



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Winston Brummett
County Attorney
Dickens County
Dickens, Texas

Dear Sir:

Opinion No. 0-5105
Re: Legality of sale of
alcoholic liquid in
"dry area"

Your letter of recent date requesting the opinion of this department on the above stated matter is in part as follows:

"I would like very much to have your opinion on the following situation:

"A certain intoxicant known as 'Wine Tonic' is being sold by drug stores as well as other business establishments in this county. Such 'Wine Tonic' contains 19% alcohol and is capable of producing a state of intoxication when taken in large quantities; such drug stores and other establishments sell such article for beverage purposes with full knowledge that parties buy such drink to become drunk on. It has reached the stage where the drug stores sell such article by the case to persons who resell by the bottle for a small profit. Under Article 666-3a--definition of liquor--'Liquor shall mean any alcoholic beverage containing alcohol in excess of four (4) per centum by weight, unless otherwise indicated. Proof that an alcoholic beverage is alcohol, spirits of wine, whiskey, liquor, wine, brandy, gin, tequilla, mesoal.... shall be prima facie evidence that the same is liquor as herein defined.' And, the term 'Alcoholic Beverage' as applied to the definition

of liquor, is set out in the second paragraph of Art. 666-3a, and is defined as any beverage containing more than one-half of one percent of alcohol by volume which is capable of use for beverage purposes, either alone or when diluted.

"Of course, this 'Wine Tonic' is supposed to be sold as a medicine and/or something to stimulate and increase the appetite and containing vitamin B1 whatever that is, the fact that it contains vitamin B1 is stamped on the label attached to each bottle. However, I have found nothing under the liquor statutes authorizing the sale of an alcoholic beverages for beverage purposes in a dry county. Nor have I found anything under any Drug Act, authorizing such sales.

"As previously stated, this is a dry county in which neither beer, liquor, or any other intoxicant can legally be sold.

"With the foregoing facts in mind, would you be kind enough to look into this matter and let me have your opinion as to the legality of the sale of such article, to wit: 'Wine Tonic', containing 19% alcohol by volume, and, capable of producing a state of drunkenness, but sold under the disguise of a medicine."

The question presented has received but little attention by the Court of Criminal Appeals under the present Texas Liquor Control Act. Decisions under the repealed Dean law are of little value in determining the question.

Under the Dean law, it was provided in the repealed Article 674, P. C., that nothing in the Act should prevent the sale of any medicinal preparation manufactured in accordance with certain pharmaceutical formulas, which were manufactured and sold for legitimate and lawful purposes, "and not as beverages." The guilty intent of the seller, under the repealed Act, was question of fact to be decided against him before a conviction would stand. If the proof showed that the liquid was sold for medicinal purposes and not as a beverage, there could be no conviction. *Holliman v. State*, 299 S. W. 249.

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Under the Texas Liquor Control Act however there is no such exception. If one in a "dry area" sells "any beverage containing more than one-half of one percent of alcohol by volume which is capable of use for beverage purposes, either alone or when diluted," he has committed an act, declared by the law to be unlawful.

The question whether a given alcoholic liquid is capable of being used as a beverage manifestly is the question for determination and is a question of fact. There is no marked dividing line between those liquids which are generally known to be for beverage purposes and those which are strictly medicinal or non-beverage. It should be noticed in determining the question that the statute defining intoxicating liquors does not clearly classify the liquids as "beverages," but includes within its scope liquids "capable of use for beverage purposes, either alone or when diluted." This is a very broad term and must include within its purview those liquids which, although not generally considered as beverages, are yet capable of being so used. This must necessarily be so when we consider that one of the purposes of the Texas Liquor Control Act was to prohibit the sale of intoxicating liquors in "dry areas." The sale of an alcoholic liquid not capable of use as a beverage constitutes no violation. *McChristi v. State*, 133 S. W. (2d) 976; *Paddy v. State*, 162, S. W. (2d) 933.

We presume under the facts stated in your letter that said "Wine Tonic" is as a matter of fact "capable of use for beverage purposes." If so, its sale in dry areas is denounced by the statute.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By /s/ E. G. Pharr
Assistant.

EGP:db

APPROVED MAR. 29, 1943
/s/ Gerald C. Mann
ATTORNEY GENERAL OF TEXAS

APPROVED
OPINION
COMMITTEE
(S) BWB,
Chairman

EGP:fo