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MALT SYRUP—POSSESSING IT FOR MANUFACTURE OF LIQUOR
ILLEGAL—DETERMINING INTENT—SALE LEGAL—EXCEPTION.

SYLLABUS:

1. *Both federal and state law make it unlawful to possess malt syrups or other substances or property intended for use in the unlawful manufacture of intoxicating liquors.*
2. *Whether or not such intent exists is a question of fact to be determined in each particular case from the evidence.*
3. *Neither the state nor the federal law prohibits the sale of malt syrups which are intended to be used for purposes other than the manufacture of intoxicating liquor.*

COLUMBUS, OHIO, March 7, 1929.

HON. LEE D. ANDREWS, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication, which reads as follows:

"I am herewith requesting your opinion on the following question:

"Is the sale of malt syrup in the State of Ohio illegal?"

This question has been asked me several times of late. The question has arisen owing to the fact that several arrests have been made in Kentucky recently and also owing to the fact that several chain stores in this county have discontinued the sale of malt syrup. It is my understanding that the arrests made in Kentucky were by federal officers."

The question you present necessitates a consideration of Section 6212-16 of the General Code of Ohio, which provides:

"It shall be unlawful to have or possess any liquor, or property designed for the manufacture of liquor, intended for use in violation of law or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue, and proceedings had thereunder, as provided in Sections 13482 to 13488, inclusive, of the General Code, so far as the same may apply, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor or property designed for the unlawful manufacture of liquor shall be destroyed unless the court shall order it to be disposed of as provided in public act 66 Federal Statutes. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as store, shop, saloon, restaurant, hotel or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process."

The substance of the foregoing section, in so far as the question under consideration is concerned, is to the effect that it is unlawful to have or possess any property

designed for the manufacture of liquor, intended for use in violation of law or which has been so used. The offense seems to be the possession of property intended for such unlawful use rather than the sale thereof.

It is believed to be proper to consider herein Section 18 of the National Prohibition Act, which provides :

“It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor.”

It will be observed that the section of the federal law, above quoted is broader in its terms than the state law, in that it prohibits the manufacture, advertising and sale of the articles therein enumerated as well as the possession of the same. There is also a wide difference in the enumeration of the articles to which the inhibition applies. However, it includes the word “substance,” which is believed to be similar to the word “property” as mentioned in the Ohio law, and, therefore, the construction of the federal courts in reference to the status of substances such as you mention will have equal application to the state law.

In the case of *United States vs. 301 Cans Acme Malt Extract*, 28 Fed. (2nd) 213, decided by a United States District Court of Massachusetts on August 21, 1928, consideration was given to the status of malt extracts. The following is quoted from the court's opinion in said case :

“Malt extract is a product which has many legitimate uses. A recipe book put in evidence gives more than 100 recipes for its use in various articles of food, including many kinds of bread, cake, desserts, candy, etc. It is said that its use, especially in bread, is widely approved and is increasing. While no doubt a good deal of what is sold goes into illegal beer, a good deal does not. It is by no means an outlaw product, but is one of many common food substances, which can be used to make alcoholic liquor, e. g., sugar, yeast, apples, grapes, etc. The government in effect concedes this, for it makes no effort to distinguish between the malt extract and hops which were seized, and the sugar and yeast, maintaining that under the circumstances shown all are forfeitable.”

After quoting Section 18 of the National Prohibition Act, *supra*, the court in its opinion uses the following language :

“The word ‘designed,’ in this connection, refers, I take it, to things which are planned for the sole, or at least for the dominant, purpose of making intoxicating liquor—things for which any other use would be merely incidental. Upon the evidence, none of the articles here in question are of that character.”

While the case above mentioned deals with the question of the right of confiscation as distinguished from the question of unlawful sale, the expressions of the court hereinbefore set forth, as to the character of the substance, are enlightening in connection with the question being considered.

In the case of *Stroh Products Co. vs. Davis, Prohibition Director, et al.*, 8 Fed. (2d) 773, decided by the District Court, E. D. Michigan, S. D., November 11, 1925, it was held as disclosed by the second branch of the headnote that :

"National Prohibition Act * * * * does not outlaw malt extract preparations, syrups, hops, and fruit juices, such as designated in Internal Revenue Regulation 60, except as they are advertised, designed or intended for use in manufacture of intoxicants; and hence such regulation, making the sale thereof unlawful, is not warranted by law, and a permit to a manufacturer, based on such regulation and not authorizing the manufacturing for sale or selling of such preparations, would not make sale thereof violation of permit."

The third branch of the headnote of said case reads as follows:

"Design or intent on part of plaintiff manufacturer, applying for permit, that liquid malt sold by it should be used in unlawfully manufacturing intoxicants, cannot be guessed at or suspected, but must be proved as an independent fact, or by circumstances which would be proper to submit to jury."

The sixth branch of the headnote is believed to be pertinent in connection with the question presented, and provides:

The inference that liquid malt was designed for unlawful use in manufacture of intoxicants could not be made from the intrinsic nature of the preparation, or its adaptability for such use, in absence of evidence of intent.

From the foregoing it will be observed that whether or not the sale or possession of the substance you mention is in violation of law is entirely a question of purpose or intent. Undoubtedly such substance is property within the meaning of Section 6212-16 of the General Code of Ohio, and is a substance within the meaning of Section 18 of the National Prohibition Act, where the intent exists to use such substances for the purpose of manufacturing intoxicating liquor. If under the Ohio law it is possessed for the purpose of use in the manufacture of intoxicating liquor, such possession would be unlawful. Of course if such substances are especially designed for such purposes, the same would constitute a violation of both the federal and state law. However, in view of the court's definition of malt extract in the opinions hereinbefore mentioned, it appears that there are many legitimate uses for which the same may be used and, therefore, it cannot be said that the same is designed for the purpose of manufacturing intoxicating liquors in the absence of other evidence. However, as indicated in said opinions, if it is the intent or purpose of one possessing such substance or property to use the same for the manufacture of intoxicating liquors or to sell it for said purpose, the same constitutes a violation of both the federal and state law.

In the case of *Shy vs. State*, 17 O. C. A. 147, it was held in substance that where the owner of property intends to dispose of same as part of a still and knowingly offers the same for sale for such purpose, its possession becomes illegal under the provisions of Section 6212-16 of the General Code. Under the rule in this case, intent is manifestly an essential element of the crime and in cases involving possession of malt syrups or other substances which have legitimate uses but which may also be used for the illegal manufacture of intoxicating liquors, intent must be proven by proper evidence in each case.

Based upon the foregoing citations and discussions, and in specific answer to your inquiry, you are advised that it is a violation of both state and federal law for one to possess malt syrups intended for use in the unlawful manufacture of intoxicating liquors. Whether or not such intent exists is a question of fact to be determined

in each particular case from the evidence. Neither the state nor the federal law prohibits the sale of malt syrups which are intended to be used for purposes other than the manufacture of intoxicating liquors.

Respectfully,
GILBERT BETTMAN,
Attorney General.

169.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF ALFRED D. EDWARDS, IN HOCKING COUNTY, OHIO.

COLUMBUS, OHIO, March 7, 1929.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of recent date submitting for my examination and approval abstract of title, warranty deed, encumbrance estimate No. 4793, and controlling board certificate, relating to the proposed purchase of certain tracts aggregating 202 acres of land in Hocking County, Ohio, owned by one Alfred D. Edwards. Said tracts of land are more particularly described as follows:

“The northwest quarter of the northeast quarter of Section 26, Township 11, Range 18. Also the northwest half of the northeast quarter of the northeast quarter of said section number twenty-six, commencing at the southwest corner of said quarter quarter section, running north to the northwest corner of said quarter quarter section, thence running east to the northeast corner of said quarter quarter section, thence running southwesterly to the southwest corner of said quarter quarter section to the place of beginning, containing 20 acres more or less, containing in all 60 acres.

Also the southeast quarter of Section 23, Township 11, Range 18, excepting therefrom 20 acres off of the northeast corner of said quarter section, containing 142 acres more or less.”

On examination of the abstract of title submitted, I find that said Alfred D. Edwards has a good and merchantable fee simple title to the above described lands subject only to the following exceptions:

1. The description of the tract of land in the southeast quarter of Section 23, Township 11, Range 18, is indefinite for the reason that the location of the twenty acres therein mentioned is not located otherwise than by the statement that the same is “off of the northeast corner of said quarter section.” In this connection I note that in the petition in the partition case, the proceedings in which have been abstracted, it is stated that said twenty acres is the north half of the northeast quarter of said southeast quarter of Section 23. In any event it should be an easy matter to locate and describe said excepted twenty acres and thereby make definite and certain the proper description of the remaining lands in the southeast quarter of Section 23, which are owned by said Alfred D. Edwards.

2. At the time the above described property was conveyed to Alfred D. Edwards by Charles F. Brandt, sheriff of Hocking County, it appeared that said lands were subject to an oil and gas lease owned by one J. C. Childs, and that said Alfred D.