflages that make the enforcement of the law difficult. It is fundamental that the legislative body must have the power to make its own laws effective, otherwise laws that are placed on the statute books would be non-enforceable.

The main question in determining the validity of such a law is, does the definition have a reasonable relation to the admitted purpose in the prohibition act? In determining this, the courts take into consideration the fact that the purpose of prohibition laws is to discourage and prevent the consumption of intoxicating liquor for beverage purposes. The courts also take into consideration the lawless character of the traffic, and the necessity of adopting extraordinary measures. Both the courts and legislative bodies recognize these fundamental principles, and are rightly influenced by them.

Justice McReynolds, in rendering the opinion in Crane v. Campbell,[4] said:

"And considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose."

The Supreme Court of Ohio, in deciding whether or not beer containing four-tenths of 1 per cent alcohol was intoxicating, said:[5]

"The legislature may have heard of 'Bishop's beer,' 'Friedon beer,' and later of 'near beer,' and concluded that the enforcement of the will of the majority should not be defeated by subterfuge or the juggling in percentages of alcohol, and has said that, for the purpose of carrying out the intention of the people to prohibit the sale of intoxicating liquors, certain beverages shall be legally considered intoxicating, although not so in fact, and malt liquor is one of

(4) 245 U. S. 304.
(5) 83 Ohio State 68.

these so designated. 'Near beer,' being a malt liquor, the statute pronounces it an intoxicating liquor and made proof of its real intoxicating qualities unnecessary. It is no more protected than 'altogether' beer, and the attempt to evade the law by brewing a 'near' or 'almost' beer is, by section 3, supra, rendered futile.

In the case of United States v. Cohn, in the Court of Appeals of Indian Territory,[6] the court said:

"No one can carefully read this statute but that he will be impressed with the idea that Congress, whatever it omitted to do, intended to completely cover the whole case, and to erect and complete an impregnable barrier against the introduction, sale and use of intoxicating liquor in all of its forms and to guard against all of the well-known subterfuges resorted to to deceive courts and juries in relation to the matter."

In the case of Feibelman v. State,[7] the court said:

"But if the prohibition should go only to the sale of intoxicating malt liquors, there would be left open such opportunities for evasions and there would arise such difficulties of proof that the law could not be effectively executed."

All of these decisions are based upon the principle that legislative bodies may enact any laws necessary in order to make the original prohibition effective and prevent the evasions of the law by liquor dealers.

Thirty-three prohibition states and thirteen local option states have defined the term "intoxicating liquor" and "included in the definition alcoholic liquids which are not in fact intoxicating. Similar laws have been passed by Congress to prevent the sale of liquor to Indians for the District of Columbia and Alaska. The courts have uniformly sustained these laws as valid enactments. Congress has defined the term "intoxicating liquor" under National Prohibition, to include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto, and other spirituous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes." Precedent and good reason fully justify Congress in taking this action.

WAYNE B. WHEELER.
Washington, D. C.

(6) 32 S. W. Rep. 38 (2) Ind. Ter.
(7) 130 Ala. 112.

BAIL—GARNISHMENT.

KELLOGG v. WITTE.

Supreme Court of Washington, July 29, 1919.

182 Pac. 570.

Money deposited as cash bail in the hands of a justice of the peace prior to passage of Laws 1919, p. 153, was not in custodia legis, and was held by the justice in his individual, rather than in his official, capacity, and was subject to garnishment.

TOLMAN, J. On October 7, 1918, appellant, as plaintiff below, filed a complaint against the defendant, respondent here in the superior court for King county and on the same day caused a writ of garnishment to issue in said cause, directed to Otis W. Brinker, justice of the peace for Seattle precinct, directing him to appear and answer as to what money or property he had in his possession or under his control belonging to and what indebtedness, if any, he owed to, respondent. The garnishee defendant answered, on October 10th, that he had in his possession the sum of $1,500, deposited with him as such justice of the peace by the respondent, as bail for one F. B. Witte and one Francis Bernard Witte, in two certain criminal actions then pending before him, in which the state was plaintiff and the said Wittes were respectively defendants. On October 17th, respondent appeared specially, and moved to quash the writ of garnishment on the grounds that the fund in question was not subject to garnishment, and that the garnishee defendant was not subject to garnishment. Thereafter appellant sued out and caused another writ to be served upon the garnishee defendant whose answer, to the second writ was the same as the answer to the first, and, in addition, set forth that the criminal proceedings in which the money had been deposited