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## INTOXICATING LIQUORS — PRESUMPTION OF INTOXICATING QUALITY —

The defendant sold at his sandwich stand what was agreed to be a malt beverage commonly known as 3.2 beer. A statute made it unlawful for any person to sell "any spirituous, malt, vinous, fermented or other intoxicating liquors." In an action to enjoin the maintaining of a liquor nuisance the trial judge held that as the defendant sold a malt liquor, the sale was a violation of the statute, and refused to admit evidence that the beer was not intoxicating as a matter of fact. On appeal, the supreme court of Kansas *held*, that while beer is presumed to be intoxicating, the defendant has a right to introduce evidence tending to prove that what he sold was not intoxicating as a matter of fact. *Kansas v. Owston*, (Kan. 1933) 23 Pac. (2d) 616.

There is some authority to the effect that liquors with high alcoholic content, such as whiskey, gin and brandy, are intoxicating as a matter of law.<sup>1</sup> But most of the cases involving sales of these liquors hold merely that the jury was justified in predicating a conviction upon proof of the sale of the whiskey, gin, or brandy, without additional evidence of their intoxicating qualities, and therefor cannot be said to hold that such liquors are as a matter of law intoxicating. However, two decisions have been found which do hold that even beer is intoxicating as a matter of law, and that the defendant may not show the contrary, even where beer

<sup>1</sup> *State v. Wadsworth*, 30 Conn. 55 (1861); *Fears v. State*, 125 Ga. 740, 54 S. E. 661 (1906); *Johnson v. State*, 152 Ark. 218, 238 S. W. 23 (1922).

has not specifically been defined as an intoxicating liquor by statute.<sup>2</sup> Where the State has proved the sale of beer, and the defendant has introduced no evidence to show that it was not intoxicating, the weight of authority is that the conviction is proper because of the unrebutted presumption or judicial knowledge that beer is intoxicating.<sup>3</sup> Some courts, however, hold that a conviction is not proper without affirmative proof by the State that the beer sold was intoxicating.<sup>4</sup> There seems to be no authority to the effect that a liquor with a very small alcoholic content is non-intoxicating as a matter of law, although courts which would take judicial notice of the fact that "beer" is intoxicating may refuse to do so in the case of less commonly known beverages containing little alcohol, such as "mead,"<sup>5</sup> "near beer,"<sup>6</sup> "malt ale,"<sup>7</sup> "Weiss beer,"<sup>8</sup> or "Temperance Beer."<sup>9</sup>

C. P. H.

<sup>2</sup> *State v. Besheer*, 69 Mo. App. 72 (1896); *State v. Rush*, 13 R. I. 198 (1881).

<sup>3</sup> *Moffitt v. People*, 59 Colo. 406, 149 Pac. 104 (1915); *Stout v. State*, 96 Ind. 407 (1884); *State v. Cloughly*, 73 Iowa 626, 35 N. W. 652 (1887); *State v. Billups*, 63 Ore. 277, 127 Pac. 686 (1912); *Briffitt v. State*, 58 Wis. 39, 16 N. W. 39 (1883); *People v. Hawley*, 3 Mich. 330 (1854); *Vines v. State*, 19 Wyo. 255, 116 Pac. 1013 (1911); BLACK, INTOXICATING LIQUORS 20 (1892); JOYCE, INTOXICATING LIQUORS 25 (1910).

<sup>4</sup> *Netso v. State*, 24 Fla. 363, 5 So. 8 (1888); *Commonwealth v. Hardiman*, 9 Gray (75 Mass.) 136 (1857); *Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. 1049 (1889); *State v. Beiswick*, 13 R. I. 211 (1881); *Cannan v. State*, 71 Tex. Cr. 416, 159 S. W. 1186 (1913); *State v. Sioux Falls Brewing Co.*, 5 S. D. 39, 58 N. W. 1 (1894).

<sup>5</sup> *Marks v. State*, 159 Ala. 71, 48 So. 864 (1909).

<sup>6</sup> *Shreveport Ice & Brewing Co. v. Brown*, 128 La. 408, 54 So. 923 (1911).

<sup>7</sup> *Fuller v. Jackson*, 97 Miss. 237, 52 So. 873 (1910).

<sup>8</sup> *Sisson v. Weiss Beer*, 102 Misc. 401, 169 N. Y. S. 1053 (1918).

<sup>9</sup> *State v. Durr*, 69 W. Va. 251, 71 S. E. 767 (1911).