# LIQUOR PROHIBITION

BY

ARCHIBALD DOUGLAS DABNEY, B. L.

Judge of the Corporation Court, Charlottesville, Virginia; formerly Commonwealth's Attorney, United States Commissioner, and a member of the Editorial Staff of The Michie Company, Law Publishers

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## PREFACE.

This book is not a treatise on the Prohibition of Intoxicating Liquors, but a mere collation of the decisions construing such statutes.

It is intended to arrange these decisions in as logical a manner as possible with reference to the various provisions of the National Prohibition Act, and to so digest them as to give a ready reference to the reported cases.

In the endeavor to finish the book as quickly as possible after the law became effective, most valuable assistance was given by Mr. James F. Minor, author of Minor on Workmen's Compensation Laws, and by Mr. Homer Ritchey, author of Ritchey on Federal Employers' Liability Act, both of the Charlottesville, Virginia bar, to each of whom grateful appreciation is given.

A. D. DABNEY.

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# NATIONAL PROHIBITION LAW

## CONSTITUTIONAL AMENDMENT.

ANALYSIS

### ARTICLE 18.

Manufacture
Sale
Transportation
Intoxicating
Liquors

SECTION 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Concurrent
Power

SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Ratification

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Constitutionality
Treated p. 56-74

Ratification was proclaimed by the State Department, January 16, 1919.

## LEGISLATIVE ENFORCEMENT.

### AN ACT

Title to Act

To prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the short title of this Act shall be the "National Prohibition Act."

### TITLE I.

TO PROVIDE FOR THE ENFORCEMENT OF WAR PROHIBITION.

This title, relating solely to War Prohibition, is superseded by title II since January 16, 1920

The term "War Prohibition Act" used in this Act shall mean the provisions of any Act or Acts prohibiting the sale and manufacture of intoxicating liquors until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States. The words

See p. 75

"beer, wine, or other intoxicating malt or vinous liquors" in the War Prohibition Act shall be hereafter construed to mean any beverages which contain one-half of 1 per centum or more of alcohol by volume.

SEC. 2. That the Commissioner of Internal Revenue, his assistants, agents, and inspectors, shall investigate and report violations of the War Prohibition Act to the United States attorney for the district in which committed, who shall be charged with the duty of prosecuting, subject to the direction of the Attorney General, the offenders as in the case of other offenses against laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said Unted States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury.

SEC. 3. Any room, house, building, boat, vehicle, structure, or place of any kind where intoxicating liquor is sold, manufactured, kept for sale, or bartered in vi-

olation of the War Prohibition Act, and all intoxicating liquor and all property kept and used in maintaining such a place, is hereby declared to be a public and common nuisance, and any person who maintains or assists in maintaining such public and common nuisance shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $100 nor more than $1,000, or be imprisoned for not less than thirty days or more than one year, or both. If a person has knowledge that his property is occupied or used in violation of the provisions of the War Prohibition Act and suffers the same to be so used, such property shall be subject to a lien for and may be sold to pay all fines and costs assessed against the occupant of such building or property for any violation of the War Prohibition Act occurring after the passage hereof, which said lien shall attach from the time of the filing of notice of the commencement of the suit in the office where the records of the transfer of real estate are kept; and any such lien may be established and enforced by legal action instituted for that purpose in any court having jurisdiction. Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease.

Sec. 4. The United States attorney for the district where such nuisance as is defined in this Act exists, or any officer designated by him or the Attorney General of the United States, may prosecute a suit in equity in the name of the United States to abate and enjoin the same. Actions in equity to enjoin and abate such nuisance may be brought in any court having jurisdiction to hear and determine equity cases. The jurisdiction of the courts of the United States under this section shall be concurrent with that of the courts of the several States.

If it be made to appear by affidavit, or other evidence under oath, to the satisfaction of the court, or judge in vacation, that the nuisance complained of exists, a temporary writ of injunction shall forthwith issue restraining the defendant or defendants from conducting or permitting the continuance of such nuisance until the conclusion of the trial. Where a temporary injunction is prayed for, the court may issue an order restraining the defendants and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation constituting the nuisance. No bond shall be required as a condition for making any order or issuing any writ of injunction under this Act. If the court shall

find the property involved was being unlawfully used as aforesaid at or about the time alleged in the petition, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or places of any kind, for a period of not exceeding one year, or during the war and the period of demobilization. Whenever an action to enjoin a nuisance shall have been brought pursuant to the provisions of this Act, if the owner, lessee, tenant, or occupant appears and pays all costs of the proceedings and files a bond, with sureties to be approved by the clerk of the court in which the action is brought, in the liquidated sum of not less than $500 nor more than $1,000, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein a period of one year thereafter, or during the war and period of demobilization, the court, or in vacation the judge, may, if satisfied of his good faith, direct by appropriate order that the property, if already closed or held under the order of abatement, be delivered to said owner, and said order of abatement canceled, so far as the same may relate to said property; or if said bond be given and costs therein paid before judgment on an order of abatement, the action shall be thereby abated as to

said room, house, building, boat, vehicle, structure, or place only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law.

In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this title, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment.

SEC. 5. The Commissioner of Internal Revenue, his assistants, agents, and in-

spectors, and all other officers of the United States whose duty it is to enforce criminal laws, shall have all the power for the enforcement of the War Prohibition Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the laws of the United States.

SEC. 6. If any section or provision of this Act shall be held to be invalid, it is hereby provided that all other provisions of this Act which are not expressly held to be invalid shall continue in full force and effect.

SEC. 7. None of the provisions of this Act shall be construed to repeal any of the provisions of the "War Prohibition Act," or to limit or annul any order or regulation prohibiting the manufacture, sale, or disposition of intoxicating liquors within certain prescribed zones or districts, nor shall the provisions of this Act be construed to prohibit the use of the power of the military or naval authorities to enforce the regulations of the President or Secretary of War or Navy issued in pursuance of law, prohibiting the manufacture, use, possession, sale, or other disposition of intoxicating liquors during the period of the war and demobilization thereafter.

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## TITLE II.

### PROHIBITION OF INTOXICATING BEVERAGES.

efinitions
iquor" or
ntoxicating
quor"

SEC. 1. When used in Title II and Title III of this Act (1) the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any 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: *Provided*, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe.

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(2) The word "person" shall mean and include natural persons, associations, copartnerships, and corporations.

"Commissioner"

(3) The word "commissioner" shall mean Commissioner of Internal Revenue.

"Application"

(4) The term "application" shall mean a formal written request supported by a verified statement of facts showing that the commissioner may grant the request.

"Permit"

(5) The term "permit" shall mean a formal written authorization by the commissioner setting forth specifically therein the things that are authorized.

"Bond"

(6) The term "bond" shall mean an obligation authorized or required by or under this Act or any regulation, executed in such form and for such a penal sum as may be required by a court, the commissioner or prescribed by regulation.

"Regulation"

(7) The term "regulation" shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations.

Authority of Commissioner

Authority of Agents

Any act authorized to be done by the commissioner may be performed by any assistant or agent designated by him for that purpose.

Records

Records required to be filed with the commissioner may be filed with an assistant commissioner or other person designated by the commissioner to receive such records.

Duties of Commissioner

SEC. 2. The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed, who is hereby charged with the duty

Prosecution

of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and such Com-

Warrants

missioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United

Preliminary Trial

States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this Act. Officers mentioned in said section 1014 are authorized to issue

Search Warrants

search warrants under the limitations provided in Title XI of the Act approved June 15, 1917 (fortieth Statutes at Large, page 217, et seq.).

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SEC. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States

Acts Prohibited

goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this Act, and all

Liberal Construction

the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Things Permitted In General

Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: *Provided*, That nothing in this Act shall prohibit the purchase and sale

Warehouse Receipts

of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts.

Specific Articles Permitted

SEC. 4. The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act if they correspond with the following descriptions and limitations namely:

Denatured Alcohol or Rum

(a) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.

Medicinal Preparations

(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia, National Formulary, or the American Institute of Homeopathy that are unfit for use for beverage purposes.

Patent Medicines

(c) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.

Toilet, etc. Preparations

(d) Toilet, medicinal, and antiseptic preparations and solutions that are unfit for use for beverage purposes.

Flavoring Extracts, etc.

(e) Flavoring extracts and sirups that are unfit for use as a beverage, or for intoxicating beverage purposes.

Vinegar and Cider

(f) Vinegar and preserved sweet cider.

Liquor for Manufacturing Purposes Permits

A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, give the bonds, keep the records, and make the reports specified in this Act and as directed by the commissioner. No such manufacturer shall sell, use, or dispose of any liquor otherwise than as an ingredient of the articles authorized to be manufactured therefrom. No more alcohol shall be used in the manufacture of any extract, sirup, or the articles named in paragraphs b, c, and d of

Use of Liquor for Manufacturing

this section which may be used for beverage purposes than the quantity necessary for extraction of solution of the elements contained therein and for the preservation of the article.

Sale of Permitted Articles for Beverage Purposes Unlawful

Any person who shall knowingly sell any of the articles mentioned in paragraphs a, b, c, and d of this section for beverage purposes, or any extract or sirup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of 1 per centum or more of alcohol by volume in which any extract, sirup, or other article is used as an ingredient, shall be subject to the penalties provided in section 29 of this Title. If the commissioner shall find, after notice and hearing as provided for in section 5 of this Title, that any person has sold any flavoring extract, sirup, or beverage in violation of this paragraph, he shall notify such person, and any known principal for whom the sale was made, to desist from selling such article; and it shall thereupon be unlawful for a period of one year thereafter for any person so notified to sell any such extract, sirup, or beverage without making an application for, giving a bond, and obtaining a permit so to do, which

Notice to Desist

Penalty

permit may be issued upon such conditions as the commissioner may deem necessary to prevent such illegal sales, and in addition the commissioner shall require a record and report of sales.

Analysis of Alcoholic Articles

SEC. 5. Whenever the commissioner has reason to believe that any article mentioned in section 4 does not correspond with the descriptions and limitations therein provided, he shall cause an analysis of said article to be made, and if, upon such analysis, the commissioner shall find that said article does not so correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said article should not be dealt with as an intoxicating liquor, such notice to be served personally or by registered mail, as the commissioner may determine, and shall specify the time when, the place where, and the name of the agent or official before whom such person is required to appear.

Notice to Show Cause

Revocation of Permit

If the manufacturer of said article fails to show to the satisfaction of the commissioner that the article corresponds to the descriptions and limitations provided in section 4 of this Title, his permit to manufacture and sell such article shall be revoked. The manufacturer may by appropriate proceeding in a court of equity

Review by Court

have the action of the commissioner reviewed, and the court may affirm, modify, or reverse the finding of the commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such article.

When Permit Necessary

When Unnecessary

Physicians' Prescriptions

Hospitals

SEC. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided, and except that any person who in the opinion of the commissioner is conducting a bona fide hospital or sanatorium engaged in the treatment of persons suffering from alcoholism, may, under such rules, regulations, and conditions as the commissioner shall prescribe, purchase and use, in accordance with the methods in use in such institution, liquor, to be administered to the patients of such institution under the direction of a duly qualified physician employed by such institution.

Duration of Permits

All permits to manufacture, prescribe, sell, or transport liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the is-

suance thereof: *Provided*, That the commissioner may without formal application or new bond extend any permit granted under this Act or laws now in force after August 31 in any year to December 31 of the succeeding year: *Provided further*, That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be in force to exceed ninety days from the day of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days. Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this Title or any law of the United States or of any State regulating traffic in liquor. No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in

writing, dated when issued, and signed by commissioner or his authorized agent.

**Form of Permit**

It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written

**Application for Permit**

application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before

**Permit Bond**

any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this Title. In the

**Review by Court of Refusal of Permit**

event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof.

Nothing in this title shall be held to apply to the manufacture, sale, transportation, importation, possession, or distri-

**Wine for Sacramental Purposes**

bution of wine for sacramental purposes, or like religious rites, except section 6 (save as the same requires a permit to purchase) and section 10 hereof, and the

provisions of this Act prescribing penalties for the violation of either of said sections. No person to whom a permit may be issued to manufacture, transport, import, or sell wines for sacramental purposes or like religious rites shall sell, barter, exchange, or furnish any such to any person not a rabbi, minister of the gospel, priest, or an officer duly authorized for the purpose by any church or congregation, nor to any such except upon an application duly subscribed by him, which application, authenticated as regulations may prescribe, shall be filed and preserved by the seller. The head of any conference or diocese or other ecclesiastical jurisdiction may designate any rabbi, minister, or priest to supervise the manufacture of wine to be used for the purposes and rites in this section mentioned, and the person so designated may, in the discretion of the commissioner, be granted a permit to supervise such manufacture.

Permit Restrictions

Ecclesiastical Manufacture

See p. 142

SEC. 7. No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best infor-

Prescriptions

mation obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word "canceled," together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided.

Necessity as Medicine

Amount Permissible

Refilling Prohibited Pharmacist Record

Every physician who issues a prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the commissioner, which shall show the date of issue, amount prescribed, to whom issued, the purpose or ailment for which it is to be used and directions for use, stating the amount and frequency of the dose.

Physician's Record

SEC. 8. The commissioner shall cause to be printed blanks for the prescriptions herein required, and he shall furnish the same, free of cost, to physicians holding permits to prescribe. The prescription blanks shall be printed in book form and shall be numbered consecutively from

Prescription Blanks

one to one hundred, and each book shall be given a number, and the stubs in each book shall carry the same numbers as and be copies of the prescriptions. The books containing such stubs shall be returned to the commissioner when the prescription blanks have been used, or sooner, if directed by the commissioner. All unused, mutilated, or defaced blanks shall be returned with the book. No physician shall prescribe and no pharmacist shall fill any prescription for liquor except on blanks so provided, except in cases of emergency, in which event a record and report shall be made and kept as in other cases.

Violation of Permit

Procedure

SEC. 9. If at any time there shall be filed with the commissioner a complaint under oath setting forth facts showing, or if the commissioner has reason to believe, that any person who has a permit is not in good faith conforming to the provisions of this Act, or has violated the laws of any State relating to intoxicating liquor, the commissioner or his agent shall immediately issue an order citing such person to appear before him on a day named not more than thirty and not less than fifteen days from the date of service upon such permittee of a copy of the citation, which citation shall be accompanied by a copy of such complaint,

or in the event that the proceedings be initiated by the commissioner, with a statement of the facts constituting the violation charged, at which time a hearing shall be had unless continued for cause. Such hearings shall be held within the judicial district and within fifty miles of the place where the offense is alleged to have occurred, unless the parties agree on another place. If it be found that such person has been guilty of willfully violating any such laws, as charged, or has not in good faith conformed to the provisions of this Act, such permit shall be revoked, and no permit shall be granted to such person within one year thereafter. Should the permit be revoked by the commissioner, the permittee may have a review of his decision before a court of equity in the manner provided in section 5 hereof. During the pendency of such action such permit shall be temporarily revoked.

**Revocation of Permit**

**Review by Court**

**Record of Liquor Handled**

SEC. 10. No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case

of transportation, and the time and place of such manufacture, sale, or transportation. The commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this Act provided.

Manufacturers and Druggists Records

SEC. 11. All manufacturers and wholesale or retail druggists shall keep as a part of the records required of them a copy of all permits to purchase on which a sale of any liquor is made, and no manufacturer or wholesale druggist shall sell or otherwise dispose of any liquor except at wholesale and only to persons having permits to purchase in such quantities.

Sale Restricted to Permittees

Labels

SEC. 12. All persons manufacturing liquor for sale under the provisions of this title shall securely and permanently attach to every container thereof, as the same is manufactured, a label stating name of manufacturer, kind and quantity of liquor contained therein, and the date of its manufacture, together with the number of the permit authorizing the manufacture thereof; and all persons possessing such liquor in wholesale quantities shall securely keep and maintain such label thereon; and all persons selling at wholesale shall attach to every package of liquor, when sold, a label setting forth the kind and quantity of liquor contained therein, by whom manufac-

Specifications in Labels

tured, the date of sale, and the person to whom sold; which label shall likewise be kept and maintained thereon until the liquor is used for the purpose for which such sale was authorized.

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Duties of Carriers Records

Delivery

SEC. 13. It shall be the duty of every carrier to make a record at the place of shipment of the receipt of any liquor transported, and he shall deliver liquor only to persons who present to the carrier a verified copy of a permit to purchase, which shall be made a part of the carrier's permanent record at the office from which delivery is made.

Oath of Consignee

The agent of the common carrier is hereby authorized to administer the oath to the consignee in verification of the copy of the permit presented, who, if not personally known to the agent, shall be identified before the delivery of the liquor to him. The name and address of the person identifying the consignee shall be included in the record.

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Duty of Consignor

SEC. 14. It shall be unlawful for a person to use or induce any carrier, or any agent or employee thereof, to carry or ship any package or receptacle containing liquor without notifying the carrier of the true nature and character of the shipment. No carrier shall transport nor shall any person receive liquor from a carrier unless there appears on the out-

side of the package containing such liquor the following information:

Information on Package

Name and address of the consignor or seller, name and address of the consignee, kind and quantity of liquor contained therein, and number of the permit to purchase or ship the same, together with the name and address of the person using the permit.

See p. 161

SEC. 15. It shall be unlawful for any consignee to accept or receive any package containing any liquor upon which appears a statement known to him to be false, or for any carrier or other person to consign, ship, transport, or deliver any such package, knowing such statement to be false.

False Statement

Order for Delivery to False Consignee

SEC. 16. It shall be unlawful to give to any carrier or any officer, agent, or person acting or assuming to act for such carrier an order requiring the delivery to any person of any liquor or package containing liquor consigned to, or purporting or claimed to be consigned to a person, when the purpose of the order is to enable any person not an actual bona fide consignee to obtain such liquor.

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Advertisement of Liquor

SEC. 17. It shall be unlawful to advertise anywhere, or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the

same, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises. But nothing herein

Legitimate Price Lists

shall prohibit manufacturers and wholesale druggists holding permits to sell liquor from furnishing price lists, with description of liquor for sale, to persons permitted to purchase liquor, or from advertising alcohol in business publications or trade journals circulating generally among manufacturers of lawful alcoholic perfumes, toilet preparations, flavoring extracts, medicinal preparations, and like articles: *Provided, however*, That nothing in this Act or in the Act making appropriations for the Post Office Department, approved March 3, 1917 (Thirty-ninth Statutes at Large, Part 1, page 1058, et seq.), shall apply to newspapers published in foreign countries when mailed to this country.

Advertisement, Manufacture or Sale of Things for Making Liquor

SEC. 18. 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.

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SEC. 19. No person shall solicit or receive, nor knowingly permit his employee

Order for or Information Regarding Liquor

to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of this Act.

Civil Suit for Causing Intoxication

SEC. 20. Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawfully selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication, and in any such action such person shall have a right to recover actual and exemplary damages. In case of the death of either party, the action or right of action given by this section shall survive to or against his or her executor or administrator, and the amount so recovered by either wife or child shall be his or her sole and separate property. Such action may be brought in any court of competent jurisdiction. In any case where parents shall be entitled to such damages, either the father or mother may sue alone therefor, but recovery by one of such parties shall be a bar to suit brought by the other.

SEC. 21. Any room, house, building, boat, vehicle, structure, or place where

Liquor Nuisances

See p. 167

intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.

Punishment

Injunction against Such Nuisance

SEC. 22. An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such

Trial

action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith

Temporary Injunction

issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nui-

Bond

sance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court

Order

shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof.

Abatement

And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or place shall not

be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than $500 nor more than $1,000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property.

See p. 171

Injunction against Trafficing

SEC. 23. That any person who shall, with intent to effect a sale of liquor, by himself, his employee, servant, or agent, for himself or any person, company, or corporation, keep or carry around on his person, or in a vehicle, or other conveyance whatever, or leave in a place for another to secure, any liquor, or who shall travel to solicit, or solicit, or take, or accept orders for the sale, shipment, or delivery of liquor in violation of this title is guilty of a nuisance and may be restrained by injunction, temporary and permanent, from doing or continuing to do any of said acts or things.

In such proceedings it shall not be nec-

Intent

essary to show any intention on the part of the accused to continue such violations if the action is brought within sixty days following any such violation of the law.

Officers' Fees

For removing and selling property in enforcing this Act the officer shall be entitled to charge and receive the same fee as the sheriff of the county would receive for levying upon and selling property under execution, and for closing the premises and keeping them closed a reasonable sum shall be allowed by the court.

Forfeiture of Lease

Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease.

Violation of Injunction

SEC. 24. In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this title, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral exami-

Contempt Proceedings

Punishment

nation of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment.

See p. 201

Property Rights in Liquor or Articles for Manufacturing Unlawfully

SEC. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A

Search Warrants

search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers

Seizure

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 and all property designed for the unlawful manufacture of liquor shall be destroyed unless the court shall otherwise order. No search war-

Search of Private Dwelling

rant 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 a 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.

See p. 213

Seizure of Vehicle

SEC. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with suffi-

Bond for Return of Seized Vehicles

cient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof,

**Sale of Vehicle upon Conviction**

**Liens on Vehicles**

**Advertisement for Claimant**

shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Disposition of Confiscated Liquors

SEC. 27. In all cases in which intoxicating liquors may be subject to be destroyed under the provisions of this Act the court shall have jurisdiction upon the application of the United States attorney to order them delivered to any department or agency of the United States Government for medicinal, mechanical, or scientific uses, or to order the same sold at private sale for such purposes to any person having a permit to purchase liquor the proceeds to be covered into the Treasury of the United States to the credit of miscellaneous receipts, and all liquor heretofore seized in any suit or proceeding brought for violation of law may likewise be so disposed of, if not claimed within sixty days from the date this section takes effect.

General Powers of Officers

SEC. 28. The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

See p. 234

Punishment In General

SEC. 29. Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

Punishment of Permittee

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than

three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this Act against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.

Prior Conviction

Cider and Fruit Juices

Incrimination No Excuse from Testifying

SEC. 30. No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpœna of any court in any suit or proceeding based upon or growing out of any alleged violation of this Act; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpœna and under oath, he may so testify or produce evidence, but no person shall be exempt from prosecution and punishment for perjury committed in so testifying.

Immunity

SEC. 31. In case of a sale of liquor

Venue of Prosecution

where the delivery thereof was made by a common or other carrier the sale and delivery shall be deemed to be made in the county or district wherein the delivery was made by such carrier to the consignee, his agent or employee, or in the county or district wherein the sale was made, or from which the shipment was made, and prosecution for such sale or delivery may be had in any such county or district.

See p. 236

Indictments, etc.

SEC. 32. In any affidavit, information, or indictment for the violation of this Act, separate offenses may be united in separate counts and the defendant may be tried on all at one trial and the penalty for all offenses may be imposed. It shall

Unnecessary Allegations

not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a

Bill of Particulars

bill of particulars when it deems it proper to do so.

See p. 331

Possession as Prima Facie Evidence

SEC. 33. After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence

that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provision of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession.

**Possession in Private Dwelling**

But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used.

**Records Subject to Inspection**

SEC. 34. All records and reports kept or filed under the provisions of this Act shall be subject to inspection at any reasonable hour by the commissioner or any of his agents or by any public prosecutor or by any person designated by him, or by any peace officer in the State where

Copies as Evidence

the record is kept, and copies of such records and reports duly certified by the person with whom kept or filed may be introduced in evidence with like effect as the originals thereof, and verified copies of such reports shall be furnished to the commissioner when called for.

See p. 463

Repeal of Inconsistent Laws

SEC. 35. All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil

Taxes and Stamps

or criminal, heretofore or hereafter incurred under existing laws.

Compromise of Civil Action

The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

Invalidity Part of Act

SEC. 36. If any provision of this Act shall be held invalid it shall not be construed to invalidate other provisions of the Act.

Storage and Transportation of Bonded Liquor

SEC. 37. Nothing herein shall prevent the storage in United States bonded warehouses of all liquor manufactured prior to the taking effect of this Act, or prevent the transportation of such liquor to such warehouses or to any wholesale druggist for sale to such druggist for purposes not prohibited when the tax is paid, and permits may be issued therefor.

Manufacture of Non-Alcoholic Beverages

A manufacturer of any beverage containing less than one-half of 1 per centum of alcohol by volume may, on making application and giving such bond as the commissioner shall prescribe, be given a permit to develop in the manufacture thereof by the usual methods of fermentation and fortification or otherwise a liq-

Over ½%

uid such as beer, ale, porter, or wine, containing more than one-half of 1 per centum of alcohol by volume, but before any such liquid is withdrawn from the factory or otherwise disposed of the alcoholic contents thereof shall under such rules and regulations as the commissioner may prescribe be reduced below such one-half of 1 per centum of alcohol: *Provided*, That such liquid may be removed and transported, under bond and under such regulations as the commissioner may prescribe, from one bonded plant or warehouse to another for the purpose of having the alcohol extracted therefrom. And such liquids may be developed, under permit, by persons other than the manufacturers of beverages containing less than one-half of 1 per centum of alcohol by volume, and sold to such manufacturers for conversion into such beverages. The alcohol removed from such liquid, if evaporated and not condensed and saved, shall not be subject to tax; if saved, it shall be subject to the same law as other alcoholic liquors.

Reduction

Tax

Credit shall be allowed on the tax due on any alcohol so saved to the amount of any tax paid upon distilled spirits or brandy used in the fortification of the liquor from which the same is saved.

When fortified wines are made and used

for the production of nonbeverage alcohol and dealcoholized wines containing less than one-half of 1 per centum of alcohol by volume, no tax shall be assessed or paid on the spirits used in such fortification, and such dealcoholized wines produced under the provisions of this Act, whether carbonated or not, shall not be subject to the tax on artificially carbonated or sparkling wines, but shall be subject to the tax on still wines only.

In any case where the manufacturer is charged with manufacturing or selling for beverage purposes any malt, vinous, or fermented liquids containing one-half of 1 per centum or more of alcohol by volume, or in any case where the manufacturer, having been permitted by the commissioner to develop a liquid such as ale, beer, porter, or wine containing more than one-half of 1 per centum of alcohol by volume in the manner and for the purpose herein provided, is charged with failure to reduce the alcoholic content of any such liquid below such one-half of 1 per centum before withdrawing the same from the factory, then in either such case the burden of proof shall be on such manufacturer to show that such liquid so manufactured, sold, or withdrawn contains less than one-half of 1 per centum of alcohol by volume. In any suit or pro-

**Burden of Proof of Alcoholic Percentage**

ceeding involving the alcoholic content of any beverage, the reasonable expense of analysis of such beverage shall be taxed as costs in the case.

**Appointment of Necessary Assistants**

SEC. 38. The Commissioner of Internal Revenue and the Attorney General of the United States are hereby respectively authorized to appoint and employ such assistants, experts, clerks, and other employees in the District of Columbia or elsewhere, and to purchase such supplies and equipment as they may deem necessary for the enforcement of the provisions of this Act, but such assistants, experts, clerks, and other employees, except such executive officers as may be appointed by the commissioner or the Attorney General to have immediate direction of the enforcement of the provisions of this Act, and persons authorized to issue permits, and agents and inspectors in the field service, shall be appointed under the rules and regulations prescribed by the Civil Service Act: *Provided*, That the commissioner and Attorney General in making such appointments shall give preference to those who have served in the military or naval service in the recent war, if otherwise qualified, and there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sum as may be required

for the enforcement of this Act, including personal services in the District of Columbia, and for the fiscal year ending June 30, 1920, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $2,000,000 for the use of the Commissioner of Internal Revenue and $100,000 for the use of the Department of Justice for the enforcement of the provisions of this Act, including personal services in the District of Columbia, and necessary printing and binding.

Summons on Innocent Owner of Property

SEC. 39. In all cases wherein the property of any citizen is proceeded against or wherein a judgment affecting it might be rendered, and the citizen is not the one who in person violated the provisions of the law, summons must be issued in due form and served personally, if said person is to be found within the jurisdiction of the court.

## TITLE III.

### INDUSTRIAL ALCOHOL.

SEC. 1. When used in this title—

"Alcohol" Defined

The term "alcohol" means that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, from whatever source or whatever processes produced.

"Container"

The term "container" includes any receptacle, vessel, or form of package, tank, or conduit used or capable of use for holding, storing, transferring, or shipment of alcohol.

INDUSTRIAL ALCOHOL PLANTS AND WAREHOUSES.

Industrial Alcohol Permits

SEC. 2. Any person now producing alcohol shall, within thirty days after the passage of this Act, make application to the commissioner for registration of his industrial alcohol plant, and as soon thereafter as practicable the premises shall be bonded and permit may issue for the operation of such plant, and any person hereafter establishing a plant for the production of alcohol shall likewise before operation make application, file bond, and receive permit.

Warehouses for Industrial Alcohol

SEC. 3. Warehouses for the storage and distribution of alcohol to be used exclusively for other than beverage purposes may be established upon filing of application and bonds, and issuance of permit at such places, either in connection with the manufacturing plant or elsewhere, as the commissioner may determine; and the entry and storage of alcohol therein, and the withdrawals of alcohol therefrom shall be made in such containers and by such means as the commissioner by regulation may prescribe.

Transfer

SEC. 4. Alcohol produced at any registered industrial alcohol plant or stored in any bonded warehouse may be transferred under regulations to any other registered industrial alcohol plant or bonded warehouse for any lawful purpose.

Tax

SEC. 5. Any tax imposed by law upon alcohol shall attach to such alcohol as soon as it is in existence as such, and all proprietors of industrial alcohol plants and bonded warehouses shall be jointly and severally liable for any and all taxes on any and all alcohol produced thereat or stored therein. Such taxes shall be a first lien on such alcohol and the premises and plant in which such alcohol is produced or stored, together with all improvements and appurtenances thereunto belonging or in any wise appertaining.

Withdrawal from Bonded Warehouse

SEC. 6. Any distilled spirits produced and fit for beverage purposes remaining in any bonded warehouse on or before the date when the eighteenth amendment of the Constitution of the United States goes into effect, may, under regulations, be withdrawn therefrom either for denaturation at any bonded denaturing plant or for deposit in a bonded warehouse established under this Act; and when so withdrawn, if not suitable as to proof, purity, or quality for other than beverage purposes, such distilled spirits

Denaturing

shall be redistilled, purified, and changed in proof so as to render such spirits suitable for other purposes, and having been so treated may thereafter be denatured or sold in accordance with the provisions of this Act.

Continuation of Distillery or Bonded Warehouse

SEC. 7. Any distillery or bonded warehouse heretofore legally established may, upon filing application and bond and the granting of permit, be operated as an industrial alcohol plant or bonded warehouse under the provisions of this title and regulations made thereunder.

Production of Industrial Alcohol

SEC. 8. Alcohol may be produced at any industrial alcohol plant established under the provisions of this title from any raw materials or by any processes suitable for the production of alcohol, and, under regulations, may be used at any industrial alcohol plant or bonded warehouse or sold or disposed of for any lawful purpose, as in this Act provided.

Exemption from Existing Statutes

SEC. 9. Industrial alcohol plants and bonded warehouses established under the provisions of this title shall be exempt from the provisions of sections 3154, 3244, 3258, 3259, 3260, 3263, 3264, 3266, 3267, 3268, 3269, 3271, 3273, 3274, 3275, 3279, 3280, 3283, 3284, 3285, 3286, 3287, 3288, 3289, 3290, 3291, 3292, 3293, 3294, 3295, 3302, 3303, 3307, 3308, 3309, 3310, 3311, 3312, 3313, 3314, and 3327 of the Revised

Statutes; sections 48 to 60, inclusive, and sections 62 and 67 of the Act of August 27, 1894 (Twenty-eighth Statutes, pages 563 to 568), and from such other provisions of existing laws relating to distillers and bonded warehouses as may, by regulations, be declared inapplicable to industrial alcohol plants and bonded warehouses established under this Act.

Regulations may be made embodying any provision of the sections above enumerated.

TAX-FREE ALCOHOL.

Denaturing Plants

SEC. 10. Upon the filing of application and bond and issuance of permit denaturing plants may be established upon the premises of any industrial alcohol plant, or elsewhere, and shall be used exclusively for the denaturation of alcohol by the admixture of such denaturing materials as shall render the alcohol, or any compound in which it is authorized to be used, unfit for use as an intoxicating beverage.

Sale of Denatured Alcohol

Alcohol lawfully denatured may, under regulations, be sold free of tax either for domestic use or for export.

Distilled Vinegar

Nothing in this Act shall be construed to require manufacturers of distilled vinegar to raise the proof of any alcohol used in such manufacture or to denature the same.

Removal for Denaturing

SEC. 11. Alcohol produced at any industrial alcohol plant or stored in any bonded warehouse may, under regulations, be withdrawn tax free as provided by existing law from such plant or warehouse for transfer to any denaturing plant for denaturation, or may, under regulations, before or after denaturation, be removed from any such plant or warehouse for any lawful tax-free purpose.

Spirits of less proof than one hundred and sixty degrees may, under regulations, be deemed to be alcohol for the purpose of denaturation, under the provisions of this title.

Tax Free Withdrawal

Alcohol may be withdrawn, under regulations, from any industrial plant or bonded warehouse tax free by the United States or any governmental agency thereof, or by the several States and Territories or any municipal subdivision thereof or by the District of Columbia, or for the use of any scientific university or college of learning, any laboratory for use exclusively in scientific research, or for use in any hospital or sanitorium.

But any person permitted to obtain alcohol tax free, except the United States and the several States and Territories and subdivisions thereof, and the District of Columbia, shall first apply for and secure a permit to purchase the same and

give the bonds prescribed under Title II of this Act, but alcohol withdrawn for nonbeverage purposes for use of the United States and the Several States, Territories, and subdivisions thereof, and the District of Columbia may be purchased and withdrawn subject only to such regulations as may be prescribed.

GENERAL PROVISIONS.

Penalties

SEC. 12. The penalties provided in this title shall be in addition to any penalties provided in Title II of this Act, unless expressly otherwise therein provided.

Regulations

SEC. 13. The commissioner shall from time to time issue regulations respecting the establishment, bonding, and operation of industrial alcohol plants, denaturing plants, and bonded warehouses authorized herein, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses, and to place the nonbeverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purpose upon the highest possible plane of scientific and commercial efficiency consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote

its use in scientific research and the development of fuels, dyes, and other lawful products.

Remission of Tax on Lost Alcohol

SEC. 14. Whenever any alcohol is lost by evaporation or other shrinkage, leakage, casualty, or unavoidable cause during distillation, redistillation, denaturation, withdrawal, piping, shipment, warehousing, storage, packing, transfer, or recovery of any such alcohol the commissioner may remit or refund any tax incurred under existing law upon such alcohol, provided he is satisfied that the alcohol has not been diverted to any illegal use: *Provided, also*, That such allowance shall not be granted if the person claiming same is indemnified against such loss by a valid claim of insurance.

Punishment for Violation of This Title

SEC. 15. Whoever operates an industrial alcohol plant or a denaturing plant without complying with the provisions of this title and lawful regulations made thereunder, or whoever withdraws or attempts to withdraw or secure tax free any alcohol subject to tax, or whoever otherwise violates any of the provisions of this title or of regulations lawfully made thereunder shall be liable, for the first offense, to a penalty of not exceeding $1,000, or imprisonment not exceeding thirty days, or both, and for a second or cognate offense to a penalty of not less than $100 nor more

than $10,000, and to imprisonment of not less than thirty days nor more than one year. It shall be lawful for the commissioner in all cases of second or cognate offense to refuse to issue for a period of one year a permit for the manufacture or use of alcohol upon the premises of any person responsible in any degree for the violation.

**Collection of Tax**

SEC. 16. Any tax payable upon alcohol under existing law may be collected either by assessment or by stamp as regulations shall provide; and if by stamp, regulations shall issue prescribing the kind of stamp to be used and the manner of affixing and canceling the same.

**Seizure of Property**

SEC. 17. When any property is seized for violation of this title it may be released to the claimant or to any intervening party, in the discretion of commissioner, on a bond given and approved.

**Application of Existing Laws**

SEC. 18. All administrative provisions of internal-revenue law, including those relating to assessment, collection, abatement, and refund of taxes and penalties, and the seizure and forfeiture of property, are made applicable to this title in so far as they are not inconsistent with the provisions thereof.

**Repeal of Conflicting Statutes**

SEC. 19. All prior statutes relating to alcohol as defined in this title are hereby

repealed in so far as they are inconsistent with the provisions of this title.

Canal Zone

SEC. 20. That it shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one's possession or under one's control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt, or spirituous liquors, except for sacramental, scientific, pharmaceutical, industrial, or medicinal purposes, under regulations to be made by the President, and any such liquors within the Canal Zone in violation hereof shall be forfeited to the United States and seized: *Provided*, That this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad.

That each and every violation of any of the provisions of this section shall be punished by a fine of not more than $1,000 or imprisonment not exceeding six months for a first offense, and by a fine not less than $200 nor more than $2,000 and imprisonment not less than one month nor more than five years for a second or subsequent offense.

That all offenses heretofore committed within the Canal Zone may be prosecuted and all penalties therefor enforced in the

same manner and to the same extent as if this Act had not been passed.

When Act Effective

SEC. 21. Titles I and III and sections 1, 27, 37, and 38 of title II of this Act shall take effect and be in force from and after the passage and approval of the Act. The other sections of title II shall take effect and be in force from and after the date when the eighteenth amendment of the Constitution of the United States goes into effect.

# Constitutionality and Preliminary Consideration

There have been many judicial decisions as to the constitutionality of the various state prohibition laws, but the entirely new point of departure supplied by the Prohibition Amendment to the Federal Constitution, makes it exceedingly unlikely, if not impossible, that any question as to the constitutionality of this "National Prohibition Act" will be successfully raised; except, possibly, as to whether the Eighteenth Amendment itself was constitutionally adopted, or whether the provisions of the Act are within the authority conferred upon Congress by the said amendment. We shall therefore be very brief in our treatment of its constitutionality as substantive law, in most cases giving merely a citation of the decisions.

**As to Constitutionality of Special Provisions.**—See post, where their subject matter is treated.

**The XVIIIth Amendment to the Constitution of the United States.**

**Not a Law Complete in Itself.**—The prohibition amendment to the federal Constitution is not a law complete in itself, in that it fixes no penalty for its violation.

Ford *v.* State (Tex. Civ. App.), 209 S. W. 490, 494.

**Validity and Mode of Adoption.**—The addition to the Constitution of the United States of an amendment prohibiting the manufacture, sale, etc., of intoxicating liquors, is an amendment of the organic law, and not prohibited by article 10, reserving to the states or people the powers not delegated to the United States by the Constitution, nor prohibited by it to the states.

Ohio *v.* Cox (D. C.), 257 Fed. 334, 335.

The requirement of Const. U. S. art. 5, that "two-thirds of both houses" shall propose amendments for adoption or rejection by the state Legislatures, means two-thirds of a quorum of each house, and not two-thirds of the whole membership of each, since "house" means a body of men united in their legislative capacity.

Ohio *v.* Cox (D. C.), 257 Fed. 334, 336.

Congress has no concern of the manner in which the people of the several states pass upon proposed amendments to the United States Constitution.

Mullen *v.* Howell (Wash.), 181 Pac. 920.

The authority to act in the matter of a proposed amendment to the Constitution of the United States does not arise in or out of the Constitution of the state, but arises out of the federal Constitution, and any act, whether by resolution or bill, on the part of the state Legislature, is a sufficient expression of the legislative will, unless Congress itself challenges the method or manner of its adoption.

Mullen *v.* Howell (Wash.), 181 Pac. 920.

**Referendums.**—Const. U. S. art. 5, providing that proposed amendment shall be valid "when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof," does not preclude submission of joint resolution of state Legislature ratifying proposed amendment to a referendum, the words "Legislatures" and "conventions" not having present-day meanings, the former referring to legislative authority, including all its branches, and not merely the legislative assembly.

Mullen *v.* Howell (Wash.), 181 Pac. 920.

Under the Washington State Const. Amend. 7, art. 2, § 1, providing for referendum of "acts, bills, or laws," joint resolution of state Legislature ratifying constitutional amendment for national prohibition proposed by Res. Dec. 19, 1917, 40 Stat. 1050, is subject to referendum, the amendment to the United States Constitution being a law within the seventh amendment of the state Constitution.

Mullen *v.* Howell (Wash.), 181 Pac. 920.

But it was held by the Oregon Supreme Court that nei-

ther House Joint Resolutions No. 1, ratifying proposed "National Prohibition Amendment," nor any other resolution of the Legislature, is subject to referendum by Oregon Const. art. 4, §§ 1, 1a; such sections applying only to proposed laws.

Herbring *v.* Brown, (Ore.), 180 Pac. 328.

To ascertain what is meant by the term "bill" and "act" in Const. art. 4, §§ 1, 1a (amended), as to initiative and referendum, reference must be made to the sense in which the words were used before such amendments were passed, and, when reference is so made, it is found that the first term means a proposed law (article 4, § 1 [original], and sections 18, 19; article 5, § 15), while the second means a bill which has been enacted by the Legislature into a law (article 4, §§ 20, 21, 22, 28); a "joint resolution" being neither a bill nor an act.

Herbring *v.* Brown, (Ore.), 180 Pac. 328.

The subject matter upon which the powers given by Const. art. 4, §§ 1, 1a, may be exercised, namely, initiative laws, constitutional amendments, and acts of the Legislature referred to the people, are referred to collectively as "measures merely as a matter of convenience and not with intent to include other and different powers."

Herbring *v.* Brown, (Ore.), 180 Pac. 328.

But in mandamus to compel submission of joint resolution ratifying amendment to United States constitution, the contention that the Legislature has no power to act by resolution is nonjusticiable; the power to question the manner of adoption being in Congress, and not the courts.

Mullen *v.* Howell, (Wash.), 181 Pac. 920.

**Police Powers of States to Regulate, Restrict or Forbid the Manufacture or Sale, Gift, Purchase and Transportation of Intoxicating Liquors, Fully Recognized.**

**In General.**—It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a state has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of

intoxicating liquors within its borders without violating the guarantees of the fourteenth Amendment.

Seaboard Air Line Railway *v.* North Carolina, 245 U. S. 298, 38 Sup. Ct. 96, 62 L. Ed. 299.
Clark Distilling Co. *v.* Western Maryland R. Co., 242 U. S. 311, 321, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218n, Ann. Cas. 1917B, 845.
Crane *v.* Campbell, 245 U. S. 304, 38 Sup. Ct. 98, 62 L. Ed. 304.
Eberle *v.* Michigan, 232 U. S. 700, 34 Sup. Ct. 464.
Purity Extract, etc., Co. *v.* Lynch, 226 U. S. 192, 201, 33 Sup. Ct. 44, 57 L. Ed. 184.
Crowley *v.* Christensen, 137 U. S. 86, 91, 77 Sup. Ct. 13, 9 Sup. Ct. 6, 34 L. Ed. 620.
Kidd *v.* Pearson, 128 U. S. 1, 32 L. Ed. 346, 2 Interst. Com. Rep. 232.
Mugler *v.* Kansas, 123 U. S. 623, 662, 8 Sup. Ct. 273, 31 L. Ed. 205.
Beer Co. *v.* Massachusetts, 97 U. S. 25, 33, 24 L. Ed. 989.
Bartemeyer *v.* Iowa, 18 Wall. 29, 21 L. Ed. 929.
Black *v.* Delaye, 193 Ala. 500, 68 So. 993, L. R. A. 1915E, 640.
Fine *v.* Moran (Fla.), 77 So. 533.
Henderson *v.* Heyward, 109 Ga. 373, 34 S. E. 590, 47 L. R. A. 366, 77 Am. St. Rep. 384.
Mack *v.* Westbrook, 148 Ga. 690, 98 S. E. 339, 341.
Fitch *v.* State, 102 Neb. 361, 167 N. W. 417, 419.
State *v.* Germain (N. D.), 170 N. W. 121.
State *v.* Tincher, 81 W. Va. 441, 94 S. E. 503.
Stratford *v.* Seattle Brewing, etc., Co., 94 Wash. 125, 162 Pac. 31, L. R. A. 1917C, 931n.
Taylor *v.* Wildman (Ia.), 145 N. W. 449, 451.
People *v.* Wheeler, 185 Mich. 164, 151 N. W. 710.
Ex parte Davis (Tex. Cr. App.), 215 S. W. 341.

It is also well established that, when a state, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered, is innocuous,

it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government.

Booth *v.* Illinois, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623.
Otis *v.* Parker, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323.
Ah Sin *v.* Wittman, 198 U. S. 500, 504, 25 Sup. Ct. 756, 49 L. Ed. 1142, 1144.
Silz *v.* Hesterburg, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75.
Murphy *v.* California, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A., N. S., 153.
Purity Extract, etc., Co. *v.* Lynch, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184.
See also, Crane *v.* Campbell, 245 U. S. 304, 38 Sup. Ct. 98, 62 L. Ed. 304.
Rast *v.* Van Deman, etc., Co., 140 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421n, Ann Cas. 1917B, 455.
Mack *v.* Westbrook, 148 Ga. 690, 98 S. E. 339, 341.
Fitch *v.* State, 102 Neb. 361, 167 N. W. 417.
Thatcher *v.* Reno Brewing Co. (Nev.), 178 Pac. 902.
Johnson *v.* State, 75 Tex. Cr. App. 177, 171 S. W. 211.

The power of the states, under their Constitutions and under the federal Constitution, to prohibit the manufacture and sale of intoxicating liquor and to provide such means for the enforcement of prohibition as seems expedient to the Legislature, is now so well settled that it is no longer an open question.

Crane *v.* Campbell, 245 U. S. 304, 38 Sup. Ct. 98, 62 L. Ed. 304.
Seaboard Air-Line Railway *v.* North Carolina, 245 U. S. 298, 38 Sup. Ct. 96, 62 L. Ed. 299.
Clark Distilling Co. *v.* Western Maryland R. Co., 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218n, Ann. Cas. 1917B, 845.
Giozza *v.* Tierman, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599.

Crowley *v.* Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620.
Mugler *v.* Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.
Bartemeyer *v.* Iowa, 18 Wall. 129, 21 L. Ed. 929.
Black *v.* Delaye, 193 Ala. 500, 68 So. 993, L. R. A. 1915E, 640.
Delaney *v.* Plunkett, 146 Ga. 547, 91 S. E. 561, L. R. A. 1917D, 926, Ann. Cas. 1917E, 685.
Cureton *v.* State, 135 Ga. 660, 70 S. E. 332, 49 L. R. A., N. S., 182n.
In re Crane, 27 Idaho 671, 151 Pac. 1006, L. R. A. 1918A, 942.
Schmitt *v.* Cook Brewing Co. (Ind.), 120 N. E. 19, 22.
State *v.* Kurent (Kan.), 181 Pac. 603.
State *v.* Macek, 104 Kan. 742, 180 Pac. 985.
State *v.* Durein, 70 Kan. 1, 78 Pac. 152, 15 L. R. A., N. S., 908, and note.
State *v.* Seaboard Air-Line R. Co., 169 N. C. 295, 84 S. E. 283.
State *v.* Fargo Bottling Works Co., 19 N. D. 396, 124 N. W. 387, 26 L. R. A., N. S., 872n.
Motlow *v.* State, 125 Tenn. 547, 145 S. W. 177, L. R A. 1916F, 177.
Ex parte Fulton (Tex. Cr. App.), 215 S. W. 331.
State *v.* Lovell (1847), 47 Vt. 493.
State *v.* Fabbri, 98 Wash. 207, 167 Pac. 133, L. R. A. 1918A, 416.
State *v.* Hemrich, 93 Wash. 439, 161 Pac. 79, L. R. A. 1917B, 962n.
State *v.* Davis, 77 W. Va. 271, 87 S. E. 262, L. R. A. 1917C, 639.

And a state act making it unlawful "to have or keep" intoxicating liquors in a public place in local option territory, or to transport liquor therein, does not deny any right guaranteed by the federal Constitution.

Ex parte Fulton (Tex. Cr. App.), 215 S. W. 331.

**Prohibition of Possession as Ex Post Facto Law or Denial of Due Process of Law.**—A state statute making it unlawful to have possession of intoxicating liquor for

sale, in force from and after April 1, 1913, and ratified March 3, 1913, is not objectionable as ex post facto when applied to the finding of liquor in the possession of accused April 17, 1913, in the absence of anything to show that the liquor was acquired prior to the ratification of the act.

State *v.* Denton, 164 N. C. 530, 80 S. E. 401.

And the application of Laws Ga. (Ex. Sess.) 1915, pt. 1, tit. 2, §§ 16 and 30, making it illegal to have in possession more than one gallon of vinous liquor, to the possession of liquor acquired after the law was enacted, but before it became effective, does not render that act invalid.

Barbour *v.* Georgia, 249 U. S. 454, 39 S. Ct. 316.

Nor does it render that act invalid as depriving of property without due process of law.

Barbour *v.* Georgia, 249 U. S. 454, 39 S. Ct. 316.

Whether the prohibition of sale may be constitutionally applied to liquor acquired before the enactment of the statute was raised in Bartemeyer *v.* Iowa, 18 Wall. 129, 21 L. Ed. 929, and Beer Co. *v.* Massachusetts, 97 U. S. 25, 33, 24 L. Ed. 989, but was not decided. The question presented here, however, is simpler.

Barbour *v.* Georgia, 249 U. S. 454, 39 S. Ct. 316.

**Right to Define as Intoxicant and Otherwise Prevent the Traffic.**—"To prohibit the traffic the Legislature may define as an intoxicant that which is far from intoxicating, in order to prevent the manufacture and sale of that which is intoxicating; that it may prevent the possession of liquor; that it may provide that the place where liquor is kept or manufactured may be declared a nuisance and closed; that it may designate those who are to handle and dispense liquor and upon what terms; that it may forbid advertisements of liquor; that it may provide what shall make a prima facie case of violation of the law. All of these provisions are properly connected with the purpose of the Legislature to prevent the traffic in intoxicating liquor as a beverage and are therefore within the title of the act."

Schmitt *v.* Cook Brewing Co. (Ind.), 120 N. E. 19, 23.

Nor does the clause, "or any alcoholic compound of malt

or liquors whether intended for beverage purposes or not, but which can be diluted, and when so diluted may be used as a beverage and will produce intoxication," etc., render the act obnoxious to the paragraph of a state constitution which declares that protection to person and property is the paramount duty of government, and shall be impartial and complete. Nor does it render the act void because violative of the due process clause of that constitution.

Jackson *v.* State, 148 Ga. 351, 96 S. E. 1001.

While total prohibition of nonintoxicants is recognized as a valid means of suppressing the liquor traffic (Purity Extract, etc., Co. *v.* Lynch, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184), yet it is a means which ought to appear plainly in the act. Such a suppression of a drink confessedly harmless in itself cannot be implied from general language prohibiting intoxicating liquors.

Hoffmann Brewing Co. *v.* McElligott (D. C.), 259 Fed. 321.

**Constitutional Provision Not an Implied Limitation on Legislative Power.**—A constitutional provision authorizing the prohibition of the sale of intoxicating liquor, is not an implied limitation on legislative power, and the Legislature has not only the authority, but must pass all laws necessary and appropriate to prevent illegal sales.

Longmire *v.* State, 75 Tex. Cr. App. 616, 171 S. W. 1165, L. R. A. 1917A, 726.

The Virginia Constitution, 1902, § 62, providing that the General Assembly shall have full power to enact local option laws, gives no new power to the Legislature, but is simply declaratory of the existing law, although it places no restriction whatever upon the legislative power.

Pine *v.* Commonwealth, 121 Va. 812, 93 S. E. 652.

See also, Ex parte Fulton (Tex. Cr. App.), 215 S. W. 331.

Ex parte Davis (Tex. Cr. App.), 215 S. W. 341.

Gulf, etc., R. Co. *v.* State (Tex. Cr. App.), 212 S. W. 845.

United States *v.* James (D. C.), 256 Fed. 102, as to effect of like provision of Texas Constitution.

**Prohibiting Importation.**—The state has plenary power to prohibit the importation of ardent spirits into the state for any purpose.

Lucchesi *v.* Commonwealth, 122 Va. 872, 94 S. E. 925.

**Prohibition of All Shipments.**—A state may, consistently with the due process of law clause of U. S. Const. 14th Amend., forbid all shipments of intoxicating liquor, whether intended for personal use or otherwise.

Clark Distilling Co. *v.* Western Maryland R. Co., 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218n, Ann. Cas. 1917B, 845.

**Right to Regulate Other Liquors, Whether Intoxicating or Not, in Connection with Prohibited Liquors.**—The right of the Legislature to reasonably prohibit the manufacture, sale, or other disposition of other liquors, whether intoxicating or not, in connection with the prohibited liquors is well settled.

Southern Pac. Co. *v.* Jensen, 244 U. S. 205, 217, 37 Sup. Ct. 524, 61 L. Ed. 1086, Ann. Cas. 1917E, 900.
Wilson *v.* New, 243 U. S. 332, 346, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938.
Clark Distilling Co. *v.* Western Maryland R. Co., 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218n, Ann. Cas. 1917B, 845.
Purity Extract, etc., Co. *v.* Lynch, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184.
Mugler *v.* Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.
Butterfield *v.* United States, 154 C. C. A. 332, 241 Fed. 556.
Southern Exp. Co. *v.* Whittle, 194 Ala. 406, 423, 69 So. 652, L. R. A. 1916C, 278.
Black *v.* Delaye, 193 Ala. 500, 520, 68 So. 993, L. R. A. 1915E, 640.
Ex parte Woodward, 181 Ala. 97, 106, 61 So. 295.
Marks *v.* State, 159 Ala. 71, 80, 48 So. 864, 133 Am. St. Rep. 20.
Lambie *v.* State, 151 Ala. 86, 91, 44 So. 51.
Dinkins *v.* State, 149 Ala. 49, 43 So. 114.

State *v.* Mattox Cigar, etc., Co. (Ala.), 77 So. 756.
Louisville, etc., R. Co. *v.* State (Ala. App.), 76 So. 505, 512.
Black *v.* Southern Exp. Co. (Ala.), 75 So. 343.
Theatrical Club *v.* State (Ala.), 74 So. 969.
State *v.* O'Connell, 99 Me. 61, 58 Atl. 59.
State *v.* Jenkins, 64 N. H. 375, 10 Atl. 699.
Luther *v.* State, 83 Neb. 455, 120 N. W. 125, 20 L. R. A., N. S., 1146n.
State *v.* York, 74 N. H. 125, 127, 65 Atl. 685, 13 Ann. Cas. 116.
Guilbert *v.* Kaufman, 68 Ohio St. 635, 67 N. E. 1062.
Pennell *v.* State, 141 Wis. 35, 123 N. W. 115.

A state may, in the exercise of its police power, prohibit the manufacture and sale of intoxicating liquor, and to the end of making the prohibition effectual may include in the prohibition nonintoxicating malt liquors.

Purity Extract, etc., Co. *v.* Lynch, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184.
S. C., 100 Miss. 650, 56 So. 316.
State *v.* George, 136 La. 906, 67 So. 953.
Fine *v.* Moran (Fla.), 77 So. 533.
See contra, Elder *v.* State, 162 Ala. 41, 50 So. 370.
See also post, "Powers to Define under Sec. 1, Title II.

"The manufacture and sale of drinks made in imitation of or intended as a substitute for intoxicating drinks as specified in the Act, although not intoxicating themselves, afford a cloak for clandestine manufacture, sale, etc., of intoxicants—the evil which the legislation was designed to prevent. Under such circumstances, the power to prohibit the manufacture, sale, etc., of the beverages will include the power also to prohibit the manufacture and sale of substitutes and imitations."

Purity Extract, etc., Co. *v.* Lynch, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184.
Kunsberg *v.* State, 147 Ga. 591, 95 S. E. 12.
See also, State *v.* George, 136 La. 906, 67 So. 953.
Claunch *v.* State (Tex. Cr. App.), 203 S. W. 981.
State *v.* Labrecque, 78 N. H. 182, 97 Atl. 747.

**Prohibition of Manufacture.**—"There is no difference in constitutional principle between the prohibition of the sale of intoxicating liquor as a beverage and the prohibition of the manufacture in order to stop the sale. The thing aimed at is the traffic in liquor as a beverage. If the people of the state, in order to stop the traffic in the beverage, deem it necessary to stop the manufacture, they have a right to do this as far as any limitations in our Constitution are concerned."

Schmitt *v.* Cook Brewing Co. (Ind.), 120 N. E. 19, 21.
See also, United States *v.* James (D. C.), 256 Fed. 102.

A state law prohibiting manufacture for personal use solely does not violate the Fourteenth Amendment to the Federal Constitution, or the provisions of State Constitutions, declaring that no person shall be deprived of life, liberty, or property without due process of law, and that no person shall be disturbed in his private affairs or his home invaded without authority of law.

State *v.* Fabbri, 98 Wash. 207, 167 Pac. 133.
State *v.* Marastoni, 85 Ore. 37, 165 Pac. 1177.

**Prohibiting Action as Agent in Purchase or Sale.**—A statute prohibiting any person from acting as the agent of another in the purchase or sale of intoxicating liquors, does not abridge any privilege or immunity guaranteed to citizens of the United States by the fourteenth amendment to the federal Constitution.

State *v.* Germain (N. D.), 170 N. W. 121.

**Under Interstate Commerce Clause of Federal Constitution.**—Act March 1, 1895, c. 145, 28 Stat. 693, forbidding the introduction of intoxicating liquor into Indian Territory, as limited to interstate commerce by the Oklahoma Enabling Act, is not unconstitutional, as discriminating between the States in respect of trade and commerce in intoxicating liquors.

De Moss *v.* United States, 162 C. C. A. 259, 250 Fed. 87.

**Effect of Webb-Kenyon Act.**—The Acts 35th Leg. of Texas (Fourth Called Sess.) c. 24, § 3, making it unlawful for any railroad to transport within or import into the state

intoxicants, or for any person to receive the same or to deliver the same, in so far as it interferes with interstate commerce, is made valid by Webb-Kenyon Act (U. S. Comp. St. 845.)

Gulf, etc., R. Co. *v.* State (Tex. Civ. App.), 212 S. W. 854.

For other cases construing Reed Amendment, the Webb-Kenyon Act, and similar Acts of Congress, see post under Sec. 3, where transportation of liquor into or through dry territory is treated.

**Constitutionality of Reed Amendment and Webb-Kenyon Act.**—"Whatever doubt may have existed as to the power of Congress to pass the Reed Amendment has been finally and fully set at rest by the decision of the Supreme Court in the case of Clark Distilling Co. *v.* Western Maryland R. Co., 242 U. S. 311, 325, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218n, Ann. Cas. 1917B, 845, followed by Seaboard Air Line Railway *v.* North Carolina, 245 U. S. 298, 303, 38 Sup. Ct. 96, 62 L. Ed. 299. Though these cases are specific affirmations of the validity of the Webb-Kenyon Law (Act March 1, 1913, c. 90, 37 Stat. 699 [Comp. St. § 8739]), they as certainly establish the validity of the Reed Amendment, because they concern, not merely a specific legislative act, but the principle upon which it rests."

United States *v.* James (D. C.), 256 Fed. 102, 103.

**Conflicting Laws and Constitutional Provisions.**—Congress having exercised its authority in a matter within its control, conflicting state laws must give way.

United States *v.* Hill, 248 U. S. 420, 39 S. Ct. 143.

The provision of Florida Laws 1918 (Sp. Sess.) c. 7736, making it unlawful for any person to have in his possession any intoxicating liquors, except that any person over 21 may possess for his personal use or that of himself and family four quarts of intoxicating liquors and 20 quarts in malt liquors, does not violate section 1, Declaration of Rights, providing that all men have the right of enjoying life, liberty, and property; nor article 19 of state Constitution as

amended (see Laws 1917, vol. 1, pp. 323, 324), forbidding manufacture and sale of intoxicating liquors.

Marasso *v.* Van Pelt (Fla.), 81 So. 529.

There is no such repugnance or doubt as to the meaning of the provisions of Texas Acts 35th Leg. (Fourth Called Sess.) c. 24, relating to transportation and receipt of intoxicating liquors as to render the same void.

Gulf, etc., R. Co. *v.* State (Tex. Civ. App.), 212 S. W. 845.

Acts 35th Leg. (Fourth Called Sess.) c. 24, § 3, making it unlawful for any railroad to transport within or import into the state intoxicants, or for any person to receive the same or to deliver the same, is not in conflict with any existing law.

Gulf, etc., R. Co. *v.* State (Tex. Civ. App.), 212 S. W. 845.

**Right of Cities to Prohibit and Regulate.**—Even though the state has assumed jurisdiction of the subject of intoxicating liquors, this does not impliedly remove the right of cities to prohibit the sale and use of liquors within their limits.

Zamata *v.* Browning (Utah), 170 Pac. 1057.

South Carolina Civ. Code 1912, § 2994, giving city councils authority to make all ordinances necessary for preserving health and good government within the city, authorized an ordinance prohibiting the sale of cider without a certificate of a licensed physician that it is to be used for medicinal purposes.

Dillon *v.* Saleeby (S. C.), 81 S. E. 153.

When authorized by its charter, a municipal corporation may by ordinance duly enacted designate the localities within its corporate limits wherein the sale of intoxicating liquors licensed under the state law may be sold and make it unlawful to sell elsewhere within the bounds of the city.

Terretto *v.* State (Tex. Cr. App.), 215 S. W. 329.

When authorized by its charter, a municipal corporation may by ordinance duly enacted designate the localities with-

in its corporate limits wherein the sale of intoxicating liquors licensed under the state law may be sold and make it unlawful to sell elsewhere within the bounds of the city, and the Constitution does not restrict the power of the Legislature to prescribe a penalty for refusal to observe such city regulations.

Terretto *v.* State (Tex. Cr. App.), 215 S. W. 329.

**Repeal of Statutes and Amendment of Constitutions.**—The Zone Liquor Law, § 3, was not repealed or superseded by Acts 35th Leg. 4th Called Sess. 1918, c. 24, § 3, nor was the latter act repealed or superseded by chapter 31, relating to sales and transportation of intoxicating liquor.

Ex parte Roya (Tex. Cr. App.), 215 S. W. 322.

Any law which might be in conflict with Texas Acts 35th Leg. (Fourth Called Sess.) c. 24, § 3, as to transportation or receipt of intoxicants, would be repealed thereby by implication, notwithstanding other sections of the chapter provide that all other laws prohibiting or regulating sale of intoxicants shall remain in full force and effect.

Gulf, etc., R. Co. *v.* State (Tex. Civ. App.), 212 S. W. 845.

Article 19 of the Florida state Constitution, providing for local option sales of intoxicating liquors, remained in force until January 1, 1919, when it was superseded by the amendment to article 19 forbidding the manufacture, sale, barter, or exchange of alcoholic or intoxicating liquors and beverages in this state; therefore a conviction for a violation in November and December, 1918, of the local option provisions of the statute, was authorized.

Correlis *v.* State (Fla.), 82 So. 601.

**If Liquor Cannot Be Legally Acquired or Procured, It May Not Be Legally Used.**—"It necessarily follows that the very purpose and intent of the act was to preclude the right to use intoxicating liquor within the state except for the specific purposes in the act expressly mentioned and reserved. If liquor can not be legally acquired or procured, it may not be legally used. While the law is somewhat

drastic in some of its provisions—doubtless it was so intended to be—yet in view of the tendency of present day legislative enactments, designed to protect the health, safety, morals and promote the general welfare of organized society, it is not the province of the courts to disregard the purpose and intent of the Legislature so long as the constitutional rights of the individual have not been invaded."

State *v.* Certain Intoxicating Liquors (Utah), 172 Pac. 1050, 1052.

**Title of Act and Mode of Adoption.**—Where an act of the legislature has for its subject "traffic in intoxicating and nonintoxicating liquors," it is not void as being in violation of the constitutional requirements regarding titles to statutes because it contains provisions prohibiting the manufacture, sale, or keeping for sale intoxicating and nonintoxicating liquors, as that term is defined by the act.

Fine *v.* Moran (Fla.), 77 So. 533.

A clause extending the prohibitory provisions of the act to any alcoholic compound or malt or liquors, whether intended for beverage purposes or not, but which can be diluted, and when so diluted may be used as a beverage and will produce intoxication, does not render the act obnoxious to the constitution, which inhibits the passage of any law containing matter different from what is expressed in the title thereof. Nor does that clause render the act violative of the constitutional provision embraced in the paragraph of the constitution referred to, which declares that no law shall pass which refers to more than one subject matter, although the law also contains a provision extending its prohibition to any spirituous, vinous malt, fermented or intoxicating liquors, or any of the prohibited liquors or beverages, which are defined in an act entited: "An act to make clearer and more certain the prohibition laws."

Jackson *v.* State, 148 Ga. 351, 96 S. E. 1001.

The Virginia Prohibition Act, § 39, is not unconstitutional under Const. 1902, § 52 (Code 1904, p. ccxxi), in that the body of the act makes it a crime merely to "transport" liquor, and the title of the act relates to "transporta-

tion for sale," because such regulation is germane to and in furtherance of the "enforcement" of the statute.

Burton *v.* Commonwealth, 122 Va. 847, 94 S. E. 923.
See also, People *v.* Humphrey, 194 Mich. 10, 160 N. W. 445, set out post under Sec. 8.

As to validity of act passed at special session of state legislature, under form of proclamation of Governor calling the session, and its conformity thereto, see Ex parte Fulton (Tex. Cr. App.), 215 S. W. 331.
Ex parte Davis (Tex. Cr. App.), 215 S. W. 341.
Gulf, etc., Co. *v.* State (Tex. Civ. App.), 212 S. W. 845.

**Right to Complain.**—A statute, relating to intoxicating liquors, will not be declared invalid in certain of its sections at the instance of one convicted under another section, and not prejudiced by its enforcement, nor affected by it.

Land *v.* State (Fla.), 81 So. 159.

**Construction—Prohibited Liquors as Subject of Criminal Offense.**—An interstate shipment of whisky had a legal value in Alabama, and contention that defendant cannot be convicted of breaking into freight cars where liquor was being kept or under larceny count will be overruled.

Wiley *v.* State (Ala.), 81 So. 343.

Outlawed whisky may be the subject of grand larceny, where taken from one claiming ownership, although the law would not afford any one damages for its taking or give any one relief looking to its recovery.

State *v.* Donovan (Wash.), 183 Pac. 127.

It is not a defense to a prosecution for having obtained money under the false pretense that defendant had delivered whisky, when in fact the bottles delivered contained only colored water, that the prosecuting witness parted with his money in an endeavor to get defendant to violate the law by selling liquor.

Hicks *v.* State (Ark.), 215 S. W. 685.

Though intoxicating liquor is contraband and without monetary value, a false representation concerning it can be

made the basis of a prosecution for obtaining money through a false pretense.

Hicks *v.* State (Ark.), 215 S. W. 685.

**Prohibited Liquors as Subject of Civil Contract.**—Contract of manufacturer, on selling to a soft drink merchant a new beverage, warranting it to be nonintoxicating, and agreeing to indemnify him against all damages for prosecution for violation of prohibition law by reason of retailing it, being entered into and acted on in good faith by retailer, is not against public policy.

Owens *v.* Henderson Brewing Co. (Ky.), 215 S. W. 90.

Despite statute prohibiting interest of wholesale liquor dealer in a saloon business, such a dealer or brewer may be concerned with a saloon business in a legitimate financial transaction by way of loan, mortgage, and lease; there being no direct or indirect payment of the license fee of the retail saloon business.

Greene *v.* Atwood (Wash.), 180 Pac. 399.

But a contract made outside of the state for the sale of whisky to be resold by the purchaser within the state, contrary to the law, is contrary to the public policy of the state, and will not be enforced, even though it was valid in the state where it was made.

Bluthenthal *v.* Kennedy, 165 N. C. 372, 81 S. E. 337.

And where defendant's intestate, either as agent or as a principal, acting with plaintiff, sold intoxicating liquors supplied by plaintiff in violation of the laws of a state, and collected and received the purchase price therefor, plaintiff could not sue for the balance of the amount so collected, after deducting credits due the intestate, since the test of recovery in such cases is whether there is a legal obligation in favor of the plaintiff separate from the illegal transaction, and requiring no aid from it, and the obligation of the estate could not be separated from the sales by the intestate, the debt resting upon such sales and the account arising therefrom.

Elder Harrison Co. *v.* Jervey, 97 S. C. 185, 81 S. E. 501.

But where part of money loaned by wholesale liquor dealer or brewer to a saloon business is illegally applied in payment of a retal liquor license, the courts will recognize the divisibility of the loan into its legal and illegal parts.

Greene *v.* Atwood (Wash.), 180 Pac. 399.

**Construction of Similar Statutes.**—In the interpretation of prohibition statutes, similar to those of other jurisdictions, they may reasonably be given the construction applied by the courts of such jurisdiction, to such statutes previously enacted.

Brown *v.* State, 17 Ariz. 314, 152 Pac. 578.

**Liberal Construction.**

See post, Sec. 3.

## TITLE I—SECS. 1-7

[NOTE. As to decided cases applicable to this title, see post under Title II, where the corresponding subjects are treated.]

**Constitutionality and Validity of War-Time Prohibition.**—The War-Time Prohibition Act of November 21, 1918, is constitutional.

United States *v.* Minery (D. C.), 259 Fed. 707.
United States *v.* Ranier Brewing Co. (D. C.), 259 Fed. 359.

And the provision of Act Nov. 21, 1918, § 1, prohibiting the manufacture of beer, wine, or other intoxicating malt or vinous liquors for beverage purposes, whether construed to prohibit the manufacture of any beer or wine, or only such as is intoxicating, is constitutional.

Hoffmann Brewing Co. *v.* McElligott (D. C.), 259 Fed. 321.

The statute intended to conserve food, to increase the man power of the nation, and to protect the organization of the army, by prohibiting the sale of beer which has a tendency to intoxicate to such an extent as to interfere with the morals, the physical welfare, or the good order of the community. Whether or not the mere sale of malt beer, even though it have not sufficient alcohol content to fully intoxicate, is of itself detrimental, whether the sale of such liquor (even though it would not fully intoxicate) is disadvantageous from the standpoint of the conservation of food, are things with which the court has nothing to do. That is a question for calm discretion of Congress, and it is evident that Congress intended by the act under consideration to prohibit the sale of such beer as it considered detrimental.

United States *v.* Schmauder (D. C.), 258 Fed. 251.

For Congress has constitutional power to prohibit the manufacture and sale of intoxicating liquors during war.

United States *v.* Baumgartner (D. C.), 259 Fed. 722.

**Act Nov. 21, 1918—Constitutionality—Power to Enact.**—It is evident if Congress, by making a tremendous drain upon the resources of the country for immediate war purposes, should thereby make it necessary to regulate the use of material immediately thereafter, in order to bring matters back to a normal base, the laws by which such restoration would be had can properly be made a part of the military measures which must be adopted in order to carry on the war and are therefore justified under the powers of the United States in waging war, as has been decided in the case of United States *v.* Minery, in this district, in an opinion filed upon this day. 259 Fed. 707.

United States *v.* Schmauder (D. C.), 258 Fed. 251.

**Does Not Infringe Xth Amendment.**—War-Time Prohibition Act Nov. 21, 1918, does not violate the Tenth Amendment to the Federal Constitution, which reserves to the states powers not delegated to Congress.

United States *v.* Minery (D. C.), 259 Fed. 707.

**Not Invalidated by XVIIIth Amendment.**—The Eighteenth Amendment to the federal Constitution, providing for national prohibition in 1920, does not invalidate War-Time Prohibition Act Nov. 21, 1918, upon ground that prohibition legislation is precluded until 1920.

United States *v.* Minery (D. C.), 259 Fed. 707.

**War-Time Prohibition—Duration of Act.**—Act Nov. 21, 1918, prohibiting the manufacture and sale of intoxicating liquors "until the conclusion of the present war," is applicable to a sale on July 8, 1919, since no treaty had then been signed with Austria, and the army had not been entirely demobilized.

United States *v.* Minery (D. C.), 259 Fed. 707.

## TITLE II—SEC. 1

### Definitions.

**Beverages Included under Terms "Liquor" or "Intoxicating Liquor," etc.—Other Definitions—Powers of Agents and Assistants—Filing Records.**

**Alcohol, Brandy, etc.—Spirituous, Vinous, Malt or Fermented Liquor, etc.**

**Prohibition of Intoxicating Beverages.**

**Containing One-Half of 1 Per Cent or More of Alcohol by Volume Fit for Use for Beverage Purposes.**

**Exceptions as to Dealcoholized Wine, or Any Beverage or Liquid with Less Than One-Half of One Per Cent Alcohol, etc.**

SEC. 1. When used in Title II and Title III of this Act (1) the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any 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: *Provided*, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bot-

tles, casks, or containers as the commissioner may by regulation prescribe.

**Person Defined.**

(2) The word "person" shall mean and include natural persons, associations, copartnerships, and corporations.

**Commissioner.**

(3) The word "commissioner" shall mean Commissioner of Internal Revenue.

**Application.**

(4) The term "application" shall mean a formal written request supported by a verified statement of facts showing that the commissioner may grant the request.

**Permit.**

(5) The term "permit" shall mean a formal written authorization by the commissioner setting forth specifically therein the things that are authorized.

**Bond.**

(6) The term "bond" shall mean an obligation authorized or required by or under this Act or any regulation, executed in such form and for such a penal sum as may be required by a court, the commissioner or prescribed by regulation.

**Regulation.**

(7) The term "regulation" shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the

provisions of this Act, and the commissioner is authorized to make such regulations.

**Assistant or Agent of Commissioner.**

Any act authorized to be done by the commissioner may be performed by any assistant or agent designated by him for that purpose. Records required to be filed with the commissioner may be filed with an assistant commissioner or other person designated by the commissioner to recive such records.

**Dictionary Definitions.**—" 'Ardent spirits' and 'spirituous liquors' are terms of general use, and each has a well-defined, well-understood meaning. In Webster's International Dictionary the term 'ardent' is defined as: 'Hot or burning; causing a sensation of burning; fiery, as ardent spirits—that is, distilled liquors.'

"Century Dictionary: Ardent spirits: 'Distilled alcoholic liquors, as brandy, whisky, gin, rum.'

"Standard Dictionary: Ardent spirits: 'Alcoholic distilled liquors.'

"Worcester's Dictionary: Ardent spirits: 'A term applied to liquors obtained by distillation, such as rum, whisky, brandy, and gin.'

"Black's Law Dictionary: Ardent spirits: 'Spirituous or distilled liquors.'

" 'Spirituous liquor means distilled liquor.' 1 Woolen & Thornton on the Law of Intoxicating Liquors, § 7.

"Spirituous: 'Containing much alcohol; distilled, whether pure or compound, as distinguished from fermented; ardent; applied to a liquor for drink.' Century Dictionary.

"Spirituous liquors: 'Any intoxicating liquor produced by distillation or by rectifying, compounding or otherwise treating or using distilled alcoholic fluids in distinction from fermented or brewed intoxicating beverages.' Standard Dictionary.

"Spirituous liquors: 'These are inflammable liquids produced by distillation and forming an article of commerce.' Black's Law Dictionary; Cyclopedic Law Dictionary.

"Spirituous liquor: 'Distilled liquor.' Anderson's Law Dictionary.

"The term 'spirituous liquor' means distilled liquor. Black on Intoxicating Liquors, § 3.

" 'Spirituous liquor is that which is in whole or in part composed of alcohol extracted by distillation; whisky, brandy, and rum being examples.' 15 R. C. L. 249.

"In Sarlls *v.* United States, 152 U. S. 570, 14 Sup. Ct. 720, 38 L. Ed. 556, the Supreme Court of the United States approved the definitions as given by Webster, Worcester, and Century Dictionaries. In United States *v.* Ellis (D. C.), 51 Fed. 808, the court, in speaking of these terms used in a prohibition statute, said: ' "Ardent" and "spirituous" are used indiscriminately as having the same meaning.' "

State *v.* Centennial Brewing Co. (Mont.), 179 Pac. 296, 297.

**Definition and Power to Define.**—In the exercise of the police power the legislature may conclusively define a beverage as intoxicating liquor whenever that course has any reasonable relation to the accomplishment of the dominating purpose of the act.

State *v.* Hemrich, 93 Wash. 439, 161 Pac. 79, L. R. A. 1917B, 962n.

Schmitt *v.* Cook Brewing Co. (Ind.), 120 N. E. 19.

And so the statute may define what are prohibited, and what are not, and designate them by general or special terms.

Marks *v.* State, 159 Ala. 71, 48 So. 864.

**Innocuous Beverages.**—If necessary to avoid subterfuge and fraud, beverages which are in themselves innocuous may be included.

State *v.* Centennial Brewing Co. (Mont.), 179 Pac. 296.

Nor does a provision that "all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this act," contravene either state or federal Constitution.

Thatcher *v.* Reno Brewing Co. (Nev.), 178 Pac. 902.

See also ante, "Constitutionality and Preliminary Considerations."

**Properties Immaterial.**—If it clearly appears that a given article is within the scope of the forbidden enumeration, and is intoxicating, its properties become immaterial.

Marks *v.* State, 159 Ala. 71, 48 So. 864.

**Percentage of Alcohol.**—A statute prohibiting all distilled liquors, rectified spirits, vinous, fermented, brewed, and malt liquors and wines, and any beverage, by whatever name called, containing more than 1 per cent of alcohol by volume at 60 degrees Fahrenheit, includes any fermented liquor, regardless of whether such beverage is in fact intoxicating.

State *v.* Labrecque, 78 N. H. 182, 97 Atl. 747.

**Conclusive Presumption.**—All liquors, specifically mentioned in a statute defining intoxicating liquors are conclusively presumed to be intoxicating liquors, without regard to their actual intoxicating properties.

State *v.* Hemrich, 93 Wash. 439, 161 Pac. 79, L. R. A. 1917B, 962n.

**Ejusdem Generis Rule.**—The rule of *ejusdem generis* has no application to the statutory definition of intoxicating liquors.

State *v.* Hemrich, 93 Wash. 439, 161 Pac. 79, L. R. A. 1917B, 962n.

**Alcoholic Percentage—Construction.** — The phrase, "any other intoxicating drink, mixture or preparation of like nature," which follows the specific enumeration of certain named liquors, is not controlled or qualified by the last clause of said section with reference to beverages containing one-half per cent alcohol being spirituous liquors.

Thatcher *v.* Reno Brewing Co. (Nev.), 178 Pac. 902.

**Enumerated Liquors Not Limited.**—The clause, "ev-

ery other liquor," after specified liquors was not intended to limit or qualify the enumerated liquors.

State *v.* Hemrich, 93 Wash. 439, 161 Pac. 79, L. R. A. 1917B, 962n.

The prohibition of ardent spirits, ale, beer, wine or intoxicating liquor or liquors of whatever kind includes all forms of beer, whether intoxicating or not, since the words "intoxicating liquor or liquors of whatever kind" do not limit the specifically prohibited liquors to intoxicating forms, but those enumerated are absolutely prohibited in any form, and the limitation applies only to liquors not enumerated.

Brown *v.* State, 17 Ariz. 314, 152 Pac. 578.

The phrase, "any other intoxicating drink, mixture or preparation of like nature," which follows the specific enumeration of certain named liquors instead of limiting the class of liquor enumerated, described another merely by their intoxicating quality.

Thatcher *v.* Reno Brewing Co. (Nev.), 178 Pac. 902. See also, United States *v.* Schmauder (D. C.), 258 Fed. 251.

"In People *v.* Strickler, 25 Cal. App. 60, 142 Pac. 1121, the court was called upon to construe a section of the local option law which reads as follows: 'The term "alcoholic liquors" as used in this act shall include spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contain one per cent by volume, or more, of alcohol, and which is not so mixed with other drugs as to prevent its use as a beverage.' The rule of the last antecedent was disregarded, and it was held that the clause, 'which contain one per cent by volume, or more, of alcohol,' modifies the term 'spirituous, vinous and malt liquors,' as well as the terms 'liquor' or 'mixture of liquors.' In State *v.* Hemrich, 93 Wash. 439, 161 Pac. 79, L. R. A. 1917B, 962n, the Washington Supreme Court construed a section of the prohibition law which provides: 'The phrase "intoxicating liquor," wherever used in this Act, shall be held and construed to include whisky, brandy, gin, rum, wine, ale, beer and any spirituous, vinous, fermented or malt liq-

uor, and every other liquor or liquid containing intoxicating properties.' The doctrine of the last antecedent was applied, and it was held that the phrase 'containing intoxicating properties' modifies the terms 'other liquor or liquid,' and does not modify any of the other preceding terms. The strained construction given to the statute considered in Ex parte Hunnicutt, 7 Okl. Cr. 213, 123 Pac. 179, may have been justified under the circumstances, but the reasoning by which the conclusion was reached does not commend it to our judgment. None of the decisions is particularly persuasive here."

State *v.* Centennial Brewing Co. (Mont.), 179 Pac. 296, 299.

**Liquor Synonymous with Liquid.**—The meaning of the word "liquor" is not restricted to alcoholic or intoxicating liquids, but the word is to be given its original meaning as synonymous or inclusive of the word "liquid."

State *v.* Hemrich, 93 Wash. 439, 161 Pac. 79, L. R. A. 1917B, 962n.

**Unspecified Liquor or Liquors—Test of Unspecified Liquors.**—The test to be applied in determining whether or not the sale and keeping for sale of liquors other than those specifically mentioned in the statute is prohibited is this: If the liquor in question be of such a kind that the distinctive character and effect of intoxicating liquor be absent, it is outside the statute; if the distinctive character and effect of intoxicating liquor be present, it is within the statute.

State *v.* Miller, 92 Kan. 994, 142 Pac. 979, L. R. A. 1917F, 238, Ann. Cas. 1916B, 365.

**"Liquor"—"Spirituous Fluid"—"Intoxicating."**—The term "liquor," in its limited sense and in its more common application implies spirituous fluids, whether fermented or distilled, such as brandy, whisky, gin, beer, and wine.

Mullins *v.* Commonwealth, 115 Va. 945, 79 S. E. 324.

" 'Generally the word "liquor" implies intoxicating liquor, and therefore proof that a defendant sold "liquor" is

sufficient to show, in the absence of adverse testimony, that he sold intoxicating liquor.' Carswell *v.* State, 7 Ga. App. 198, 66 S. E. 488; Howard *v.* State, 7 Ga. App. 61, 65 S. E. 1076; Lewis *v.* State, 6 Ga. App. 779, 65 S. E. 842; Tompkins *v.* State, 2 Ga. App. 639, 58 S. E. 1111; Wilburn *v.* State, 8 Ga. App. 28, 68 S. E. 460."

Smith *v.* State, 17 Ga. App. 118, 86 S. E. 283.

**Intoxicating Decoctions.**—The term liquor or liquors includes all kinds of intoxicating decoctions, whether spirituous, vinous, malt, or alcoholic.

Marks *v.* State, 159 Ala. 71, 48 So. 864.

**"Intoxicating Liquor"—What Is and What Is Not —Statutory Signification.**—The words "intoxicating liquors," wherever used in the intoxicating liquor laws, became impressed with the signification given them by that statute.

State *v.* Miller, 92 Kan. 994, 142 Pac. 979, L. R. A. 1917F, 238, Ann. Cas. 1916B, 365.

**"Intoxicant" Defined.**—"Any liquor intended for use as a beverage, or capable of being used, which contains alcohol, either obtained by fermentation or by the additional process of distillation, in such proportion as it will produce intoxication when taken in such quantities as may practically be drunk, is an intoxicant. This has been recognized by the authorities and elementary writers as a proper definition of what is an intoxicant."

Weinberg *v.* State, 81 Tex. Cr. App. 306, 194 S. W. 1116.

Under the law of some states the test is whether the liquor, when taken in reasonable quantities, will intoxicate.

Salvador *v.* State, 79 Tex. Cr. App. 343, 185 S. W. 12.

In order to come under the ban of some state laws, liquor must either contain more than one half of 1 per cent of alcohol, or a sufficient quantity of it in a liquor or compound, capable of being used as a beverage to intoxicate a human being.

Estes *v.* State (Okla. Cr. App.), 166 Pac. 77.

The term "intoxicating liquor," as used in War-Time Prohibition Act Nov. 21, 1918, means any liquor, intended or capable of being used as a beverage, containing a proportion of alcohol which will produce intoxication when the beverage is taken in such quantities as it is practically possible for a man to drink.

United States *v.* Baumgartner (D. C.), 259 Fed. 722.

A law prohibiting the sale of, or keeping for sale, intoxicating liquors, includes intoxicating liquors of every kind and character which are now in use, or which in the future may come into use as a beverage, no matter by what name they may be named or called, and no matter how small a percentage of alcohol they may contain, and no matter what other ingredients may be in them.

McLean *v.* People, — Ala. —, 180 P. 676.

**"Intoxicating Bitters."**—Intoxicating bitters includes those bitters, beverages, or decoctions in which the distinctive character and effect of intoxicating liquors are present, so that it may be used as a beverage notwithstanding the other ingredients it may contain; and if it can be used as a beverage, though the other ingredients are medicinal and predominate, and alcohol is used to preserve these medicinal ingredients and serve as a vehicle therefor, then it may or may not be included, depending on the evidence in each particular case, it being without the province of any court to declare as a matter of law that a particular bitters or beverage is or is not intoxicating, unless the statute or law so declares, or it be one the effect of which every one is presumed to know.

Marks *v.* State, 159 Ala. 71, 48 So. 864.

**Whisky, Porter and Ale.**—Whisky, porter, and ale are taken to be intoxicating liquors.

State *v.* Barr (Vt.), 77 Atl. 914.
State *v.* Killeen (N. H.), 107 Atl. 601.
Coats *v.* State (Tex. Cr. App.), 215 S. W. 856.
Landers *v.* State (Tex. Cr. App.), 210 S. W. 694.

**Jamaica Ginger.**—Jamaica ginger, containing more than 1 per cent of alcohol, is intoxicating liquor.

State *v.* Intoxicating Liquors and Vessels (Me.), 106 Atl. 711.

It is a matter of common knowledge that for years Jamaica ginger, whatever its merits may be, has been used as a substitute for other intoxicants.

State *v.* Intoxicating Liquors and Vessels (Me.), 106 Atl. 711.

Jamaica ginger containing 92 per cent alcohol and kept for sale as a beverage was "intoxicating liquor" within the meaning of Laws 1917, c. 147, § 19, and a prosecution could be had under such section, notwithstanding section 21, relating to Jamaica ginger.

State *v.* Agalos (N. H.), 107 Atl. 314.

**Peach Brandy.**—It may be inferred that a liquor denominated by the seller as peach brandy, and for which payment is received as such, is brandy, and therefore an intoxicating liquor.

Howard *v.* State, 7 Ga. App. 61, 65 S. E. 1076.

**Alcohol.**—It is a matter of common knowledge that alcohol is an intoxicant and an intoxicating liquor.

State *v.* Klein (Ia.), 174 N. W. 481.
McLean *v.* People (Colo.), 180 Pac. 676.
State *v.* Nicolay (Mo. App.), 184 S. W. 1183.

Pure alcohol is without the term "spirituous and intoxicating" liquors.

Marks *v.* State, 159 Ala. 71, 48 So. 864.

And a sale of alcohol as a beverage, however, diluted or disguised, violates a law specifically prohibiting the sale of alcohol.

Feagin *v.* Andalousia, 12 Ala. App. 611, 67 So. 630.

**"Alcoholic or Spirituous."**—"Alcoholic means containing or pertaining to alcohol, which is a volatile organic body, a limpid colorless liquid, hot and pungent to the taste, having a slight, but not offensive, scent. It has but one source, namely, fermentation, and is extracted from its by-products by distillation; its purity and strength depending on the degree of perfection or completeness of distillation. While it is the intoxicating principle of all intoxicating

drinks, within the meaning of ordinary prohibition statutes, it is rarely in its pure state used as a beverage."

Marks *v.* State, 159 Ala. 71, 48 So. 864.

The phrase, "alcoholic or spirituous liquors," necessarily means intoxicating liquors.

Marks *v.* State, 159 Ala. 71, 48 So. 864.

**Near Beer.**—But the expression, "near beer," does not import an intoxicating liquor.

Stoner *v.* State, 5 Ga. App. 716, 63 S. E. 602.
Campbell *v.* Thomasville, 6 Ga. App. 212, 64 S. E. 815.
Abbott *v.* State, 11 Ga. App. 43, 74 S. E. 621.

**"Potability" or Beverage Character.**—"The sale of spirituous, vinous, fermented, or malt liquor, not capable of being used as a beverage, is not prohibited. The word 'beverage' means a drink or liquor for drinking. Century Dictionary. Every one of the terms—'spirituous liquor,' 'vinous liquor,' 'fermented or malt liquor'—has a well-understood meaning. Every one of those liquors is not merely capable of being used as a beverage, but it is in fact a beverage, and it is a contradiction of terms to speak of spirituous, vinous, fermented, or malt liquor, not capable of being used as a beverage."

State *v.* Centennial Brewing Co. (Mont.), 179 Pac. 296, 297.

**Nonpotable Intoxicant.**—Liquor which will not intoxicate by immoderate use because one using it "would become sick long before he becomes intoxicated" is not "intoxicating liquor."

Geer Drug Co. *v.* Atlantic Coast Line R. Co., 104 S. C. 207, 88 S. E. 448, Ann. Cas. 1917C, 908.

**"Still Beer."**—A substance made of corn meal and molasses, designed to be used for distilling whisky, and commonly called "still beer," or "beer," which is alcoholic, and intoxicating when drunk to excess, and in such a physical state that it can be and actually is drunk as a beverage, is a "beverage," as used in a statute making it an offense to dis-

till or manufacture any alcoholic liquor or beverage, any part of which is alcoholic.

Patterson *v.* State (Ga. App.), 100 S. E. 641.

**Beer, and Its Varieties.**—Judicial notice will be taken that "beer" without any qualifying term is a malt liquor containing sufficient alcohol to produce intoxication.

Lyon *v.* City Club, 83 S. C. 509, 65 S. E. 730.

**Mild Beer.**—Though not containing sufficient alcohol to require an internal revenue license for its sale, beer may be intoxicating within the prohibition amendment.

Hall *v.* State, 19 Ariz. 12, 165 Pac. 300.

Under the internal revenue laws and all standards by which Congress could have viewed the matter, beer described in an information as a malt product, commonly known as lager beer, and containing as much as one-half of one per cent of alcohol, is of the class known as intoxicating liquor, and as such its sale is prohibited.

United States *v.* Schmauder (D. C.), 258 Fed. 251.

"Not every liquid called beer is judicially known to be intoxicating. Cripe *v.* State, 4 Ga. App. 832, 62 S. E. 567; Snider *v.* State, 81 Ga. 753, 7 S. E. 613, 12 Am. St. Rep. 350. Some beers are known to be nonintoxicating. In order to show that the sale of a liquid denominated as beer is unlawful and consequently that the keeping of the liquid for sale is likewise unlawful it must be shown that the beer in question comes within one of those classes whose sale is regulated by law. Persimmon, locust, corn, and other brewed liquor may be called by the most innocent name and yet the proof may show that the name is but a disguise, and that the sale of the fluid in question is prohibited by law."

Lumpkin *v.* Atlanta, 9 Ga. App. 470, 71 S. E. 755.

**Under War Prohibition Act.**—Congress extended at the time of passing this law to prohibit lager beer with an amount of alcoholic content sufficient to make it taxable by the revenue department, sufficient to bring it within the general definition of lager beer, as known from past experience, and sufficient to bring the act within the prohibition of the

Selective Service Law, which prohibited the sale of "any intoxicating liquors including wine and beer."

United States *v.* Schmauder (D. C.), 258 Fed. 251.

Act Nov. 21, 1918, providing that no beer, wine, or other intoxicating liquors shall be manufactured or sold during continuance of the war, etc., refers only to intoxicating beer and wine.

United States *v.* Baumgartner (D. C.), 259 Fed. 722.

The War-Time Prohibition Act of November 21, 1918, prevents only the manufacture and sale of beer, wine, etc., which is in fact intoxicating.

Hoffman Brewing Co. *v.* McElligott (C. C. A.), 259 Fed. 525.

The War-Time Prohibition Act of November 21, 1918, preventing the sale of beer, wine, and other intoxicating liquors, etc., refers only to beer and wine which is in fact intoxicating.

United States *v.* Ranier Brewing Co. (D. C.), 259 Fed. 350.

In the provision of Act Nov. 21, 1918, § 1, that "no grains, cereals, fruit or other food product shall be used in the manufacture or production of beer, wine or other intoxicating malt or vinous liquors for beverage purposes," the words "beer" and "wine" are qualified by "intoxicating," and the act does not prohibit the manufacture of beer which is not in fact intoxicating.

Hoffmann Brewing Co. *v.* McElligott (D. C.), 259 Fed. 321.

**Act Nov. 21, 1918.**—"Congress had it in mind to say 'beer or any other product of malt of an intoxicating nature.' The thought was that expressed in the Selective Service Law (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, § 2019a]), which says: 'Any intoxicating liquor, including beer, ale or wine.' But either statement would suggest that Congress classified, and intended to classify, beer as intoxicating, and merely made sure that it was covered by the law in case dispute arose. The law included beer, and showed that Congress understood it to be intoxicating."

United States *v.* Schmauder (D. C.), 258 Fed. 251.

**Beer.**—It is apparent that the intent of the Congress was to prohibit the sale of those malt products which were commonly known as beer, which were also commonly supposed to be intoxicating, which had always been classified as intoxicating liquor, and which because of their alcoholic content had some effect upon the production and man power of the nation, while at the same time using in their manufacture some of the food products of the nation, which were needed for the purposes of the war and for the purposes of restoring conditions at the termination of hostilities, so far as Congress had power to regulate conditions after the war as a part of its military operation and conduct.

United States *v.* Schmauder (D. C.), 258 Fed. 251.

That the Treasury Department should have interpreted the act as only applying to what it considers intoxicating beer is persuasive and entitled to great weight.

United States *v.* Cerecedo Hermanos Y. Compania, 209 U. S. 337, 339, 28 Sup. Ct. 532, 52 L. Ed. 821.

Komada & Co. *v.* United States, 215 U. S. 392, 396, 30 Sup. Ct. 136, 54 L. Ed. 249.

Adams Exp. Co. *v.* New York, 232 U. S. 14, 30, 34 Sup. Ct. 203, 58 L. Ed. 483.

Hoffmann Brewing Co. *v.* McElligott (D. C.), 259 Fed. 321.

**Mixtures.**—Mixtures of intoxicating liquors retaining their alcoholic qualities, which will intoxicate and may be used as a beverage and become a substitute for the ordinary intoxicating drinks are intoxicating liquors.

Roberts *v.* State (Ga. App.), 60 S. E. 1082.

"The fact that ardent spirits are mixed with other ingredients, and, as thus compounded, labeled Jamaica ginger and sometimes used for medicinal purposes, does not change the situation, for as we said in Brown *v.* State, 17 Ariz. 314, 152 Pac. 578: 'Of course, the name by which it was called cannot affect its kind or quality. It is the stuff of which it is made, and not its name, that gives it place among the prohibited liquors named in the Constitution.'"

Cooper *v.* State, 19 Ariz. 486, 172 Pac. 276.

**Substitutes.**—A beverage containing an enzyme, which is an unorganized ferment, and containing either maltose or glucose or a substitute therefor, is prohibited as a device or substitute.

State *v.* Mattox Cigar, etc., Co. (Ala.), 77 So. 755.

**Beer Substitutes.**—It is the process and material, and not the name which classifies the product; and so a liquor made by the usual process of making beer, is beer, regardless of its name, although fermentation is arrested to reduce the percentage of alcohol and it is nonintoxicating.

Brown *v.* State, 17 Ariz. 314, 152 Pac. 578.

**Beer Characteristics.**—A liquor that foams like beer, smells, looks, and tastes like it, and is put up in bottles like it and has a name suggesting it, is a "substitute or device" under a statute prohibiting any device or substitute for any intoxicating liquor.

Dees *v.* State (Ala. App.), 75 So. 645.

**Near Beer.**—"Near Beer" is a beverage intended as a substitute for beer, and is a malt liquor.

Howard *v.* Acme Brewing Co., 143 Ga. 1, 83 S. E. 1096, L. R. A. 1917A, 91.

**Whisky Defined.**—Whisky is alcohol, diluted with water and mixed with other elements or ingredients.

Marks *v.* State, 159 Ala. 71, 48 So. 864.

**"Cider" Defined.**—The word "cider" includes the pressed juice of apples whether fermented or unfermented. The terms "sweet cider" and "hard cider" are in popular use to distinguish between the juice of the apple before and after fermentation. "Hard cider" is fermented cider.

People *v.* Emmons, 178 Mich. 126, 144 N. W. 479, Ann. Cas. 1915D, 425.

**"Vinous Liquor" Defined.**—Vinous liquor means liquor made from the juice of grapes, and it may also include

wines made from fruits or berries by process of fermentation, by addition of sugar and alcohol.

Marks *v.* State, 159 Ala. 71, 48 So. 864.

State *v.* Coverdale, 1 Boyce's (24 Del.) 555, 77 Atl. 754.

**Judicial Notice of Percentage of Alcohol.**—In a prosecution for the sale of wine under a statute which defines alcoholic liquors as including vinous liquors which contain more than 1 per cent of alcohol, and which are not so mixed with other products as to prevent their use as a beverage, the court will take judicial notice that wine is a drinkable vinous liquor containing more than 1 per cent of alcohol.

People *v.* Mueller, 168 Cal. 526, 143 Pac. 750.

**Spirituous Liquor.**—Spirituous liquor is that which is in whole or in part composed of alcohol, extracted by distillation, such as whisky, brandy, or rum.

Marks *v.* State, 159 Ala. 71, 48 So. 864.

**Intoxicating Distinguished from Spirituous Liquor.**—Intoxicating liquors are any liquors intended for use as a beverage, or capable of being so used, which contain alcohol, regardless of how obtained, in such per cent that they will produce intoxication when imbibed in such quantities as may practically be drunk; but the term, however, is not synonymous with spirituous liquors, since, while all spirituous liquors are intoxicating, all intoxicating liquors are not spirituous.

Marks *v.* State, 159 Ala. 71, 48 So. 864.

**Whisky.**—Any and all kinds of whisky are included in the terms spirituous and intoxicating liquors.

Donaldson *v.* State, 3 Ga. App. 451, 60 S. E. 115.

Shaneyfelt *v.* State, 8 Ala. App. 370, 62 So. 331.

**Malt Liquor Defined.**—"Malt liquor, or beer, as is commonly known, is a brewed liquor made of grain, especially barley, flavored with hops, and is a liquor which has undergone fermentation, and contains alcohol. 5 Cyc. 678."

State *v.* Lynch, 5 Boyce's (28 Del.) 569, 96 Atl. 32.

The words "malt liquor," in the law are construed to mean a fermented or alcoholic liquor and not to include a liquor containing malt, but neither fermented nor containing alcohol.

State *v.* Hemrich, 93 Wash. 439, 161 Pac. 79, L. R. A. 1917B, 962n.

Malt liquors include nonintoxicating, as well as intoxicating liquors.

Commonwealth *v.* Goodwin, 109 Va. 828, 64 S. E. 54.
Bradley *v.* State, 3 Ala. App. 212, 58 So. 95.
State *v.* Hemrich, 93 Wash. 439, 161 Pac. 79, L. R. A. 1917B, 962n.

A beverage containing 5.73 per cent malt is a malt liquor though it contains no alcohol, preservatives, or saccharine, and was nonintoxicating.

Purity Extract, etc., Co. *v.* Lynch, 100 Miss. 650, 56 So. 316.

The phrase "malt liquors and liquor or liquid * * * which contains as much as two per centum alcohol," includes malt liquor containing less than two per centum of alcohol, the words "malt liquor" meaning any malt beverage, the percentage of alcohol being immaterial.

State *v.* Centennial Brewing Co. (Mont.), 179 Pac. 296.

But under a statute providing that the term alcoholic liquors shall include spirituous, vinous, and malt liquors and any other liquor which shall contain 1 per cent or more of alcohol, the sale of malt beverages which do not contain 1 per cent of alcohol is not prohibited.

People *v.* Strickler, 25 Cal. App. 60, 142 Pac. 1121.

Nonintoxicating malt liquor is a fermented malt liquor containing alcohol in quantities insufficient to produce intoxication when used as a beverage.

Claunch *v.* State (Tex. Cr. App.), 203 S. W. 891.

**Process.**—Malt liquors are the product of a process by which grain is steeped in water to the point of germination, the starch being thus converted into saccharine matter, which is kilm dried then mixed with hops, and by a fur-

ther process of brewing made into a beverage; porter, ale, beer, etc., being embraced within the expression.

Marks *v.* State, 159 Ala. 71, 48 So. 864.

**Potentially Alcoholic.**—A malt beverage of such composition that it will generate alcohol of itself, under certain conditions, is potentially a malt liquor.

State *v.* Hemrich, 93 Wash. 439, 161 Pac. 79, L. R. A. 1917B, 962n.

## Acts Prohibited.

**"Manufacture" — "Sell" — "Barter" — "Transport" — "Import" — "Export" — "Deliver" — "Furnish" — "Possess" — Liberal Construction—General Exceptions—Liquor for Nonbeverage Purposes and Wine for Sacramental Purposes—Permits—Spirits in Bond —Warehouse Receipts—Tax Liability.**

SEC. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: *Provided*, That nothing in this Act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts.

**Liberal Construction, Reason and Spirit.**

The prohibition laws must be liberally construed to accomplish the purposes of their enactment, which is to suppress the evils of intemperance and secure obedience to, and the enforcement of, the laws of the state for the suppres-

sion of illegal manufacture of and traffic in prohibited liquors, and to prevent evasions and subterfuges by which the law may be violated.

Carson *v.* State, 3 Ala. App. 206, 58 So. 88.
State *v.* Philips, 109 Miss. 22, 67 So. 651.

The end sought for is the prevention or at least the diminution of the drinking of intoxicating liquors by the people of the state. The legislation upon the subject, including the statute in question, should be construed to further that end, so far as the language, without bending either way, fairly allows.

State *v.* Bass Pub. Co., 104 Me. 288, 71 Atl. 894, 20 L. R. A., N. S., 495.
State *v.* Jones-Hansen-Cadillac Co. (Neb.), 172 N. W. 36.

As said in one case: "But, as we have attempted to show in this opinion, we are perfectly clear that the Legislature in enacting the prohibition statute was aiming to prevent the evil of intemperance caused by the use of intoxicating liquors as a beverage. To accomplish this beneficent purpose, the law should receive a reasonable construction, equally removed on the one hand from a harsh literal interpretation which would render it unpopular and difficult of enforcement, and, on the other hand, from a latitude that would tend to fritter away its beneficial purpose and cause it to become a mere *brutum fulmen*."

Roberts *v.* State, 4 Ga. App. 207, 60 S. E. 1082.

And in another: "Incidentally it may be said in this connection, that while the statute, of which this section is a part, prescribes a penalty for its violation, and that penal statutes are, as a general rule, strictly construed, it has been held here and elsewhere that laws in regard to the sale of intoxicating liquors ought to be so construed as to carry out the true purpose of their enactment. State *v.* Walker, 221 Mo. 511, 120 S. W. 1198, affirming 129 Mo. App. 371, 108 S. E. 615. And in accomplishing this purpose they should be liberally construed. Seattle *v.* Foster, 47 Wash. 172, 91 Pac. 642; Cox *v.* Burnham, 120 Ia. 43, 94 N. W. 265; People *v.* Craig, 128 App. Div. 908, 112 N. Y. Supp. 1142. Probably the rule in regard to the construction of

this case of statute is best stated in a New York case (Mead *v.* Stratton, 87 N. Y. 493, 41 Am. Rep. 386) in which it is said: "While a statute of this character should not be enlarged, it should be interpreted, where the language is clear and explicit, according to its true intent and meaning, having in view the evil to be remedied and the object to be attained."

State *v.* Missouri Athletic Club (Mo.), 170 S. W. 904, 905.

**Statutory Signification.**—The sentence, "and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this act," cannot be adjudged out of the act, or restricted or enlarged in its plain signification, unless, after exhausting every legitimate method of construction, it is found irreconcilable with the scope and purpose of the act or void for constitutional reasons.

State *v.* Reno Brewing Co. (Neb.), 178 Pac. 902.

An act making it unlawful for any railroad to transport within or import into the state intoxicants, or for any person to receive the same or to deliver the same, is not indefinitely framed or of such doubtful construction that it cannot be understood from the language in which it is expressed.

Gulf, etc., R. Co. *v.* State (Tex. Civ. App.), 212 S. W. 845.

**Public Policy.**—In determining the public policy of a state with reference to guilt in question of the sale with purchase of intoxicating liquor the court must accept the statute as fixing the public policy, and have no concern with the reasons of the lawmakers in failing to condemn the buyer.

Anderson *v.* Fant (S. C.), 79 S. E. 640, 641.

**When Strictly Construed.**—But it has been held that the Reed-Jones Amendment, § 5 (U. S. Comp. St. 1918, § 8739a), declaring that whoever shall cause intoxicants to be transported in interstate commerce except for certain purposes into any state whose laws prohibit the sale and manufacture of such liquors shall be punished, is highly penal in its nature, therefore to be strictly construed, so that a case

to come within its purview must come both within the spirit and letter.

Sickel *v.* Commonwealth (Va.), 99 S. E. 678.

And an act prohibiting the transportation of intoxicating liquor for another, is a criminal statute, and must be strictly construed, so that all persons must be excluded from its operation who are not expressly included within its provisions.

Edwards *v.* State (Ark.), 213 S. W. 11.

**Permit.**—In a statute making it unlawful to sell or permit to be sold without a license certain specified liquors, the word "permit" must be construed as meaning "assent," in view of the strict construction given criminal statutes.

State *v.* Waxman (N. G. Sup.), 107 Atl. 150.

**Prospective Operation of Statute.**—In the view of the North Carolina Revisal, 1905, §§ 2832, 5455, 5456, defendant who sold spirituous liquors in a county December 20, 1918, could be convicted of the offense as a misdemeanor under the act previous to Public Local Laws 1919, c. 2, ratified January 23, 1919, making the retailing of spirituous liquors in the county a felony, made prospective only in its operation by its provision that it should take effect from its ratification, more particularly in view of the intention of the Legislature as shown by the title of the act.

State *v.* Mull (N. C.), 101 S. E. 89.

**Manufacture.**

**Manufacture "or" Sale—Conjunctive.**—"As will be noted by reference to the Reed Amendment, it is applicable to any state the laws of which prohibit 'the manufacture or sale therein of intoxicating liquors for beverage purposes.' Thus it is sufficient if either the manufacture or the sale is prohibited. Attention is called to a line of decisions in which the disjunctive 'or' is sometimes construed as 'and,' but such a construction is not applicable in this case. Congress had the authority to prohibit the shipment of intoxicating liquors into states which prohibit the manufacture of liquors, or which prohibit the sale of liquors,

either one or the other, or both, and there is no good reason to conclude that Congress did not intend exactly what it said."

United States *v.* Collins (D. C.), 254 Fed. Rep. 869, 870.

**Manufacture.**—"Manufacture," as used in the statute, means to make, irrespective of quantity produced or use to which it is to be put.

State *v.* Marastoni (Ore.), 165 Pac. 1177.

The word "manufacture" means the process of making by art, or reducing materials into form fit for use, by hand or machinery.

State *v.* Raven, 91 S. C. 265, 74 S. E. 500.

One who converts raw material out of which alcoholic liquors can be made into alcohol is guilty of "manufacturing" alcoholic liquors.

Patterson *v.* State (Ark.), 215 S. W. 629.

**Attempt to Manufacture.**—Under the Alabama Prohibition Law of 1915 a mere ineffectual attempt to manufacture whisky was not an offense.

Cochran *v.* State (Ala. App.), 82 So. 560.

**For Personal Use Only.**—Under a law providing that it shall be unlawful for any person to manufacture, sell, barter, exchange, give away, furnish, or otherwise dispose of any intoxicating liquors, or to keep any intoxicating liquor, with intent to sell, barter, exchange, give away, etc., one who manufactures intoxicating liquor solely for his own personal use, and without intent to sell, is guilty, since the words "intent to sell," in the statute refer only to that which immediately precedes, to wit, "keep any intoxicating liquor."

State *v.* Fabbri, 98 Wash. 207, 167 Pac. 133.

**Distillation.**—To run beer or singlings composed of corn, meal, sugar or molasses, and water through the process of distillation once is a violation of the manufacturing provision of the statute.

Lowery *v.* State, 135 Ark. 159, 203 S. W. 838.

**Aiding and Abetting Manufacture.**—Under North Carolina Revisal 1905, § 3269, providing that on trial of any indictment the prisoner may be convicted of the crime charged or of a less degree of the same crime, defendant could be convicted of a violation of Pub. Laws 1917, c. 157, prohibiting the manufacture of liquor, whether he was a principal in the first degree or in the second degree as an aider and abetter, the latter being but a lower grade of the principal offense.

State *v.* Horner, 174 N. C. 788, 94 S. E. 291.

One who fired a gun in the air when he saw an officer approaching a blockade distillery to aid and abet the distillers and to enable them to escape was an accessory to the distillers and was equally guilty with the principals.

State *v.* Killian (N. C.), 101 S. E. 109.

**Participating in Manufacture.**—Where defendant not only permitted the illegal business of manufacturing liquor to be done in his house, but furnished the still and the place for using it, he was a participant in the crime of manufacturing liquor.

State *v.* Jones, 174 N. C. 709, 95 S. E. 576.

One who is present at a distillery when whisky is being manufactured and personally assists in the manufacture of the same is guilty of manufacturing whisky, and it is immaterial whether or not he owns the distillery, and whether or not he is hired to work there.

Thomas *v.* State (Ga. App.), 100 S. E. 760.

But to constitute a violation of the law prohibiting the manufacture of liquor, it is not necessary that the process of manufacturing should be complete, and hence a person letting the water out of a still and scraping the still is engaged in the manufacture of liquor and is guilty of a violation.

State *v.* Raven, 91 S. C. 265, 74 S. E. 500.

"In the light of the rule that in misdemeanors all who aid or abet are principals, one who, at a place where a still is being unlawfully operated, participates in any act necessary or usual in the manufacture of whisky, such as stir-

ring the meal, keeping up the fire, or carrying water to be used in mixing the meal, is so connected with the manufacture prohibited by law as to authorize his conviction upon an indictment charging him with manufacturing liquor, when it appears that any act done by him was necessarily a contribution to the success of the unlawful undertaking."

White *v.* State, 18 Ga. App. 214, 89 S. E. 175.

Or participates by such acts as helping barrel the liquor and leveling the still worm when it is about to get out of proper adjustment.

Strickland *v.* State, 9 Ga. App. 201, 70 S. E. 990.

But if defendant went to a still where other persons had manufactured liquor or had been frustrated in so doing, merely to haul away the remnants and without intention to take part in the manufacture of liquor, and hauled away beer as an act disconnected with the manufacture of liquor, he did not violate a law prohibiting the manufacture of liquor.

State *v.* Horner, 174 N. C. 788, 94 S. E. 291.

**Wine Making.**—Extracting the juice of grapes and allowing it to ferment, and thereby letting it become intoxicating liquor, is "manufacturing" intoxicating liquor.

State *v.* Fabbri, 98 Wash. 207, 167 Pac. 133.

One who presses juice from grapes, puts it in a vat and permits it to ferment by natural process, with intent to use part of it in the state, manufactures wine in violation of law.

State *v.* Marastoni (Ore.), 165 Pac. 1177.

See also post, under Sec. 19.

**Sale.**

**What Constitutes.**—"Where one person delivers to another certain intoxicating liquors in exchange and consideration for a sum of money then and there paid, the transaction constitutes a sale of intoxicating liquors, and it is immaterial whether the purchaser subsequently delivers a portion of such liquors to other persons who had theretofore contributed to a purse with which such liquors were

purchased, where it appears that the person making such a sale was ignorant of the fact that such liquors were to be subsequently delivered to parties other than the one producing and paying the money."

Darneal *v.* State (Okla. Cr. App.), 171 Pac. 737.
See Deal *v.* State, 14 Ga. App. 121, 80 S. E. 537, 541.

A "sale" is a contract for the transfer of property from one person to another for a valuable consideration, and to constitute a sale of whisky there must be the assent of two parties.

Scroggins *v.* United States (C. C. A.), 255 Fed. 825.

Where a witness went to defendant, and paid cash for a barrel of wine, which was delivered to the witness' place of business on the same day, the transaction was a sale, and not a contract for the sale of the liquor.

D'Amico *v.* State (Del.), 102 Atl. 78.

**"Delivery."**—If defendant told the alleged purchaser where the liquor might be found, and he found it at such a place and took possession, there was a sufficient delivery to constitute the transaction a sale.

State *v.* Sullivan, 97 Wash. 639, 166 Pac. 1123.

Where accused took money from another undertaking to procure whisky for him, and gave the money to a third person who advised accused he put some whisky under a certain box, of which accused informed the purchaser, this constituted a "delivery" of the whisky by accused to the purchaser; the whisky placed under the box being under accused's exclusive control until surrendered to the purchaser.

State *v.* Elmore (Mo. App.), 189 S. W. 612.

**Place of Delivery.**—A sale of intoxicating liquor occurs at the place of delivery, where the seller actually parts with the property.

Blackburn *v.* State, 79 Tex. Cr. App. 446, 185 S. W. 581.

Where the seller of intoxicating liquors delivers them in person or by his agent to the purchaser, without the inter-

vention of a common carrier, the place of delivery is the place of sale.

Lochinar *v.* State, 111 Md. 660, 76 Atl. 586, 19 Ann. Cas. 579.

**Ownership of Liquor Sold Immaterial.**—"The state's witness approached the defendant and told him that he wanted a quart of liquor. The defendant replied that he had none for sale, but that a third person had left a quart in his (defendant's) house for which he (the third person) desired a named amount of money. The witness paid the money to the defendant, and went and got the liquor from the place designated. Held: (1) The case does not rest on circumstantial evidence alone. (2) Under the doctrine that, in misdemeanors, all who participate are principals, it is immaterial whether the liquor belonged to the defendant or not."

Loeb *v.* State, 6 Ga. App. 23, 64 S. E. 338.
Roberts *v.* State, 8 Ga. App. 476, 69 S. E. 585.
Scott *v.* State, 3 Ala. App. 142, 57 So. 413.

Under a statute prohibiting any person from selling spiritous liquor in any quantity, a servant or agent may be guilty of unlawfully selling liquor, the property of his principal, though the agent have no property in the liquor so sold.

State *v.* Gross, 76 N. H. 304, 82 Atl. 533.
Lochinar *v.* State, 111 Md. 660, 76 Atl. 586, 19 Ann. Cas. 579.

Defendant who at the request of one who had ordered whisky made affidavit that it was his and was not intended for any illegal purpose, paying the notary with money furnished by the party ordering the whisky, took the affidavit to the express office, signed for and received the liquor and delivered it to the party who had ordered it, was guilty of a sale.

Coleman *v.* State, 74 Tex. Cr. App. 36, 166 S. W. 164.

Where beer is illegally sold, it is immaterial as to who is the proprietor of place of sale, or that the person making sale is not interested therein.

Files *v.* State (Okla. Cr. App.), 182 Pac. 911.

**Place of Sale.**—The sale of liquor is made at the place where the minds of the parties meet and where the purposes of each party become understood.

Huddleston *v.* Commonwealth, 171 Ky. 310, 188 S. W. 398.

Where accused, owning whisky which was either in the state or in a sister state, made a contract of sale, received the price, and through an express company delivered the whisky in the state, there was an illegal sale in the state.

State *v.* Cardwell, 166 N. C. 309, 81 S. E. 628.

Where a seller in one state, pursuant to a written order from a buyer in another shipped the latter two carloads of beer, the sale took place before arrival of the beer at its destination and its delivery to buyer.

Monumental Brewing Co. *v.* Whitlock (S. C.), 97 S. E. 56.

Where a brewing company located in Illinois gave to the bankrupt the exclusive right to sell its beer at wholesale, the same to be delivered f. o. b. at Omaha, Neb., the sales must be deemed to have occurred in Illinois, where the brewing company was licensed, so the company was entitled to have allowed its claim against the bankrupt, based on sales made under the contract, though it was not licensed in Nebraska to sell intoxicating liquors.

Belden & Co. *v.* Leisy Brewing Co., 161 C. C. A. 420, 249 Fed. 462.

One who ordered whisky from a liquor house in a sister state at the request of a third person and solely for his accommodation was not guilty of illegally selling liquor in the county of delivery.

State *v.* Cardwell, 166 N. C. 309, 81 S. E. 628.

**Shams to Evade Law.**—Where the ordering of the liquor by defendant from a firm outside of the state, and a shipment by it to the purchasers in local option territory were shams, defendant was guilty of selling.

State *v.* Jamison (Mo. App.), 199 S. W. 713.

**Contributors to Pool.**—Where accused and a third person contributed to a pool to buy whisky, and accused took the money and brought a bottle of whisky, which he and the third person consumed, he was guilty of selling liquor.

Horton *v.* State, 105 Miss. 333, 62 So. 360.

But an accused who ordered a keg of beer, to be drunk by a number of persons, including himself, the expense being prorated between them, was not guilty of an unlawful sale of intoxicants; it appearing all the money collected was expended in the purchase of the beer and payment for icing and transportation.

Dantzler *v.* State, 104 Miss. 233, 61 So. 305.

**Sales with Meals.**—A boarding house keeper, who as a part of the dinner, serves beer or wine to his boarders who pay a specified sum per day for board, is guilty of selling liquor.

Skermetta *v.* State, 107 Miss. 429, 65 So. 502, 52 L. R. A., N. S., 722n.

**Purchaser Helping Himself.**—Where an accused told a person desiring whisky that he had some in his trunk and the purchaser paid him money and went to accused's home, where another member of accused's family showed him the trunk containing the whisky from which he took it, the accused is guilty of a sale.

Whitten *v.* State, 75 Tex. Cr. App. 225, 170 S. W. 718.

**Devices Representing Money.**—Where a person purchases from one person ticket or other such device to be punched or exchanged for intoxicating liquors, and another person, having charge of such liquors recognizes the purchasing value of such ticket and exchanges liquors therefor by taking up the ticket or punching it, the transaction is a sale, and both the person selling the ticket and the person dispensing the liquors are equally guilty.

State *v.* Zehnder, 182 Mo. App. 161, 168 S. W. 661.

**Sale by Coupons.**—Where a number of persons each contribute money to an agent, who purchases a stock of intoxicating liquors and thereafter dispenses, upon the or-

der of one of such persons a quantity of the liquor in exchange for a book of coupons which had been purchased, either by such person or by the person to whom the liquor was delivered, the transaction is a sale in violation of the prohibition law, notwithstanding the persons for whose benefit the liquor was purchased composed a *bona fide* club, organized for social and intellectual welfare, and the use of the liquor was only an incident to the main purpose of the club and although no profit is made on the sale. And this is true whether the persons have become incorporated as a social club or whether they constitute a voluntary association of persons for mutual pleasure and benefit.

Deal *v.* State, 14 Ga. App. 121, 80 S. E. 537.

**Sale on Credit.**—The fact that a sale of liquor was void because on credit, does not exempt the seller from criminal liability where sale was illegal.

State *v.* Yocum (Mo. App.), 205 S. W. 232.

"A sale on credit is a complete sale. Therefore a sale of whisky, whether cash or on credit or whether subsequently paid for or not, constitutes a violation of law."

Lupo *v.* State, 118 Ga. 759, 45 S. E. 602.
Cook *v.* State, 124 Ga. 653, 53 S. E. 104.
Finch *v.* State, 6 Ga. App. 338, 64 S. E. 1007.

**Single Sale as "Engaging in Business."**—A statute providing that "retail dealers of * * * intoxicating liquors * * * shall be * * * deemed to include all persons who sell any such liquors by the drink or by the bottle," and that "each violation * * * shall be construed to constitute a separate and complete offense," was intended to make a single sale constitute "engaging in business."

State *v.* Hays, 38 S. D. 546, 162 N. W. 311.

**"Bootlegger" Defined.**—In prohibition territory a "bootlegger" means a seller of whisky.

Medlock *v.* State, 79 Tex. Cr. App. 322, 185 S. W. 566.

"Under section 10144, Complied Laws of 1913 (North Dakota), which provides that 'the crime of bootlegging * * * is committed by any person who sells * * *

intoxicating liquors * * * in the buildings of any person, * * * without the permission of the owner, or of the person entitled to the possession of such * * * buildings,' no such ownership or right of possession exists in one who merely has an agreement with a livery stable keeper that he may keep a horse in a barn which may be rented out, and, in lieu of charging for the stabling and hay, the livery stable owner may keep one-half of the proceeds of such renting, the owner of such horse being held to be a licensee merely."

State *v.* Stanley, 38 N. D. 311, 164 N. W. 702.

**"Blind Tiger" Construed.**—"A blind tiger is a place where intoxicants are sold on the sly and contrary to the law." Standard Dictionary Words and Phrases.

Ruston *v.* Fountain, 118 La. 53, 42 So. 644.
Shreveport *v.* Maroun, 134 La. 490, 64 So. 388.

**"Barroom" Construed.**—Under a law forbidding the sale of intoxicating liquors in less quantities than one-half pint and the consumption of such liquors on premises where sold, a barroom is such place, and the operation of barrooms is prohibited.

Christopher *v.* Charles Blum Co. (Fla.), 82 So. 765.

**Sale to "Intoxicated" Person.**—The word "intoxicated" in an indictment charging a violation, a law, providing that no person shall knowingly sell intoxicating liquor to any intoxicated person, means a materially changed condition produced by the immoderate or excessive use of intoxicants, as contrasted with normal condition and conduct

O'Donnell *v.* Commonwealth, 108 Va. 882, 62 S. E. 373.

**Liability for Sale by Agent.**—Where intoxicants belonging to the master are sold illegally by the servant with the master's knowledge or consent, the master is liable as if he made the sale himself.

Rash *v.* State, 13 Ala. App. 262, 69 So. 239.
Commonwealth *v.* Stone (Ky.), 176 S. W. 1138.

**Clerk.**—Where a clerk, acting as agent for accused, sells spirituous liquor with the authority of or consent or under

the direction of the accused, his act is the act of the accused, and the accused is as criminally liable as though he himself made the sale.

State *v.* Hastings, 2 Boyce (Del.) 482, 81 Atl. 403.

**Express or Implied Authority.**—The proprietor of a soft drink place was not liable for the unlawful sale of intoxicating liquors by his employee, although committed in his place of business, unless such unlawful act was directed or knowingly assented to, acquiesced in, or permitted by the employer.

Elliott *v.* State, 19 Ariz. 1, 164 Pac. 1179.

"The fact alone that appellant was engaged in selling beer at wholesale from the stock there stored is not enough to support a finding that he had possession of the stock, or that he had the control, management, or supervision of the same, or that he was keeping or operating a place where intoxicating liquor was being sold, bartered, or given away in violation of law. [4] It is clear that, unless appellant occupied the position of owner or manager of the business, or one having authority to control the doings in and about the place, he cannot be held amenable for another's acts, although he may have known of the illegal sales."

Boos *v.* State, 181 Ind. 562, 105 N. E. 117.
Walters *v.* State, 174 Ind. 545, 92 N. E. 537.
Gable *v.* State (Ind.), 121 N. E. 113.

To "permit the unlawful use of intoxicating liquor" by the proprietor of a business implies his knowledge and consent and acquiescence.

Elliott *v.* State, 19 Ariz. 1, 164 Pac. 1179.

**Scope of Authority.**—Where the attempt is made to convict a person and to hold him criminally responsible for the acts of his employee, it must be clearly shown that such act was reasonably within the scope of the agent's employment, or was an act done within the course of the principal's business. One employed to do the ordinary work in and around a feed and wagon yard is not ordinarily employed, nor is it within the scope of the employer's business, to sell whisky in such yard, and the employer of such per-

son would not be criminally responsible for the acts of such employee in selling whisky in said yard, unless he was then engaged in such unlawful business at that place, or had hired such employee to sell whisky in addition to his general duties as helper in the feed and wagon yard.

Simpson *v.* State (Okla. Cr. App.), 173 Pac. 529.

**Liability for Sale to Agent.**—If one desiring intoxicating liquor gave money to another, who gave it to defendant, and defendant bought liquor, and gave it to person who furnished money, it was sale by defendant within contemplation of local option law.

Lopez *v.* State (Tex. Cr. App.), 208 S. W. 167.

**Presumption of Agency.**—Agency may be presumed from the conduct of the parties, and may be implied from a single transaction, and need not be proved as an independent fact, but may be inferred from a variety of facts.

State *v.* Legendre, 89 Vt. 526, 96 Atl. 9.

And the authority of an agent may be by parol and collected from the circumstances.

State *v.* Legendre, 89 Vt. 526, 96 Atl. 9.

**Agency a Subterfuge.**—Evidence that defendant told a witness that he had no whisky, but pointed out a negro from whom he thought it could be obtained, and that witness gave defendant money to obtain whisky from negro, and defendant returned, told witness that whisky could be found in a certain place where witness found it, authorized an inference that defense of agency for purchaser was a subterfuge and justified conviction of selling intoxicating liquors.

Bragg *v.* State (Ga. App.), 99 S. E. 310.

**Purchase for Resale at Profit, Not as Agent.**—Where accused asked the witness whether he desired whisky, and, being answered in the affirmative, informed the witness that he would charge him a quarter a quart more than it cost in another town, and being given the money shortly returned, saying that he had procured the whisky from a third person, accused was not the agent of the witness, for, had he been an agent, he would not have been entitled to make the

profits, and, it appearing that he bought the whisky at one price and resold it at another, the sale took place in the county where it was made.

Blackburn *v.* State, 79 Tex. Cr. App. 466, 185 S. W. 581.

**Sale of Homemade Cider by Agent.**—Where the law relating to sales of intoxicating liquors and other liquors, excepts from its prohibition sales of "cider in any quantity by the manufacturer from fruits grown on his own land within the state," and the right of sale by agent or employee is an incident of ownership, such a manufacturer could sell through his agent, and neither would be amenable to the penalty for illegal sale.

State *v.* Williams, 172 N. C. 973, 90 S. E. 905.

[NOTE. This decision was under an express exception from the North Carolina prohibition law, common heretofore in most such laws, but no counterpart to which is found in the Volstead Act.]

**Aiding and Abetting an Unlawful Sale.**—Where defendant aided and abetted in an unlawful sale of liquor on his premises, such offense being made a misdemeanor by law, defendant was guilty as a principal.

State *v.* Winner, 153 N. C. 602, 69 S. E. 9.
State *v.* Denton, 154 N. C. 641, 70 S. E. 839.
Crawley *v.* State (Ala. App.), 73 So. 222, 223.

Wrongful sale of intoxicating liquor being a misdemeanor, all who participated therein knowingly, would be separately liable as principals in the offense.

State *v.* Gross, 76 N. H. 304, 82 Atl. 533.

"The sale of intoxicating liquor in the state of Georgia is a misdemeanor. All who procure, counsel, command, aid, or abet the commission of a misdemeanor are regarded by the law as principal offenders, and may be indicted as such; and any one charged in an indictment with the sale of intoxicating liquors may be convicted by proof, either that he directly and personally enacted the criminal transaction, or that he procured, counseled, commanded, aided, or abetted the criminal transaction of another, who was the direct and

immediate actor. Loeb *v.* State, 6 Ga. App. 23, 64 S. E. 338."

Littlefield *v.* State, 22 Ga. App. 783, 97 S. E. 259.

And where defendant knowingly permitted another to use his home for the illicit sale of whisky on one occasion, he was an aider and abettor on that occasion; that it is as much a violation of law as if he habitually permitted it.

State *v.* Denton, 154 N. C. 641, 70 S. E. 839.

And under a statute providing that all persons concerned in the commission of a crime, whether felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet, in its commission are principals, where restaurant patrons gave a waiter a dollar, with the request that he secure whisky for them, and the waiter went to an illegal seller of whisky, who gave him a pint for the dollar, the waiter returning the bottle to the restaurant patrons is guilty.

Moyean *v.* State, 18 Ariz. 491, 62 Pac. 135, L. R. A. 1917D, 1014n.

And a person who acts as go-between in purchasing intoxicating liquor at an illegal sale thereof, and who thereby aids and abets in the consummation of the sale is punishable under the statute.

Kendrick *v.* State, 11 Okla. Cr. App. 380, 146 Pac. 727.

See also post, under Sec. 19, Title II.

**Advising or Encouraging Sale.**—A prosecution for selling intoxicating liquors brought against the president of a corporation and its manager, where the president actually sold the liquor and the manager, although not present at the sale, prepared the invoice therefor in the usual course of business on information received from the buyer, and left the invoice on the desk of the shipping clerk for his attention, such acts did not constitute advising or encouraging the commission of the offense.

Hill *v.* State, 19 Ariz. 78, 165 Pac. 326.

**Participating in Sale.**—Where one asked to get liquor for another takes the other to a house where, on receiving

the other's money, he goes in and returns with a pint of whisky and gives it to the other without disclosing the name of the person from whom he procured it, he is guilty of selling whisky being a necessary factor and active participant in the sale.

Williams *v.* State, 129 Ark. 344, 196 S. W. 125.

Where a defendant, to be guilty of aiding a liquor law violation must contribute to the result, it is sufficient if by prearrangement with the principal he is present to render assistance if it should become necessary.

Bridgeforth *v.* State, 15 Ala. App. 502, 74 So. 402.
See also post, under Sec. 19.

**Aiding and Abetting Unlawful Keeping for Sale.**—Under a statute, providing that a clerk who violates or aids in violating any provision of law relating to intoxicating liquors is equally guilty with the principal, a clerk who aids another keeping intoxicating liquors with intent unlawfully to sell the same is guilty.

State *v.* Stickney 111 Me. 590, 90 Atl. 705.

**Aiding and Abetting Sale for Purpose of Procuring Evidence to Convict.**—"The defendant intended to commit the act which the law prohibits. He knew the law, and brought the whisky into Thomas county for the express purpose of inducing others to violate the law, for the purpose of assigning them in the violation of the law. He was enmeshed in the net spread by himself. The law does not countenance the commission of a crime, even though the purpose be the apprehension of others engaged in the same criminal conduct. There is crime enough already, and it is no part of the duty of an officer of the law to aid or abet another in the commission of crime. If, to accomplish a great good, it is ever permissible to do a wrong, certainly the ministers of the law are not to be encouraged in their efforts to induce others to commit crime, even though they must intend the arrest and punishment of their unsuspecting victims. The sheriff of the county washed his hands of the whole transaction, and he is to be commended for his act."

Mitchell *v.* State, 20 Ga. App. 778, 93 S. E. 709, 710.

**Acting as Intermediary or Agent in Sale Purchase.**—Where the intermediary between the purchaser and the seller is a necessary factor, without whose assistance the sale of liquor could not have been consummated, he is interested in the sale, in the sense of the law, whether he has any pecuniary interest or not.

Condit *v.* State, 130 Ark. 341, 197 S. W. 579.

One who acts as intermediary in a sale of liquor for both the seller and the buyer, and except, for whom the sales would not have been made, is guilty of an illegal sale; but it is different where one buys liquor for a third party as a matter of accommodation and not as a subterfuge and was not interested in the sale.

Dean *v.* State, 130 Ark. 322, 197 S. W. 684.
Hamilton *v.* State, 80 Tex. Cr. App. 516, 191 S. W. 1160.

And if defendant had no interest in and did not reap any profit from whisky, but procured it as an accommodation, it would not constitute a "sale." (Per Gaines, special Judge.)

Alexander *v.* State (Tex. Cr. App.), 204 S. W. 644, 645.

But one who, to accommodate a friend, purchased whisky for him, receiving half of the purchase price from his friend, and paying the other half himself and keeping part of the whisky, acted as an intermediary for both parties in rendering a service which made the sale possible and was therefore guilty as a principal of unlawfully selling whisky.

Wilson *v.* State, 114 Ark. 574, 169 S. W. 795.
See also post, under Sec. 18.

**Validity of Provision of Statute.**—The prohibition against any sale of intoxicating liquor applies to a sale which passes the title, regardless of the seller's ownership; and so a statute providing that any person who shall act as agent or assisting friend of the buyer or seller of intoxicating liquor shall be guilty, is valid.

Scott *v.* State, 3 Ala. App. 142, 57 So. 413.

**Purchasing Liquor for Another.**—Accused, who, on request of a third person to obtain for him some whisky, purchased it from one selling in violation of law, cannot escape liability for acting as the agent of the purchaser by showing that he had been employed to obtain evidence against those unlawfully selling intoxicants, and had obtained the assurance of the deputy sheriff before making the purchase that he would not incur any risk for his offense, was wholly unnecessary to obtain evidence against the seller, and was entirely distinct from that of unlawful selling.

Brantley *v.* State, 107 Miss. 466, 65 So. 512.

Under a statute making it an offense to act as agent or assistant to either the seller or purchaser in effecting the sale of any liquor a sale of which is unlawful under the act, the defendant's purchase of whisky outside of the state with money given to him in the state and his act in bringing it back into the state for delivery, was not unlawful.

Anderson *v.* State, 109 Miss. 521, 68 So. 770.

Where accused procured the liquor, which he delivered to a third person, in a town where the sale of liquor was prohibited, he is guilty of the unlawful retailing of intoxicants, though he purchased the liquor as agent for such third person.

Pope *v.* State, 108 Miss. 706, 67 So. 177.

Accused, who informed the prosecuting witness, who furnished him with money to buy whisky, that he knew where it could be purchased, is guilty of an unlawful sale in procuring whisky for the witness.

Woods *v.* State, 114 Ark. 391, 170 S. W. 79.

**Attempt to Procure Liquor for Another.**—A person, who upon the solicitation of another, attempts to procure intoxicating liquors for him, but does not himself solicit the giving of an order therefor, is not guilty of a violation of the law against soliciting or taking orders.

Bain *v.* State, 76 Tex. Cr. App. 519, 176 S. W. 563.

**Accomplices and Accessories.**—A person who knowingly takes part in the unlawful sale of spirituous liquor

thereby aids and assists the seller in committing a crime, and hence is an accomplice.

State *v.* Ryan, 1 Boyce's (Del.) 23, 75 Atl. 869.

But one who purchased intoxicating liquor is not an accomplice with the seller, since to aid or abet requires an approach to the crime from the same angle as the principal, whereas a purchaser of liquor approaches from a different angle than that of the seller.

Baumgartner *v.* State (Ariz.), 178 Pac. 30.

And one employed to make purchase of intoxicants for purpose of appearing as witness against defendant was not an "accomplice," within the law, so that conviction could be had on his uncorroborated testimony; the crime being the sale and not the purchase.

State *v.* Busick, 90 Ore. 466, 177 Pac. 64.

See also, State *v.* Gosell, 137 Minn. 41, 162 N. W. 683.

**Landlord as Accessory.**—One who rents a house to another with the knowledge that the latter intends to use it for the illegal sale or storage of intoxicating liquors, is an accessory, aiding and abetting in the commission of this offense, and therefore may be convicted of this misdemeanor as a principal; but it is for the jury alone, and not the court, to determine whether certain facts constitute criminal negligence, and for that reason it was error to charge the jury that, if the defendant, when he rented his home, had an opportunity to know that the person to whom he rented it intended to use it for the illegal sale or keeping of liquors, he would be guilty.

Moody *v.* State, 14 Ga. App. 523, 81 S. E. 588.

**Procurer as Aider and Abettor.**—Alabama Acts, Sp. Sess. 1907, p. 71, makes it unlawful for any person to sell, barter, exchange, give away, or otherwise dispose of spirituous liquors, and Code 1907, 7363, makes it a crime to aid, abet, counsel, or procure any unlawful sale, purchase, or gift or other unlawful disposition, of such liquors. Held, that since one who procures prohibited liquors for another, who receives the same, necessarily also aids and abets the sale or unlawful disposition thereof by the dispenser, the

one so procuring is guilty of aiding and abetting though the purchaser or receiver may not be punishable.

Johnson *v.* State, 172 Ala. 424, 55 So. 226, Ann. Cas. 1913E, 296.

And one who procured liquor from an illicit dealer in the state by purchase and delivered it to another, both the purchase and the delivery being made at a place where the sale of liquor is prohibited, is deemed a principal, and liable criminally as the seller of the liquor is liable, since in misdemeanors all who participated in the offense are principals.

State *v.* Burchfield, 149 N. C. 537, 63 S. E. 89, 16 Ann. Cas. 555.

But where the penalties of the statute are directed against the seller and not against the buyer, one who purchases intoxicating liquor in a dry county at the solicitation of another, and with his money and for his use and as his agent, in good faith, and not as a subterfuge or for purposes of evasion, does not commit an offense.

State *v.* Provencher, 135 Minn. 214, 160 N. W. 673, Ann. Cas. 1917E, 598.

The law, however, does not countenance an evasion or subterfuge. The claimed agency must be exercised in good faith and not to hide a participation in an illegal traffic. The evidence in this case was such as to make the defense of agency in good faith for the jury, and the court by charging that there was no defense of agency in good faith erroneously deprived the defendant of the right to have the question determined by the jury.

State *v.* Provencher, 135 Minn. 214, 160 N. W. 673, Ann. Cas. 1917E, 598.

**Using Name of Another in Ordering or Receiving Liquor.**—"Where it would appear to have been the intention of the lawmaker to make it an offense for a person to use the name of another in ordering or receiving, either personally or through an agent authorized in writing, shipments of intoxicating liquors in prohibited territory; in either case the offense consists, not in ordering the liquor, whether for legal or illegal purposes, but in using the name of another in

the ordering and receiving; and section 8, in declaring that 'it shall be unlawful for any person to use the name of another in ordering or receiving,' etc., is to be interpreted as meaning that it shall be unlawful for any person to use a name other than his own for the purpose stated, and it is therefore immaterial in a prosecution under that section whether the name which the defendant is charged with having used is that of a real or a fictitious person."

State *v.* Ferris, 142 La. 198, 76 So. 608.

**Requesting Another to Bring in Liquor.**—Under the first Arizona constitutional amendment, prohibiting the introduction of intoxicating liquors into the state, one who requested another to bring liquor into the state was punishable as a principal, although he purchased it from such person within the state, under Pen. Code 1913, § 27, relating to parties to crimes.

Stover *v.* State, 19 Ariz. 308, 170 Pac. 788.

**Permitting Sales on Leased Premises.**—Under a law defining the crime of permitting liquor to be sold on leased premises in local option territory, it must be shown that the leasing was with intent or with knowledge that liquors were to be sold on the premises.

Elkhorn Min. Corp. *v.* Commonwealth, 173 Ky. 417, 191 S. W. 256.

**Aiding in Preparing for Business.**—The mere fact that a manufacturer or wholesaler furnishes to a retailer money and fixtures for the purpose of enabling the retailer himself to conduct a retail liquor business does not violate the law.

Baxter *v.* Chattanooga Brewing Co. (Ala.), 82 So. 16.

The invalidating effect of the law prohibiting one engaged in the manufacture or sale of intoxicants from conducting business for the retail of such liquors, cannot be visited upon an agreement not made for the purpose of conducting a retail liquor business, either in the name of the manufacturer or wholesaler or in the name of another.

Baxter *v.* Chattanooga Brewing Co. (Ala.), 8 So. 16.

**Purchase.**—In some states it is not unlawful for one to buy intoxicating liquor, for his own use and bring it into the state, or to have liquor so purchased in his possession for personal use.

Adams Exp. Co. *v.* Commonwealth, 154 Ky. 462, 157 S. E. 908, 48 L. R. A., N. S., 342.

Commonwealth *v.* White (Ky.), 179 S. E. 469.

A person aiding the buyer, but not the seller, is not guilty of selling intoxicating liquors since the statute does not make the purchase, but only the sale, unlawful.

Wilson *v.* State, 130 Ark. 204, 196 S. W. 921.

And it being no violation of law for a person to purchase intoxicating liquor; it was not a violation of law for accused to aid the purchaser in buying liquor at his instance; it not appearing that accused was in any wise agent for the seller.

Harris *v.* State, 113 Miss. 457, 74 So. 323, L. R. A. 1917D, 1013n.

Hightower *v.* State, 73 Tex. Cr. App. 258, 165 S. W. 184.

**Loan.**—A loan of beer is a violation of the Alabama prohibition law.

Sanders *v.* State (Ala. App.), 79 So. 312.

One who as an accommodation, loaned to another whisky with the understanding that a similar amount was to be returned cannot be convicted for the sale or barter of intoxicating liquors, since in a loan goods are transferred to another to be returned by the latter to the lender in kind, while a sale is a transfer of property in consideration of the payment of money, and a barter is an exchange of goods for other goods.

Jones *v.* State, 108 Miss. 530, 66 So. 987.

Evidence that whisky was loaned by defendant to another will not sustain a conviction for illegal sale of intoxicating liquor.

Garfield *v.* State, 114 Miss. 710, 75 So. 548.

**Gift of Liquor.**

Giving a friend a drink of whisky, though in a place where no one could see what was being done, is a violation of the Alabama law.

Haynes *v.* State, 5 Ala. App. 167, 59 So. 325.
Grace *v.* State, 1 Ala. App. 211, 56 So. 25.

**Furnishing.**

The word "furnish," as used in a statute, prohibiting a furnishing of alcoholic liquors in certain terrritory, means to supply, to offer for use, to give, or to hand.

People *v.* Joy, 30 Cal. App. 36, 157 Pac. 507.

**Furnishing to Soldier.**—If certain bottles in defendant's possession contained wine which would intoxicate, and defendant left a bottle where his brother-in-law, a marine in the military forces of the United States, could get it by arrangement, defendant violated Acts 35th Leg. (4th Called Sess.) c. 7, punishing the procuring or furnishing of intoxicating liquors for or to any person in the military service of the United States.

Gardner *v.* State (Tex. Cr. App.), 212 S. W. 169.

**Barter or Exchange for Other Property.**

Under a state statute making it unlawful for any person to sell, barter, exchange, give away, or otherwise dispose of, spirituous liquors; and another statute making it a crime to aid, abet, counsel, or procure any unlawful sale, purchase, or gift, or other unlawful disposition of such liquors, with the further provision that a conviction for violation thereof may be had under an indictment for selling such liquor contrary to law, a conviction may be had on proof of a barter or exchange of liquor for other property.

Johnson *v.* State, 172 Ala. 424, 55 So. 226, Ann. Cas. 1913E, 296.

**Exchange for Stolen Property.**—"Under the prohibition law, making it unlawful to sell or barter for a valuable consideration intoxicating liquors, the exchange of intoxicating liquors for stolen property constitutes a violation."

Turner *v.* State, 18 Ga. App. 393, 89 S. E. 538.

**Transporting Liquor.**

See also post, Secs. 10, 13, 14, and 15.

**Receiving from Carrier Construed.**—A statute making it unlawful to receive intoxicating liquors from a common or other carrier, or to possess liquors so received, is not confined to carriers for hire, but was intended to cover every phase of the handling of intoxicants except as otherwise indicated in the statute.

Liquor Transp. Cases *v.* State, 140 Tenn. (13 Thompson) 582, 205 S. W. 423.

As to receiving altar wine from carrier and transportation thereof, see ante, under Sec. 6.

**On Person.**—Under a section providing that "no person, except as provided in this chapter shall bring into this state or transport from place to place within this state, by wagon, cart, or other vehicle, or by any other means or mode of carriage, any liquor or liquids containing alcohol," * * * transport means to carry or convey from one place to another, and carrying liquor on the person is a means or mode of carriage.

State *v.* Pope, 79 S. C. 87, 60 S. E. 234.

A defendant, who asked a witness against him whether he wanted some whisky, and who, on an affirmative answer, went away to some hidden store and returned carrying a quart of whisky in his hand, which he handed to the witness for a price, was guilty of carrying around on his person intoxicating liquor with intent to sell it.

State *v.* Alderman (Ia.), 174 N. W. 30.

**Accessory to Transportation.**—Under the constitutional amendment prohibiting the introduction of whisky into the state for sale, one aiding and assisting the principal in the commission of the offense by driving an automobile hired by the principal, if knowing that he was assisting the principal in bringing the whisky into the state or if having reason to know and making no investigation or inquiry, would be guilty of an offense, as, though it might be impossible for him to definitely ascertain the purpose for which the prin-

cipal was bringing liquor into the state, he should at least have made some inquiry into such purpose.

Aaron *v.* State, 18 Ariz. 378, 161 Pac. 881.

**Conspiracy.**—There may be a conspiracy to violate the Reed Amendment (Comp. St. 1918, §§ 8739a, 10387a-10387c) by transporting liquor into a prohibition state, indictable under Criminal Code, § 37 (Comp. St. § 10201).

Laughter *v.* United States (C. C. A.), 259 Fed. 94.

To create such relation, between a conspiracy and the substantive offense which was its purpose, as ought to prevent a double prosecution, there must be a complete identity between those acts which are the overt acts essential to make the conspiracy punishable and those acts which are necessary to make out the substantive offense.

Laughter *v.* United States (C. C. A.), 259 Fed. 94.

**For Unlawful Use.**—Under the Federal law prohibiting the transportation of intoxicating liquors from one state to another, for unlawful use in the latter state, and state law prohibiting the sale or keeping for sale of intoxicating liquors, etc., an interstate carrier is not prohibited from bringing into the state intoxicating liquors, except only such as are intended for unlawful use in the state, and a carrier in possession of liquors for delivery to a person who intends to use the same in violation of law, or a carrier delivering in the state liquor to a person in the state intending to use the same illegally, violates the state law, unless it has no knowledge of the unlawful purpose.

Southern Exp. Co. *v.* State, 188 Ala. 454, 66 So. 115.

"**Shipment.**"—"To deliver for shipment and to ship mean the same thing."

State *v.* Lieber, 143 La. 158, 78 So. 431.

**Private Carrier.**—A private carrier could, under the South Carolina statute, for hire or as a favor, bring into the state not more than one gallon of liquor for another person's personal use during one calendar month without in-

tent to violate the law, having the same privilege of transporting liquor as a common carrier for hire.

State *v.* Gens, 107 S. C. 448, 93 S. E. 139.

A person ordering liquor, not exceeding a gallon a month, to be brought into the state for his personal consumption, had the choice of bringing it in by a private carrier for hire or a common carrier.

State *v.* Allston, 107 S. C. 485, 93 S. E. 177.

But a law prohibiting transporting liquor into the state, for another does not apply to one who carries liquor into the state for himself for purpose of resale.

Rivard *v.* State, 133 Ark. 1, 202 S. W. 39.

**Possession for Transportation to Druggist.**—Under the Georgia statute, it is not illegal for a common carrier to have possession of pure alcohol to transport from a wholesale druggist to a practicing physician at another point in the state, keeping drugs in his office to compound his own medicine and using alcohol for medicinal purposes only, where all conditions of act were complied with.

Southern Exp. Co. *v.* State (Ga. App.), 100 S. E. 791; S. C., 100 S. E. 109.

**Automobile as a Common Carrier.**—An automobile may be so used as to become a "common carrier" in interstate commerce.

United States *v.* Simpson (D. C.), 257 Fed. 860.

**Within State.**—"In Munn *v.* State, 5 Okl. Cr. App. 245, 114 Pac. 272, it is held: 'When a person is charged with conveying intoxicating liquor from a point unknown to some definite point named, and the proof shows that the person so charged, when first discovered, was conveying whisky, and fails to show from what definite point he started with it, it is sufficient.' In Rupard *v.* State, 7 Okl. Cr. App. 201, 122 Pac. 1108, it is held: 'In prosecutions for unlawfully conveying intoxicating liquors from one place in this state to another place therein, the state is only required to establish by the proof, beyond a reasonable doubt, that the liquor charged to have been conveyed, or some portion of it,

was conveyed as alleged in the information.' In Watkins *v.* State, 13 Okl. Cr. App. 507, 165 Pac. 621, it is held: 'It is unlawful for any person to convey from place to place within this state intoxicating liquors which said person has previously purchased within this state, and it is immaterial whether the person so purchasing such liquor and conveying the same intended to use such liquor lawfully or unlawfully. Intent is not a material ingredient of the offense of conveying intoxicating liquors.' Maynes *v.* State, 6 Okla. Cr. App. 487, 119 Pac. 644."

McNeal *v.* State (Okl. Cr. App.), 179 Pac. 943, 944.

**From Train to Depot.**—A carrying of intoxicating liquors from a train to the depot platform is a "transportation."

Liquor Transp. Cases *v.* State, 140 Tenn. (13 Thompson) 582, 205 S. W. 423, 424.

**Delivery by Carrier to Transfer Company.**—In view of Rem. Code Wash. 1915, § 6262—15, authorizing a person to bring into the state two quarts of whisky or a dozen quarts of beer, first obtaining a permit giving his name, which shall be affixed to the package, and requiring the carrier before delivering the package to cancel the permit, and section 6262-18, making it unlawful for a carrier to bring liquor into the state otherwise than permitted by the statute, it would be a crime, both under such statute and Criminal Code, § 240 (Comp. St. § 10410), for a carrier to deliver to a transfer company named as consignee in the bill of lading, a carload of liquor made up of packages bearing permits so issued to individuals.

Great Northern Pac. S. S. Co. *v.* Rainier Brewing Co. (C. C. A.), 255 Fed. 762.

**Shipment into Indian Reservation.**—Where a state law forbids manufacture and sale of intoxicating liquors therein, interstate shipments of intoxicating liquors into a portion which formerly was an Indian reservation are not authorized, because Indian titles have been extinguished, the Webb-Kenyon Act having deprived such shipments of protection arising out of their interstate character.

Missouri, etc., R. Co. *v.* Danciger, 160 C. C. A. 176, 248 Fed. 36.

The provision of Act March 1, 1895, § 8 (Comp. St. § 4136b), making it an offense to carry or have carried intoxicating liquors into Indian Territory, held not repealed by implication by Act March 3, 1917, § 5 (Comp. St. 1918, §§ 8739a, 10387a-10387c), and to be still in force in that part of Oklahoma then comprising Indian Territory.

United States *v.* Luther (D. C.), 260 Fed. 579.

**Intent Immaterial.**—Where it is unlawful for any person to convey from place to place within a state intoxicating liquors which said person has previously purchased within this state, it is immaterial whether the person so purchasing such liquor, and conveying the same intended to use such liquor lawfully or unlawfully. Intent is not a material ingredient of the offense of conveying intoxicating liquors.

Watkins *v.* State, 13 Okla. Cr. App. 507, 165 Pac. 621.

But to render a carrier liable to a penalty under Ky. St. 2569b, of knowingly transporting and delivering intoxicating liquor intended for sale, it is necessary that the agent of the carrier making the delivery knew of the purpose or use to which such liquor was to be put, and knowledge of the agent at other points is insufficient.

American Exp. Co. *v.* Commonwealth, 171 Ky. 1, 186 S. W. 887.

And a person who conveys a package from one place in this state to another place therein, which package contains intoxicating liquor of which he has no knowledge and no information sufficient to put a reasonable man on inquiry, is not subject to the punishment imposed by the statute for unlawfully conveying intoxicating liquor from one place in this state to another place therein.

Golpi *v.* State, 14 Okla. Cr. App. 564, 174 Pac. 288.

**Movement on Own Premises.**—A law forbidding the transportation of intoxicating liquor into the state or from one point to another within the state, contemplates nothing less than the transporting from one premises to another and does not forbid a movement of liquors by a person within the limits of his own premises or in his own house.

Liquor Transp. Cases *v.* State, 140 Tenn. (13 Thompson) 582, 205 S. W. 423.

**Delivery as Distinguished from Transportation.**—A mere delivery of liquor by one person to another, entirely disconnected with the act of transporting liquor into the state, does not constitute an offense under a law denouncing the shipment, transportation, or delivery of liquors from another state or territory or foreign country to another person, firm, or corporation in the state.

Winfrey *v.* State, 133 Ark. 357, 202 S. W. 23.

**Transporting by Agent.**—Where one convicted of transporting intoxicating liquors within the limits of a town in violation of an ordinance, had not entered the corporate limits but had the liquor transported by his agent, he was guilty under the rule that one may commit a crime through the agency of another.

Hartsville *v.* McCall, 101 S. C. 277, 85 S. E. 599.

Though a statute makes it unlawful "to convey or transport over or along any public street or highway any of said liquors, bitters or drinks for another," yet as the party for whom they are transported could lawfully transport them for himself, he is not guilty of the offense as aiding and assisting those unlawfully transporting them for him.

Edwards *v.* State (Ark.), 213 S. W. 11.

Carrying away liquor bought on prescription, see ante, under Sec. 8.

**Interstate Commerce.**—Transportation of intoxicants by automobile from one state to another is "interstate commerce."

Ex parte Westbrook (D. C.), 250 Fed. 636.

**Extraterritorial Effect.**—An act making it a misdemeanor to transport intoxicating liquor into the state, can have no extraterritorial effect, and so cannot make guilty as an aider one who outside the state delivers the liquor to the carrier.

Burton *v.* State (Ark.), 206 S. W. 51.

**Liability of Consignor.**—The words declaring it an offense "to ship" or to "transport," intoxicating liquor into the

state, are synonymous, and apply to the carrier, and not the consignor.

Burton *v.* State (Ark.), 206 S. W. 51.

**Destination Determines Interstate Character.**—So far as original carrier of intoxicating liquors is concerned, the character of the shipment as to being interstate is determined by the destination named in the bill of lading.

State *v.* Great Northern R. Co., 98 Wash. 197, 167 Pac. 103.

A shipment of liquor from a point without the state to a point within it cannot be regarded as an intrastate shipment though, before the shipment reaches its destination, it passes after crossing the boundary line of the state, from one point in it to another.

Robertson *v.* State, 130 Ark. 158, 197 S. W. 31.

**When State Jurisdiction Attaches—Draying Liquor from Depot.**—"Defendant's admission that he was conveying beer, and his contention that the three barrels belonged to three different named individuals, to whom he was merely taking the shipments from a depot as a drayman, and that beer was a part of an interstate shipment into part of state formerly Oklahoma Territory, which consignees had a right to have conveyed to them from depot, did not bring defendant within protection of interstate commerce clause (Const. U. S. art. 1, § 8)."

Smith *v.* State (Okla. Cr. App.), 181 Pac. 942.

**Reed Amendment—What Constitutes Violation.**—The Reed amendment to postal appropriation made by Act March 3, 1917 (Comp. St. 1918, § 8739a), is not violated unless there is actual transportation of intoxicating liquors from point without to point within state, which has prohibited their manufacture or sale; "into," as used, conveying idea of entrance, passage, or motion.

United States *v.* Collins (D. C.), 254 Fed. 869.

Relative to transporting liquor into a prohibition state in violation of Act March 3, 1917, § 5 (Comp. St. 1918, § 8739a), defendant having actually transported whisky in his

boat across the state line in the Mississippi into Tennessee, and with intent that it should finally remain in that state, it was immaterial that he had incidentally gone out again with his boat and cargo, or that he was outside it when arrested.

Bishop *v.* United States (C. C. A.), 259 Fed. 195.

Proof that defendant loaded liquor into an automobile in Mississippi and had carried it across into Tennessee along the highway to Memphis when arrested, held sufficient to sustain a conviction for violation of the Reed amendment, although in following the road they were about to cross the line again into Mississippi; there being evidence to warrant a finding that their intended destination was Memphis.

Jones *v.* United States (C. C. A.), 259 Fed. 104.

If one transports intoxicating liquors into a state whose laws prohibit their sale and manufacture, but in doing so employs no instrumentality of interstate commerce, he does not violate the Reed-Jones Amendment, § 5 (U. S. Comp. St. 1918, § 8739a).

Sickel *v.* Commonwealth (Va.), 99 S. E. 678.

Employees on an interstate train passing through the state were passengers, and could not be convicted under the State Prohibition Law by proof that more than one quart of liquor was found in their possession, in the absence of evidence that they intended to dispose of the same while in the state; such employees being protected by the Commerce Clause of the federal Constitution, and the Reed Amendment (U. S. Comp. St. 1918, § 8739a) to the Webb-Kenyon Act March 1, 1913 (U. S. Comp. St. § 8739), not prohibiting the transportation of liquor through a state.

Martin *v.* Commonwealth (Va.), 100 S. E. 836.

The Va. Acts 1916, c. 146, do not prohibit the transportation of liquor through the state, nor a passenger passing through the state from having liquor in his possession while on the train of an interstate carrier passing through the state.

Martin *v.* Commonwealth (Va.), 100 S. E. 836.

**Distance of Transportation.**—Under the Reed Amendment persons who procured liquor in Florida, loaded it into a motorcar, and started to carry the same into Georgia, are guilty of violation of some of the provisions of the act, the transportation of the liquor being interstate commerce, even though defendants were arrested before they had driven two miles.

Ex parte Westbrook (D. C.), 250 Fed. 636.

**Reed Amendment Applies Only to State-Wide Dry States.**—The Reed Amendment (Comp. St. 1918, § 8739a), prohibiting transportation of intoxicating liquors in interstate commerce into any state whose laws prohibit manufacture or sale, applies only to states that have prohibited manufacture or sale within entire territory, not merely in parts under local option.

United States *v.* Collins (D. C.), 254 Fed. 869.

But it is held to be unlawful under this statute for an interstate carrier to transport for beverage purposes intoxicating liquors from without the state into a county which had adopted prohibition, Rev. St. Tex. 1911, art. 5727, declaring the sale, etc., within prohibition territory of intoxicating liquors with intent to violate the law, to be an offense.

McAdams *v.* Wells Fargo & Co. Exp. (D. C.), 249 Fed. 175.

To render the Reed Amendment (Act March 3, 1917, § 5 [Comp. St. 1918, §§ 8739a, 10387a-10387c]), prohibiting the transportation of liquor in interstate commerce, except for certain purposes, into any state "the laws of which prohibit the manufacture or sale therein," of liquors for beverage purposes, applicable to a state, it must have adopted a general policy of prohibition throughout its territory; but it is not essential that such prohibition should be literally without exception.

Laughter *v.* United States (C. C. A.), 259 Fed. 94.

**Transportation under Reed Amendment Where Constitutionality of State Law Undecided.**—"Transportation of intoxicating liquors into Texas, which has prohibited their manufacture for beverage purposes, is violation of Reed

Amendment of postal appropriation made by Act March 3, 1917 (Comp. St. 1918, § 8739a), though there is some ground to believe court of last resort in Texas will hold state prohibitory law unconstitutional, as the federal court will not anticipate and be guided by what the state court might thereafter hold."

United States *v.* Collins (D. C.), 254 Fed. 869.

**Importation for Importer's Consumption as Allowed by State Law.**—Reed Amendment (part of section 5 of Act March 3, 1917 [Comp. St. 1918, §§ 8739a, 10387a-10387c]), declaring a punishment for one causing liquor to be transported in interstate commerce, except for certain purposes, into a state whose laws prohibit its manufacture or sale there for beverage purposes, providing that nothing therein shall authorize shipment of liquor into a state contrary to its laws, held, in view of the prior Wilson and Webb-Kenyon Acts (Comp. St. §§ 8738, 8739), not intended merely to aid the state law, but to apply to liquor which a person was bringing in for his own consumption, as allowed by the state law.

United States *v.* Hill, 248 U. S. 420, 39 S. Ct. 143.

**Transporting through Dry State to Wet State.**—It is not a violation of the Reed Amendment (Comp. St. § 8739a) to carry intoxicating liquors from a state in which sale was allowed across a state in which sale was prohibited, where the liquor was destined for a third state in which sale was permitted.

Berryman *v.* United States (C. C. A.), 259 Fed. 208.

United States *v.* Gudger, 249 U. S. 373, 39 Sup. Ct. 323, 63 L. Ed. —.

Preyer *v.* United States (C. C. A.), 260 Fed. 157.

**Delivery to Minor—Webb-Kenyon Act.**—An express company is guilty of a crime in delivering shipments of liquor from another state to a minor in Alabama, under Gen. Acts 1915, p. 43, § 10, and the Webb-Kenyon Act (U. S. Comp. St. § 8739).

Perry *v.* Southern Exp. Co. (Ala.), 81 So. 619.

**As Question for Jury.**—Under Ky. St. 2569a and the Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699) relative to the transportation of intoxicating liquor, where a carrier transported whisky in the usual course of business, without knowing or believing that the consignee who received it in territory where its sales was forbidden intended to sell it, but believing that it was for his personal use, its guilt was for the jury, since if it acted upon reasonable grounds in good faith after such investigation as ordinary care required and was misled, it was not liable.

Adams Exp. Co. *v.* Commonwealth, 160 Ky. 66, 169 S. W. 603.

**Unbroken Packages—Burden of Proof.**—Regardless of a provision casting the burden upon the person claiming the article seized in a proceeding to confiscate an interstate shipment of liquor side-tracked within this state, the burden was on the state to prove that the shipment was in fact not interstate, under a section, providing that the prohibitory provisions "shall not apply to shipments transported by any common carrier of unbroken packages of intoxicating liquor in continuous transit through this gate from a point outside of the state to another point outside of the state."

State *v.* Great Northern R. Co., 98 Wash. 197, 167 Pac. 103.

**Burden of Proof.**—An employee on a train of an interstate carrier passing through the state did not have the burden, under Va. Acts 1916, c. 146, to prove that he was on an interstate journey through the state; although ardent spirits in excess of one quart were found in his possession, the evidence for the state showing that the liquor was found upon the train itself.

Martin *v.* Commonwealth (Va.), 100 S. E. 836.

**Transportation of Wines for Sacramental Purposes.**—Under the law making it lawful for any common carrier or other carrier to transport wines for sacramental purposes to any priest or minister, a sexton of a church or communicant may convey either for or without hire wine to the priest or minister.

Liquor Transp. Cases *v.* State, 140 Tenn. (13 Thompson) 582, 205 S. W. 423.

**Possession.**

As to possession as evidence of crime, see post, Section 33.

**Constitutionality.**—That part of the "prohibition law," which declares it to be a misdemeanor for one to have, control, or possess any alcoholic, spirituous, malt, or intoxicating liquors, or other liquors which, if drunk to excess, will produce intoxication, is not unconstitutional.

Cureton *v.* State, 135 Ga. 660, 70 S. E. 332, 49 L. R. A., N. S., 182n.
Delaney *v.* Plunkett, 146 Ga. 547, 550, 91 S. E. 561, L. R. A. 1917D, 926n, Ann. Cas. 1917E, 685.
Barbour *v.* State, 146 Ga. 667, 668, 92 S. E. 70.
Jackson *v.* State, 148 Ga. 351, 96 S. E. 1001, decided September 10, 1918.
Saddler *v.* State, 148 Ga. 462, 97 S. E. 79.

**Time of Acquiring.**—Under a statute making it unlawful to have in possession liquor of more than a certain amount, it is immaterial that it was lawfully acquired before the act went into effect.

O'Rear *v.* State, 15 Ala. App. 17, 72 So. 505.

**In Residence.**—A person, who stores liquors in a garage disconnected from his dwelling house, violates a law prohibiting the storing of liquors, except in a "private residence," which means actual dwelling house, and not all buildings within curtilage.

People *v.* Labbe (Mich.), 168 N. W. 451.

**Storing or Keeping Liquor at Other than Private House or Room.**—One who, receiving whisky from an express office, placed the liquor temporarily in a room in house of his employer until he could get off at dinner and carry it to his own house in another part of town did not thereby violate an ordinance forbidding "storing" or "keeping" of liquor at another place than his house or private room although when leaving the liquor he opened the package and took a drink.

Newberry *v.* Dorrah, 105 S. C. 28, 89 S. E. 402.

In a prosecution for unlawfully keeping ardent spirits in a place other than a *bona fide* home for personal use where it appeared that defendant lived above a store in which he sold soft drinks and had stored spirits in a vacant store building owned by him fronting on the next street, and also in a grocery store adjacent to the building wherein he lived, connecting by a hallway across an alley, the place wherein the liquor was stored, was not within the curtilage of his *bona fide* residence.

Pettus *v.* Commonwealth, 123 Va. 806, 96 S. E. 161, 162.

**Temporary Possession.**—One who received from another, though only for temporary keeping, a grip containing whisky, with knowledge that it contained more than a quart, violated a law prohibiting the having in possession at one time of more than one quart of spirituous liquor.

State *v.* Willey (Del.), 108 Atl. 79.

But if accused had liquor in her restaurant, merely keeping it there until she should go home in order to give it to her sick mother, she was not guilty of storing liquor since "storing" is the act of laying away against a future time, and involves the idea of continuity or habit.

State *v.* Bradley, 109 S. C. 411, 96 S. E. 142.

"Under the ruling of the majority of the court in Cohen *v.* State, 7 Ga. App. 5, 65 S. E. 1096, one who intentionally carries whisky to his place of business, and keeps it there for any length of time, no matter for what reason or for what purpose, may be convicted of the offense of keeping intoxicating liquors on hand at his place of business."

Nowell *v.* State, 18 Ga. App. 143, 88 S. E. 909.

**Liquor Placed on Premises by Third Person.**—The fact that whisky was placed on the premises of a soft drink establishment by a third party, with the owner's knowledge, is not a violation of a statute, condemning the keeping or storing of prohibited liquors on the premises of a person engaged in selling beverages.

Brown *v.* State (Ala. App.), 81 So. 366.

**Physical Possession Unnecessary.**—Where liquors were found in defendant's residence, it was not necessarily

a complete defense that he was not at his residence when liquors were found, or since they were put in residence, as one may unlawfully have, control, or possess liquor without being present at place of storage, or having it in his physical possession.

Hendrix *v.* State (Ga. App.), 100 S. E. 55.

**Keeping under Joint Ownership.**—Where defendant, who with his son-in-law and their respective families was going on a fishing trip, purchased liquor for use of the party, the son-in-law furnishing half the money, held that, though defendant be considered the agent of the son-in-law, and that title to half the liquor passed to him on the purchase, yet defendant was guilty of unlawfully keeping intoxicating liquor with intent to barter, exchange, give away, furnish, and otherwise dispose of the same, in violation of law, for the delivery of the liquor to the son-in-law would be a "disposal," etc.

Banks *v.* State (Ind.), 123 N. E. 691.

**Possession of Apparatus for Distilling or Manufacture.**—Under a provision making it an offense to knowingly permit or allow any one to have, possess, or locate on his premises any apparatus for the distilling or manufacturing of the liquors and beverages specified in the act, neither "mash" nor "mobby" is a part of the "apparatus for the distilling or manufacturing" of the liquors, etc.

Davis *v.* State (Ga. App.), 100 S. E. 782.

**Without Knowledge.**—That a lard can found in defendant's house is an apparatus for distilling and manufacturing whisky does not justify a conviction, where the undisputed evidence showed that such lard can had been brought to the house and left there only a few hours before, without defendant's knowledge.

Parker *v.* State (Ga. App.), 100 S. E. 38.

**Keeping Liquor Stored for Sale.**—To keep liquor stored for sale is to keep liquors with intent to sell same.

People *v.* Bullock, 173 Mich. 397, 139 N. W. 43.

**General Application of Prohibition.**—Burns' Ann. St. of Indiana Supp. 1918, § 8356d (Acts 1917, c. 4, § 4), prohibiting the keeping of intoxicating liquor with intent to sell, is not intended to apply only to those having bonded liquor, but is general in its application.

State *v.* Sarlin (Ind.), 123 N. E. 800.

If a person has liquor in his possession for the purposes of sale he is guilty of the crime of having possession of liquor with intent to sell it, whether he makes a sale or not.

State *v.* Simons (N. C.), 100 S. E. 239.
Combs *v.* Commonwealth, 162 Ky. 86, 172 S. W. 101.

**Amount Immaterial.**—"In a prosecution for having in possession spirituous liquor for purposes of sale, the amount kept on hand by defendant is immaterial as far as his guilt is concerned; the gist of the offense being to have intoxicating liquor on hand for the purpose of sale."

State *v.* Simmerson (N. C.), 98 S. E. 784.

**Keeping or Maintaining Club Room or Place Where Liquor Is Received or Kept for Use, Gift, or Sale.**

A provision prohibiting keeping or maintaining any clubroom or other place in which liquors are received or kept for use, gift, or sale does not refer alone to a clubroom, but includes any other "place" such as a place walled off by a canvas tent in a street; and a corporation organized for a legitimate purpose, which maintains a canvas tent in a street and there dispenses intoxicating liquor, is within the statute.

Shideler *v.* Tribe of the Sioux, 158 Ia. 417, 139 N. W. 897.

Nor is it necessary that there shall be any permanent keeping; and a corporation organized for a legitimate purpose, which distributes liquors as a part of an entertainment to visitors in the city, violates the statute.

Shideler *v.* Tribe of the Sioux, 158 Ia. 417, 139 N. W. 897.

But under a Texas statute, a club dispensing intoxicating liquors to members and guests in good faith is not engaged in the business of selling intoxicating liquors.

Country Club *v.* State (Tex.), 214 S. W. 296.

**Liability of Member of Social Club.**—A member of a *bona fide* social club which has paid the tax required by law as a condition precedent to keeping on hand intoxicating liquors for the use of its members, and which dispenses such liquors in a manner prohibited by law, is not, by reason of his membership, guilty of either selling intoxicating liquors or keeping them on hand at his place of business. A member of such a club would not be guilty of either offense unless it be shown that he participated in some way in the criminal act. Mere knowledge on his part that sales of liquor were being made, and his failure to object thereto, would not amount to a crime.

Wright *v.* State, 14 Ga. App. 185, 80 S. E. 544.

"Any one or more of its members who engaged in the sale of liquors are as amenable to the law as if one of them had, while in the clubrooms, committed murder or larceny or any other criminal offense. Nor does it make any difference that no profit was received from the sale of the liquor."

Deal *v.* State, 14 Ga. App. 121, 80 S. E. 537, 541.

**Liability of Manager of Social Club.**—The manager of a social club, who orders intoxicating liquor for the use of its members and who either directly or indirectly procures, counsels, commands, aids or abets in the making of a sale of such liquors, is guilty as a principal. This is true even though such manager may not have been present when the particular sale was made, nor had knowledge of such sale until after it was consummated.

Deal *v.* State, 14 Ga. App. 121, 80 S. E. 537.

**Sale by Employee of Social Club.**—On the trial of an indictment for selling liquor, it was held no defense that the accused sold the liquor as an employee of the social club to the members thereof. Intoxicating liquor cannot be sold in Georgia by an individual or a corporation as a beverage, and where a steward of a social club sells to the members of the club intoxicating liquor, he is guilty of a violation of what is known as the prohibition law, although in making the sale he is acting solely for the benefit of the club.

Rothschild *v.* State, 12 Ga. App. 728, 78 S. E. 201.

One employed by such a club as secretary and treasurer and whose only duties are to collect the dues and fees from the members, keep the books, and look after the correspondence for the club, and who does not in any other way participate in the illegal sale of intoxicating liquor by the club, is not guilty either of selling intoxicating liquors or of keeping them on hand at his place of business.

Wright *v.* State, 14 Ga. App. 185, 80 S. E. 544.

**Use and Property Rights in Alcoholic Liquors.**

"No exceptions being made in the act other than those expressed, it was the legislative intent to not only forbid the possession but to abolish property rights in alcoholic liquors within the confines of the state after August 1, 1917, aside from the exceptions expressly provided for in the act, no matter when or how acquired, for what use intended, or in what place kept or possessed."

State *v.* Certain Intoxicating Liquors (Utah), 172 Pac. 1050, 1051.

"It necessarily follows that the very purpose and intent of the act was to preclude the right to use intoxicating liquor within the state except for the specific purposes in the act expressly mentioned and reserved. If liquor cannot be legally acquired or procured, it may not be legally used. While the law is somewhat drastic in some of its provisions —doubtless it was so intended to be—yet in view of the tendency of present day legislative enactments designed to protect the health, safety, morals and promote the general welfare of organized society, it is not the province of the courts to disregard the purpose and intent of the legislative so long as the constitutional rights of the individual have not been invaded."

State *v.* Certain Intoxicating Liquors (Utah), 172 Pac. 1050, 1052.

**Intent and Knowledge of Intoxicating Character.**

**Intent to Do Prohibited Act Sufficient.**—The only intent necessary to constitute a violation of a statute prohibiting the sale of intoxicating liquors without a license, is an

intent to do the prohibited act, though the seller believes in good faith that the sale is not prohibited by the statute.

State *v.* Country Club (Tex. Civ. App.), 173 S. W. 570.

Nor does a statute exempting from punishments persons acting in ignorance or mistake of fact without criminal intent, relieves a person selling a prohibited beverage.

Hill *v.* State, 19 Ariz. 78, 165 Pac. 326.

But, as said in another case: "The old rule that original intent must accompany a crime is still the law, even as to liquors, so far as we have been able to ascertain. There must be actual or constructive intent to do the thing which constitutes the crime; otherwise there is no criminal act. If it can be said that the liquor in this case was in the possession of the defendant merely because it was in his shop, when he did not know it, still such possession, not being conscious, was not actual and intentional possession, as contemplated by the statute."

Jackson *v.* Gordon (Miss.), 80 So. 785.

**Reliance on Brewer's Guaranty of Nonintoxicating Character.**—It is no defense to sale in violation of prohibition, that defendants relied on a guaranty of the brewer that the beer was nonintoxicating, and investigation showing it did not contain enough alcohol to require an internal revenue license.

Hall *v.* State (Ariz.), 165 Pac. 300.

Intent is not an ingredient of the offense of selling intoxicating liquors in violation of statute and hence defendant's testimony that the liquor which he sold had been sold to him as cider under a guaranty that it did not have any alcohol in it was properly excluded.

Beiser *v.* State, 9 Ala. App. 72, 63 So. 685.

**"Knowingly" Construed.**—"Knowingly," as used in a statute making it unlawful for any person to knowingly deliver in dry territory a package of liquor intended for sale, means only such information as would cause a person of or-

dinary prudence to believe that the liquor was intended for sale contrary to law.

American Exp. Co. *v.* Commonwealth, 171 Ky. 1, 186 S. W. 887.

But knowledge that the statement required on the package is false is an essential of the crime.

Goodman *v.* Commonwealth, 169 Ky. 542, 184 S. W. 876.

"It is entirely immaterial with what intention an unlawful purchase of prohibited liquors is transported from one to another place in this state, and it is not a defense to a prosecution for transporting such liquors that the party transporting them intends to use such liquors for a lawful purpose."

Gilliland *v.* State (Okla. Cr. App.), 179 Pac. 786.

An ordinance, making it a misdemeanor to transport intoxicating liquors to certain prohibited places, construed to apply only where there is evidence of a wrongful intent not where the act is merely inadvertent.

Ex parte Ahart, 172 Cal. 762, 159 Pac. 160.

**Imputed Knowledge.**—Under a statute making it an offense to deliver liquor in prohibition territory, "knowing that the required statement of personal use is false," such knowledge may be imputed to one who has not obtained of the consignee a statement that the liquor is for personal use, or who has not in good faith relied on such statement.

Goodman *v.* Commonwealth, 169 Ky. 542, 184 S. W. 876.

**Intended Use as a Beverage.**—To convict one of a sale of spirituous liquor, it is necessary for the jury to find that accused sold the liquor with intention that it be used as a beverage, irrespective of the subsequent uses to which the purchaser put it.

State *v.* Hastings, 2 Boyce's (25 Del.) 482, 81 Atl. 403.

**Intent to Use as Medicine.**—Jamaica ginger, containing more than 1 per cent of alcohol, is intoxicating liquor within the meaning of Rev. St. c. 127, §§ 21, 22, and the one having it in possession for sale violates the law, regardless of

an intent of such person that it should be used only as a medicine or for household purposes, and not as a beverage.

State *v.* Intoxicating Liquors and Vessels (Me.), 106 Atl. 711.

**Scienter Not Element of Offense.**—*Scienter* is not an element of the offenses created by the prohibition law of most states. So in a prosecution for the illegal sale of malt liquor, the defendant may successfully defend by showing that the liquor he sold was not intoxicating, but not by showing merely that in good faith he thought it was not intoxicating.

Battle *v.* State, 6 Ga. App. 578, 65 S. E. 333.

In a prosecution possessing intoxicating liquor, it is not sufficient that the defendant hotel porter received as baggage of an incoming guest a suit case, which he had no right to inspect and which contained liquor, but he must have had guilty knowledge or intent.

State *v.* Cox, 91 Ore. 518, 179 Pac. 575.

**As Question of Fact.**—In a prosecution for being in control or possession of intoxicating liquor, where defense is that defendant had no knowledge of the presence of the liquor found in his possession, it raises a question of fact, and it will be reasonably presumed that he had knowledge thereof.

Jackson *v.* Gordon (Miss.), 80 So. 785.

**Alcoholic Medicines, Extracts, Sacramental Wine.**

In only a few instances have the courts had occasion to construe provisions of state laws, expressly excepting certain articles. But so far as bearing on Sec. 4 of Title II of the Federal Act, the decisions of the state courts are digested here, without setting out again the statutory section.

**Intoxicating Medicines—Dilution by Purchaser—Excessive Use by Him.**—The lawful act of compounding essence of Jamaica ginger in form which could not be used as a beverage, and selling it in due course of business, could not be rendered unlawful by the conduct of a purchaser in

diluting the medicine and taking it in excessive quantities and with excessive frequency whether as a medicine or as a beverage.

Humphrey *v.* State (Ala. App.), 77 So. 82.

**Sale as Medicine and as Beverage Distinguished.**—Where a person has the right to sell Jamaica ginger, the same being a medicine for medicinal purposes; he has no right to sell Jamaica ginger, a spirituous liquor, even if it be a medicine, to be used as a beverage.

State *v.* Hastings, 2 Boyce's (25 Del.), 482, 81 Atl. 403.

**Absolute Prohibition Knows No Unexpressed Exceptions.**—Where the constitution forbids the sale and disposition of ardent spirits, ale, beer, and wine and intoxicating liquor of any kind to any person, as in the state of Arizona (Article 23, constitution), and it contains no exceptions, as that it may be prescribed and sold as a medicine, or for medicinal purposes, neither doctors nor druggists nor any one else may sell or dispose of any of the named or described liquors as such, or when compounded as a medicine. It is not a regulatory provision, but one of outlawry. It is one of suppression and not one of supervision. The fact that ardent spirits are mixed with other ingredients and, as thus compounded, labeled Jamaica ginger and sometimes used for medicinal purposes, does not change the situation.

Cooper *v.* State, 19 Ariz. 486, 172 Pac. 276, citing Brown *v.* State, 17 Ariz. 314, 152 Pac. 578.

Troutner *v.* State, 17 Ariz. 506, 154 Pac. 1048, L. R. A. 1916D, 262.

Hall *v.* State (Ariz.), 165 Pac. 300.

**"Quart a Month" Law Construed.**—Under a state law permitting receipt of only one quart of distilled liquor "not oftener than once a month," one who received a quart November 29th, and another December 23rd following would be guilty, in view of Code 1904, § 5, providing that, unless otherwise expressed, the word "month" shall mean calendar month.

Cochran *v.* Commonwealth, 122 Va. 801, 94 S. E. 329.

**Sale of Flavoring Extracts for Beverages.**—A grocer who sold for beverage purposes flavoring extracts containing from 30 to 90 per cent alcohol, claimed to be legitimate food products, violated the law though the sales were in quantities less than required to produce drunkenness.

**Wine for Sacramental Purposes.**

**Receiving "Altar Wine" from Carrier.**—A state law prohibiting the receiving of liquors, the sale of which is prohibited by the laws of this state, from a common carrier, does not make it an offense for a Roman Catholic priest to receive altar wine to be used solely for sacramental purposes in divine worship.

De Hasque *v.* Atchison, etc., R. Co. (Okla.), 173 Pac. 73.

The provisions of section 46, art. 25, of the Constitution of Oklahoma (section 410, Wms. Anno.), prohibiting the sale and transportation of intoxicating liquors, does not apply to altar wine to be used solely for sacramental purposes in divine worship, although such wine be capable of use as a beverage, and, if drunk in sufficient quantities, will produce intoxication.

De Hasque *v.* Atchison, etc., R. Co. (Okla.), 173 Pac. 73.

**Physicians' Prescriptions—Permits—Physical Examination—Medical Necessity—Limit of Amounts—Cancellation by Pharmacist—Records of Pharmacists and Physicians.**

SEC. 7. No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word "canceled," together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided.

Every physician who issues a prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the commissioner, which shall show the date of issue, amount prescribed, to whom issued, the purpose or ailment for which it is to be used and directions for use, stating the amount and frequency of the dose.

**Prescription Blanks—Form—Furnished by Commissioner—Return of Stubs and Unused Blanks—Emergency Cases—Record and Report.**

SEC. 8. The commissioner shall cause to be printed blanks for the prescriptions herein required, and he shall furnish the same, free of cost, to physicians holding permits to prescribe. The prescription blanks shall be printed in book form and shall be numbered consecutively from one to one hundred, and each book shall be given a number, and the stubs in each book shall carry the same numbers as and be copies of the prescriptions. The books containing such stubs shall be returned to the commissioner when the prescription blanks have been used, or sooner, if directed by the commissioner. All unused, mutilated, or defaced blanks shall be returned with the book. No physician shall prescribe and no pharmacist shall fill any prescription for liquor except on blanks so provided, except in cases of emergency, in which event a record and report shall be made and kept as in other cases.

**Constitutionality of Provision.**—The Alabama law regulating the issuance of prescriptions for intoxicating liquors, is not objectionable as interfering with the personal liberty of a physician since it embraces all of his class; it being competent for the Legislature, in the interest of regulating and prohibiting the liquor traffic, to pass such bill.

McAllister *v.* State, 156 Ala. 122, 47 So. 161.

"Nor is the Michigan law invalid because the original act, while prohibiting liquor to be sold by merchants, permitted it to be sold by druggists for medicinal, mechanical, or scientific purpose. The contention that this was an unlawful discrimination is answered by Kidd *v.* Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346, 2 Inters. Com. Rep. 232; Rippey *v.* Texas, 193 U. S. 504, 24 Sup. Ct. 516, 48 L. Ed. 767; Loyd *v.* Dollison, 194 U. S. 445, 24 Sup. Ct. 703, 48 L. Ed. 1065. Those cases show that the state may prohibit the sale of

liquor absolutely or conditionally; may prohibit the sale as a beverage, and permit the sale for medicinal and like purpose; that it may prohibit the sale by merchants and permit the sale by licensed druggists."

Eberle *v.* Michigan, 232 U. S. 700, 34 Sup. Ct. 464.

The Indiana Prohibition Law (Acts 1917, c. 4) is not unconstitutional in giving the right to registered pharmacists to deal in intoxicants under certain restrictions, and because those who have liquors manufactured in the state which are in bond may have possession, pay tax, and dispose of such liquors outside of the state, since the "privileges and immunities" section of the state Constitution (article 1, § 23), the "class" section (article 1, § 23), and the "general law" section (article 4, § 22), are not violated if an act is reasonably designed to protect the health, morals, or welfare of the public.

Schmitt *v.* Cook Brewing Co. (Ind.), 120 N. E. 19, 20.

**Validity of Provision—Title of Act.**—Michigan Pub. Acts 1889, No. 207, entitled "An act to prohibit the manufacture, sale, keeping for sale, giving away, or furnishing of vinous, malt, brewed, fermented, spirituous or intoxicating liquors," etc., amended by Pub. Acts 1911, No. 261, without altering the title to provide that any physician who prescribes any intoxicating liquors for any person whom he knows, or has good reason to believe, intends to use them in whole or in part as a beverage, or contrary to the provisions of the act, or without a diagnosis showing that liquor is indicated, shall be guilty, is not invalid as attempting to regulate the practice of medicine, and as subjecting physicians to a penalty, without giving notice in the title.

People *v.* Humphrey, 194 Mich. 10, 160 N. W. 445, 446.

**Revocation of Authority for Violations of Law.**—Initiative Measure No. 3 (Laws 1915, p. 6) § 8, providing, among other things, that it shall be unlawful for a physician, after he has been convicted a second time of a violation of any of the provisions of the act, to thereafter write any pre-

scriptions for furnishing, delivery, or sale of intoxicating liquor, is valid.

State *v.* Emonds (Wash.), 182 Pac. 584.

**Disqualification for Permit—Ex Post Facto Laws.**—A state law providing that a county auditor shall not issue a permit to any druggist who has been convicted of violating any of the liquor laws of the state, and requiring applicant to state in his application that he has not been convicted of violating any of the liquor laws, although applied so as to prohibit issuing of permits to druggists who have violated prior laws, are not *ex post facto* in their nature; the disqualification not being an additional punishment for past offenses.

Rosenoff *v.* Cross, 95 Wash. 525, 164 Pac. 236.

**"Pharmacist" or Druggist Defined.**—The words druggist or pharmacist, as used in a statute permitting the sale of intoxicating liquors by druggists or pharmacists only, mean such druggists or pharmacists as are actively engaged in business, and the possession of an excess quantity of liquor by a registered pharmacist not engaged in business is unlawful even though acquired before such law became effective.

State *v.* Martin, 92 Wash. 366, 159 Pac. 88.

**"Patient" Construed.**—A statute making it unlawful for any physician to furnish any person a prescription for any kind of intoxicating liquors except to patients of such physician, where the patient is afflicted with some disease and his condition is such that in the opinion of the physician, the taking of intoxicating liquors would be beneficial, applies where a person himself seeks the advice of the physician and states his ailments, and such person is a "patient" within the meaning of the act.

State *v.* Morton, 38 S. D. 504, 162 N. W. 155.

But a state law providing that it shall be unlawful for any physician to furnish a prescription for any kind of intoxicating liquors to be used as a beverage or for any pur-

pose except for medicinal purposes in case of actual sickness, applies only to case where the application for the prescription is made by some one other than the person alleged to be ill.

State *v.* Morton, 38 S. D. 504, 162 N. W. 155.

**Sale by Physician Not a Druggist.**—Where a physician who was not a druggist or a registered pharmacist and had not filed bond as such, sold intoxicating liquors in local option territory, he was guilty of violating the law, though the liquor was needed, intended and used for medicinal purposes.

People *v.* Bell, 170 Mich. 675, 137 N. W. 107.

**By Person Not Authorized to Sell Medicine.**—It is no defense in a prosecution for unlawfully selling spirituous liquor, that the liquor was sold as a medicine, where accused was not authorized to sell medicine.

State *v.* Buckman, 2 Boyce's (25 Del.) 591, 83 Atl. 938.

**Prosecution of Druggist.**—A druggist who makes a sale of intoxicating liquors not in compliance with the terms of the exception in his favor to the general prohibition against sales without a state license, may be prosecuted under the ordinary and general indictment for selling without a state license.

State *v.* Wills, 73 W. Va. 446, 80 S. E. 783.

**Offense of Unlawfully Issuing Prescription Covers Invalid Prescription.**—Where a statute declares that any physician who shall make any prescription to any person for intoxicating liquors to be used other than for medicinal purposes shall be deemed guilty of a misdemeanor, and provides the character of prescription which will protect a druggist in making sales of intoxicants, a physician who unlawfully issued a prescription for intoxicating liquor though he wrote the prescription in such a manner that the druggist who filled it was not protected, is nevertheless guilty; the word prescription meaning a direction of remedy or remedies for a disease and the manner of using

them, and not necessarily a valid prescription which would protect the druggist who filled it.

State *v.* Nicolay (Mo. App.), 184 S. W. 1183.

**Good Faith Essential.**—A person selling spirituous liquor as medicine must make the sale in good faith as such and he must use reasonable care and prudence to ascertain for what purpose it is to be used.

State *v.* Hastings, 2 Boyce's (25 Del.) 482, 81 Atl. 403.

The question of good faith enters into every sale of alcohol by a registered druggist or pharmacist, notwithstanding the formal sufficiency of his record, the record of sales not being conclusive under a statute providing that it shall be unlawful to sell intoxicating liquors except as provided, and requiring druggist to keep a "true" and "exact" record of sales.

State *v.* Holland, 99 Wash. 645, 170 Pac. 332.

**Good Faith of the Essence.**—In prosecution of physician for furnishing prescription for intoxicating liquors, the essence is whether or not a physician acted in good faith in giving the prescription to his patient.

State *v.* Morton, 38 S. D. 504, 162 N. W. 155.

**Physician Cannot Keep for Sale or Engage in Traffic.**—Though a physician is entitled to keep intoxicating liquors on his premises for use in his practice, he does not have the right to keep liquors for sale and engage in that traffic.

State *v.* Chamberlain, 180 Ia. 685, 163 N. W. 428, 429.

**Sale of Liquor in Stock with Business.**—If a druggist, in the legitimate pursuit of his business, had a right to purchase from the dispensary such liquors as were needed in compounding medicines, to keep them as a part of his stock of drugs, and when so compounded in good faith, to sell them without liability; it necessarily follows that, if having them, he desires to sell out his entire business to another, he might do so without violating the law;

and the mere fact that such liquors were a part of the stock of goods for which the note was given did not render the note illegal and void.

Long *v.* Holley, 177 Ala. 508, 58 So. 264.

**Necessity for Prescription in All Cases.**—A licensed druggist cannot sell intoxicating liquor to a practicing physician, except upon the written prescription of a practicing physician in good standing in his profession and not of intemperate habits.

State *v.* Davis, 68 W. Va. 142, 69 S. E. 639, Ann. Cas. 1912A, 996, 32 L. R. A., N. S., 501.

State *v.* Tullos, 135 La. 640, 65 So. 870.

**What Prescription Should Contain.**—In West Virginia a prescription must state substantially the following, viz.: (1) The name of the person for whom prescribed; (2) the kind and quantity of liquor; (3) that it is absolutely necessary as a medicine for such person; and that it is not to be used as a beverage.

State *v.* Davis, 68 W. Va. 142, 69 S. E. 639, Ann Cas. 1912A, 996, 32 L. R. A., N. S., 501.

A written order addressed to a licensed druggist and signed by a practicing physician, in the following words, viz. "Send me OJ spts. whisky and oblige. 12-12-09"—is not a lawful prescription for intoxicating liquor, and a sale made thereon is unlawful.

State *v.* Davis, 68 W. Va. 142, 69 S. E. 639, Ann. Cas. 1912A, 996, 32 L. R. A., N. S., 501.

**Failure to Attest Prescription.**—Where a druggist in making sales of liquors under permits, omitted to attest two of them, as required by law, the sales were thereby rendered illegal, though made in good faith, and though the permit holder falsely tested at the date shown thereon as required by law, and hence such sales rendered defendant's business subject to injunction as a liquor nuisance.

Wachal *v.* Davis, 145 N. W. 867.

**Failure to Take Affidavit of Purchaser.**—A druggist who keeps alcohol for no other purpose than for medicinal

and external uses, and in selling it on a prescription and for medicinal purposes, has failed to take the required affidavit from the purchaser, may be guilty of violating the statute, and may have committed a crime, but he has not committed the specific crime of keeping intoxicating liquors for sale as a beverage.

State *v.* Lesh, 27 N. D. 165, 145 N. W. 829.

**False Statement by Purchaser.**—A druggist who has complied with statute in making sale of alcohol commits no offense against the law because person to whom he sold it made false statement in violation of statute for purpose of procuring it.

State *v.* McCasky, 97 Wash. 401, 166 Pac. 1163.

**Identification of Prescription.**—Where, on the trial of a physician for prescribing intoxicating liquors with intent to evade the prohibition law, the testimony identified a prescription as one that the physician had given to prosecuting witness in a fictitious name, the prescription was properly received in evidence, though there was no allegation in the information of a prescription in the fictitious name.

State *v.* Terry, 128 La. 680, 55 So. 15.

**Production of Prescription in Evidence.**—A physician on trial for prescribing intoxicating liquors with intent to evade the prohibition law may not complain of the court's refusal to require the production of the prescriptions relied on by the state to establish its case.

State *v.* Terry, 128 La. 680, 55 So. 15.

**Written Prescriptions Not Privileged.**—The written prescriptions of practicing physicians on which a licensed druggist has made sales of intoxicating liquors, and which he has preserved in his possession, as the statute directs, are not his private papers and documents within the meaning of the constitutional guaranty against compulsory self-crimination.

State *v.* Davis, 68 W. Va. 142, 69 S. E. 639, Ann. Cas. 1912A, 996, 32 L. R. A., N. S., 501.

Such prescriptions are *quasi* public documents and the constitutional privilege is not violated by compelling a druggist who stands for unlawfully selling spirituous liquors, to produce them in court in order that they may be used as evidence against him on his trial.

State *v.* Davis, 68 W. Va. 142, 69 S. E. 639, Ann. Cas. 1912A, 996, 32 L. R. A., N. S., 501.

**Sale to Be Drunk on Premises as Beverage.**—Where the law provides that it shall be unlawful for any registered pharmacist to sell or give away any intoxicating liquor whatever to be used as a beverage or drank on the premises, and that no registered pharmacist who shall allow intoxicating liquors to be drank on the premises or in any room adjoining the premises, the selling or giving of intoxicating liquor to be drank as a beverage anywhere by a registered pharmacist, is unlawful and also the selling or giving of such liquors to be drank on the premises as a beverage or otherwise.

State *v.* Julius, 29 S. D. 638, 137 N. W. 590.

**Whisky Lawfully Purchased on Prescription May Be Carried Away.**—One who secures whisky from a druggist upon a lawful prescription may carry it on his person for a reasonable time and until in the natural course of events and conveniently he reaches his private residence, notwithstanding a provision prohibiting keeping liquor in any place except private residences. Where accused secured liquor on physician's prescription, his keeping it on his person from 6 o'clock in the evening until 8 o'clock did not exceed a reasonable time, although he had it on his person in a temperance bar in a hotel in which he had his room.

People *v.* Harris (Mich.), 168 N. W. 447.

**Law Allowing Shipment to Physician Does Not Allow Sale by Him.**—A provision excepting from the prohibition law the shipment or delivery to physicians of liquors in unbroken packages not exceeding five gallons at any one time, does not permit liquor to be sold by physicians.

Van Winkle *v.* State, 4 Boyce's (27 Del.) 578, 91 Atl. 385.

**Unlawful Seizure—Return.**—Where a druggist obtained liquors to be sold in compliance with the law, and such liquors were unlawfully seized, he had a right to their return, though he had in the meantime sold his drug business.

State *v.* Snell, 99 Wash. 195, 169 Pac. 320.

**Reclaiming Property Seized.**—Under a law regulating the sale and use of intoxicating liquor, a registered pharmacist not actually engaged in business, failing to reclaim an excess quantity of liquors seized by showing that he intends to engage in the druggist business, cannot reclaim them on the ground that he intends to keep them for private consumption.

State *v.* Martin, 92 Wash. 366, 159 Pac. 88.

**Presumption of Unlawful Sale.**—When a sale of intoxicating liquors is proven to have been made by a licensed druggist, it is presumed to have been unlawfully made, and the burden is then cast upon him to rebut such presumption.

State *v.* Davis, 68 W. Va. 142, 69 S. E. 639, Ann. Cas. 1912A, 996, 32 L. R. A., N. S., 501.

**Intent to Break Law Not Essential.**—The law relating to the sale of intoxicants by a pharmacist being prohibitory and authorizing the sale only under certain conditions, an intent to disobey the law is not essential to violation, and a pharmacist who sells intoxicants is bound at his peril to see that all provisions relating to the sale are complied with.

Milhiser *v.* Gandrup (Ia.), 146 N. W. 843.

See also, Cooper *v.* State, 19 Ariz. 486, 172 Pac. 276.

**Necessity That Pharmacist Be Licensed by State.**—Two partners engaged in the drug business neither of whom possessed a pharmacist's license, and who had no licensed pharmacist in their employ, were not druggists within the statute, and had no right to sell whisky on a prescription, or without it.

State *v.* O'Kelley, 258 Mo. 345, 167 S. W. 980, 52 L. R. A., N. S., 860n.

See ante, Sec. 6.

**Assigned License.**—No assignment of a druggist's license will protect the assignee thereof in making sale of spirituous liquors unless first assented to on proper application by the authorities, authorized to grant the original license. These statutes are mandatory and strict compliance therewith is required.

State *v.* Ross, 70 W. Va. 549, 74 S. E. 670, 39 L. R. A., N. S., 814n.

**Expired Permit Void.**—Under a law providing that druggists desiring to ship intoxicating liquors into the state shall first secure a permit therefor which shall be void 30 days from the date of issue, a permit to a druggist to ship intoxicating liquors into the state was absolutely void after 30 days and liquor was contraband, although permit was good when shipment started.

State *v.* Great Northern R. Co., 101 Wash. 464, 172 Pac. 546.

**Destroying Character of Intoxicating Liquor.**—Under a statute, providing that druggists holding permits may sell and dispense intoxicating liquors, but forbidding the sale of any preparation or compound under any name, form, or device which may be used as a beverage and which is intoxicating in its character, if the character of an intoxicating liquor is so destroyed that it could not be used for a beverage, and it becomes in fact a medicine to be used for disease and of such a character that it could not be used as an intoxicating drink, its sale would not be an offense.

Berner *v.* McHenry, 169 Ia. 483, 151 N. W. 450.

**Frequency of Applications for Prescriptions.**—In a prosecution of a physician for having prescribed whisky with good reason to believe that the patient intended to use it as a beverage, it was competent to prove, not only the frequency of the applications for prescriptions made by the patient, but the ease with which another had, by telephone, secured a prescription for a like amount of liquor, which he directed be given the first patient.

People *v.* Humphrey, 194 Mich. 10, 160 N. W. 445, 446.

**Liability of Partner for Illegal Sale by Copartner.**—A member of a partnership, which is engaged in the drug business, although neither of the partners nor any of their employees are licensed pharmacists, is liable for a sale of intoxicating liquor made by his copartner, although he was not present at the time.

State *v.* O'Kelley, 258 Mo. 345, 167 S. W. 980, 52 L. R. A., N. S., 860n.

**Search Warrant against Druggist.**—That persons accused of illegal sales of intoxicating liquors are druggists, does not exempt them from operation of a law providing for issuance of search warrant on affidavit of probable cause to believe illegal sales are being made.

State *v.* Gordon (Wash.), 163 Pac. 772.

**Carriers—Records of Shipments—Permit of Consignee—Record of Delivery—Oath of Consignee—Identification—Name and Address.**

SEC. 13. It shall be the duty of every carrier to make a record at the place of shipment of the receipt of any liquor transported, and he shall deliver liquor only to persons who present to the carrier a verified copy of a permit to purchase, which shall be made a part of the carrier's permanent record at the office from which delivery is made.

The agent of the common carrier is hereby authorized to administer the oath to the consignee in verification of the copy of the permit presented, who, if not personally known to the agent, shall be identified before the delivery of the liquor to him. The name and address of the person identifying the consignee shall be included in the record.

**Validity of Requirement.**—A provision requiring a record to be kept of the receipt and delivery of shipments of intoxicating liquor to be open for inspection by any officer or citizen during business hours does not violate Const. U. S. Amend. 14, as that amendment does not impair the exercise of the police power.

State *v.* Seaboard Air Line R. Co., 169 N. C. 295, 84 S. E. 283.

**Care of Records.**—Requiring a carrier to keep a book showing deliveries of intoxicating liquors, though requiring ordinary care to preserve record, does not require that record be kept in burglar or fireproof safe.

Commonwealth *v.* Southern Exp. Co., 182 Ky. 132, 206 S. W. 167.

**Liability of Carrier for Default of Agent.**—Under a state statute requiring carriers to keep a book showing all receipts and deliveries of liquor, with various particulars, open to inspection, and declaring "that any railroad, express or other transportation company, or any employee or agent who fails," neglects, or refuses to comply with the provision of the section or who makes or causes to be made any false entry in such book, shall be deemed guilty of misdemeanor, an express company which provided an appropriate book for the insertion of such entries, but its local agent delivered intoxicating liquors without requiring the consignee to sign his name, it was held, that, as the purpose of the statute is to provide a check upon the shipment of intoxicating liquors into territory where their sale as a beverage is prohibited, the express company cannot avoid liability on the ground that its duty was fulfilled when it provided the book for the required entries and signature of the consignee, and that the offense, if any, was committed only by its agent; the use of the disjunctive "or" in the penal provision not showing any intent to relieve transportation companies, and cast all burdens on their agents.

Commonwealth *v.* Adams Exp., 179 Ky. 394, 200 S. W. 648.

**Delivery in Good Faith after Proper Investigation.**—A carrier who in good faith, and after proper investigation, delivers liquor to a consignee without any knowledge that the same is intended for illegal use in the state, is not guilty.

Southern Exp. Co. *v.* State, 188 Ala. 454, 66 So. 115.

"When alcohol is shipped from a point out of this state to a point in the state and delivered by a common carrier to a person in this state, the duty devolves upon the carrier to use reasonable care to learn for what purpose it is to be used, and it can only deliver the alcohol when in the exercise of such reasonable care it is convinced that the alcohol is to be used for strictly medicinal or mechanical purposes. As stated in Adams Exp. Co. *v.* Commonwealth, 160 Ky. 66, 169 S. W. 603, if the express company acts upon reasonable grounds in good faith after such investigation as ordinary care requires, and is misled, it is not lia-

ble; otherwise it is liable. So too in the case of Southern Exp. Co. *v.* State, 188 Ala. 454, 66 So. 115. In discussing this question, the Supreme Court of Alabama said: 'If in good faith and after proper investigation a common carrier of interstate commerce delivered liquors to a consignee without any knowledge on its part that such liquors are intended by the consignee for illegal use, then such carrier cannot, we think, be held to have violated any law of this State.' In the case of Clark Distilling Co. *v.* Western Maryland R. Co. (D. C.), 219 Fed. 333, the court held: 'Where intoxicating liquors are offered to a carrier for transportation from Maryland into West Virginia, for the alleged personal use of the consignee, the carrier is not bound at his peril to make sure that the liquors are not intended to be used contrary to the laws of such state, but is only required to act in good faith in a *bona fide* effort to prevent its instrumentalities being used to aid a violation of the law. The court said: "In this case nothing need be decided other than that the defendant as a common carrier is bound to receive for shipment and to transport and deliver in West Virginia, such liquors as are intended solely for the personal use of the consignee even though the orders for them had been solicited by letters mailed at points outside the state. It has no right to accept for shipment, or to deliver in West Virginia liquors which are intended by any person interested therein to be used in any way forbidden by the law of that state. It is not bound at its peril to make sure that no liquor transported by it is intended to be used contrary to the state law. It need not create or maintain any special staff of investigators or detectives to aid it in determining such questions. It must, however, act in good faith. Its agent and employees who handle such shipments for it must keep their eyes open, and must exercise common sense to prevent it and its instrumentalities being used as aids in violation of the law. The question of the good faith of the express company in delivering the alcohol to Wilson was a question of fact for the jury in this case, and the court should have instructed the jury as above indicated." ' "

Quinn *v.* Reed, 130 Ark. 116, 197 S. W. 15.

Under an act prohibiting the delivery in prohibition territory of interstate shipments of intoxicating liquor, where

such liquor is intended to be used contrary to law, persons delivering intoxicants within local option territory are bound to exercise proper care, which is the use of such diligence as the circumstances require to see that the liquor is not used contrary to law, and only a mistake of fact will excuse a delivery of liquors used or intended to be used contrary to law.

Ex parte Peede, 75 Tex. Cr. App. 247, 170 S. W. 749.

**Conspiracy to Effect Unlawful Delivery.**—A defendant, indicted with another for conspiring with employees of a carrier to have the employees deliver intoxicants to them under a fictitious name, may be convicted of conspiracy, notwithstanding delivery to the other alone.

McKnight *v.* United States, 164 C. C. A. 527, 252 Fed. 687.

**Connecting Carrier's Agency.**—"A common carrier over whose lines a shipment of intoxicating liquors has not been consigned, but merely in cars it has been consigned over other lines to a destination point, cannot act as the agent of the consignee in receipting for and accepting delivery of the shipment."

Hudgens *v.* Southern Exp. Co., 74 W. Va. 760, 83 S. E. 63.

See also, as to transportation of liquor as a crime, ante under Sec. 3.

**Notice to Carrier of Nature of Shipment—Information Required on Outside of Package.**

SEC. 14. It shall be unlawful for a person to use or induce any carrier, or any agent or employee thereof, to carry or ship any package or receptacle containing liquor without notifying the carrier of the true nature and character of the shipment. No carrier shall transport nor shall any person receive liquor from a carrier unless there appears on the outside of the package containing such liquor the following information:

Name and address of the consignor or seller, name and address of the consignee, kind and quantity of liquor contained therein, and number of the permit to purchase or ship the same, together with the name and address of the person using the permit.

**"Consignee" Construed.**—"Consignee," in a statute declaring it an offense to ship into a state a package of liquors unless labeled to show the name of the consignee, not being defined, must be assumed to be used in its ordinary commercial and legal significance, and so to mean the one to whom the carrier may lawfully make delivery in accordance with its contract of carriage.

Great Northern Pac. S. S. Co. *v.* Rainier Brewing Co. (C. C. A.), 255 Fed. 762.

**Any Evasion Illegal.**—Under a law requiring interstate shipments of intoxicating liquor to be so labeled as to plainly show the nature of their contents, any attempt to evade the law, by failing to set forth the particulars truthfully, or to disclose them plainly, or any attempt to cover up with advertising matter the facts which the law requires

the label to reveal, so as to readily catch the eye, violates the law.

United States *v.* Hillsdale Distillery Co. (D. C.), 242 Fed. 536.

**Marks Must Be Clear and Plain.**—"The act of Congress says that the nature of the contents of the package shall be plainly shown and shown on the outside cover. The requirement is a definite one, very easily complied with. It means that the marks must be of manifest, self-evident import, and must appear at the place indicated. It clearly excludes the idea of reference elsewhere for information, or of a general knowledge of the trade-names or brands adopted by particular merchants for their business, which have not gained a place in the common vocabulary of the country. What has been said also precludes resort to bills of lading issued by the carrier."

Schmidt Brewing Co. *v.* United States (C. C. A.), 254 Fed. 695, 696.

Thus, where defendant made interstate shipments of beer, and the only external marks indicating the nature of the packages were the name of the defendant brewing company, the trade-name, "Select," and a serial number, he was guilty of violation of a provision prohibiting the interstate shipment of liquors, unless the package have its contents plainly labeled on the outside, the fact that the nature of the contents might have been inferred or learned from other sources being immaterial.

Schmidt Brewing Co. *v.* United States (C. C. A.), 254 Fed. 695.

**Duty of Carrier to Inform Itself of Purpose of Consignee.**—Under federal Penal Code 240 (Acts March 4, 1910, c. 321, 35 Stat. 1137 U. S. Comp. St. Supp. 1911, p. 1662) prohibiting interstate shipments of intoxicating liquors unless each package containing the same is so labeled as to plainly show the name of the consignee, the nature of the contents, and the quantity, a carrier of interstate commerce is apprised of the character of the shipment when intoxicating liquor is received by it, and under the Webb law (Act March 1, 1913, c. 90, 37 Stat. 699), before it de-

livers the liquor to the consignee in the state it should inform itself of the purpose of the consignee, and where it has liquor in its possession for delivery for a person intending to use it in violation of the law, or actually delivering it in the state to such person, it is presumptively guilty of a violation of the law of the state.

Southern Exp. Co. *v.* State, 188 Ala. 454, 66 So. 115.

**Right of Carrier to Rely on Absence of Label.**—Unless otherwise advised, either of the fact that an unlabeled package contains liquors within the description of the statute, or of circumstances reasonably calculated to arouse suspicion or inquiry with respect to that fact, the carrier to whom a shipment for transportation and delivery in Alabama is offered without the state, may rely on the absence from a package of the label required by such section as negativing the presence therein of forbidden liquors in receptacles of prohibited capacities.

State *v.* Southern Exp. Co. (Ala.), 75 So. 343.

And a carrier will not be held to receive at peril of offending the prohibitory and regulatory laws of Alabama consignments of intoxicating liquor destined for transportation into and for delivery in Alabama, where they were free from cause of suspicion that they contained prohibited liquors in receptacles of forbidden capacities.

State *v.* Southern Exp. Co. (Ala.), 75 So. 343.

**Failure to Inspect—Statute Forbidding Opening.**—An Act prohibiting the delivering carrier from opening on the premises in Alabama an original package, does not excuse an interstate carrier's failure to inspect liquors tendered for shipment from without the state to a point within the state; the operation of such section being restricted to its purpose to prevent the apportionment of or distribution of the contents of a shipment of liquor at destination on the premises of the carrier.

State *v.* Southern Exp. Co. (Ala.), 75 So. 343.
See also ante, under Sec. 3, Title II.

**False Statements of Liquor Shipments—Receipt, Shipment or Delivery Unlawful.**

SEC. 15. It shall be unlawful for any consignee to accept or receive any package containing any liquor upon which appears a statement known to him to be false, or for any carrier or other person to consign, ship, transport, or deliver any such package, knowing such statement to be false.

**Application to Carrier.**—The Ky. St. 2569b, subd. 1, prohibiting in dry territory delivery of intoxicating liquor to any person intending to sell it and subsection 2, prohibiting consignment, transportation, or shipment of such liquor or any package of intoxicating liquors upon which appears a false statement, was held applicable to carrier as well as to consignor or consignee.

American Exp. Co. *v.* Commonwealth, 171 Ky. 1, 186 S. W. 887.

But the carrier is liable only if its agent knew the package to be falsely marked or the purpose for which such liquor was to be used, and is not required to use reasonable care to ascertain the purpose for which such liquors are to be used.

American Exp. Co. *v.* Commonwealth, 171 Ky. 1, 186 S. W. 887.

See also ante, under Sec. 3, Title II.

**Advertisements Unlawful—Signs and Bill Boards—Exceptions—Price Lists, etc.—Advertisements of Alcohol—Newspapers Published Abroad.**

SEC. 17. It shall be unlawful to advertise anywhere, or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the same, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises. But nothing herein shall prohibit manufacturers and wholesale druggists holding permits to sell liquor from furnishing price lists, with description of liquor for sale, to persons permitted to purchase liquor, or from advertising alcohol in business publications or trade journals circulating generally among manufacturers of lawful alcoholic perfumes, toilet preparations, flavoring extracts, medicinal preparations, and like articles: *Provided, however*, That nothing in this Act or in the Act making appropriations for the Post Office Department, approved March 3, 1917 (Thirty-ninth Statutes at Large, Part 1, page 1058, et seq.), shall apply to newspapers published in foreign countries when mailed to this country.

**Authority of State to Prohibit.**—As the state has authority under its police power to regulate the sale of intoxicants, and as contracts relating to such sales are subject to such power, a statute prohibiting newspapers and magazines in the state from advertising for the sale of intoxicants, does not work an impairment of contracts, even though publishers already had contracts for the publication of liquor advertisement, such contracts being also subject to the police power.

Advertiser Co. *v.* State, 193 Ala. 418, 69 So. 501.

The power to prohibit or regulate the sale of intoxicating liquors includes also the power to prohibit solicitations for such sales by agent or advertisement.

Black *v.* Delaye, 193 Ala. 500, 68 So. 993.

See State *v.* Ross (N. D.), 170 N. W. 121.

**Circulation by Mail.**—"A liquor dealer residing and doing business in another state, who, by the agency of the United States mails sends into one state unsolicited and there circulates or distributes to prospective customers price lists, circulars and order blanks advertising his liquors for sale and which he proposes to ship into this state to them, and which advertising matter by such agency is actually delivered to a citizen of this state, is guilty of a violation of section 8, chapter 13 Acts of the legislature of 1913 known as the Yost Law (Code 1913, c. 32A. 8. § 287) and so construed, said act, by virtue of the acts of congress known as the Wilson act (Act Aug. 8, 1890, c. 728 Stat. 313, U. S. Comp. St. 1913, 8738) and the Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699, U. S. Comp. St. 8739) does not infringe the commerce clause of section 8 of article 1 of the Federal constitution. Nor does the provision of section 8 of said act 1913, so construed and applied, violate the 'privileges and immunities' clause of the Fourteenth Amendment to the Federal constitution."

State *v.* Davis, 77 W. Va. 271, 87 S. E. 262, L. R. A. 1917C, 639.

**Newspapers Published without State.**—The law prohibiting the sale of newspapers and magazines containing liquor advertisements, does not, when applied to a newspaper published out of the state, and containing an advertisement of liquor manufactured out of the state and to be shipped into the state to individuals ordering it, violate Const. U. S. art. 1, 8, vesting in Congress the exclusive power to regulate interstate commerce.

Black *v.* Delaye, 193 Ala. 500, 68 So. 993.

See also, State *v.* Davis, 77 W. Va. 271, 87 S. W. 262, L. R. A. 1917C, 639, set out *supra.*

**Scope of Prohibition.**—The Georgia statute (Rev. St. 1903, c. 29, 45), forbidding the publication of advertisements of the sale or keeping for sale of intoxicating liquors, includes advertisements of intoxicating liquors sold or kept for sale without the state.

State *v.* Bass Pub. Co., 104 Me. 288, 71 Atl. 894, 20 L. R. A., N. S., 495.

**Advertisement Must Give Information Where to Be Obtained.**—It is not a violation of a statute prohibiting the advertisement of intoxicating liquors, or of any person from whom, or the price at which, or the method by which, intoxicating liquors may be obtained, for a newspaper to publish an advertisement signed by the United States Brewers' Association, setting forth that the Federal government had recognized the distinction between beer and spirituous liquors, and attempting to popularize beers and light wines as temperance beverages at the expense of distilled liquors, the advertisement not giving any information as to where beer or light wines could be obtained.

State *v.* Advertiser Co. (Ala.), 77 So. 758.

**Giving Away Samples in Connection with Circulars, etc.**—Where an agent of a nonresident dealer in intoxicating liquors distributes circulars and price lists of such liquors, and in connection therewith, personally gives away samples of such intoxicating liquors in this state, he is guilty of soliciting.

Kirkpatrick *v.* State, 12 Ga. App. 252, 77 S. E. 104.

**Soliciting or Receiving Orders—Giving Information as to Obtaining Liquor.**

SEC. 19. No person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of this Act.

**Constitutionality.**—A law which prohibits the soliciting or taking of orders for the sale of intoxicating liquors in counties where such sales are, by law, prohibited, is a police regulation, necessary for the effective enforcement of the State's prohibitory regulations. The act forbidding soliciting orders for intoxicating liquor, is not affected by the extension of the scope of its operations caused by the passage of the general prohibition act.

Rose *v.* State, 4 Ga. App. 588, 62 S. E. 117.

**Receiving "or" Soliciting.**—Where a statute makes the receiving of orders for spirituous liquors, as well as the soliciting of them, an offense, and the two terms are connected by the disjunctive "or" not the conjunctive "and," it is not necessary that there be a soliciting, but the receiving of them alone is a violation of the statute.

State *v.* Decker, 75 W. Va. 565, 84 S. E. 376.

**Taking Order for Liquor—Place of Sale.**—Taking an order for liquor to be furnished from a wholesale house located elsewhere for subsequent shipment to the party giving the order does not amount to a sale in the county, where the order was taken.

People *v.* Meloche, 186 Mich. 536, 152 N. W. 918.

**Solicitation by Letter.**—Where the solicitation or taking orders for the sale of intoxicating liquor is forbidden, whether the solicitation is by the seller personally, or whether the solicitor is only an agent of the seller, to solicit

the sale of intoxicating liquor by letter or circular is a crime, if the letter is intended to be delivered and is in fact delivered as intended. The term solicit personally includes any act done by the seller himself which may tend to effect a sale, as contrasted with any like act by an agent of the seller, tending to a similar result. Whether a solicitation is personal or by an agent, is not dependent upon the personal presence of the solicitor, but upon whether the means of solicitation, whether oral or in writing, are used by an agent or by the principal himself. The solicitation of orders by mail for the sale of intoxicating liquors is personal solicitation if the seller himself in person writes or mails the letter received by the prospective buyer.

Rose *v.* State, 4 Ga. App. 588, 62 S. E. 117.

**Delivery Unnecessary.**—Defendant, as agent of a firm of liquor dealers, solicited a person to purchase one gallon of liquor, for which he received payment in full, giving an order on the firm of liquor dealers, setting forth the goods sold, price paid, the mode of shipment and directing the dealers to express the same at once. Defendant admitted that his orders to the firm of liquor dealers were always filled. Held, to constitute a sale of liquor, without evidence of a delivery of the same.

State *v.* Small, 82 S. C. 93, 63 S. E. 4.

**Liquor Nuisance as Crime.**

SEC. 21. Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.

Whoever establishes, continues, or uses any building for the purpose of selling therein intoxicating liquor, or for the purpose of keeping intoxicating liquor therein with intent to sell the same, is guilty of keeping a liquor nuisance.

State *v.* Jarvis (Ia.), 165 N. W. 61.

**As Continuing Offense.**—The crime of maintaining a liquor nuisance is a "continuing offense."

State *v.* Maguire, 31 Idaho 24, 169 Pac. 175.

**Single Sale.**—A single sale will warrant a conviction under an information for keeping and maintaining a com-

mon nuisance by keeping a place where intoxicating liquors are sold as a beverage.

Scott *v.* State, 37 N. D. 90, 163 N. W. 813.

**Time Not a Material Ingredient.**—Time is not a material ingredient of the crime of keeping and maintaining a common nuisance contrary to the provisions of the prohibition law.

State *v.* Webb, 36 N. D. 235, 162 N. W. 358.

**Knowledge of Accused—Intent.**—Proof of sale of liquor on defendant's premises, without proof that it was done with the knowledge, consent, acquiescence, or connivance of defendant, does not establish that he kept the liquor sold with intent to sell it in violation of law.

State *v.* Jarvis (Ia.), 165 N. W. 61.

**Maintenance for One Day Sufficient.**—"It was not incumbent upon the state to show that the place was used for such unlawful purposes during the entire period named in the indictment. Proof that the defendant kept and maintained a tenement for any one of such purposes during any part of the time comprised within the days named in the indictment would warrant a conviction. It is the nature of the acts done, not the length of time during which they are committed, that constitutes the offense. The case is made out, the offense is committed, if for a single day between those dates that place was so used. If for a single hour in the day it was so used, for that hour it was a common nuisance, and whoever for that hour maintained the place was guilty of keeping and maintaining a common nuisance."

State *v.* Kapicsky, 105 Me. 127, 73 Atl. 830, 23 L. R. A., N. S., 737.

**Legal Title Unnecessary—Possession and Control.**—"Upon an indictment charging maintenance of a public nuisance by knowingly permitting unlawful sales of intoxicating liquors in a building therein described as 'owned and occupied' by defendant, proof of legal title by her is not essential. Possession and control of the premises are all the statute requires."

State *v.* Rogers, 80 W. Va. 680, 93 S. E. 757.

**Intoxicating Character of Liquor.**—In a prosecution for maintenance of a liquor nuisance the state must show, either directly or by fair inference, that the liquors contained some alcohol, and therefore were intoxicating, when taken from the accused.

State *v.* Knapp, 177 Ia. 278, 158 N. W. 517.

**Procurement by State Agent as Defense.**—Under a state law making it the duty of state agents to aid in the capture and prosecution of persons committing crime or violating the laws of the state, the fact that such an agent, without improper solicitation, and while endeavoring to ascertain whether defendant was violating the law, asked for a pint of whisky and received and paid for it, was no defense to prosecution for maintaining a liquor nuisance.

State *v.* See, 177 Ia. 316, 158 N. W. 667.

**Immaterial Whether Lessee or Agent.**—And it was not material whether one prosecuted for maintaining a liquor nuisance, and who sold intoxicating liquors to persons acting as state agents, was renting the place or was acting as clerk or employee for his mother.

State *v.* See, 177 Ia. 316, 158 N. W. 667.

**Jurors—Challenge for Prejudice.**—In a nuisance prosecution for selling intoxicating liquor the state cannot question prospective jurors regarding their prejudice against the testimony of witnesses obtaining information solely for purposes of prosecution.

State *v.* Hoffman (Ore.), 166 Pac. 765.

**Abatement—Appeal of Search and Seizure Proceedings.**—A prosecution for maintenance of a liquor nuisance does not abate by the pendency on appeal of search and seizure proceedings against the same parties.

State *v.* Knapp, 177 Ia. 278, 158 N. W. 517.

**Evidence and Question for Jury.**

See post, "Evidence," under Section 33.

**Abatement of Nuisance.**—An automobile or other vehicle used in the unlawful transportation of intoxicating liquor which is, by statute declared to be a common nuisance, may be abated as in the act provided.

State *v.* Jones-Hansen-Cadillac Co. (Neb.), 172 N. W. 36.

See also post, under Sec. 23.

## TITLE II—SEC. 23

### INJUNCTION.

**Nature of Proceeding—Jurisdiction and Scope.**

**Nuisance to Traffic in Liquor—Keeping, Carrying About or Dealing in—Injunction—Showing as to Intention to Continue—Fees of Officer—Forfeiture of Lease.**

SEC. 23. That any person who shall, with intent to effect a sale of liquor, by himself, his employee, servant, or agent, for himself or any person, company, or corporation, keep or carry around on his person, or in a vehicle, or other conveyance whatever, or leave in a place for another to secure, any liquor, or who shall travel to solicit, or solicit, or take, or accept orders for the sale, shipment, or delivery of liquor in violation of this title is guilty of a nuisance and may be restrained by injunction, temporary and permanent, from doing or continuing to do any of said acts or things.

In such proceedings it shall not be necessary to show any intention on the part of the accused to continue such violations if the action is brought within sixty days following any such violation of the law.

For removing and selling property in enforcing this Act the officer shall be entitled to charge and receive the same fee as the sheriff of the county would receive for levying upon and selling property under execution, and for closing the premises and keeping them closed a reasonable sum shall be allowed by the court.

Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease.

**Nature of Proceeding.**—An action to enjoin the maintenance of a liquor nuisance is not criminal, but civil, and a preponderance of evidence is sufficient to warrant an injunction.

State *v.* Cipra, 92 Kan. 591, 141 Pac. 1133.

A law which imposes a penalty upon persons unlawfully selling or giving away intoxicating liquors, and gives the chancery court jurisdiction concurrent with courts of law to entertain suits for penalties and to suppress the business as a nuisance, and to further punish the persons engaged therein, is not a criminal statute, and does not authorize criminal prosecutions.

State *v.* Marshall, 100 Miss. 626, 56 So. 729, Ann. Cas. 1914A, 434.

**No Criminal Conviction Necessary.**—The remedy by action in equity to enjoin a public nuisance may be invoked against a place for the sale of intoxicating liquors, though there has been no criminal conviction of the keeper of the place.

State *v.* Reisen, 165 Wis. 258, 161 N. W. 747, 748.

**Equitable Jurisdiction.**—The equitable jurisdiction of the court to enjoin a public nuisance is not affected by the fact that a criminal prosecution may also be instituted for the acts which constitute the nuisance.

State *v.* Lyon, 83 S. C. 509, 65 S. E. 730.

**Power of Chancery Court.**—A constitutional provision which declares that the chancery court shall have full jurisdiction in all matters of equity, means that in whatever is a matter of equity, the court's power to adjudge is full, and that, when the court takes hold of a subject, it ought to dispose of it fully and finally, the word "full" implying that nothing is reserved, and, as thus construed, the provision is broadly declaratory of the rule that, where equity has jurisdiction for one purpose, it acquires jurisdiction for all purposes, and a court of chancery, having statutory jurisdiction under a statute to abate a liquor nuisance, may not

only abate nuisance, but may also render judgment for the statutory penalties.

State *v.* Marshall, 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434.

But under the authority to abate nuisance conferred by a state law, the injunction goes primarily against places in which the prohibition laws are habitually violated and incidentally against persons who maintain such places. Such authority does not extend to violations of the prohibition laws generally or in ways other than those designated in said sections. Neither said section nor any other laws confers upon courts of equity general power to govern the state by injunction, in so far as its laws pertain to the subject of intoxicating liquors.

State *v.* Baltimore, etc., R. Co., 78 W. Va. 526, 89 S. E. 288, L. R. A. 1916F, 1001.

**Blanket Injunction.**—A person maintaining a nuisance by selling liquor at a certain place cannot be enjoined from selling liquor independently of the place where nuisance exists; and hence a blanket injunction against defendants, restraining them from selling alcoholic liquors within the state was properly refused.

State *v.* Lyon, 83 S. C. 509, 65 S. E. 730.

**Statutory Authority Essential.**—"In the absence of a statute conferring it, equity has no jurisdiction to abate a public nuisance, either civil or criminal, at the instance of an individual or the state, not affecting or injuring the enjoyment of property or other personal rights. Injunction is not a remedy for the enforcement of criminal laws generally."

State *v.* Baltimore, etc., R. Co., 78 W. Va. 526, 89 S. E. 288, L. R. A. 1916F, 1001.

Alton *v.* Salley (Mo.), 215 S. W. 241.

The general rule is that, in absence of specific statute, injunction will not lie to abate a nuisance where the acts complained of are an offense against the criminal laws, but where a place or particular business is declared to be a public nuisance, as is a liquor nuisance, by statute, such a nui-

sance, notwithstanding it violates the criminal laws, may be abated by injunction pursuant to the statute authorizing a civil action to abate a public nuisance.

State *v.* Bossingham, 35 S. D. 355, 152 N. W. 285.

Thus, unless made so by statute, the crime of aiding in the delivery and distribution of intoxicating liquors is not a nuisance, for such acts were not a nuisance at common law.

Hathaway *v.* Benton, 172 Ia. 299, 154 N. W. 474.

And a court of chancery, at the instance of the commonwealth, will not enjoin the use of a building for the mere sale of intoxicating liquors on Sunday, in the absence of the statute authorizing the action, although the sale of liquor on Sunday is prohibited by law.

Commonwealth *v.* Ruh, 173 Ky. 771, 191 S. W. 498, L. R. A. 1917D, 283.

And the shipment of liquor into a local option county by a common carrier cannot be enjoined by a court of equity, regardless of the criminality of the act, where such shipment did not result in the maintenance of a public nuisance, it not appearing that such shipment resulted in drunkenness, the remedy being to proceed under the criminal statutes, for a court of equity has no jurisdiction to enjoin an act merely because it is criminal.

State *v.* Chicago, etc., R. Co. (Mo. App.), 191 S. W. 1051.

**Sale of Liquor Alone.**—The illegal sale of intoxicating liquor cannot be enjoined when unaccompanied by circumstances making a nuisance.

State *v.* Kirkwood Leisure Hours' Social, etc., Club (Mo. App.), 187 S. W. 819.

See also, Alton *v.* Salley (Mo.), 215 S. W. 241.

**Law in Force When Suit Brought Governs.**—The liability of one, alleged to maintain a liquor nuisance, to injunction, must be governed under the law as it stood when

the suit was brought, unaffected by a statute which became effective three months thereafter.

Civic Improv. League *v.* Hanson, 181 Ia. 327, 164 N. W. 752.

**Case Must Come within Statute.**—Under a state statute authorizing an injunction against persons who may sell or give away any vinous or spirituous liquors unlawfully, defendants, who sold beer, cannot be enjoined, though the beer contained alcohol; for beer is a malt liquor, and is neither a vinous nor a spirituous liquor.

Collotta *v.* State, 110 Miss. 448, 70 So. 460.

And a manufacturing plant where only nonintoxicating malt liquor is made and sold, is not a nuisance which may be abated under the "blind tiger" statute which declares that "any place spirituous, malt, or intoxicating liquors are sold in violation of law, shall be deemed a nuisance, and the same may be abated or enjoined as such," etc.

Howard *v.* Acme Brewing Co., 143 Ga. 1, 83 S. E. 1096.

**Delivery Alone.**—And where the statute made offenses relating to intoxicating liquor a nuisance only when carried on in or in connection with building or places, the crime of aiding in delivering intoxicants is not a nuisance. Nor is such crime made a nuisance by virtue of a statute declaring that, if any common carrier or person shall transport or convey intoxicating liquors without first having been furnished with a certificate by the clerk of the court, he shall upon conviction be fined.

Hathaway *v.* Benton, 127 Ia. 299, 193 N. W. 474.

**What Constitutes a Nuisance.**

The generally accepted doctrine is that the keeping of a place where intoxicating liquors are sold contrary to law does not constitute such place a nuisance *per se* that courts of equity will abate by injunction.

Territory *v.* Robertson, 19 Okla. 149, 92 Pac. 144.

Joyce on Nuisance, 415.

Commonwealth *v.* Ruh, 173 Ky. 771, 191 S. W. 498, L. R. A. 1917D, 283.

And under a statute providing that all places used for the illegal sale or keeping of intoxicants are common nuisances, the premises involved must have been habitually and customarily used for the purposes mentioned.

State *v.* Gastonguay (Me.), 105 Atl. 402.

And the mere assembling of idle and turbulent citizens at a given place where liquor is sold does not constitute a public or private nuisance unless it appears that they have been guilty of some misbehavior which is sufficient under the law to produce such result.

State *v.* Dick & Bros. Quincy Brewing Co., 270 Mo. 100, 192 S. W. 1022, L. R. A. 1917D, 1023n.

But it has been held that one who sells liquor in violation of law and has the reputation of so doing maintains a liquor nuisance.

State *v.* Kiefer, 172 Ia. 306, 151 N. W. 440.

"The sale of liquor in violation of law is a crime, but equity will not enjoin the sale. This will be left to the courts of law. But unlawful sales of liquor may be made at such places and under such facts and circumstances as to make the whole thing a public nuisance. It is then, and only then, that equity will intervene and abate the nuisance. But the evidence must show such surrounding circumstances and facts as will constitute the maintenance of the place of sale a public nuisance. Merely showing that there are violations of law in the sales by selling less than the license to sell authorized does not make a public nuisance."

State *v.* Jones (Mo.), 209 S. W. 876, 877.

**Clubhouse.**—One is engaged in the illegal traffic in intoxicating liquors, in violation of the law and an injunction will lie, where the building in which liquor is kept is not a dwelling house, but a public place, and is used by him and others as a clubhouse, or for distribution of the liquor, or if the liquor is received or kept in his place of business, though it is for their personal use.

Dutton *v.* Anderson (Ia.), 145 N. W. 321.

**Places Where Persons Are "Permitted" to Resort, etc.**—The word "permit" construed in connection with a

statute, providing that "all places where * * * persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage * * * are hereby declared to be common nuisance," means the same as "consent," and consent implies knowledge.

State *v.* Wheeler, 38 N. D. 456, 165 N. W. 574, 575.

**Place Where "Intoxicating" Liquors Are Manufactured, Stored, Sold, etc.**—The term "intoxicating liquors," as used in Nevada Prohibition Law, § 14, making place where such liquors are manufactured, stored, sold, etc., public nuisances, is, when said section is considered together with sections 6 and 17, to be taken as used interchangeably with the word "liquors" in section 1, and district court had jurisdiction to enjoin defendant brewing company from manufacturing and selling "Sierra Beverage," although said beverage is not intoxicating.

State *v.* Reno Brewing Co. (Nev.), 178 Pac. 902.

**Vehicle as "Place."**—A vehicle moving about from one place in the city to another while engaged in selling intoxicating liquors in violation of law and of the ordinance of the city, is a place within the meaning of a statute and city ordinance which prohibit nuisances as defined in that statute.

Kansas City Breweries Co. *v.* Kansas City, 96 Kan. 731, 153 Pac. 523.

**"Bootlegging."**—A statute declaring that any person who shall keep or carry around his person, or in any vehicle, or leave in a place, intoxicating liquors with intent to dispose of same, in violation of law, shall be termed a "bootlegger," and that every bootlegger may be restrained by injunction from doing any of the acts prohibited by law, does not apply to the case of an expressman aiding in delivering and distributing intoxicating liquors ordered by others; for a bootlegger is one who disposes of or sells liquor in violation of law.

Hathaway *v.* Benton, 172 Ia. 299, 154 N. W. 474.

**Social Club.**—Under a statute providing that the conducting, maintaining, carrying on or engaging in the sale

of intoxicating liquors, and all means, appliance, fixtures, etc., are declared public nuisance, an incorporated social club which had been in existence for 25 years with a limited membership, and dispensed intoxicating beverages to its members at cost of material and service without overhead charges, as a mere incident to the main purpose of the club, the social intercourse of its members, no person not a member of the club, being permitted to obtain anything from the club at his own expense, was not guilty of conducting a nuisance; the sale of intoxicating liquors as a business and for profit, being the nuisance contemplated by the Legislature.

State *v.* Mountain City Club, 136 Tenn. (9 Thompson) 102, 188 S. W. 579.

But it has also been held that a place of resort is a nuisance if used by a club either to sell intoxicating liquors to its members, or to distribute among its members intoxicating liquors owned by them in common, or to procure for and dispense to its members intoxicating liquors which are bought for and belong to them individually.

State *v.* Kapicsky, 105 Me. 127, 73 Atl. 830, 23 L. R. A., N. S., 737.

And if a club, by its agent, purchase and stores intoxicating liquor for its members and deals out in portions to each member upon his order the liquors belonging to and kept for him and keeps a place for that purpose, such place is a common nuisance under the statute.

State *v.* Kapicsky, 105 Me. 127, 73 Atl. 830, 23 L. R. A., N. S., 737.

**Voluntary Abatement.**—And where a fraternal organization periodically permits intoxicating liquors to be brought upon its premises and permits its members to gather there for the purpose of drinking such liquors, its premises thereby become a nuisance which may be enjoined and abated; but where the officers and members of such organization are notified by the responsible public officers to quit such practices under threat of prosecution and they do quit in apparent good faith and remove all liquor paraphernalia from their premises, the lodge and its property cannot be subjected to an injunction as an existing nuisance

in a suit commenced after offensive practices have been definitely and permanently abandoned.

State *v.* Midland Aerie No. 412, Fraternal Order of Eagles, 98 Kan. 793, 161 Pac. 903.

**Clubhouse as "Place of Resort."**—Where a statute provides that all places of resort where intoxicating liquors are kept, sold, or given away, drank, or dispensed in any way not provided by law are common nuisances, held, that a "place of resort" does not mean a place to which the public generally may resort, but includes places to which resort is had by a limited class, and hence included a clubhouse to which members and their guests were admitted, and who drank their own liquor there, kept in lockers which were their own property.

State *v.* Cumberland Club, 112 Me. 196, 91 Atl. 911.

**Injunction against Transportation Company.**—Under the Texas statute injunction will lie to restrain a railroad from using its transportation facilities in the state for receiving, transporting, or delivering intoxicants except for medicinal, scientific, mechanical, or sacramental purposes.

Gulf, etc., R. Co. *v.* State (Tex. Civ. App.), 212 S. W. 845.

**Injunction against Illegal Sale of Extracts.**—Injunction lies against illegal sale of flavoring extracts by grocer for beverage purposes, under the Iowa statute.

State *v.* Klein (Ia.), 174 N. W. 481.

**Acts to Be Restrained Must Be Unlawful.**—"In those instances in which injunction lies to prevent conduct amounting to a nuisance abatable by such remedy, it is limited to unlawful acts and is not available as a means of prevention of lawful acts. Only so much of such conduct as is unlawful can be restrained."

State *v.* Baltimore, etc., R. Co., 78 W. Va. 526, 89 S. E. 288, L. R. A. 1916F, 1001.

Thus, where a club might lawfully dispense liquor to its members and guests, the state was not entitled to restrain

it from so dispensing the same on the ground that such was not within its corporate powers.

Country Club *v.* State (Tex.), 214 S. W. 296.

**Constitutionality.**

A statute, making the conducting, maintaining, carrying on, or engaging in the sale of intoxicating liquors, and all building nuisances, subject to abatement thereunder, and authorizing injunction restraining the continuance of such nuisances and closing the building or place where it is conducted is constitutional.

State *v.* Ragghianti, 129 Tenn. (2 Thompson) 560, 167 S. W. 689.

And such a statute providing that all places in a prohibition district where intoxicating liquors are sold in violation of law, etc., are common nuisances and may be abated and enjoined, when construed to permit a temporary injunction closing a hotel which had been used for the unlawful sale of intoxicating liquors, does not deprive the hotel keeper of his property without due process of law, though a permanent injunction against operating the hotel would have that effect.

State *v.* Kasiska, 27 Idaho 548, 150 Pac. 17.

A statute providing for the issuance of an injunction against liquor nuisances, and authorizing the seizure and destruction of property used in maintaining the nuisance, is a valid exercise of the power to enact laws for seizure of property attempted to be used for an unlawful purpose or in an unlawful manner.

In re State, 179 Ala. 639, 60 So. 285.

Such statute gives a cumulative remedy in equity and the power of the Legislature to provide such cumulative equitable remedy cannot be successfully questioned. It was invoked, and, *sub silentia,* sanctioned in Marvin *v.* Larson, 153 Wis. 488, 140 N. W. 285.

State *v.* Stoughton Club, 163 Wis. 362, 158 N. W. 93.

**Essential Elements.**

It is essential to an injunction to restrain a nuisance that

the nuisance should exist at the filing of the petition, but it is not essential that the nuisance should continue up to the final hearing; and while the abandonment of a nuisance in good faith before the final hearing should have weight with the court in the exercise of its discretion, a mere moving to other quarters after a preliminary restraining order, and on the eve of a final hearing, with nothing to show a complete and *bona fide* abandonment of the design to violate the law, is not sufficient to stay injunction.

State *v.* Lyon, 83 S. C. 509, 65 S. E. 730.

**Showing of Special Injury.**—A statute authorizing injunctions restraining the continuance of a nuisance consisting of the carrying on of the sale of intoxicating liquors on a bill filed by citizens and freeholders or by the attorney-general or district attorney, changes, with respect to the nuisance to which it relates, the rule that parties seeking to enjoin a nuisance must show special injury.

State *v.* Ragghianti, 129 Tenn. (2 Thompson) 560, 167 S. W. 689.

**Good Faith Immaterial.**—Where one accused of maintaining a liquor nuisance had no permit, and any sale by him to any person under any circumstances was unlawful, his good faith or reasonable effort to avoid imposition cannot affect the question of his unlawful sales.

Fisher *v.* Skoglund, 155 Ia. 440, 136 N. W. 231.

**Procedure.**

**Notice and Its Necessity.**—Assuming that under a statute relating to injunction against nuisance consisting of the conducting, maintaining or engaging in the sale of intoxicating liquors, a temporary injunction should not have been issued without notice to the defendant, an injunction issued without notice was merely erroneous, as a matter of procedure, and was not void, or in excess of jurisdiction, and a violation thereof was punishable as a contempt.

State *v.* Ragghianti, 129 Tenn. (2 Thompson) 560, 167 S. W. 689.

**Who May Prosecute.**—Under a state statute, authorizing a citizen of the county to institute and maintain a

suit to enjoin a liquor nuisance, an action instituted and maintained by a citizen of the county will not be abated merely because his attorney employed detectives, who were paid by Anti-Saloon League not incorporated in the county, to obtain evidence for the prosecution, and the attorney, a nonresident, received the fees, notwithstanding section 3459, provided that action must be prosecuted by the real party in interest, except where the party is expressly authorized by statute to sue.

Reusch *v.* Loserth, 158 Ia. 227, 139 N. W. 454.

**Trial by Jury.**—A constitutional provision for trial by jury is not violated by a law which imposes a penalty for the illegal sale of liquor, and gives the chancery court concurrent jurisdiction of suits for penalties and power to suppress as a nuisance any place of business where the statute is violated, and to punish and restrain the violators thereof, since a jury trial therein is no more a matter of right than in any other chancery case, and since the chancellor is empowered by law to award a jury trial when needed.

State *v.* Marshall, 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434.

Persons dealing in intoxicating liquors have no vested right in a jury trial in order to determine whether or not their place of business is a public nuisance. For such purpose an action in equity constitutes due process of law.

State *v.* Stoughton Club, 163 Wis. 362, 158 N. W. 93.

**Petition.**—In an action to abate a liquor nuisance, a cause of action was stated in a petition which alleged that at the place described a nuisance, as defined in the statute, was maintained with the knowledge, permission and consent of the defendants, who owned the property.

State *v.* Glass, 99 Kan. 159, 160 Pac. 1145.

Where a bill for injunction against a liquor nuisance alleged that the solicitor was informed and had probable cause for believing and did believe that the accused had in his possession, or operated a room or place of business, wherein he kept for sale and sold prohibited liquors; that

he had within the past 12 months offered and sold quantities of said liquors and allowed some of it to be drunk on the premises, creating and maintaining a common liquor nuisance in violation of law, and that the accused was not a druggist and did not keep a drug store at his place of business, and that his place of business was not exclusively used for a dwelling house, it averred no facts and was insufficient and could not be supported by the rule that a bill will be given every reasonable intendment.

Woodward *v.* State, 173 Ala. 7, 55 So. 506.

**Alleging Details of Violation of Law.**—A petition in a suit to enjoin a liquor nuisance, which alleges that defendant occupied the premises described, and owned and kept thereon intoxicating liquors with intent to sell the same as a beverage in violation of law, is sufficiently specific as against a motion to require averments stating specifically how, and in what manner, if any, the provisions of the mulct law have been violated by defendant.

Fisher *v.* Stoevenor & Co., 155 Ia. 548, 136 N. W. 673.

**Alleging Intent.**—A petition praying an injunction, and alleging that defendant kept intoxicating liquor with intent to sell in violation of the law, is sufficiently specific; the allegation of keeping with intent to sell in violation of law being one of ultimate fact.

Bowers *v.* Maas, 154 Ia. 640, 135 N. W. 25.

**Description of Premises.**—In a prosecution to restrain a liquor nuisance described as maintained at 83 and 85 Market Street in a certain city, such description would be construed to include premises designated as 83½ Market Street, which was a stairway entrance to the second story of the building described, in which respondent and his family lived.

State *v.* Chicco, 82 S. C. 122, 63 S. E. 306.

**Description of Defendant.**—An allegation that one "did keep and maintain" a liquor nuisance applies either to one who occupies or who controls the occupation and procures or permits the illegal use of the place.

State *v.* Fogg, 107 Me. 177, 77 Atl. 714.

**Alleging Unlawful Transportation by Carrier.**—"A bill praying an injunction against transportation of persons so carrying intoxicating liquors, by common carrier, unless such carrier through its agents, servants and employees, has first ascertained by due diligence and caution and in good faith that such liquors are not intended for use or disposition by such persons contrary to law, and not charging the rendition of aid and assistance to any particular person in his violations of the prohibition laws, by the carrier so proceeded against, raises no question as to right in the state to enjoin such transportation as to particular individuals."

State *v.* Baltimore, etc., R. Co., 78 W. Va. 526, 89 S. E. 288, L. R. A. 1916F, 1001.

The allegation of a petition substantially averring the violation of three sections of the criminal law which forbade the receiving, storing, keeping, or delivering of intoxicating liquors without a license as a dramshop keeper or a wholesaler, the petition wholly failing to set forth any facts showing that the things done by the road were the proximate and efficient cause of the creation of a public nuisance, were insufficient to give the equity court jurisdiction, since to connect the railroad with the public nuisance alleged to have resulted from the drunkenness and disorder consequent upon the illicit sale of liquor it was indispensable that plaintiff show that such drunkenness and disorder were caused directly by the mere act of the road in transporting and delivering liquor in the county, or that such act participated in bringing about the condition.

State *v.* Woolfolk (Mo.), 190 S. W. 877.

A bill by the state, by its solicitor, against an interstate carrier to enjoin the maintenance of a liquor nuisance, which alleges that the carrier has a warehouse, where goods received are stored to await delivery to the consignees; that prohibited liquors are received at the warehouse in large quantities and at frequent intervals for delivery to individuals for illegal purposes; that prohibited liquors are received by the carrier for distribution or delivery, contrary to the laws of the state, and that it is maintaining a "liquor nuisance"—charges a violation of the law by the carrier and authorizes injunctive relief, the words "prohibited

liquor" meaning intoxicating liquors which under the law the carrier has not the legal right to have in its possession.

Southern Exp. Co. *v.* State, 188 Ala. 454, 66 So. 115.

**Bill for Injunction against Breach of Anti-Advertizing Law.**—A bill for injunction against violations of the anti-advertising liquor law need not negative the application of the rule concerning original packages in interstate shipments, since that is a matter of defense.

Black *v.* Delaye, 193 Ala. 500, 68 So. 993.

**Cross Petition.**—A cross petition filed by a defendant city, which cross petition states that the plaintiff is doing certain specific acts which are in violation of the intoxicating liquor laws of this state and the ordinance of the defendant city, and which constitute a common nuisance as defined by the law of the state and the ordinances of the city, and asks for an injunction against the doing of these acts, states a cause of action.

Kansas City Breweries Co. *v.* Kansas City, 96 Kan. 731, 153 Pac. 523.

**Prayer for Greater Relief Than Allowable.**—Where a complaint in a proceeding to abate and enjoin illegal dealing in intoxicating liquors states a good cause of action, it is not bad because the complaint seeks greater relief than is allowable, by praying for the imposition of the punishment provided by the criminal laws for the illegal sale of liquor, but he is still entitled to have all the relief to which he shows a right, and which is in whole or in part appropriate to the prayer.

State *v.* Marshall, 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434.

**Plea and Defenses.**

**Plea of Abatement of Nuisance.**—In an action for an injunction to abate a liquor nuisance, the plea that defendant had already abated the nuisance himself is addressed largely to the discretion of the trial court, and the issuance of an injunction is no abuse of the court's discretion,

where the defendant abated the nuisance only the night before the trial.

Bowers *v.* Maas, 154 Ia. 640, 135 N. W. 25.

**Plea of Pending Appeal in Search Warrant Case.**—In a civil suit to enjoin a liquor nuisance in a bowling alley, an order for the destruction of the liquors made by a justice and an appeal to the district court in a search warrant proceeding, being a *quasi* criminal proceeding not between the same parties nor involving the same issues and seeking a different and more limited relief, cannot be pleaded in abatement and is not a bar.

State *v.* Knapp, 178 Ia. 25, 158 N. W. 515.

**Plea That Acts Were in Open Violation of Law.**—It is no defense to a proceeding brought to abate and enjoin a blind tiger as a nuisance that the sale of spirituous, malt, or intoxicating liquor was in open violation of law.

Thompson *v.* Simmons & Co., 139 Ga. 845, 78 S. E. 419.

**Death of Defendant Abates Proceeding.**—Where the defendant in an action to enjoin a liquor nuisance *dies* pending appeal, the action abates, and the liquor on defendant's premises cannot be adjudged a nuisance, since there can be no intent by defendant to keep and sell liquor in violation of law, which is a necessary element.

Babbitt *v.* Corrigan, 157 Ia. 382, 138 N. W. 466.

**Evidence.**

**Admissibility—Acts Not Alleged.**—Under a petition praying an injunction and alleging that defendant was keeping intoxicating liquor with intent to sell in violation of the law, evidence of unlawful sales, or other unlawful acts or omission, not specifically alleged, is admissible, for the keeping with intent is the ultimate fact which can only be proven by the unlawful acts.

Bowers *v.* Maas, 154 Ia. 640, 135 N. W. 25.

**Proof of Other Dates.**—Where the defendant is charged with maintaining a liquor nuisance on the 20th day

of January, 1915, and evidence is introduced to sustain the information as to that date, and further evidence is introduced to show that the defendant was maintaining a liquor nuisance on the 8th day of September 1914, the latter evidence is admissible, where evidence is also introduced tending to show a continuation of the nuisance between the two dates.

State *v.* Maguire, 31 Idaho 24, 169 Pac. 175.

**Surrounding Circumstances.**—In a trial for maintaining a liquor nuisance testimony as to what was found on the place, indicating the presence of intoxicating liquors, sounds of disturbance at night on the Fourth of July, and acts of an intoxicated man who was neither a boarder nor visitor at the place, was properly received to connect accused with control of the place and the acts done and conditions found there, as was evidence of shipments from a particular city of liquors to him up to the time when whisky bottles with labels bearing the name of that city were found at the place.

State *v.* Fogg, 107 Me. 177, 77 Atl. 714.

**Sold as Beverage—Use Immaterial.**—In a suit to enjoin the sale of intoxicating liquors, if the liquor in question was sold as a beverage and contained alcohol, it would not be material whether it was actually used as a beverage or not.

State *v.* Silka, 179 Ia. 663, 161 N. W. 703.

**Weight and Sufficiency.**—In an action to enjoin a liquor nuisance, evidence that defendant was the agent of the corporation owning the building, and that he purchased and placed the liquor in the building for sale, was sufficient to sustain a judgment for plaintiff.

Barber *v.* Dapolonia (Ia.), 171 N. W. 586.

Under statutes respectively providing that, in action to enjoin liquor nuisances evidence of the general reputation of the place described shall be admissible to establish the existence of the nuisance, and that the finding of intoxicating liquors in the possession of one not authorized to sell shall be presumptive evidence of a violation of law,

the finding of several cases of beer, and of empty bottles coupled with the general reputation that the place in question was one where intoxicants were unlawfully sold, is sufficient to establish *prima facie* the existence of the liquor nuisance.

Shideler *v.* Naughton, 163 Ia. 616, 145 N. W. 280.
State *v.* Silka, 179 Ia. 663, 161 N. W. 703.
McMillan *v.* Metcalfe (Ia.), 174 N. W. 481.

**Burden of Rebutting Prima Facie Case.**—In a suit to enjoin a liquor nuisance, where the evidence *prima facie* established its existence, the burden is on defendant to rebut the *prima facie* case.

Shideler *v.* Naughton, 163 Ia. 616, 145 N. W. 280.

**Questions for Jury.**—In a proceeding for an injunction against the use of premises for the illegal sale of intoxicating liquors, authorized by statute whether the premises are used for the illegal sale of liquors must be determined by a jury unless a jury trial is waived.

State *v.* Leary, 75 N. H. 459, 76 Atl. 192, 44 L. R. A., N. S., 457n.

**Hearing.**—Despite a statute providing that an application for a temporary injunction to abate a liquor nuisance may be supported by evidence in the form of affidavit, depositions, oral testimony, or otherwise, the final hearing on the merits is on evidence in conformity with the practice obtaining in the trial of equity causes generally, and plaintiff is entitled to have the cause set down for trial and hearing on evidence adduced according to the usual practice notwithstanding defendant's affidavit in opposition to the motion for a temporary injunction denied the contention of plaintiff.

Batten *v.* Snearly, 168 Ia. 362, 150 N. W. 583.

**Costs.**—Though an injunction in a suit to enjoin a liquor nuisance be denied, because defendants in good faith, before commencement of the action, abandoned the practice of handling liquor, yet this having been done after the petition was sworn to and plaintiff not appearing to have

known thereof when he filed his petition, or to have been actuated by motive other than to secure enforcement of the law, costs should be taxed against defendant.

Davidson *v.* Benevolent and Protective Order of Elks, No. 374, 174 Ia. 1, 156 N. W. 187.

In a suit for the abatement of a liquor nuisance in a bowling alley, brought against the tenant and the owner of the building, there being no testimony that the landlord had any knowledge of her codefendant's use of the property, it was improper to tax costs to the landlord.

State *v.* Knapp, 178 Ia. 25, 158 N. W. 515.

In a suit to enjoin the sale of intoxicating liquors, on trial in vacation as to one of the defendants on application for a temporary injunction, a decree, granting a temporary injunction, providing that the costs upon the hearing for temporary writ of injunction be taxed against a defendant, was not a judgment against defendant for costs, but simply a provision that the costs on the temporary injunction be so taxed because they were made in the contest by this defendant, and that as between him and the other defendants they should be taxed to him, and that the cause be heard, later as to other defendants.

State *v.* Silka, 179 Ia. 663, 161 N. W. 703.

**Issuance of Injunction.**—Where a corporation organized for a legitimate purpose dispensed intoxicating liquors in violation of law, and the evidence warranted the inference that it would continue to do so unless restrained, and it claimed the right to do so, the court will enjoin the corporation and the persons actually participating in the illegal dispensing of liquor.

Shideler *v.* Tribe of the Sioux, 158 Ia. 417, 139 N. W. 897.

In an action to enjoin alleged liquor nuisance, injunction should be promptly granted and without any evasion, where the evidence is sufficient to show a violation of law, notwithstanding interest or motive of attorneys and witnesses.

Barber *v.* Buonanni Co., 179 Ia. 642, 161 N. W. 688, 689.

On a petition to enjoin one styling himself J. W. Lang, from violating the liquor laws, making C. W. Nies, a party, and charging that defendant Nies, "alias J. W. Lang," was maintaining the nuisance to abate which the injunction was sought, where the trial court found that Lang was an alias, Nies might be punished in his own proper person.

Nies *v.* Jepson, 174 Ia. 188, 156 N. W. 292.

Proof that several illegal sales of intoxicants were made from defendant's drug store within a limited time warrants the issuance of an injunction to restrain the nuisance, under the rule that knowledge may be shown by the doing of like acts; such evidence warranting a finding that defendant has knowledge of the sales.

Barber *v.* City Drug Store, 173 Ia. 651, 155 N. W. 992.

**Discretion of Court.**—The discretion of the trial court in refusing permanent injunction of an alleged liquor nuisance, where it appears satisfactorily to it that it has been in good faith abated, is not unlimited, and where the existence of the nuisance is conclusively shown, a writ for injunction is justified.

Fisher *v.* Skoglund, 155 Ia. 440, 136 N. W. 231.

Where the evidence is conflicting, the court below did not abuse its discretion in granting an interlocutory injunction restraining the defendant from maintaining a "blind tiger" and selling intoxicating beers and intoxicating liquors at the place.

Loh *v.* Howard, 141 Ga. 509, 81 S. E. 198.

**Breadth of Injunction.**—An injunction against maintaining a liquor nuisance should be broad enough to preclude every possibility of the continuation or reopening of the nuisance by the persons enjoined or by any one acting for, by, through or under them or either of them or with their permission.

State *v.* Glass, 99 Kan. 159, 160 Pac. 1145.

Where the allegations of a petition were that the defendants were operating and maintaining a blind tiger, or liquor nuisance at a particular place, by there selling spirit-

uous malt, and intoxicating liquors in violation of law, and there was no contention that the defendants were maintaining elsewhere a similar nuisance, either in connection with, or independently of, the one alleged to exist at the place designated in the petition, nor even that the defendants were contemplating or intending to elsewhere create and maintain such nuisance, the judge was not authorized to grant an interlocutory order enjoining the defendants from maintaining a nuisance, not noly at the place designated in the petition, but elsewhere.

Watkins *v.* Wilkerson, 141 Ga. 163, 80 S. E. 718, Ann. Cas. 1915C, 1124.

**Injunction against Automobile after Destruction of Liquor Seized.**—Where intoxicating liquors were being sold from an automobile, and the automobile and liquor were seized, and the liquor destroyed, the destruction of the liquor was not necessarily an abatement of the nuisance and there still might be grounds for proceedings in injunction against the automobile.

State *v.* Raph (Ia.), 168 N. W. 259.

**Denial of Injunction.**—Where, in an action to enjoin liquor nuisances because the statements of consent filed by defendants were insufficient, it appeared that defendants had been out of business 10 days before their case came on for trial in the district court, and it was not claimed that they intended to resume the business, the injunction was properly denied.

State *v.* Harrison, 159 Ia. 67, 140 N. W. 223.

An injunction, restraining the maintenance of a liquor nuisance, cannot be issued as to a defendant without proof that he was in control of the drug store where the sales were made at that time, it appearing that he had subsequently purchased the same.

Barber *v.* City Drug Store, 173 Ia. 651, 155 N. W. 992.

In a prosecution to abate and enjoin a blind tiger, the defendant cannot be adjudged to be disqualified from doing business under a near beer license which he holds and from ever doing business for himself under any such license, and

from being employed by another engaged in business under such a license, and, by reason of such disqualification, be enjoined from doing business under such license until the further order of the court.

Cassidy *v.* Howard, 140 Ga. 844, 80 S. E. 1.

**Injunction Unnecessary after Abatement.**—Where officers found a barrel of whisky under defendant's stable and two other barrels buried near by, and it was their duty to seize the same to be forfeited to the state, and it will be presumed that they discharged such duty, and, the nuisance being abated, it was error to enjoin the defendant from thenceforth receiving liquor and having it in his possession; there being no evidence that he intended so to do.

Thornton *v.* Skelton (Ga. App.), 99 S. E. 299.

The court in a suit to enjoin a liquor nuisance may deny an injunction, defendants in good faith, before the action was commenced, though to avoid being enjoined, having abandoned the practice of handling liquors in their club-rooms.

Davidson *v.* Benevolent and Protective Order of Elks, No. 374, 174 Ia. 1, 156 N. W. 187.

**Abatement.**

See also ante, under Sec. 21.

In a suit to enjoin a liquor nuisance in a bowling alley, where the defendant did not know that the liquor he was selling was intoxicating, abandoned the sale, and voluntarily abated the nuisance before commencement of the suit, a decree and order of abatement may be entered to insure complete repentance.

State *v.* Knapp, 178 Ia. 25, 158 N. W. 515.

Under statute declaring the building in which a liquor nuisance is maintained a nuisance and providing that an order of abatement shall direct the effectual closing of the building, in a suit to abate a liquor nuisance in a bowling alley for illegal sales by a tenant, an order of abatement and for the closing of the building were proper, although

the owner, made defendant, had no notice or knowledge of the illegal sales.

State *v.* Knapp, 178 Ia. 25, 158 N. W. 515.

Blind tigers are public nuisances, affecting the whole community, and, as such, they may be abated.

Ruston *v.* Fountain, 118 La. 53, 42 So. 644.
Legg *v.* Anderson, 116 Ga. 401, 42 S. E. 720.
Lofton *v.* Collins, 117 Ga. 434, 43 S. E. 780, 61 L. R. A. 150.
Rush *v.* Commonwealth (Ky.), 47 S. W. 586.
Mugler *v.* Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.
Purity Extract, etc., Co. *v.* Lynch, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184.
Shreveport *v.* Maroun, 134 La. 490, 64 So. 388.

**Relief on Giving Bond by Defendant.**—Under direct provisions of a statute, the owner of a building, in which a liquor nuisance has been maintained without his knowledge and an order of abatement entered closing the building, may upon establishing his good faith, paying costs, and filing bond to full value of the property to prevent the nuisance being established, recover possession, and have the order of abatement canceled so far as it relates to the property.

State *v.* Knapp, 178 Ia. 25, 158 N. W. 515.

**Appeal or Certiorari.**—On certiorari by one found guilty of contempt in being concerned in the liquor traffic in violation of an injunction, weight is given the finding of the trial court.

Dutton *v.* Anderson (Ia.), 145 N. W. 321.

On certiorari to review order finding accused guilty of contempt by violating injunction against illegal sale of intoxicating liquors, while evidence to sustain the finding must amount to more than the mere preponderance which sustains recovery of the law side, violation need not be proved beyond a reasonable doubt.

Nies *v.* District Court (Ia.), 161 N. W. 316.

On certiorari to review order adjudging accused guilty of contempt in violating an injunction restraining illegal sale of intoxicating liquors, the review is not *de novo,* but the finding below does not have as much weight as a verdict.

Nies *v.* District Court (Ia.), 161 N. W. 316.

**Reversal.**—Where an injunction against maintaining a liquor nuisance in a building was issued against the owner and others, the reversal of the decree, as against one not shown to have been in control of the business or building at the time of the nuisance will not carry with it the decree against the owner.

Barber *v.* City Drug Store, 173 Ia. 651, 155 N. W. 992.

**Contempt of Court for Violation of Injunction—Proceedings—Punishment.**

SEC. 24. In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this title, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment.

**Violation by Tenant—Presumption.**—Statutory prohibition against violating liquor laws by servant, agent, employee, or tenants, and commands in injunctions against sale by servant, agent, tenant, or employee, mean, so far as contempt proceedings are concerned, that the landlord cannot shield himself by having his tenant sell the liquor; that the finding of liquor in a hotel raises a presumption that the owner has violated the law through his tenants; but that such presumption is not conclusive, and the doctrine of landlord and tenant or *respondeat superior* does not apply.

Nies *v.* District Court (Ia.), 161 N. W. 316.

**Good Faith of Defendant Immaterial.**—The test whether liquor is intoxicating, and whether the seller has violated injunction restraining sale of intoxicating liquor, is the character of the liquor, and not the good faith of the defendant, so that evidence that the defendant did not know of the intoxicating character of the liquor is incompetent.

Nies *v.* District Court (Ia.), 161 N. W. 316.

**Effect Not Avoided by Removal to Place in Same County.**—Injunction against an incorporated club and its officers from using the premises of the club, or any part, for selling spirituous, vinous, or malt liquors, etc., related to the business or occupation in which the club and its officers were engaged, and could not be avoided by removal to another town in the same county.

Ex parte Alderete (Tex. Cr. App.), 203 S. W. 763.

**Nature of Proceeding.**—A charge of contempt of court for violating an injunction inhibiting the sale of intoxicating liquors as a nuisance, is a criminal contempt which is punitive in character to vindicate the authority of the law and of the court as an organ of society, and which, though it may arise in private litigation, raises an issue between the public and the accused, not a civil contempt, which is a proceeding in furtherance of the right of a private person which the court has determined he as a litigant is entitled to.

Anderson *v.* Daugherty, 137 Tenn. (10 Thompson) 125, 191 S. W. 974.

**Governed by Special Statute.**—The procedure in contempt cases arising under the prohibitory law is governed by the special provisions found in such law, and the provisions of the law relating to contempts in general do not govern in contempt cases arising under the prohibitory law.

State *v.* Finlayson (N. D.), 170 N. W. 910.

"All contempt proceedings, whether for violation of a liquor injunction or any other decree or order of the court, are special and *sui generis* and the general procedural rules do not apply thereto, save as expressly provided. In their

nature they are both criminal and civil, and by some courts they are held to partake more of nature of criminal than civil proceedings. See Wells *v.* District Court, 126 Ia. 340, 102 N. W. 106; Grier *v.* Johnson, 88 Ia. 99, 55 N. W. 80; Black *v.* State, 75 Neb. 603, 106 N. W. 787; State *v.* District Court, 24 Mont. 33, 60 Pac. 493; Raymert *v.* Smith, 5 Cal App. 380, 90 Pac. 470; Ex parte Kearney, 7 Wheat (U. S.) 38, 5 L. Ed. 391; Gompers *v.* Bucks Stove Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A., N. S., 874n."

Tuttle *v.* Hutchison, 173 Ia. 503, 151 N. W. 845, 851.

Where either of two injunctions prohibiting defendants from selling, etc., intoxicating liquors, is good, and its provisions broad enough to cover the act charged against him on an information for violation of such injunction, he is guilty of contempt for the violation of either.

State *v.* District Court, 176 Ia. 178, 157 N. W. 737.

In contempt proceedings for violation of two decrees of injunction prohibiting defendant from selling, etc., intoxicating liquors, where the provisions of the two decrees are the same, they should be treated as one decree.

State *v.* District Court, 176 Ia. 178, 157 N. W. 737.

**Knowledge or Intent.**—If landlord of hotel knew that soft drinks were to be served and did not know that intoxicating liquors were to be served, she was not criminally liable for contempt by violating injunction against sales of intoxcating liquors; but, if she knew that a drink called "malta" was to be sold and it was in fact intoxicating, she was criminally liable, though she thought it was a soft drink.

Nies *v.* District Court (Ia.), 161 N. W. 316.

**Trial by Jury.**—In a contempt proceeding under the North Dakota Prohibitory Law, the party charged with contempt is not entitled to a trial by jury.

State *v.* Markuson, 5 N. D. 147, 64 N. W. 934.
S. C., 7 N. D. 155, 73 N. W. 82, reaffirmed.
State *v.* Finlayson (N. D.), 170 N. W. 910.

**Allegations of Petition.**—Where, upon a bill alleging that defendant was engaged in the sale of intoxicating liquors, a temporary injunction was issued enjoining defendant from further engaging in the sale of liquors, from moving or disturbing his stock of liquors and bar fixtures, or from entering the barroom of his building and interfering therewith, a petition for an attachment for contempt, charging that he had continued the sales of intoxicating liquor in willful disobedience of the injunction showed a violation of the injunction; it not being pretended that defendant supposed himself to be charged with selling liquors at any place other than his barroom.

State *v.* Ragghianti, 129 Tenn. (2 Thompson) 560, 167 S. W. 689.

**Dismissal.**—In contempt proceedings for violation of two injunctions against the sale, etc., of intoxicants, where the court sustained the motion to strike the first count of the information setting out the first injunction, and the other injunction was void and not sufficient to cover the acts charged, the entire case must be dismissed.

State *v.* District Court, 176 Ia. 178, 157 N. W. 737.

**Evidence—Grand Jury Minutes.**—Where the defendant was enjoined from selling, or keeping for sale, intoxicating liquor contrary to law and was later indicted by the grand jury for keeping a liquor nuisance for a period, seven months of which antedated the injunctional decree, on an information for contempt of the injunctional decree, the minutes of the testimony taken before the grand jury could be considered in order to fix the time of the contempt when it was claimed offense was committed to which the defendant had pleaded guilty.

Orr *v.* Cornell (Ia.), 156 N. W. 296.

**Kind of Beverage.**—In a prosecution for contempt by violation of injunction against illegal sale of intoxicating liquors, evidence that a beverage called "malta," and sold by defendant contained a very small percentage of alcohol, is immaterial, since under the statute it is "intoxicating liquor" if it contains any alcohol.

Nies *v.* District Court (Ia.), 161 N. W. 316.

**Sufficiency of Showing of Contempt.**—On information for contempt of an injunction decree against selling and keeping for sale intoxicating liquors contrary to law, an indictment by the grand jury for keeping a liquor nuisance for a period, seven months of which antedated the decree, would not alone be sufficient to justify a commitment for contempt of court for violating the decree.

Orr *v.* Cornett (Ia.), 156 N. W. 296.

Where a druggist was enjoined from illegally selling intoxicating liquors, and his place of business was described in the injunction, and the druggist sold his business, but remained as a clerk, a personal selling of intoxicant is a violation of the injunction, rendering him liable for contempt.

Rust *v.* District Court, 162 Ia. 244, 143 N. W. 1086.
State *v.* Kurent (Kan.), 184 Pac. 721.

**Liability of Husband of Owner of Premises.**—In prosecution for contempt by violating injunction against illegal sale of liquors, the husband of the owner of the premises, indicted with her, who merely assisted in installing apparatus for vending soft drinks, but who further resisted raiding officers and denied them entrance, is in no essentially different position than had he himself secured the intoxicating liquors and was keeping them with intent to sell them.

Nies *v.* District Court (Ia.), 161 N. W. 316.

**Liability of Servant.**—A servant is not presumed to know of an injunction which affects his master's title in and to his master's property or which affects his master's right to the use and occupancy of his property for the sale of liquor so as to be liable for a violation of the injunction.

Harris *v.* Hutchison, 160 Ia. 149, 140 N. W. 830, 44 L. R. A., N. S., 1035.

**Servant Not a Party to Suit.**—One not a party to a suit resulting in an injunction restraining third person from maintaining a liquor nuisance on premises and perpetually restraining the use of the premises for the traffic in intoxicating liquors, and without knowledge of its issuance, is not

guilty of contempt for a violation of the injunction for selling liquor on the premises as a servant of the third person.

Harris *v.* Hutchison, 160 Ia. 149, 140 N. W. 830, 44 L. R. A., N. S., 1035.

**Same Acts as Contempt and Subject of Criminal Prosecution.**—In a contempt proceeding for the violation of a decree enjoining the sale of intoxicating liquors and the maintenance of a nuisance at a certain place, the defendant may be punished for sales of liquor and for acts done in maintaining a nuisance, although a criminal prosecution is pending against him for the same sales and acts.

State *v.* Kurent (Kan.), 184 Pac. 721.

**Defenses.**—Where one accused of violating injunction restraining illegal sale of liquors had previously been enjoined under a permanent writ, his interposing to a charge of contempt the fact that the injunction should not have been granted, is a purely collateral attack upon the injunction and of no avail.

Nies *v.* District Court (Ia.), 161 N. W. 316.

**Appeal or Certiorari.**—In contempt proceedings for violation of an injunction *pendente lite* against a liquor nuisance, issued *ex parte* on an allegation in the complaint, on which issue has not been joined, that defendant was the owner or manager of the place, the order for injunction cannot be taken on *certiorari,* as adjudication of the fact alleged.

State *v.* District Court, 54 Mont. 580, 172 Pac. 539.

**Unlawful Possession—Search and Seizure—Warrants—Property Subject to Seizure—"Private Dwelling."**

SEC. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, 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 and all property designed for the unlawful manufacture of liquor shall be destroyed unless the court shall otherwise order. 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 a 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.

**Ex Post Facto Legislation.**—A statute making it unlawful to have possession of intoxicating liquors for sale in force from and after April 1, 1913, and ratified March 3, 1913, is not objection as *ex post facto* when applied to

the findings of liquor in the possession of accused April 17, 1913, in the absence of anything to show that the liquor was acquired prior to the ratification of the act.

State *v.* Denton, 164 N. C. 530, 80 S. E. 401.

**Intent.**—"The old rule that criminal intent must accompany a crime is still the law, even as to liquors, so far as we have been able to ascertain. There must be actual or constructive intent to do the thing which constitutes the crime; otherwise there is no criminal act. If it can be said that the liquor in this case was in the possession of the defendant merely because it was in his shop, when he did not know it, still such possession, not being conscious, was not actual and intentional possession, as contemplated by the statute."

Jackson *v.* Gordon (Miss.), 80 So. 785.

The chief element in the offense of storing alcoholic liquors is the unlawfulness of the storing the intent of him who has the liquor.

State *v.* Tooley, 107 S. C. 408, 93 S. E. 132.

**Presumptions and Inferences of Law.**—The presumption raised by statute that intoxicants found in one's possession are held by him for an illegal purpose, applies to hotel keeper who kept liquors in his private room in hotel; exceptions as to private dwelling house contained in such section not applying.

State *v.* Marquardt (Ia.), 169 N. W. 338.

In a prosecution for storing alcoholic liquors, the court may not infer as matter of law that the discovery of a very small quantity of liquor in defendant's safe on three separate occasions within a period of six months did not amount to storing.

State *v.* Tooley, 107 S. C. 408, 93 S. E. 132.

**Ownership of Premises.**—Under a statute providing that the keeping of prohibited liquors or beverages in a building not used exclusively for a dwelling shall be *prima facie* evidence that they are kept for sale etc., it is not essential in order to raise the statutory presumption to prove,

in prosecution for violation of the prohibition law, that the accused owned, or even had legal possession of, the building in which liquors were kept.

Stout *v.* State, 15 Ala. App. 206, 72 So. 762.

There is a presumption against any one whose property is found employed in violation of liquor laws that such property was engaged with owner's knowledge.

State *v.* Southern Exp. Co. (Ala.), 75 So. 343.

**Quantity Immaterial.**—If defendant's act in storing liquors be unlawful, a court will not measure with nicety the quantity defendant had in his safe.

State *v.* Tooley, 107 S. C. 408, 93 S. E. 132.

**Possession—What Constitutes.**—Where defendant gave a public drayman a check for a trunk and instructed him to get it, and take it to a certain place, and paid him therefor, and it was seized while in the drayman's possession and found to contain more than one gallon of whisky there was such a possession by defendant as to make out a *prima facie* case against him.

State *v.* Lee, 164 N. C. 533, 80 S. E. 405.

Where a statute makes it unlawful for any person, other than licensed druggists and medical depositories, to have in possession for purposes of sale any liquors, and makes the having in possession of more than one gallon at a time *prima facie* evidence of violation of the section, and three barrels, each containing 40 pint bottles of whisky, concealed with potatoes, addressed to defendant, were seized while in the care and custody of the railroad carrying them to him by his consent and procurement, it was held that he was in "possession" of such whisky within the statute.

State *v.* Blauntic, 170 N. C. 749, 87 S. E. 101.

**Possession by Agent.**—Under statute of possession of liquor by defendant's agent is a possession by defendant.

Hoskins *v.* Commonwealth, 171 Ky. 204, 188 S. W. 348.

Where defendant receipted for whisky, and directed the express agent how to dispose of it, the expressman became his agent, so that, for the purpose of a prosecution for having possession of whisky for sale in local option territory, the whisky came into defendant's possession.

Combs *v.* Commonwealth, 162 Ky. 86, 172 S. W. 101.

**"In Own Home."**—In a statute providing that nothing in the act shall prevent one "in his own home" from having and giving to another ardent spirits, the words "at his home," mean anywhere within the curtilage, the cluster of dwelling houses used by the family as a habitation, as defined from time immemorial, and the words "in his own home," "in his home," and "permanent residence of the person and his family," have substantially the same meaning.

Bare *v.* Commonwealth, 122 Va. 783, 94 S. E. 168, 169.

**Locked Room in Public Building.**—The keeping of liquor in a room on the first floor of a building used as a public resort, surrounded by rooms open to the public, is prohibited by a statute making it unlawful to keep any liquor in any room, building, or structure other than a private residence, not used as a place of public resort, though the room in question was locked.

People *v.* Wheeler, 185 Mich. 164, 151 N. W. 710.

**Mere Possession Not Illegal unless So Declared.**—Under a statute providing that after November 1, 1916, it shall be unlawful for any person to manufacture, transport, sell, keep, or store for sale more than a gallon of intoxicating liquor, the mere keeping of liquor is not illegal, but to constitute the offense it must be kept for sale.

Pine *v.* Commonwealth, 121 Va. 812, 93 S. E. 652, 654.

**Mere Possession at Private Residence Not Unlawful.**—Under a statute which in Sec. 1 provides that it shall be unlawful for any person to sell, keep for sale, give away, or furnish any intoxicating liquors, etc., or to keep any place where such liquors are sold, stored for sale, given away, or furnished, and Sec. 38 thereof, providing that

the keeping or having in any house or building, except a private residence occupied as such, of any intoxicating liquors, for the purpose of selling, giving away, or furnishing to those frequenting the place, or others, shall be held to be the keeping of a place where intoxicating liquors are sold, furnished, or given away, it is held, that section 38 does not make it impossible to commit the offense of keeping a place where intoxicating liquors are stored, given away, and furnished in a private residence, since the two sections should be read together, and, when so read, if the offense is shown to have been in a private residence, something more must be shown than the keeping or having any of the liquors mentioned in section 1.

People *v.* Lester, 195 Mich. 477, 162 N. W. 72.

**"Keeping" Construed.**—Liquor Law, rendering illegal the "keeping" of intoxicants, uses the word "keeping" as synonymous with having in possession, being in control, though the term as sometimes used implies a continued possession.

Balfe *v.* People (Colo.), 179 Pac. 137.

**"Place of Business" Construed.**—A place of business within the prohibition law, is a public place of business, not in the sense that it belongs to the public nor that there is any great degree of publicity, but that it must be a place to which the public is invited either expressly or by implication to transact business; and by "public" is meant that the public is invited to come to it and has access to it for a purpose within the scope of the business that is carried on.

Brocks *v.* State, 19 Ga. App. 3, 90 S. E. 989.

"Presumptively, a 'pressing club,' where clothes are pressed for a monetary consideration, is a 'place of business,' where the public are invited, at least impliedly, to come and transact business with the owner or manager, and accordingly it is such a public place of business as is contemplated in the statute, which forbids the keeping on hand at one's place of business intoxicating liquors. Roberts *v.* State, 4 Ga. App. 207, 60 S. E. 1082; Jenkins *v.* State, 4

Ga. App. 859, 62 S. E. 574; Land *v.* State, 5 Ga. App. 98, 62 S. E. 665."

Jones *v.* State, 17 Ga. App. 118, 86 S. E. 284.

**Pool Room as Public Place.**—"A poolroom frequented and used by the public is a 'public place,' within the meaning of the prohibition statute. The phrase 'public place,' as used in the prohibition law, by a broad, general, and not wholly exhaustive definition, includes any place which, from its public character, members of the general public frequent, or where they may be expected to congregate at any time as a matter of common right; also any place at which, even though it is privately owned or controlled, a number of persons have assembled, through common usage or by general or indiscriminate invitation, express or implied. Tooke *v.* State, 4 Ga. App. 495, 61 S. E. 917, 918."

Griffin *v.* State, 15 Ga. App. 552, 83 S. E. 871.

**Under Interstate Commerce Clause of Constitution.**—The possession of two quarts of whisky by an interstate passenger carried for his private use, and not in excess of what is reasonably necessary for his personal use and comfort while on the journey, is protected by the commerce clause of the Constitution as possession of personal baggage.

Howard *v.* State (Ala. App.), 73 So. 559.

**Possession upon the Street.**—The Nevada Prohibition Act, § 7, was intended to prevent a person from having intoxicating liquor upon the street for personal or any other use other than contemplated by the act itself.

Ex parte Zwissig (Nev.), 178 Pac. 20.

**Action for Undisclosed Principal as Defense.**—One found in possession of intoxicating liquors, which may be imported only for personal use, and shown to have made affidavit that the same were for his own use, cannot make a good defense on the ground he was acting for an undisclosed principal.

Balfe *v.* People (Colo.), 179 Pac. 137.

**Common Carriers.**—An act which declares that: "It shall be unlawful for any corporation, firm, person or individual to * * * have, control or possess, in this state, any of said enumerated liquors or beverages whether intended for personal use or otherwise, save as is hereinafter excepted," by its plain terms makes it unlawful for any corporation to have, control, or possess, in this state, any of the liquors mentioned. There is no exception in behalf of common carriers. The express mention of common carriers in another part of the same section and elsewhere in the act does not show that it was the intention of the General Assembly to except common carriers from the provisions of this law, but the act clearly indicates that it was the intention of the Legislature to prohibit intoxicating liquors, except in specified case, from being transported into or within, or possessed or controlled in this state by any person whatsoever, natural or artificial. This intent is made clear by the fact that the act names every conceivable one who could transport or possess or control intoxicating liquors. The defendant company is a corporation, and consequently is included under the plain terms of the act.

Seaboard Air Line Railway *v.* State (Ga. App.), 97 S. E. 549.

**Liquor Acquired before Law Passed.**—A statute making it unlawful to have possession of over a certain amount of intoxicating liquor, does not render unlawful liquor acquired prior to the act's effective date, and held only for personal use.

State *v.* Eden, 92 Wash. 1, 158 Pac. 967, 159 Pac. 700.

**Search Warrant Provision.**

**Against Druggest.**

See ante, under Sec. 8.

**Construction of Statutes.**—The particular statutes under consideration, in reference to search warrants, should receive a broader and more liberal construction than the general statutes in reference to common-law search warrants, and it is not necessary in the complaint or warrant to

describe the liquor or property to be searched for nor the premises to be searched, with that degree of common-law search warrants.

Milwaukee Beer Co. *v.* State, 55 Okla. 181, 155 Pac. 200.

A statute authorizing searches and seizures confers extraordinary and harsh remedies and must be strictly complied with, and a search warrant can lawfully issue only in the cases and with the formalities prescribed by the statute.

In re State, 179 Ala. 639, 60 So. 285.

A warrant issued by a justice of the peace, commanding search of a certain passenger train to see if intoxicating liquors are being carried thereon contrary to law, is not authorized by Barnes' West Va. Code 1918, c. 32a, § 9 (Code 1913, c. 32A, § 9 [sec. 1288]), and is void.

Clark *v.* Norfolk, etc., R. Co. (W. Va.), 100 S. E. 480.

**Constitutionality.**—The North Car. Laws 1913 c. 44, relating to the illegal sale of intoxicating liquors and known as the search and seizure law, is constitutional.

State *v.* Cathey, 170 N. C. 794, 87 S. E. 532.

The Alabama Act providing for the suppression of the evils of intemperance and especially section 22 subd. 6, par. "a" (page 76) providing for searches and seizure of intoxicating liquors wrongfully kept for sale, is not unconstitutional.

Jones *v.* State, 4 Ala. App. 159, 58 So. 1011.

The provision in the statute that any place suspected of being a blind tiger shall be searched by an officer designated in a search warrant, issued on an affidavit that the affiant believes the place to be a blind tiger and no such additional evidence as the court may require to make out a *prima facie* case and that if any intoxicating liquor found therein shall be seized by the officer and brought before the court along with all persons found in the place, is not violative of the constitutional guaranty against unreasonable

search and seizure and the issuance of a warrant without probable cause supported by oath or affirmation.

State *v.* Doremus, 137 La. 266, 68 So. 605.

**Nature of Proceeding as in Rem.**—A proceeding originating in a search warrant under the act relating to the suppression of intemperance, conducted in the name of the state for the condemnation of beer and in which a claimant asserts interest is no criminal prosecution but a proceeding *in rem,* which, upon reasonable, or general notice, determines the status of the property as to the whole world.

Toole *v.* State, 170 Ala. 41, 54 So. 195.

**Search without Warrant.**—"That the circumstances were such as to cause an ordinarily prudent officer, in the exercise of his duties, to believe that plaintiff had intoxicating liquor in his suit case for unlawful purposes, did not justify the officer in making a search of the suit case and using the force reasonably necessary for that purpose, since; while the statute authorizes an officer to seize intoxicating liquors illegally kept without a warrant, no search without a warrant is authorized."

Caffini *v.* Hermann, 112 Me. 282, 91 Atl. 1009.

**Sufficiency of Charge of Offense.**—An amended search warrant, charging that defendant, on whose premises a quantity of intoxicating liquors was found after search, had committed the offense of having in his possession intoxicating liquors for the purpose of sale in a local option county, is almost, if not quite, as specific as would be required for an indictment, and is sufficient since such warrant need not charge the offense with the technical accuracy required in an indictment.

Frey *v.* Commonwealth, 169 Ky. 528, 184 S. W. 896.

But a complaint in a proceeding under a statute, to search for and seize intoxicating liquors, describing the place as "a certain shop and dwelling and its appurtenance," occupied by defendant as a store and dwelling is insufficient for failing to charge that the dwelling house, or any

part of it, is used as an inn or shop, or for purposes of traffic, within the statute.

State *v.* Soucie, 109 Me. 251, 83 Atl. 700.

In search and seizure proceeding under Alabama Act, (Aug. 25, 1909, Gen. & Loc. Laws Sp. Sess. 1909, p. 74), on motion an affidavit was properly overruled, where the affidavit stated that defendant kept a place where spirituous, vinous, or malt liquor or beverages were kept for sale or otherwise illegally disposed of, known as the Olympian Hotel.

Cheek *v.* State, 3 Ala. App. 646, 57 So. 108.

**Insufficiency of Affidavit Makes Warrant Void.**—Where a search warrant issued to discover liquors was based on a wholly insufficient affidavit, which failed to show that there was probable cause to believe that the liquors were illegally kept as required by statute, the warrant was void, and the proceeding could not be sustained by an amendment filed after the warrant had been executed and the liquor seized.

Coleman *v.* State, 7 Ala. App. 424, 61 So. 20.

**Description of Premises and Property.**—A search warrant describing the property to be seized as the following contraband intoxicating liquors now unlawfully in the possession, storage, and keeping of and on the premises occupied by S., the said place being known as No. 1216 G. Street in the city of C., to wit a lot of whisky, brandy, wine, rum, gin, and beer in barrels, demijohns, bottles, and other vessels, sufficiently described the premises and property.

Farmer *v.* Sellers, 89 S. C. 492, 72 S. E. 224.

**Fictitious Name.**—Under a statute which requires a complaint, in a proceeding to search for and seize intoxicating liquors unlawfully kept, to state the name of the keeper, or that it is unknown, a complaint, stating the keeper's name fictitiously as "John Doe," without stating that his real name is unknown, is void.

State *v.* Intoxicating Liquors, 110 Me. 260, 85 Atl. 1060.

**Affidavit of Probable Cause—What Must Be Stated.**—Under state law providing for issuance of search warrant on affidavit of probable cause to believe that intoxicating liquors are being sold unlawfully, probable cause need only be sufficient to create the belief in the mind of the judge that liquor is being sold contrary to law, and there is no requirement that the cause be stated in the complaint; the ascertainment of probable cause being a judicial function.

State *v.* Gordon (Wash.), 163 Pac. 772.

The Alabama Act authorizes search and seizure for liquors on a warrant to be issued when any person, firm or association, etc., keeps a place where prohibited liquors and beverages are manufactured, sold, kept for sale, or otherwise disposed of contrary to law, or when such liquors are stored for sale delivery, or distribution contrary to law, or for other illegal purpose in any warehouse or other place, when such prohibited liquors are in the possession of any person, firm, or association conducting on the premises an unlawful drinking place or maintaining liquor nuisance, or when any persons, firm, or association is carrying on at the place the business of a retail or wholesale dealer in liquors, and such liquors are kept for sale by such dealer. Held, that such warrants were only issuable on a showing of probable cause by an affidavit naming or describing the person or party whose premises are to be searched, if known, etc., together with probable cause shown for believing that one or more of the specified grounds for issuing the process exists and hence an affidavit, merely alleging that the affiants had cause to believe, and did believe that malt liquors were stored in a building owned by C. then occupied by certain others and known as the "Old Tillery Shop," in L. County, or in a nearby restaurant operated by J. in such county, was insufficient to support the writ.

Coleman *v.* State, 7 Ala. App. 424, 6 So. 20.

**Time for Execution.**—A search warrant cannot legally be enforced so long after its issuance that the search could not be reasonably considered a *bona fide* effort to recover the property described, though there is no absolute time

fixed by law enforcing the warrant. The time of executing a search warrant depends upon the character of the person charged with having the stolen or contraband goods, the nature of the crime charged, etc., there being no absolute time fixed by law for its execution.

Farmer *v.* Sellers, 89 S. C. 492, 72 S. E. 224.

**Arrest on Void Search Warrant Illegal.**—"An arrest made on a void search warrant is illegal, and a conviction of the person arrested thereon in a justice's court is illegal and void."

Emsweller *v.* Wallace, 78 W. Va. 214, 88 S. E. 787.

**"Place" That Can Be Searched.**—West Va. Statute (Code 1913, § 1288) authorizing a warrant for the search of any house, building, or other place in which it is charged the manufacture, sale, offering, keeping, or storing for sale or barter of liquor contrary to law is carried on, and for seizure of fixtures and arrest of persons found therein, contemplates a house, building, boat, or place which persons may be and performing the forbidden acts, and a suitcase, trunk, or other small container of liquors or packages of liquors, is not such a "place."

Emsweller *v.* Wallace, 78 W. Va. 214, 88 S. E. 787.

**Liability for Action under Invalid Warrant.**—Defendants, who voluntarily participated in a raid upon plaintiff's hotel and assisted rangers in forcibly breaking and entering his storeroom, and carrying away his stock of liquors, knowing the invalidity of the search and seizure warrant under which the Rangers purported to act, and that the seizure was unlawful, even, though commanded or requested to do so by such Rangers, were liable to plaintiff in damages.

Cartwright *v.* Canode, 106 Tex. 502, 171 S. W. 696.

**Failure of Officer to Sign Return to Warrant.**—In a prosecution for criminally keeping for sale spirituous and intoxicating liquors, failure of officer to sign a return to a search warrant did not render it improper to admit in evidence liquor seized under the search warrant.

State *v.* Agalos, (N. H.), 107 Atl. 314.

**Seizure in Transportation—Confiscation of Conveyance—Destruction of Liquor—Sale of Other Property—Disposition of Proceeds.**

SEC. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a keeping the property, the fee for the seizure, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their

priorities, which are established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose, as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

**Constitutionality of Law Imposing Forfeiture.**—"If the state, in the valid exercise of the police power, may declare it unlawful and illegal for any person to transport, ship, or carry whisky by any means whatsoever from any point without this state to any point within this state, and from place to place within this state, it necessarily follows that the state may, in the exercise of its police power, adopt any means reasonably necessary, and not unduly oppressive upon the individual, to prevent the transportation of such whisky. Crane *v.* Cambell, 245 U. S. 304, 38 Sup. Ct. 98, 99, 62 L. Ed. 304. Such liquors cannot reasonably be brought from without to a point within this state, nor

carried from point to point within the state without the use of some vehicle or conveyance of some kind or description. The power to prohibit the transportation of liquors is conceded, at least in this case; and it would seem to follow as a necessary conclusion, that the forfeiture of the vehicle used in the transportation of such liquor upon the public highways, private ways, and waters of this state is a measure reasonably necessary for the accomplishment of the purpose."

Mack *v.* Westbrook, 148 Ga. 690, 98 S. E. 339, 341.
See also, Skinner *v.* Thomas, 171 N. C. 98, 85 S. E. 976, L. R. A. 1916E, 338n.

And an act providing that sheriff or arresting officer "who becomes cognizant of the facts or who finds liquor in such conveyances or vehicle being illegally transported" shall seize the same, is not in violation of constitutional provision as to unreasonable seizure.

Maples *v.* State (Ala.), 82 So. 183.

And an act as to seizure of vehicles used for transportation of liquor, is not subject to the objection that it is unconstitutional, in that no detinue writ may be employed to retake possession pending forfeiture suit, and that this is violative of the Constitution, which guarantees that courts shall always be open and every person shall have a remedy by due process of law.

Maples *v.* State (Ala.), 82 So. 183.

The Prohibition Act of Utah confers upon the courts the power to declare forfeited to the state all automobiles used for the illegal transportation of intoxicating liquors.

State *v.* Jenson (Utah), 184 Pac. 179.

**As Denying Jury Trial.**—A law providing that the court having jurisdiction of property seized as having been used in unlawful transportation of intoxicating liquors shall, without a jury, order a hearing and take evidence and determine as in civil cases, does not violate the United States Constitution or Const. Okl. art. 2, § 19, as denying a jury trial.

One Cadillac Automobile *v.* State (Okla.), 182 Pac. 227.

**Forfeiture of Vehicle Used.**—A provision making it a criminal offense to import distilled spirits punishable by fine or imprisonment or both, is not a customs law, but a prohibition law enacted under the police power of Congress, and while the seizure and forfeiture as contraband of spirits so imported, though not specifically provided for, is essential to the effective enforcement of the law, the court cannot impose as an additional punishment the forfeiture of the vehicle used, under another statute.

United States *v.* One Ford Automobile (D. C.), 259 Fed. 894.

In the instant case a prior statute provides that when goods or merchandise are brought into the United States in violation of or contrary to law, not only the goods so brought in, but the vehicles used in bringing them in, shall be condemned and forfeited. But prior to the act of Aug. 10, 1917, the bringing of distilled spirits into the United States was not a crime unless brought in without payment of duty. But the Act of Aug. 10, 1917, forbidding their importation or bringing in under any circumstances no duty could be imposed and there could be no violation of that law because it no longer applied, therefore the court holds that the only applicable law is that of Aug. 10, 1917, and as the forfeiture of the vehicle in which brought is no part of the penalty imposed by that act, the vehicle could not lawfully be confiscated.

United States *v.* One Ford Automobile (D. C.), 259 Fed. 894.

**Right to Trial by Jury.**—Proceedings for the seizure and condemnation of liquor alleged to be unlawfully kept for sale are not prosecutions for criminal offenses within the constitutional provision giving a right to trial by jury in such prosecutions, but are civil proceedings *in rem* to fix the status of the property.

State *v.* Intoxicating Liquor, 82 Vt. 287, 73 Atl. 586.

In a proceeding against intoxicating liquors for their destruction, jury trial may be denied where the only person appearing as defendant admitted that he claimed the liq-

uors and kept them for purposes clearly in violation of the statute.

State *v.* Certain Intoxicating Liquors (Utah), 177 Pac. 235.

But a proceeding to forfeit, under U. S. Rev. St. § 2140 (Comp. St. 1916, § 4141), an automobile seized on land, on the ground that it was used as a means for the introduction of intoxicating liquor into the Indian country, is one at law, and the parties are entitled to the usual rights and remedies incident to such an action, including the right to trial by jury.

Shawnee Nat. Bank *v.* United States, 161 C. C. A. 509, 249 Fed. 583.

**Construction.**—It is a principle of natural law and justice that statutes will not be held to forfeit property, except for the fault of the owner or his agents, unless such a construction is unavoidable.

Shawnee Nat. Bank *v.* United States, 161 C. C. A. 509, 249 Fed. 583.

A statute imposing a forfeiture should be strictly construed and in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation.

United States *v.* One Cadillac Eight Automobile (D. C.), 255 Fed. 173.

Thus, in Act March 2, 1917, § 1 (U. S. Comp. St. 1918, § 4141a), providing for the forfeiture of automobiles or other vehicles used in introducing liquor into the Indian country, "or where the introduction is prohibited by treaty or Federal statute," the phrase quoted must be limited to treaties or statutes relating to Indian affairs, to which the statute solely relates, and cannot be extended to apply to vehicles used in introducing liquors into prohibition states in violation of Act March 3, 1917, § 5 (Comp. St. 1918, § 8739a).

United States *v.* One Buick Automobile (D. C.), 255 Fed. 793.

And in ascertaining the legislative intention relative to laws prohibiting the manufacture and sale of intoxicating liquors, and forfeiting property used in such traffic, it will be considered that forfeitures are not favored in the law.

State *v.* Jones-Hansen-Cadillac Co. (Neb.), 172 N. W. 36.

And a law prohibiting the manufacture and sale of intoxicating liquors, and providing for the confiscation of property used in the traffic, will not be construed to forfeit the property of innocent citizens, unless a legislative intent is manifest that such forfeiture is necessary for the preservation of the public health and safety.

State *v.* Jones-Hansen-Cadillac Co. (Neb.), 127 N. W. 36.

**Under Provision Requiring Liberal Construction.**—In view of Comp. Laws of Utah, 1917, § 5839, requiring the provisions of the Revised Statutes to be liberally construed, and the Prohibition Law, § 1, requiring liberal construction of the act, under Comp. Laws 1917, § 3359, an automobile used in the illegal transportation of liquor into Utah may be seized and forfeited as other things and other property may be forfeited in accordance with the various provisions of the Prohibition Law, the rule of *ejusdem generis* not applying in the construction of the section.

State *v.* Davis (Utah), 184 Pac. 161.

**Law Not Retroactive.**—An automobile used prior to the enactment of the law authorizing seizure and confiscation for the unlawful transportation of intoxicating liquors, is not subject to seizure and confiscation therefor.

First Nat. Bank *v.* State (Okla.), 178 Pac. 670.

**Property Liable to Forfeiture.**—As said in one case: "It seems clear and plain from the mere reading of the act that the kind of property to be summarily dealt with under sections 11 and 12 is the liquor itself, and the articles necessarily and customarily used in connection therewith for the sale and consumption thereof, such as the containers, glassware, bar furniture and fixtures, and the like. It is equally clear that boats and vehicles, being expressly

named in section 5, are to be disposed of under the terms of that section, and not otherwise. It may be that a boat is an implement, within the ordinary definition; and, were the provisions of section 5 omitted from the act, we might so define it. But we cannot believe that the framers of the act, after having provided that a boat or vehicle so used shall be deemed a nuisance, and be abated as such, intended again to cover the same subject by the use of the words 'implements, furniture and fixtures,' as used in sections 11 and 12, and thus to provide a wholly different manner for the disposition thereof, inconsistent with the previous provisions already incorporated in section 5. This court appears to have already adopted this view. Everett *v.* McCulloch, 102 Wash. 51, 172 Pac. 863."

Van Bug Fish Co. *v.* Herstrom (Wash.), 177 Pac. 334, 335.

**Seizure of Money.**—A statute, providing that it shall be the duty of an officer, without warrant, to arrest the offender and seize the liquor, bars, furniture, fixtures, vessels, and appurtenances thereunto belonging so unlawfully used * * * does not legally authorize such officer in making such seizure to seize money.

State *v.* Certain Appurtenances Used in Sale of Intoxicating Liquors, 46 Okla. 538, 149 Pac. 130.

**Automobiles.**—A statute specifying boats, teams, wagons, and sleds, impliedly excludes automobiles.

Shawnee Nat. Bank *v.* United States, 161 C. C. A. 509, 249 Fed. 583, 584.

"Prior to the enactment of chapter 188 of the 1917 Session Laws of the state of Oklahoma, there was no legal authority for the seizure and confiscation of an automobile used for the unlawful transportation of intoxicating liquors."

State Nat. Bank *v.* State (Okla.), 172 Pac. 1073.

But under Nebraska Laws 1917, c. 187, if an automobile used in the unlawful transportation of liquor be declared a nuisance, the interest of the owner or mortgagee thereof,

who has notice of its unlawful use, may be sold and the proceeds applied as provided by section 33.

State *v.* Jones-Hansen-Cadillac Co. (Neb.), 172 N. W. 36.

**Introducing Liquor into Indian Country—Forfeiture of Vehicle Used.**—Under Rev. St. § 2140, Act March 1, 1907 (Comp. St. §§ 4141, 4142), and supplementary acts, a special enforcement officer of the Indian Bureau has authority to seize and subject to forfeiture proceedings an automobile containing liquor which he has reason to suspect is about to be introduced into the Indian country or among Indians, where its introduction is prohibited by law or treaty, although at the time of seizure it is not within the Indian country.

United States *v.* One Ford Five-Passenger Automobile (D. C.), 259 Fed. 645.

**Automobile as "Appurtenance."**—An automobile seized July 21, 1915, while unlawfully conveying intoxicating liquors in presence of an officer having power to serve criminal process, was not subject to seizure by him and forfeiture to the state under Rev. Laws 1910, § 3617, as it was not an "appurtenance" within that section.

Sharpe *v.* State (Okla.), 181 Pac. 293.
One Cadillac Automobile *v.* State (Okla.), 172 Pac. 62.
Lebrecht *v.* State (Okla.), 172 Pac. 65.
State *v.* One Packard Automobile (Okla.), 172 Pac. 66.
One Moon Automobile *v.* State (Okla.), 172 Pac. 66.

**Stolen Automobile.**—Where an automobile was stolen and thereafter condemned because transferring intoxicating liquors and sold, the true owner, who had no knowledge of its illegal use, and who established his ownership and the theft, might recover it in trover against purchaser, as purchaser got no better title than the possessor had at the seizure.

Smith *v.* Spencer-Dowler Co. (Ga. App.), 100 S. E. 651.
See also, State *v.* Davis (Utah), 184 Pac. 161.

**Vehicle Used—Owner's Knowledge—Subject to Seizure.**—"When, with the knowledge of the owner, any such vehicle is used on any of the public roads or private ways of this state in conveying any liquors or beverages, the sale or possession of which is prohibited by law, the vehicle or conveyance is subject to seizure and sale in the manner prescribed regardless of what might have been the purpose and intent of the owner or operator of the vehicle at the time it was so employed. Under the plain and explicit terms of the act itself, the fact that the liquors or beverages thus conveyed were for the personal use of the owner or operator of the vehicle would not alter the rule, but the provision is that the mere use of a vehicle, wherein and whereby any of the enumerated liquors are conveyed with the knowledge of the owner, renders the vehicle subject to seizure and sale, regardless of what may have been the reason in thus using the vehicle, or what may have been the purpose as to the use or disposition of the liquors."

Crapp *v.* State (Ga. App.), 98 S. E. 174.

**Seizure of Liquor in Possession of Common Carrier.**—Under a law making it unlawful to have in possession any intoxicating liquors, and providing that no property right shall exist in such liquors, but that the same are forfeited and subject to seizure and destruction, liquors in possession of a common carrier although in course of shipment in interstate commerce, are subject to seizure and forfeiture.

Northern, etc., Co. *v.* Brenneman (C. C. A.), 259 Fed. 514.

**Proceeding Is in Rem.**—Although the owner is named in the petition, and process is prayed against him, the judgment prayed is, however, one solely *in rem,* for the condemnation of the automobile.

Mack *v.* Westbrook, 148 Ga. 690, 98 S. E. 339, 343.

Proceedings to confiscate intoxicating liquors are proceedings *in rem* governed by the rules of civil procedure.

State *v.* Great Northern R. Co., 98 Wash. 197, 167 Pac. 103.

But in another case it is said that forfeiture proceedings against the intoxicating liquors only are criminal cases governed by the rules of criminal law.

Perro *v.* State, 113 Me. 493, 94 Atl. 950.

**Requirements of Law to Be Strictly Observed.**—"A proceeding to condemn an automobile used on a public road or private way of this state in conveying liquors or beverages, the sale or possession of which is prohibited by law (Ga. Laws Ex. Sess. 1917, p. 16, § 20), is summary in its nature, and the provisions of the act affording this remedy must be strictly complied with."

Phillips *v.* Stapleton (Ga. App.), 97 S. E. 885.

"Where there has been a signal failure to comply with the provisions of chapter 6513 of the Laws of Florida (Acts 1913), requiring an information to be filed within 24 hours after the seizure of intoxicating liquors, which have been shipped into a county in which the sale of such liquors is prohibited by law, as well as a failure to comply with still other provisions of such chapter, a decree ordering the forfeiture and destruction of such liquors will be reversed."

Lippman *v.* State, 72 Fla. 428, 73 So. 357.

**Grounds for Seizure.**—There must be something more than mere suspicion to justify the seizure and confiscation of intoxicating liquors while in possession of a common carrier as an interstate shipment.

State *v.* Great Northern R. Co., 98 Wash. 197, 167 Pac. 103.

**Legal Seizure Essential to Jurisdiction.**—In Maine a legal seizure is essential to jurisdiction of a proceeding *in rem* by libel for the forfeiture of intoxicating liquors, containing vessels, and of vehicles.

State *v.* Ford Touring Car No. 1, 440,316, 117 Me. 232, 103 Atl. 364.

That an officer has possession of spirituous liquors taken from the owner who kept them for legal sale does not

alone authorize their condemnation, but they must have been legally seized pursuant to a lawful warrant.

State *v.* Spirituous Liquors, 75 N. H. 273, 73 Atl. 169.
State Nat. Bank *v.* State (Okla.), 172 Pac. 1073.

**Liability to Forfeiture Although Wrongfully Seized.**—Liquors kept in violation of law are none the less liable to forfeiture because the possession thereof is wrongfully or illegally obtained by an officer.

State *v.* Schoppe, 113 Me. 10, 92 Atl. 867.

**Seizure without Warrant.**—An officer who seizes property without a warrant is held to a strict compliance with all the requirements of law authorizing such proceedings.

State *v.* Schoppe, 113 Me. 10, 92 Atl. 867.

**Duty of Officers.**—Under the Georgia law where officers found a barrel of whisky under defendant's stable and two other barrels buried near by, it was their duty to seize the same to be forfeited to the state.

Thornton *v.* Skelton (Ga.), 99 S. E. 299.

**When Brought in Name of State.**—"The proceeding authorized by section 20 of the act in question (Ga. Acts Ex. Sess. 1917, p. 16) is one *in rem,* against the offending thing, and not against the offending owner. It is not decided that the solicitor of the court having jurisdiction had not legal capacity to institute condemnation proceedings in his name as solicitor; but it is suggested that the proceeding, in the nature of an information should properly be brought in the name of the state."

Mack *v.* Westbrook, 148 Ga. 690, 98 S. E. 339, 340.

**Petition and Amendment Thereof.**—A petition, headed "State of Georgia, Whitfield County," directed "To the Superior Court of Said County," and regularly filed in the office of the clerk of that court, which contained the following paragraph: "The above-described car is the property of Tom Burgan, of Catoosa county, Georgia, and was being used by him, and by others with his knowledge and

consent, in the transporting of intoxicating liquors over and through the public highways of said county in violation of law," was properly amended by inserting after the word "county," in the latter part of the paragraph, the words "of Whitfield." Perry *v.* Mulligan, 58 Ga. 479; Hall *v.* Mobley, 13 Ga. 318; Cowart *v.* Young, 74 Ga. 694; Murphy *v.* Peabody, 63 Ga. 522. In the last-named case Judge Bleckley says in the opinion (page 524): "The rule of amendment is as broad as the doctrine of universal salvation."

Burgan *v.* State (Ga. App.), 99 S. E. 636.

**Petition—Amendment—Demurrer.**—After petition, in proceeding to condemn car unlawfully used to transport liquors, was amended so as to charge its use on highways of county of Whitfield, a demurrer filed by defendant, alleging that jurisdiction is in superior court of Catoosa county, because petition before amendment alleged that it was seized while used in that county, was properly stricken.

Burgan *v.* State (Ga. App.), 99 S. E. 636.

And the special plea to the jurisdiction was also properly stricken, after the petition was so amended.

Burgan *v.* State (Ga. App.), 99 S. E. 636.

**Findings of Fact—Necessity.**—In a proceeding for the forfeiture of intoxicating liquors, libeled by the state and claimed by the carrier in whose possession they were found, specific findings of fact are unnecessary to support a judgment of forfeiture; such judgment being a finding for the state upon all the issues of fact necessary to support the libel.

State *v.* Intoxicating Liquors, 112 Me. 138, 91 Atl. 175.

**Burden of Proof.**—If action to defeat any property rights in and destroy certain intoxicating liquors is tried as an action *in rem,* plaintiffs have the burden of proving the allegations of forfeiture.

Noble *v.* People (Colo.), 177 Pac. 970.

**Proof Requisite.**—In a proceeding for the seizure and condemnation of intoxicating liquors alleged to have been

kept for unlawful sale, the state is not required to prove the keeping for sale beyond a reasonable doubt, but only by a fair preponderance of the evidence.

State *v.* Intoxicating Liquor, 82 Vt. 287, 73 Atl. 586.

Although a statute provides that there shall be no property right in liquors kept or used for the purpose of violating any provision of the act, the facts constituting forfeiture must be made to appear in court, or in some legal manner or proceeding and cannot be declared upon default without any evidence.

Noble *v.* People (Colo.), 177 Pac. 970.

In this case the court said: "In McConathy *v.* Deck, 34 Colo. 461, 466, 83 Pac. 135, 4 L. R. A., N. S., 358n, 7 Ann. Cas. 896, and the many citations and quotations therein, the principle is announced that forfeitures take place immediately, under the statute, without any proceeding to declare a forfeiture, upon the happening of the event; still, in all forfeiture cases that we have been able to examine, the facts constituting the forfeiture were made to appear in court before the forfeiture could be pronounced or made effectual. The owner of the property must be afforded the means of demanding and enforcing his constitutional right to defend and protect his property against forfeiture. In all cases where the rule has been announced, it has been in court where the owner had the opportunity to defend his property rights. If we concede section 20 of the statute warrants such a proceeding, the property rights of defendants could only be defeated by proof on the trial of facts constituting a forfeiture. A forfeiture, under the circumstances, could not be declared upon default without any evidence."

Noble *v.* People (Colo.), 177 Pac. 970, 974.

**Presumptions.**—When intoxicating liquors have been found illegally in an automobile used for their transportation it is *prima facie* evidence that the car was being used illegally, and one desiring to recover the car must establish by a preponderance of the evidence, not beyond a reason-

able doubt, the fact of his ownership, and that he had no knowledge of the illegal use.

State *v.* Davis (Utah), 184 Pac. 161.

**Return of Officer Not Evidence.**—Where an automobile was seized by an officer without warrant as a thing used in violation of the prohibition laws, such return is of itself incompetent as evidence to prove any unlawful characteristics thereof, or to establish facts which distinguish it or its use as illegal or prohibited at the time of its seizure.

Cox *v.* State (Okla.), 160 Pac. 895.

**Credibility of Witnesses.**—In search, seizure, and forfeiture proceedings, the credibility of the witnesses is peculiarly within the province of the trial court, which is not bound by the statements of defendants, particularly where the inferences deducible from the undisputed facts were contrary to such statements.

State *v.* Jenson (Utah), 184 Pac. 179.

**Interest of Mortgagee.**—Under a statute authorizing the seizure of a vehicle used in conveying, concealing or removing intoxicating liquors, and providing on conviction of the defendant that he shall forfeit and lose all right, title and interest in and to the property seized and providing for the sale of the property seized when no person is arrested, and for distribution of the proceeds of the sale, where the owner of an automobile is arrested, the interest of a mortgagee who had no knowledge of the use being made of the machine is not forfeited.

Skinner *v.* Thomas, 171 N. C. 98, 87 S. E. 976, L. R. A. 1916E, 338n.

Shawnee Nat. Bank *v.* United States, 161 C. C. A. 509, 249 Fed. 583.

Maples *v.* State (Ala.), 82 So. 183.

**Presumption.**—Where, in a proceeding under Rev. St. § 2140 (U. S. Comp. St. 1916, § 4141), to forfeit an automobile on the ground that it was used as a means for the introduction of intoxicating liquor into Indian country, the court found that a chattel mortgagee had a valid lien, but

that it was inferior to the rights of the United States under the forfeiture proceeding, it must be presumed, in absence of evidence, that the mortgagee had nothing to do with the introduction of the liquor into Indian country.

Shawnee Nat. Bank *v.* United States, 161 C. C. A. 509, 249 Fed. 583.

But a provision that automobiles used in introducing intoxicants in violation of law, whether used by the owner or other person, shall be subject to forfeiture applies to interest of mortgagee, though machine is used contrary to provision of mortgage.

United States *v.* One Seven Passenger Paige Car (D. C.), 259 Fed. 641.

**Other Liens on Property Seized.**—In a statutory proceeding to condemn or confiscate a vehicle employed in the illegal transportation of liquor, contrary to the provisions of law where the owner of the vehicle had previously sold it to the party engaged in the illegal transaction, but reserved title to it until full payment of the purchase price, part of which purchase price was represented by a retention of title note duly recorded, and the remainder of which was by agreement to be covered by a similar note, in case the vendee failed to pay the remainder on or before a date specified and where the evidence disclosed that the vendors were wholly without knowledge of the illegal intent or acts of the vendee, and the property was seized in behalf of the state before the agreed time when the second note reserving title was to be executed in the event that the amount to be covered thereby had not been previously paid, the owner would be entitled to the full amount of the purchase money due as might appear from the evidence, including both the amount covered by the note actually given and the note agreed to be given.

Whites *v.* State (Ga. App.), 98 S. E. 171.

Where an automobile is sold on installments, if the vendor or his assignee has no knowledge or information of the car's intended use in the illegal transportation of intoxicating liquors he is entitled to reclaim it when seized by the sheriff for forfeiture.

State *v.* Davis (Utah), 184 Pac. 161.

**Want of Recordation Does Not Defeat.**—In a proceeding to condemn an automobile illegally employed in the transportation of intoxicating liquors, where the owner had conditionally sold it to the party engaged in the illegal transaction under a contract reserving title until payment, the mere fact that such contract had not been recorded does not defeat the seller's claim of title.

Armington & Sons *v.* State (Ga. App.), 100 S. E. 15.

**Want of Knowledge or Consent of Owner as Defense.**—Where undisputed facts showed that neither taxicab owner nor chauffeur knew that passenger was using car to transport intoxicating liquor, and that the owner had not been negligent in employing the chauffeur, and had directed him not to use the car for such illegal purposes, the court could not order the car forfeited and destroyed under a law providing for forfeiture of vehicles used in violating the liquor laws.

State *v.* Southern Exp. Co. (Ala.), 75 So. 343.

The Alabama act does not contemplate the condemnation and selling of property of those who did not aid or assist in the unlawful transportation of liquors or who were not chargeable with notice or knowledge that their property was to be used for such purpose; the words "aided and assisted" implying either knowledge on the part of the person assisting or such negligence as to charge him with knowledge that his property is to be used in violation of law.

State *v.* Hughes (Ala.), 82 So. 104.

**Acquittal of Defendant in Criminal Prosecution as Defense.**—Acquittal of defendant in a prosecution for having liquors unlawfully in his possession, had no bearing in a subsequent action by the state under such act looking only to the destruction of the liquor.

State *v.* Certain Intoxicating Liquors (Utah), 177 Pac. 235.

But it has also been held that when a defendant has been indicted, convicted, and punished under Act Aug. 10, 1917,

§ 15 (Comp. St. 1918, § 3115¼l), for importing distilled spirits in violation of its prohibition, he cannot be proceeded against *in rem* for forfeiture of the vehicles used in bringing in such spirits, under Rev. St. § 3062 (Comp. St. § 5764), but the spirits, being unlawfully in the United States, may be seized and condemned.

*In re* Food Conservation Act (D. C.), 254 Fed. 893.

**Verdict of Acquittal as Evidence.**—Where the state institutes an action to condemn an automobile under section 20 of the act of 1917 (Ga. Laws Ex. Sess. 1917, p. 16), providing for the forfeiture of any vehicle in which spirituous liquors are carried on any public road or private way in this state, and the action is resisted by the interposition of a claim, if the defendant was a person who had been indicted and acquitted of a penal charge based on the same transaction, the verdict of acquittal founded on his illegal possession of the the liquor seized with the automobile is admissible in support of the claim. Where the claim is interposed by a third person, the general rule is that the verdict of acquittal, though based on the same transaction, is inadmissible.

Duncan *v.* State (Ga.), 99 S. E. 612.
S. C., 100 S. E. 38.

**Error in Striking Defense.**—Where the court erred in striking the defense filed by claimant in a proceeding to condemn an automobile, the further proceedings were nugatory.

Griffin *v.* Smith (Ga. App.), 99 S. E. 386.

**Custody Pending Hearing.**—When the law did not provide for notice and hearing before destroying property, but the driver and the owner were nevertheless notified that a hearing would be had before the police judge, to show cause why the taxicab should not be adjudged forfeited and ordered destroyed, pending such determination, the vehicle was rightfully in the custody of the officers, and not the subject of replevin by its owner.

Allison *v.* Hern, 102 Kan. 48, 169 Pac. 187.

Property seized by an officer pursuant to a warrant issued in proceedings against an unlicensed drinking place,

is, after seizure, in the custody of the law, and the possession thereof by the officer cannot be disturbed until the proceedings are terminated and an order of the court disposing of the property is made and served upon him, or in some way brought to his official attention. Until such order is made by the court, neither an action for the possession, for the conversion or for the loss of the property by the negligence of the officer, can be maintained by the owner of the property or by any person claiming an interest therein.

Sponnick *v.* Duluth, 123 Minn. 528, 143 N. W. 970.

**Intervention by Claimant.**—In proceedings to condemn an automobile, the owner has the right to intervene and file a "defense."

Griffin *v.* Smith (Ga. App.), 99 S. E. 386.

**Necessary Allegations.**—The allegation by a claimant to intoxicating liquors which had been seized, that he was interested in the property seized is defective for failure to show that the claimant had such an interest as entitled him to defend.

Toole *v.* State, 170 Ala. 41, 54 So. 195.

Burgan *v.* State (Ga. App.), 99 S. E. 636.

**Demurrer Thereto—Effect.**—Demurrer to intervention in seizure of a shipment of liquor admits the facts alleged showing the shipment was lawful.

State *v.* Pensacola, etc., S. S. Co. (Ala.), 75 So. 892.

**Affidavit and Bond.**—In proceedings to condemn an automobile instituted under the Georgia law, the owner is not required to make affidavit and give bond as in claim cases.

Griffin *v.* Smith (Ga. App.), 99 S. E. 386.

**Bailee for Hire as Claimant.**—A claimant, who is bailee for hire of the liquors, has special title thereto which entitles him to possession of the liquors against a wrongful seizure.

State *v.* Intoxicating Liquors, 112 Me. 393, 92 Atl. 326.

**Intervention by Carrier.**—A carrier which has lawfully assumed the delivery of an interstate shipment of liquor, authorized by law, may intervene in a seizure thereof as a "person claiming any right, title or interest" therein.

State *v.* Pensacola, etc., S. S. Co. (Ala.), 75 So. 892.

**Manager of Bottling Works—Authority to Appear and Claim for Owner.**—The statute authorizing the owner to make claim for liquors under seizure and secure their release contemplates an appearance by the real owner personally or by a properly authorized representative, and hence the manager of bottling works, in which liquors, when seized, were in store awaiting the time when, augmented by further orders and collections, they should be shipped to their real owners outside the state, was not entitled to claim the liquors, as he was not such a party in interest as the law contemplated nor a properly authorized agent of such a party.

State *v.* Intoxicating Liquors, 112 Me. 220, 91 Atl. 947.

**Burden of Proof on Claimant.**—If action to defeat property rights in and to destroy certain intoxicating liquors is tried as a replevin suit, the parties claming title to the liquors must recover upon the strength of their own title.

Noble *v.* People (Colo.), 177 Pac. 970.

**Burden of Proof as to Right of Claimant to Custody.**—Under Maine Rev. St. c. 29, § 51, providing that upon hearing of a claim for intoxicating liquors seized by the state, the magistrate, if satisfied that the liquors were not kept or deposited for unlawful sale, and that the claimant is entitled to custody thereof, shall give him an order for the return of the liquors, the claimant is bound to show, not only that the liquors were not kept or deposited for unlawful sale, but that he is entitled to their custody; the burden of proving that issue being on the claimant.

State *v.* Intoxicating Liquors, 112 Me. 138, 91 Atl. 175.

**Injunction by Claimant.**—"In Gunn *v.* Atwell, 148 Ga. 137, 96 S. E. 2, it appeared that a certain automobile in the

posssession of one Jenkins, and in which intoxicating liquors were found, was seized by police officers of the city of Macon, and the seizure was reported to the solicitor of the city court of Macon, who instituted condemnation proceedings under section 20 of the prohibition laws of this state, approved March 28, 1917. (Acts Ex. Sess. 1917, p. 16.) Atwell filed an equitable petition in which it was alleged that Jenkins was neither the owner nor a lessee of the car, but that Atwell was the owner thereof and had no knowledge that Jenkins had used the automobile for the purpose of transporting intoxicating liquors; and Atwell prayed that the officers be required to surrender the automobile, and for injunction and general relief. It was ruled, in the case cited, that section 20 of the act *supra,* provides an adequate remedy at law for an adjudication of all the rights of the defendant in error; and therefore there was no ground for equitable jurisdiction. The facts in the instant case bring it clearly within that ruling; and there was no error in refusing to order the sheriff of the county to deliver the possession of the car to the plaintiff, and to enjoin the pending condemnation proceedings in the city court; the plaintiff having an adequate remedy at law for the adjudication of the rights claimed by her in the petition for injunction."

Nesmith *v.* Martin (Ga.), 98 S. E. 551.

**Condemnation of Excess Quanitity as Contraband.**—The provision of a law prohibiting the possession of excess quantities of intoxicating liquors, operates *in rem* so that any such excess quantity is contraband and subject to condemnation, regardless of the finding as to the owner.

State *v.* Martin, 92 Wash. 366, 159 Pac. 88.

**Order of Court Necessary for Destruction.**—Under Rev. St. U. S. § 2140 (U. S. Comp. St. § 4141), an officer of the United States had no right to destroy at a point in Kansas intoxicating liquors which had been seized from costody of railroad, on ground they were to be shipped into adjacent Indian territory, without a valid order of court authorizing him so to do, but his seizure, if he had reason to suspect or was informed the liquor was about to be in-

troduced into Indian territory, may have been valid, despite its subsequent illegal destruction.

Danciger *v.* Atchison, etc., R. Co. (Mo.), 212 S. W. 5.

**Order for Destruction—Force.**—The provision of the judgment of conviction against plaintiff, of receiving liquor in greater quantity than allowed by law, that the officer, in whose possession it was under a seizure, destroy it, cannot be avoided in an action against the officer to recover it.

Felia *v.* Belton, 170 N. C. 112, 86 S. E. 999.

**Unlawful Seizure of Liquor from Druggist—Return.**

See ante, under § 8.

**Restraining Order against Return of Automobile.**—Where intoxicating liquor and an automobile were seized and the liquor destroyed, the obtaining of an *ex parte* order, restraining the sheriff from returning the automobile until a full hearing was had, did not deprive the owner of property without due process of law; such order simply holding matters in *statu quo*.

State *v.* Raph (Ia.), 168 N. W. 259, 260.

**Appeal and Error.**—Where the trial court found that a chattel mortgagee had a valid lien on an automobile, sought to be forfeited because used by the mortgagor to carry intoxicating liquors into Indian country, but declared the lien inferior to the claim of the United States, the mortgagee was entitled to raise on such record the question whether the automobile was subject to forfeiture, as well as whether its interest could be forfeited, as the findings did not support the judgment.

Shawnee Nat. Bank *v.* United States, 161 C. C. A. 509, 249 Fed. 583, 584.

**Penalties—For Sale or Manufacture—For Violating Permit, False Records, Reports, Affidavits, etc.**

SEC. 29. Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this Act against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.

**Making Breach of Act a Felony—Constitutionality.** —The provision in the act passed by the General Assembly

of Georgia at its extraordinary session held in March, 1917, and approved March 28, 1917 (Acts Ex. Sess. 1917, p. 7), entitled "An act to amend and supplement the prohibition laws of this state," etc., which declares that any one who distills, manufactures, or makes alcoholic or spirituous liquor, or malted liquor any part of which is alcoholic, within this state, shall be guilty of a felony, is not unconstitutional as violating the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Delaney *v.* Plunkett, 146 Ga. 547, 91 S. E. 561, L. R. A. 1917D, 926n, Ann. Cas. 1917E, 685.

Yaughan *v.* State, 148 Ga. 517, 97 S. E. 540.

**Right to Create Criminal Offense.**—"The legislative act making it a crime 'for any person * * *' to keep a place with the intent of or for the purpose of manufacturing, selling, bartering, giving away, or otherwise furnishing, any spirituous, vinous, fermented or malt liquors, or compounds whatever, * * * is not condemned by the constitutional provisions guaranteeing due process of law and the equal protection of the law."

Proctor *v.* State (Okla. Cr. App.), 176 Pac. 771.

**Construction—Plural as Including Singular Number.**—The words "violations" and "provisions" contained in the first section of the act providing for punishment for persistent violators of the prohibitory liquor law, include the singular number of the words mentioned.

State *v.* Watson, 92 Kan. 983, 142 Pac. 956.

**Abatement of Nuisance and Personal Punishment.**—It clearly is legislative intent as expressed in one section of a law to provide for two penalties, one the abatement of the offending premises, the other punishment of the offending person, leaving the character and the extent of the punishment against the offending person to the subsequent section.

State *v.* Clancy, 97 Wash. 410, 166 Pac. 778.

## TITLE II—SEC. 32

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**I. Indictment, Information and Warrant.**

SEC. 32. In any affidavit, information, or indictment for the violation of this Act, separate offenses may be united in separate counts and the defendant may be tried on all at one trial and the penalty for all offenses may be imposed. It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so.

1. DEFINITIONS.

**"Intoxicated."**—The word intoxicated in an indictment charging a violation of a statute providing that no person shall knowingly sell intoxicating liquor to any intoxicated persons, means a materially changed condition produced by the immoderate or excessive use of intoxicants as contrasted with normal condition and conduct.

O'Donnell *v.* Commonwealth, 108 Va. 882, 62 S. E. 373.

**Oath to Warrant or Complaint.**

The law does not require the state to disclose in the first instance that the prosecuting officers in a liquor prosecution had notice or knowledge of the offense when the complaint was sworn to.

State *v.* Smith, 96 Kan. 320, 150 Pac. 640.

Under the Alabama statute (Acts 1915, p. 32, § 32), providing that, when prosecution for violation of the prohibition law is begun by affidavit, as there authorized, it may continue, in whatever court trial shall be had, on such affidavit, the solicitor, on appeal of the case from the county court to circuit court, need not file a complaint or brief statement of the case, as required by Code 1907, § 6730, on such appeal in other misdemeanor cases.

Cockran *v.* State (Ala.), 82 So. 560.
Walker *v.* State (Ala. App.), 81 So. 179.

2. SPECIFICATION OF OFFENSE.

Under a statute requiring the indictment to state the offense with a degree of certainty that will enable the court to pronounce proper judgment, an indictment to support a judgment of conviction must aver every fact necessary to an affirmation of guilt, and the statement of bald conclusions will not suffice.

Holt *v.* State (Ala. App.), 78 So. 315.

Thus where the law makes it an offense to transport for sale ardent spirits, or to advertise for sale or to aid in procuring ardent spirits, or to act as agent or employee in certain instances, but without specifying the facts constituting these separate offenses, an indictment failing to set forth the acts done constituting these offenses is insufficient.

Pine *v.* Commonwealth, 121 Va. 812, 93 S. E. 652, 653.

3. AVERMENT OF SCIENTER AND INTENT.

An information, charging the importation of intoxicating liquors in violation of law, is not defective because not charging that defendant knew the liquor was intoxicating.

Balfe *v.* People (Colo.), 179 Pac. 137.

" 'We see no force,' said the court, 'in the objection that it was not charged that the accused knew that the liquor was intoxicating. The only case cited in its support is from Maine, where the offense was defined as "knowingly" transporting, etc.' "

Balfe *v.* People (Colo.), 179 Pac. 137, 138.

An indictment under a statute charging that accused's dwelling house was a place where intoxicants were illegally kept, sold, given away, etc., need not allege in terms that he knew, or consented to the prohibited acts.

State *v.* Arsenault, 106 Me. 192, 76 Atl. 410.

But under a statute making it an offense to transport or deliver liquor to persons in dry territory or to minors, a carrier transporting or delivering such liquor must know that the consignee came within the prohibited class, and

an indictment under such section is fatally defective, if it does not charge knowledge on the part of the carrier.

Adams Exp. Co. *v.* Commonwealth, 177 Ky. 449, 197 S. W. 957.

An information which alleges that the defendant had in his possession intoxicating liquors, and which does not allege generally an intention to violate the provisions of the prohibitory law, or specifically allege an intention to sell, barter, give away and otherwise furnish such liquors, is too indefinite to charge any offense and a demurrer thereto should have been sustained.

Park *v.* State, 120 Okla. Cr. App. 302, 155 Pac. 494.

An indictment against a physician for wrongfully issuing a prescription for liquor charging that accused did unlawfully make out and issue to M. a prescription for intoxicating liquor, and for a compound of which intoxicating liquor formed a part, to be used otherwise than for medicinal purpose, was in the language of the statute, and sufficiently charged that the prescription was not issued with the intent that the liquor should be used for medicinal purposes.

State *v.* Bates, 168 Mo. App. 365, 127 S. W. 79.

An information under a statute making it an offense to issue a prescription for intoxicating liquors to be used otherwise than for medicinal purposes, is insufficient as not connecting its issuance with the purpose of the liquor's use; it charging merely the issuance of the prescription which is set out and constitutes the end of the charge against the physician, and then starting off with a separate paragraph and a new sentence, to the effect that said liquors were to be used otherwise than for medicinal purposes, and this not charging defendant with that intent, but covering only the purpose of the person who got the prescription.

State *v.* Bradford (Mo. App.), 195 S. W. 523.

A complaint that defendant willfully and unlawfully transported intoxicating liquors sufficiently charges a wrongful intent.

Ex parte Ahart, 172 Cal. 762, 159 Pac. 106.

See McNeal *v.* State (Okla. Cr. App.), 179 Pac. 943, 944, to effect that it is not necessary, in charging unlawful transportation of whisky, to allege that it is being conveyed for an unlawful purpose, not for the proof to so show.

See Maynes *v.* State, 6 Okla. Cr. App. 478, 119 Pac. 644.

4. REQUISITE CERTAINTY.

Indictments for the sale of intoxicating liquors must be drawn with such a degree of legal certainty as to identify the particular transaction complained of, so that the court may judge whether the facts alleged are sufficient to inform the accused of what charge he is called on to meet, and to enable him to plead the judgment in bar of a second prosecution.

State *v.* Muller, 80 Wash. 368, 141 Pac. 910.

5. CLERICAL ERRORS AND VERBAL INACCURACIES.

An indictment charging a violation of the law prohibiting the sale of intoxicating liquors in prohibition territory, omitting the letter "i" in the middle of the word "intoxicating," when first used, held not open to attack.

Bird *v.* State (Tex. Cr. App.), 206 S. W. 844.

Where an information charged the maintenance of a nuisance in a frame building on a location sufficiently described, and an amended information recited that the nuisance was maintained in a concrete building, the location being exactly the same, the misdescription of the materials out of which the building was constructed did not prejudice the defendant's rights.

State *v.* Berger, 97 Kan. 366, 155 Pac. 40.

**Sufficiency of Petition for Penalty.**—A petition to recover penalty for violation of a statute as to delivery by carrier of intoxicating liquors in prohibition territory, alleging that "law prohibiting sale of spirituous, vinous and malt" was in force at time and place of alleged delivery is not rendered insufficient by omission of word "liquors," when context enables court to supply it.

Southern Exp. Co. *v.* Commonwealth, 177 Ky. 767, 198 S. W. 207.

6. SURPLUSAGE.

Under a state law allowing registered druggists to sell for certain purposes, allegations in an information charging accused with being a registered druggist and selling for a prohibited purpose may be rejected as surplusage, since they do not identify the crime.

State *v.* Bartow, 95 Wash. 480, 164 Pac. 227.

An indictment charging that accused unlawfully used his dwelling house for the illegal keeping and sale of intoxicants, and that the place was one where intoxicants were unlawfully kept, sold, given away, drunk, and dispensed, charges one offense only, under a statute declaring unlawful places used for the illegal sale or keeping of intoxicants and places where intoxicants are illegally kept, sold, given away, or dispensed; the latter allegations respecting the place being properly disregarded as surplusage, if indefinite.

State *v.* Arsenault, 106 Me. 192, 76 Atl. 410.

In a prosecution for retailing liquor without a license, an affidavit entitled, "State of Louisiana *v.* J. M.," and charging defendant with committing the offense "in violation of the law and against the peace and dignity of the state of Louisiana," was not insufficient, though on a printed blank which stated in the printed matter that the offense was also in violation of the ordinance of a city; the printed statement being merely surplusage.

State *v.* Maroun, 133 La. 1083, 63 So. 593.

7. STATUTORY LANGUAGE.

An indictment charging in the form prescribed by the statute that defendant sold, offered for sale, kept for sale, or otherwise disposed of spirituous, vinous, or malt liquor contrary to law is sufficient.

Spigener *v.* State, 11 Ala. App. 296, 66 So. 896.

Under a statute providing that an indictment for selling, offering for sale, keeping for sale, or otherwise disposing of intoxicating liquors is sufficient is charging that defendant kept, sold, or disposed of the liquor contrary to law, an in-

dictment charging the sale of intoxicating liquors without a license or contrary to local regulations is sufficient; the averment as to license being rejected as surplusage because, under the act of 1909, all sales of intoxicating liquor were inhibited.

Scott *v.* State, 3 Ala. App. 142, 57 So. 413.

In another case decided in Georgia, it was said: "Since the offense charged is a purely statutory offense (Youmans *v.* State, 7 Ga. App. 101, 113, 66 S. E. 383), the court did not err in overruling the demurrer to the indictment which alleged a violation of section 434 of the Penal Code of 1910, in the terms and language of the Code, and so plainly that the nature of the offense charged could be easily understood by the jury. Pen. Code 1910, 954; Ricks *v.* State, 16 Ga. 600. See in this connection Rose *v.* State, 1 Ga. App. 596, 58 S. E. 20. It is unnecessary to allege the name of the agent through when, or the agency by which, or the manner in which the solicitation is accomplished, and the connection of the defendant with the solicitation or its subsequent ratification by him is a matter for proof. In Loeb *v.* State, 75 Ga. 258, an indictment for the analogous offense of furnishing liquor to a minor through a sale by a clerk of the defendant was upheld, though the name of the clerk or agent was not stated. It is immaterial whether or not the allegations in the indictment referring to the United States mail and the Southern Express Company as agencies by and through which the defendant solicited the sale of liquors, were specific, since 'allegations in an indictment which are too general and indefinite to set forth a crime may be treated as surplusage if there are other averments in the indictment which sufficiently allege the commission of an offense.' Elsbery *v.* State, 12 Ga. App. 86, 76 S. E. 779. It was unnecessary to add in the present indictment, by and through the United States mails and by and through the Southern Express Company, under the ruling by this court in Rose *v.* State, 4 Ga. App. 588, 62 S. E. 117, that the words personally in section 434 would cover solicitation through the mails or through an express company. The effect of section 434 (Acts 1897, p. 39) is to extend the act of 1893, p. 115, so far as soliciting is concerned, and its clear meaning is that the person who sells intoxicating liquors or solicits their sale in

any county of this state, shall be responsible, whether the act is committed by himself individually, or by any person who is his agent, it matters not what may be the means employed by either to effect the illegal solicitation. Rose *v.* State, 4 Ga. App. 588, 595, 62 S. E. 117."

Cashin *v.* State, 18 Ga. App. 87, 88 S. E. 996.

Where no form is provided by statute for an indictment under a statute making it unlawful to have in possession, etc., more than a certain quantity of named kinds of liquor, the indictment must follow the language or substantially the language of the section.

Holt *v.* State (Ala.), 78 So. 315.

An indictment in the form prescribed in a statute charging the accused with carrying on the business of a dealer in liquors, is not fatally defective if it fails to charge that he sold, or caused to be sold, spirituous, vinous, or malt liquor.

Wilkins *v.* State (Fla.), 78 So. 523.

Under a statute declaring that all places used for the illegal sale of intoxicating liquors, etc., are common nuisances, an indictment, charging that accused did maintain a building which was used for the sale of intoxicating liquors, etc., is not defective because of failure to allege that it was personally used by accused; the charge in the terms of the statute being sufficient.

State *v.* Trowbridge, 112 Me. 16, 90 Atl. 494.

Under a statute prohibiting the sale of any intoxicating liquor, an information, charging that defendant did unlawfully sell one bottle of spirituous intoxicating liquor which intoxicating liquor so sold was capable of being used as a beverage, being substantially in the language of the statute, was sufficient in view of that section defining the phrase "intoxicating liquor" to include whisky, brandy, gin, wine, ale, beer, and any spirituous liquor.

State *v.* Sullivan, 97 Wash. 639, 166 Pac. 1123.

An indictment, which alleges the possession of a quantity of intoxicating liquors by the defendant, is not subject to demurrer upon the ground that it charges no offense, and

that it does not set out the amount of liquor in defendant's possession.

Harris *v.* State, 21 Ga. App. 796, 95 S. E. 321.

An indictment charging in the language of the statute, that accused received for storage, distribution, or on consignment for another alcoholic liquors, held not void for duplicity or uncertainty.

Rogers *v.* State, 133 Ark. 85, 201 S. W. 845.

Under the express provision of the Alabama Code 1907, 7353, an indictment is sufficient to charge a violation of the prohibition law which charges that accused sold liquors without a license and contrary to law.

Kelley *v.* State, 171 Ala. 44, 55 So. 141.

An indictment for violating the Virginia prohibition act (Laws 1916, c. 146) reciting that accused "within one year next prior to the finding of this indictment and subsequent to the 1st day of November 1916, in said City of Norfolk, did unlawfully manufacture, sell, offer, keep, store, and expose for sale, give away, dispense, solicit, advertise and receive orders for ardent spirits against the peace and dignity of the commonwealth," was not subject to demurrer, under Const. art. 1, 8 as not sufficient to inform defendant of the cause and nature of the accusation, or as tending to deprive her of liberty and property without due process of law, in violation of Const. U. S. Amend. 14, 1, in view of the right of accused to obtain a bill of particulars.

Wilkerson *v.* Commonwealth, 122 Va. 920, 95 S. E. 388.

An information that defendant, on the 7th of January, 1918, being in the county of Walla Walla, unlawfully had in possession five 5-gallon barrels of whisky, contrary to the statute, etc., being in almost the exact language of the statute, sufficiently charged violation of Rem. Code, 1915, § 6262—22, by possession of an excess quantity for illegal disposition, though not charging the excess quantity was held for sale or unlawful disposition.

State *v.* Bachtold (Wash.), 180 Pac. 896.

An information for violation of the Colorado Liquor Law, § 1, charging that defendant, on a given date in a given

county, "did unlawfully import into the state" intoxicating liquor, being substantially in the language of the statute, held to charge the offense with sufficient certainty.

Balfe *v.* People (Colo.), 179 Pac. 137.

**Particulars Necessary.**—In charge for manufacturing spirituous liquors, which testimony tends to prove, it is not sufficient to set forth such offense in words of statute, without allegations of particulars of the alleged offense or the manner or mode of manufacture.

Cole *v.* State (Okla. Cr. App.), 180 Pac. 713.

In view of Pen. Code 1913, §§ 934, 936, 938, 939, 943, and Const. art. 2, § 24, an information charging that accused, "on or about the 27th day of December, 1918, at and in the county of Y., state of A., did then and there willfully and unlawfully give, sell, and dispose of intoxicating liquor to another, contrary," etc., was fatally defective, in that it did not contain a statement of the acts constituting the offense in ordinary and concise language, notwithstanding the rule as to the sufficiency of charging offense in the language of the statute.

Earp *v.* State (Ariz.), 184 Pac. 942.

**Averment That Act Was Contrary to Law.**—The fact that form 79, as set out in the Alabama Code of 1896, suggests two different forms, does not dispense with the necessity for the material averment that the sale was contrary to law.

Smith *v.* State, 155 Ala. 102, 46 So. 753.
See Sills *v.* State, 76 Ala. 92.

**Averment as to Kind of Liquor.**—An indictment charging in separate counts that accused unlawfully disposed of spirituous liquors, fermented liquors, and intoxicating drink, being in the words of the statute, was sufficient, it not being necessary under the Code to specify the particular variety of liquor sold and disposed of.

Curry *v.* State, 117 Md. 587, 83 Atl. 1030.

**Averment That Liquor Was Intoxicating.**—An indictment in the form prescribed by statute charging the ac-

cused with carrying on the business of a dealer in liquors, need not allege in terms that the liquors were intoxicating.

Ladson *v.* State, 56 Fla. 54, 47 So. 517.

**Name of Vendee.**—An indictment, charging the unlawful sale of intoxicants substantially in the language of the statute, and so as to enable a person of common understanding to know what was intended, the accused what he was called upon to answer, and with sufficient certainty to enable the court to pronounce judgment, on conviction, according to the right of the case, was sufficient, though not alleging the name of the person to whom the liquor was sold.

McNeil *v.* State, 125 Ark. 47, 187 S. W. 1060.

**Conviction of Offense Not Charged Improper.**—Under statute providing that an indictment for any first offense under sections 3, 4, or 5 of the act shall be sufficient if substantially in the form or to the effect set forth in those sections, where an indictment charged the keeping of intoxicating liquors in violation of section 3 no conviction could be had under section 17, making it unlawful to keep ardent spirits in a house of ill repute.

Lane *v.* Commonwealth, 122 Va. 916, 95 S. E. 466.

See also post, "Variance," I, B, 11.

8. BILL OF PARTICULARS.

In a prosecution for engaging in the retail liquor business without having paid the tax required, refusal of bill of particulars, allowance of testimony for the government of witnesses whose names were not indorsed upon the indictment, and the scope of the opportunity allowing defendants to meet such unexpected proof, are matters resting in the discretion of the trial court.

Mayer *v.* United States (C. C. A.), 259 Fed. 216.

Where an indictment alleged a sale of whisky on a certain date in the town of P. defendant is not entitled to a bill of particulars as to the house, square, street, or section of the town, where the sale took place; defendant claiming that he made no sale at all.

State *v.* Doucet, 136 La. 180, 66 So. 772.

Where the motion for a bill of particulars is not accompanied by an affidavit showing the information desired and the need of it for the purposes of defense, and the prosecuting attorney, before commencement of the trial, pursuant to court direction, designates upon the record the names of the persons for whom the evidence for the state and the admissions of defendant show the liquors were unlawfully carried, denial of the motion will not be deemed prejudicial error in the appellate court.

State *v.* Duff, 81 W. Va. 407, 94 S. E. 498.

"Neither was there any error in refusing to compel the attorney for the commonwealth to furnish a better bill of particulars. Each count of the indictment gave the date when the offense was alleged to have been committed, and the city of Richmond as the point to which the ardent spirits were transported, and that was all the information needed to enable the defendant to concert his defense. The offense charged was not one likely to be committed in public, and the place from which the spirits were transported was probably unknown to the grand jury. To require its allegation and proof would be of no assistance to the defendant, and would, in many cases, defeat the object of the statute. The indictment sufficiently informed the defendant of 'the cause and nature of his accusation.' "

Sickel *v.* Commonwealth (Va.), 97 S. E. 783.

9. NEGATIVE AVERMENTS.

An indictment charging accused with pursuing the business of selling intoxicating liquors in local option territory need not negative the exceptions in the statute.

Jones *v.* State, 76 Tex. Cr. App. 239, 174 S. W. 349.

See also, Winfrey *v.* State, 133 Ark. 357, 202 S. W. 23, as to exception for sacramental or medicinal purposes.

An indictment charging the violation of the state prohibition law need not negative the exception in the statute which allows the sale of pure alcohol under certain prescribed circumstances.

McAdams *v.* State, 9 Ga. App. 166, 70 S. E. 893.

"In a prosecution under chapter 187, (Nebraska) Laws 1917, for having possession of intoxicating liquor, the information need not negative the exceptions under which its possession may be lawful, but these are available in defense."

Fitch *v.* State (Neb.), 167 N. W. 417.

Where the Constitution prohibiting the bringing into the state of intoxicating liquors, does not specifically except intoxicants intended for personal use, though the bringing of such liquors is not an offense, an information charging the bringing into the state of intoxicants need not negative that they were intended for personal use; that being a matter of defense to be urged.

Sturgeon *v.* State, 17 Ariz. 513, 164 Pac. 1050, L. R. A. 1917B, 1230.

When a statute has reference only to receipt of liquor by transportation, exceptions in other sections have no application to the offense created, and need not be negatived in indictment.

Cochran *v.* Commonwealth, 122 Va. 801, 94 S. E. 329.

**That Transportation Is Not Interstate.**—An indictment alleging that accused, a private person, unlawfully transported and delivered intoxicating liquor to a person named in a county which had adopted prohibition, need not allege whether the transportation was interstate or intrastate, where the Act relates to intrastate transactions, and section 12 thereof declares that it shall not be necessary to negative exceptions, but the same shall be available as purely defensive matter.

Longmire *v.* State, 75 Tex. Cr. App. 616, 171 S. W. 1165, L. R. A. 1917A, 726.

**Exception in Favor of Druggist or Registered Pharmacist.**—"In an information charging the violation of section 1 of the (Kansas) 'Bone-Dry Law' (Laws 1917, c. 215) making it unlawful 'for any person to keep or have in his possession any intoxicating liquors * * * or to give away or furnish intoxicating liquors to another, except druggists or registered pharmacists as hereinafter provided,' it

is not necessary to allege that the defendant was not a druggist or registered pharmacist."

State *v.* Perello, 102 Kan. 695, 171 Pac. 630.

See also, State *v.* Bartow, 95 Wash. 480, 164 Pac. 227.

The exception declaring it unlawful for any one "other than druggists and medical depositories" to engage in the business of selling liquor, forming no portion of the description of the offense, a warrant charging one with engaging in the business of selling liquor need not negative his being within the exception.

State *v.* Moore, 166 N. C. 284, 81 S. E. 294.

State *v.* Wainscott, 169 N. C. 379, 85 S. E. 380.

**Sales to Soldiers in Uniform—Exceptions.**—An indictment charging the unlawful selling of intoxicating liquor to soldiers in uniform, in violation of Act May 18, 1917, c. 15, § 12, 40 Stat. 76, declaring that it shall be unlawful to sell any intoxicating liquor to any officer or member of the military forces while in uniform, except as herein provided, is sufficient, though it did not negative the exceptions which the Secretary of War is authorized to prescribe as to the sale of liquor at any military station, etc., for medicinal purposes; it appearing that the sales were made outside of any military reservation over which the Secretary of War has jurisdiction, and it not being shown that any exceptions had been prescribed.

Young *v.* United States, 162 C. C. A. 133, 249 Fed. 935.

**Exceptions to Reed Amendment.**—An indictment for violation of Act March 3, 1917, § 5, known as the Reed Amendment (Comp. St. 1918, § 8739a), making it an offense to "cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal or mechanical purposes," into a prohibition state, need not negative the excepted uses, which is matter of defense.

United States *v.* Simpson (D. C.), 257 Fed. 860.

It was held otherwise, however, in Sickel *v.* Commonwealth (Va.), 99 S. E. 678.

10. MISJOINDER, DUPLICITY, MULTIFARIOUSNESS, ETC.

**Two Offenses in Same Indictment.**—The Arkansas statute does not except offenses against the liquor laws from the general rule forbidding two or more offenses to be charged in one indictment.

Chronister *v.* State (Ark.), 215 S. W. 634.

**Joinder of Different Offenses in Different Counts—Misdemeanors.**—It was proper for the state to charge the accused with conducting a grogshop, because he had made a sale of liquor, and then to charge him in the second count, with the unlawful sale of the liquor, so that if he failed to prove the first count, it could fall back on the second. As the offense charged was misdemeanor, it was not an improper cumulation of offenses.

State *v.* John, 129 La. 208, 55 So. 766.

Where an indictment for violating the prohibition law charged accused in one count with making an unlawful sale, and in another count with selling, offering for sale, keeping for sale or otherwise disposing of intoxicating liquors, proof of two different sales within the punishable period was properly admitted in view of a statute providing that indictments may act out several charges in separate counts, and that accused may be convicted and punished upon each count as upon separate indictments.

Shivers *v.* State, 7 Ala. App. 110, 61 So. 467.

An affidavit may in separate counts charge that accused was guilty of the unlawful sale of intoxicants, and that he kept a place where intoxicants were unlawfully sold.

Rash *v.* State, 13 Ala. App. 262, 69 So. 239.

Under Rev. St. § 1024 (Comp. St. § 1690), a count for unlawfully carrying liquor into the Indian country and one for there having it in his possession may be joined in the same indictment.

United States *v.* Luther (D. C.), 260 Fed. 579.

**Joinder in Same Count Conjunctively.**—Where several offenses are embraced in the same general statu-

tory definition, and are punishable in the same manner they are distinct offenses, and may be charged conjunctively in the same count, and a conviction may be had on proving the commission of the offense in any of the ways alleged.

Johnson *v.* State, 75 Tex. Cr. App. 177, 171 S. W. 211.
State *v.* Sarlin (Ind.), 123 N. E. 800.

An indictment is not defective because it charges two offenses conjunctively, but the proper mode to raise the question that more than one offense is charged, is to require the state to elect.

Gramlich *v.* State, 135 Ark. 243, 204 S. W. 848.

An indictment charging conjunctively a violation of an Act, making it unlawful except as otherwise provided for any person to ship, transport, carry or deliver intoxicating liquor to any other person in prohibition territory, charges but one offense committed in any one of the ways specified.

Johnson *v.* State, 75 Tex. Cr. App. 177, 171 S. W. 211.

Under a statute providing that no person shall sell, "or" keep for sale, intoxicating liquor, an information may properly charge defendant with selling "and" keeping for sale.

McLean *v.* People (Colo.), 180 Pac. 676.

An indictment charging a violation of a statute which used the words, "transport into" and "deliver" conjunctively, sufficiently charged that the transportation and delivery was to some other person, firm, or corporation, the word "deliver" used conjunctively with "transport," necessarily implying a transfer of possession to some other entity, meaning to yield possession of, to hand over, or to surrender.

Winfrey *v.* State, 133 Ark. 357, 202 S. W. 23.

**Joinder in One Count.**—The sale and manufacture of intoxicating liquors may be charged in the same count of the indictment.

McAdams *v.* State, 9 Ga. App. 166, 70 S. E. 893.

The sale and the manufacture of intoxicating liquors may be alleged in one count in an indictment, and proof of either

crime charged in such count will be sufficient to support a general verdict of guilty.

McAdams *v.* State, 9 Ga. App. 166, 70 S. E. 893.
Southern Exp. Co. *v.* State, 1 Ga. App. 700, 58 S. E. 67.
Jones *v.* State, 12 Ga. App. 564, 77 S. E. 892.

A statute providing the form of an indictment for violation of the prohibition law and permitting a number of offenses against the law to be charged in one count, is valid.

Pine *v.* Commonwealth, 121 Va. 812, 93 S. E. 652, 653.

**Charging in Disjunctive or Alternative.**—Counts of an affidavit for violation of the prohibition law, charging in the alternative the doing of various things contrary to law, complying with the requirement of the statute, are sufficient.

Dees *v.* State (Ala. App.), 75 So. 645.

An indictment charging that defendant sold, offered for sale, gave away or otherwise disposed of spirituous, vinous, and malt liquors, is not demurrable.

Cunningham *v.* State (Ala. App.), 75 So. 816.

In a prosecution for keeping and selling intoxicating liquors, the state may charge the defendant with the commission of more than one offense in the alternative, leaving it to the jury to determine under all the evidence of which specific offense charged, if any, the defendant is guilty, so that, where accused was charged with selling, offering for sale, keeping for sale, or otherwise disposing of, spirituous liquors, contrary to law, the state was not required to elect on which charge it would rely for a conviction.

Allison *v.* State, 1 Ala. App. 206, 55 So. 453.

Under a statute making it an offense to "sell or give" intoxicating liquor, an information, charging that defendant did "sell and give" intoxicating liquors to the person named, charges but one offense.

State *v.* Laymon (S. D.), 167 N. W. 402.

**Same; Contrary View.**—The Indiana court says: "It has been decided many times that it is sufficient to charge a crime in the language of the statute, but this statement of the law should not be taken literally. This does not mean

that disjunctives in the statute may be used. The meaning of the statute must be gathered and the substantive words or their equivalents used. It has been repeatedly held by this court that, where a statute declares that it shall be unlawful for a person to do this, or that, or that, it is sufficient to charge the several acts conjunctively, but it is not sufficient to charge them disjunctively because this rendered the pleading uncertain. The defendant has a right to a direct and positive charge in order that he may plead and defend. Where a statute, as here, declares it unlawful 'to keep intoxicating liquor with the intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same,' it is proper to charge that one did unlawfully keep with the intent to sell, barter, exchange, give away, furnish, 'and' otherwise dispose of the same. That is to say, the state may charge conjunctively all of the acts following the intent. Davis *v.* State, 100 Ind. 154; State *v.* Stout, 112 Ind. 245, 13 N. E. 715; Fahnestock *v.* State, 102 Ind. 156, 1 N. E. 372; Regadanz *v.* State, 171 Ind. 387, 391, 86 N. E. 449."

State *v.* Sarlin (Ind.), 123 N. E. 800.

Where a statute declares it unlawful "to keep intoxicating liquor with intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same," it is proper to charge that one did unlawfully keep with "intent to sell, * * * furnish and otherwise dispose of the same," but not to charge disjunctively.

State *v.* Sarlin (Ind.), 123 N. E. 800.

An indictment for the unlawful possession of intoxicating liquors, as defined by Burns' Ann. St. Supp. 1918, § 8356d, with intent to unlawfully sell or dispose of the same, is defective for uncertainty, where the several purposes for which the liquors were kept are joined by the disjunctive "or," instead of the conjunctive "and."

Young *v.* State (Ind.), 124 N. E. 679.

State *v.* Sarlin (Ind.), 123 N. E. 800.

An affidavit or indictment under Burns' Ann. St. Supp, 1918, § 8356d, for unlawful keeping of intoxicating liquor with intent to sell, etc., which ends with the words "or use," tends to show innocence and is vitiated thereby, and such

words cannot be treated as surplusage, and such affidavit was properly quashed under provision of Burns' Ann. St. 1914, § 2065, subd. 3.

State *v.* Sarlin (Ind.), 123 N. E. 800.

An information charging that defendant did willfully and intentionally manufacture certain spirituous, vinous, fermented, or malt liquors, or an imitation or substitute therefor, is bad for duplicity.

Cole *v.* State (Okla. Cr. App.), 180 Pac. 713.

**Charging Offense in Different Places.**—In a Delaware case it was said: "The contention of defendant's counsel is that the allegation that the sale was had in 'the store or warehouse' of defendant is in the alternative and implies that he sold in two places. The court is of opinion that to charge a sale in more than one place in a single count would be fatally defective, but it appears by the language used that it was intended to charge the defendant with a sale at a single place, known as the store or warehouse, and if there is any repugnancy in the indictment it can only show as a variance after the trial of the case."

State *v.* Li Fieri (Del.), 102 Atl. 77.

**Charging in Alternative—In Different Counts.**—The rules permitting double and alternative allegations in indictment do not apply to indictments for violation of the prohibition laws where the offenses are charged in separate counts.

Herring *v.* State (Ala. App.), 75 So. 646.

**Charging Same Offense in Different Counts in Different Ways.**—"The words, 'whether intended for personal use or otherwise,' are exclusive, and no matter for what purpose intended, it is unlawful for any person to 'have, control or possess' any of the liquors enumerated in said section: 'and, where an indictment charges that such liquors were kept for sale,' the words 'for sale' may be stricken as immaterial, as they are not 'descriptive of the identity of that which is legally essential to the claim of charge.' This being true, the two counts of the indictment were practically the same. Under the present prohibition laws of this state

there is no independent crime of keeping for sale intoxicating liquors, as separate and distinct from the crime of having, controlling, and possessing such liquors. From the above it will be seen that the two counts under which the defendant was tried, charged the commission of one offense in two different ways."

Corley *v.* State (Ga. App.), 98 S. E. 401, 402.

**Charging Same Sale to Different Persons.**—An indictment for pursuing the occupation of selling intoxicating liquors in prohibition territory, which, after alleging that defendant unlawfully engaged in and pursued the business, alleged that he did then and there sell to J. H., R. B. and J. B., intoxicating liquors, did not allege a sale jointly to the persons named, but that the sales were made to each of them.

Vance *v.* State, 80 Tex. Cr. App. 177, 190 S. W. 176.

A count in an information that accused sold intoxicating liquors to three persons named therein imports a sale at the same time to such persons, and is not duplicitous.

Ray *v.* State (Del.), 100 Atl. 472.

**New Offense Added on Appeal.**—Where defendant, after conviction in the county court on a charge that he sold, offered for sale, kept for sale, or otherwise disposed of spirituous, vinous, or malt liquors contrary to law, appealed to the circuit court and was there tried on a complaint filed, charging him not only as charged in the original affidavit, but also with having in his possession spirituous liquor contrary to law, the added charge set forth a distinct offense from that contained in the original affidavit, and should have been stricken on defendant's motion.

Echols *v.* State (Ala.), 75 So. 814.

**Charging as Principal and Accessory.**—A count charging defendant with an unlawful sale of intoxicating liquors, and with having been an accessory to such a sale, is not bad as charging the two offenses of being principal and of being accessory, despite the erroneous characterization of the method of committing the offense as accessory before the fact.

Harris *v.* State (Ark.), 215 S. W. 620.

**Joinder of Defendants in Indictment.**—Members of a lodge, which maintains clubrooms in which liquors are sold to members, and the barkeeper making the sale, who is not a member of the lodge, may be legally joined in one count for violation of a law prohibiting maintaining of any clubroom for purpose of selling or furnishing intoxicating liquors.

Hawkins *v.* State (Okla. Cr. App.), 182 Pac. 732.

Where an indictment against two persons charges that the said persons, naming them, did "then and there unlawfully and with force and arms have, possess, and control certain alcoholic, spirituous, malt, and intoxicating liquors," either one or both of them may be convicted, according as the evidence may show either one or both guilty. Having and possessing intoxicating liquor is not a joint offense, like riot, and the indictment in this case is "joint and several."

Page *v.* State (Ga. App.), 99 S. E. 55.

11. AVERMENTS OF PLACE.

"In a prosecution for the sale of liquor it is not necessary to set forth in the indictment the precise locality at which the alleged sale was consummated, or to do more than show that it was within the jurisdiction of the court."

Pines *v.* State, 15 Ga. App. 348, 83 S. E. 198.
See also, Donovan *v.* State, 170 Ind. 123, 83 N. E. 744.
Rigrish *v.* State, 178 Ind. 470, 99 N. E. 786.
Haymond *v.* State (Ind.), 119 N. E. 5, 6.

A complaint alleging that at a particular town, in a particular county, intoxicating liquors were unlawfully kept, deposited, and transported by J. K. in a Ford touring car (giving its number), owned and driven by said J. K. on the public way in said town, cannot be held to charge the offense of keeping and depositing intoxicating liquors, under Rev. St. of Maine, c. 127, § 27; there being no allegation of the place at which kept and deposited.

State *v.* Ford Touring Car No. 1,440,316, 117 Me. 232, 103 Atl. 364.
State *v.* Atwood, 166 N. C. 438, 81 S. E. 318.

The offense denounced by statute, prohibiting the keeping of a place for the unlawful sale of intoxicating liquor, is

complete when one holds himself out to the public as ready and able to furnish liquor, and an indictment charging the offense sufficiently identifies it by designating the particular building or place where liquor is kept for unlawful sale.

Fehringer *v.* People, 59 Colo. 3, 147 Pac. 361.

So far as an alleged violation through the accused's keeping liquor on hand at his place of business is concerned, it is not necessary to describe the place of business further than to locate it in the county of the prosecution, but where keeping on hand at a public place is charged the indictment should specify what public place is referred to.

Hall *v.* State, 8 Ga. App. 747, 70 S. E. 211.

A place where intoxicating liquors were unlawfully kept was sufficiently described as "Lot No. 46 in the original town of R., Crawford County, Kansas."

State *v.* Macek, 140 Kan. 742, 180 Pac. 985.

"In a prosecution for the so-called crime of bootlegging under the provisions of section 10144 of the (North Dakota) compiled Laws of 1913, an information is sufficiently definite which charges that the crime was committed in a barn on a certain block, in a certain city and county, and the name of the owner of such barn is not necessary."

State *v.* Stanley, 38 N. D. 311, 164 N. W. 702.

But where defendants were charged with the sale of intoxicating liquors on Sunday at a place within the borough limits of Penn's Grove, and the proofs showed sales in the open waters of the Delaware river, but the state did not attempt to show that the boundaries of such borough extended below the lower-water mark, in view of 4 Comp. St. of New Jersey, 1910, p. 5371, providing that an offense committed upon such river shall be described "as having been committed in and upon the waters of the River Delaware in said county," the contention that defendants were convicted of a crime other than charged must be sustained.

State *v.* Cooper (N. J. Sup.), 107 Atl. 149.

**Origin and Destination of Conveyance.**—"An information, charging an unlawful conveyance of intoxicating liquor, must allege the place or point in the county from and

to which such conveyance was made, if they are known, and, if unknown, it must be so alleged."

Robbins *v.* State, 12 Okla. Cr. App. 412, 157 Pac. 1027.

In another case it was said: "It is averred in the information in this case that the place from which said alcohol was transported was unknown to the informant, and that it was transported to a designated place in the city of Eufaula, and these allegations as to the transportation of said alcohol were sufficient. In Schave *v.* State, 4 Okl. Cr. App. 285, 111 Pac. 962, it is held: 'An information charging the unlawful conveyance of liquor from one place in the state to another place therein is not defective for failing to state the place from which the liquor was conveyed, where it alleges that such place was unknown to the informant.'"

McNeal *v.* State (Okla. Cr. App.), 179 Pac. 943, 944.

An indictment under Reed Amendment, Act March 3, 1917, for transporting liquor into a prohibition state, is not fatally defective because it incorrectly states the point from which the transportation started.

Malcolm *v.* United States (C. C. A.), 256 Fed. 363.

A presentment need not specify the place where the transportation began when such place is unknown to the grand jurors.

Liquor Transp. Cases *v.* State, 140 Tenn. (13 Thompson) 582, 205 S. W. 423, 424.

See also Sickel *v.* Com. (Va.), 197 S. E. 783.

**Necessity of Alleging within State.**—An affidavit charging the unlawful keeping of intoxicating liquor for sale in the city, town, and state, with intent then and there to sell, barter, exchange, give away, furnish, or otherwise dispose of the same, to persons within this state, being in the language of the statute, is sufficient as against the objection that it fails to allege appellee's keeping such liquors for sale within the state.

Schulmeyer *v.* State (Ind.), 124 N. E. 490.

An indictment for having possession of liquor in the Indian country, is not subject to demurrer, because it did not

specifically designate the particular location in the Indian country within the named district.

United States *v.* Luther (D. C.), 260 Fed. 579.

12. AVERMENTS OF TIME.

An indictment need not aver the time of the commission of the offense charged, unless time is of the essence, in which case it must be averred and proved.

Kelley *v.* State, 171 Ala. 44, 55 So. 141.

An allegation in an indictment for selling intoxicating liquor as to the time of the sale is immaterial, and a conviction may be sustained upon proof of the sale to the person named at any time within two years prior to the filing of the indictment.

State *v.* Freeman, 162 N. C. 594, 77 S. E. 780.
Clopton *v.* Commonwealth, 190 Va. 813, 63 S. E. 1022.

The offense of engaging in the business of selling liquor in prohibition territory, laid by the indictment as committed on or about a certain day embraces a period of three years prior and up to the filing of the indictment.

Jackson *v.* State (Tex. Cr. App.), 200 S. W. 150.

Where an indictment for wrongfully selling liquor without a license charged that the offense was committed on August 4, 1910, the state was entitled to offer evidence of a sale made by accused on the 18th following; time not being of the essence of the offense.

State *v.* Green, 127 La. 830, 54 So. 44.
See also, State *v.* Francis, 157 N. C. 612, 72 S. E. 1041.

An indictment for pursuing the business of selling intoxicants in local option territory, alleging that on or about the 25th day of April A. D. 1917, and anterior to the presentment of the indictment, defendant in a named county did then and there engage in and pursue the occupation and business of selling intoxicating liquor, and setting out the date of numerous specific sales, is not defective, in that no sales are alleged to have been made on or after the day defendant is alleged to be engaged in the business on which day

the bill was returned; at least two specific sales within three years being specified.

Alexander *v.* State (Tex. Cr. App.), 204 S. W. 644, 645.

"In State *v.* Green, 127 La. 830, 54 So. 45, the court said: 'But, while time is not of the essence, so far as fixing a date in the indictment is concerned, it is of the essence so far as letting the defendant know at some stage or other of the trial what particular offense he is being called upon to answer. Therefore, by offering evidence of a sale made on the 18th of August, the prosecution committed itself to the sale of that date as being the one for which the defendant was prosecuted. And, this being so, it was error to allow evidence of a sale made on a different date. The indictment being for the selling of liquors, and not for the keeping of a grog or tippling shop, each separate sale was a distinct offense; and it is elementary that evidence of other crimes than that for which the defendant is being tried is not admissible.' 'Where on an indictment for illegal selling, the prosecution has proved one unlawful sale, it is error to admit evidence of other sales.' 9 Cyc. 269. On the trial of the case the witness for the prosecution was permitted to testify to two sales of whisky, at different times, and under different circumstances, one on April 4th (Easter Sunday), and the other shortly before or after, or some time after. That the sales were distinct is conclusively shown by the testimony of the witness that on April 4th he got whisky some 50 steps from the shop of the defendants, and at another time got whisky within said shop, and on both occasions left money on the counter of the shop to pay for the whisky. the case comes clearly within the rule enunciated in State *v.* Green, *supra.*"

State *v.* Elliott, 138 La. 457, 70 So. 473, 474.

An information for keeping intoxicating liquors for sale as a beverage, contrary to the provisions of the Laws of North Dakota and which states that: Heretofore, to wit, at various and sundry times between the 1st day of April, 1912, and the 30th day of November 1912, in the county of Benson in said state of North Dakota, one Lloyd Lesh, late of said county of Benson and said statute of North Dakota, did commit the crime of keeping intoxicating liquors for

sale as a beverage, committed as follows, to wit: That at said time and place the said Lloyd Lesh did wilfully, wrongfully and unlawfully keep intoxicating liquor for sale as a beverage, etc., sufficiently charges the offense of keeping intoxicating liquors for sale as a beverage, and is not defective in that it fails to specify the date on which the crime was committed nor is it void for duplicity.

State *v.* Lesh, 27 N. D. 165, 145 N. W. 829.

Under a statute declaring it not necessary to state the time at which the offense was committed, and that it may be alleged to have been committed on any day before the finding of the indictment and generally before such finding, unless time is a material element of the offense, the time of unlawfully keeping for sale, and selling intoxicating liquors was not a necessary averment of an affidavit charging the offense, and affidavit charging its commission within the last 12 months was sufficient; but if averred as committed at any time before the affidavit, defendant might require the state to show its commission at that time and within the time prescribed by the statute making it punishable.

Glover *v.* State, 11 Ala. App. 287, 66 So. 877.

An indictment against a druggist for the sale of intoxicating liquor is not bad for not specifying the day of sale, if it alleged it to be within one year before the finding of the indictment.

State *v.* Davis, 68 W. Va. 184, 69 S. E. 644.

But an information charging that defendant on July 27, 1916, and between that date and May 29, 1916, possessed certain liquor, but not averring possession of all of such liquor at one and the same time, was too indefinite to sustain a judgment thereon, and was demurrable.

Killough *v.* State (Okla. Cr. App.), 183 Pac. 430.

**Period of Alleged Nuisance.**—Since a conviction or acquittal of maintaining a liquor nuisance during a given period bars subsequent prosecution based on the same period, an indictment must specifically allege the time relied on with certainty.

State *v.* Peloquin, 106 Me. 358, 76 Atl. 888.

An indictment charging the keeping of a liquor nuisance between a specified date and the date of the finding of the indictment was sufficient to cover the period between the specified day and the first day of the term at which the indictment was found.

State *v.* Peloquin, 106 Me. 358, 76 Atl. 888.

**Averments Respecting Period of Limitation.**—Where an indictment charged that accused on the —— day of ———, in the year 19— and within the last two years, did unlawfully sell, by retail, whisky, etc., without a license, it sufficiently charged that the sale was within the two-year statutory period of limitations; the balance of the allegation as to the time being meaningless and surplusage.

Mullins *v.* Commonwealth, 115 Va. 945, 79 S. E. 324.

An indictment which recited that it was found at the December term, 1912, and charged that accused, within 12 months on the last preceding 191— in the said county, did sell, etc., without license, sufficiently showed that the offense was committed within the statutory period of limitation, and was sufficient notwithstanding the omission in charging the year in which the offense was committed.

Shiflett *v.* Commonwealth, 114 Va. 876, 77 S. E. 606.

An indictment found October 17, 1910, charging that since August 25, 1909, accused unlawfully sold liquors, etc., was not demurrable, as showing that the offense was committed more than one year before finding of the indictment.

Gresham *v.* State, 1 Ala. App. 230, 55 So. 447.

While, under a statute providing that an indictment shall not be invalid for omitting to state the time at which the offense was committed, the indictment for unlawfully selling intoxicants need not allege the precise time of the sale, it must allege facts showing that the offense charged was committed within the period of limitation.

Shiflett *v.* Commonwealth, 114 Va. 876, 77 S. E. 606.

**Averment of Act Lawful within Part of Period Covered.**—An indictment charging that defendant within a year prior to finding the indictment unlawfully had in his

possession two quarts of whisky is bad; such act not having been an offense till three months before the finding of the indictment.

Blair *v.* Commonwealth, 122 Va. 798, 94 S. E. 185.

And an indictment charging that within a year next prior to its finding, defendant unlawfully gave away ardent spirits, having been found within three months after the going into effect of the prohibition law, prior to which the act charged was not necessarily unlawful, is insufficient.

Kennan *v.* Commonwealth, 122 Va. 831, 94 S. E. 186.

An indictment charging a sale of intoxicating liquor without a license covers a violation of the law 12 months prior to its return into court, and an indictment returned at the 1909 fall term of court, while the prohibitory law did not become effective until January 1st, of that year is demurrable, because covering time prior to January 1st, 1909, in the absence of any local prohibitory law covering the county.

Kelley *v.* State, 171 Ala. 44, 55 So. 141.

See also, Lester *v.* State, 8 Ala. App. 376, 62 So. 337.

Where an affidavit for an alleged wrongful sale of intoxicating liquors only attempted to charge an offense in J. County under the prohibitory law (Gen. Acts Sp. Sess. 1907, p. 71, 1) which went into effect in J. County on January 1, 1908, and the complaint was made on May 1st, of that year, time was a material ingredient of the offense, and the complaint was fatally defective for failure to allege that the offense was committed after the act took effect.

Marks *v.* State, 159 Ala. 71, 48 So. 864, 133 Ann. St. Rep. 20.

13. AVERMENTS OF QUANTITY AND PRICE.

An allegation in an indictment as to quantity of liquor sold need not be proved as laid unless the quantity constitutes an essential element of the crime.

Strozier *v.* State, 127 Ark. 543, 192 S. W. 884.

See Hall *v.* State, 8 Ga. App. 747, 70 S. E. 211.

**Nature of Consideration.**—It need not be alleged of what the valuable consideration for which the liquor was sold consisted.

Hall *v.* State, 8 Ga. App. 747, 70 S. E. 211.
State *v.* John, 129 La. 208, 55 So. 766.

14. AVERMENTS OF NAMES.

**Name of Vendee.**—The state is not required to allege the name of the person to whom a sale of intoxicating liquor was made, and, although each separate sale constitutes a separate offense, may offer proof of more than one sale to secure a single conviction, but subsequent prosecution is barred on all sales offered in evidence.

Dean *v.* State, 130 Ark. 322, 197 S. W. 684.
See also, State *v.* John, 129 La. 208, 55 So. 766.
Clopton *v.* Commonwealth, 109 Va. 813, 63 S. E. 1022.
Hall *v.* State, 8 Ga. App. 747, 70 S. E. 211.

"The state is not required to inform the defendant, in a bill of information or indictment charging him with having unlawfully sold intoxicating liquor of the name of the purchaser."

State *v.* Smith, 139 La. 442, 71 So. 734.

Though the illegal sale of intoxicating liquors is now a felony instead of a misdemeanor, the rule still applies that it is not necessary for the indictment to allege the name of the purchaser.

Springer *v.* State, 129 Ark. 106, 195 S. W. 376.

The name of the purchaser need not be stated in an indictment for the sale of intoxicating liquors; but if the name is stated, proof of sale to any other person is irrelevant, unless he was agent for the person named and the defendant was aware of this relation.

Finch *v.* State, 6 Ga. App. 338, 64 S. E. 1007.
Pines *v.* State, 15 Ga. App. 348, 83 S. E. 198.
Williams *v.* State, 89 Ga. 438, 15 S. E. 552.
Carter *v.* State, 68 Ga. 96.

It is said in one case: "There is some conflict in the authorities as to whether it is necessary to name the pur-

chaser in an indictment or information charging one with unlawfully selling intoxicating liquor. The better rule is tersely expressed in Fletcher *v.* Commonwealth, 106 Va. 840, 56 S. E. 149, where it is said: 'The gist of the offense is the unlawful sale, and the name of the person to whom it was made is immaterial.' This ruling is favored, without being expressly decided, in our own case of State *v.* Bodecker, 11 Wash. 417, 39 Pac. 645, where we said: 'The crime, under our statute, consists in the selling, and there would seem to be no reason why the name or names of the individual or individuals to whom the sale is made should be specified'—citing State *v.* Becker, 20 Ia. 438; State *v.* Schweiter, 27 Kan. 499; State *v.* Gummer, 22 Wis. 411; State *v.* Jaques, 68 Mo. 260; State *v.* Heldt, 41 Tex. 220."

State *v.* Koerner (Wash.), 175 Pac. 175, 176.

An indictment against a druggist for the sale of intoxicating liquor is not bad for not naming the person to whom the sale was made.

State *v.* Davis, 68 W. Va. 184, 69 S. E. 644.

But an information for violation of the Arizona Prohibition Law must, in view of Pen. Code 1913, §§ 934, 936, 938, 939, 943, Const. Art. 2, § 24, name the person to whom the liquor was sold or given.

Earp *v.* State (Ariz.), 184 Pac. 942.

**Indictment for Pursuing Liquor Business.**—But an indictment for pursuing the business of selling intoxicating liquors in prohibited territory must give the name of the alleged purchaser of liquor touching the two sales essential under the statute.

Fisher *v.* State, 81 Tex. Cr. App. 568, 197 S. W. 189.

**Information Charging Conspiracy.**—"In an information charging a conspiracy with intent to sell intoxicating liquors, it is not necessary to aver in said information the names of the person or persons to whom the defendants intended to sell such liquors."

Conley *v.* State (Okla. Cr. App.), 179 Pac. 480.

**Name of Person for Whom Kept and to Whom Delivered.**—In an information charging that defendant unlawfully kept for and delivered to one John Doe, whose true name is unknown, a certain amount of intoxicating liquor, the charge that it was kept for a person unknown could be treated as surplusage, so that the information was not invalid as not stating the name of the party for whom it was kept.

State *v.* Leonard (Mo. App.), 190 S. W. 957.

An information charging the keeping of intoxicating liquor for another in violation of Rev. St. 1909, 7226, is sufficient, though it does not name the person for whom the liquor was kept.

State *v.* Brown (Mo. App.), 198 S. W. 177.

"In prosecution for the sale of intoxicating liquor it is well settled that the name of the person to whom the liquor is sold is immaterial; the person to whom it is sold not being an element of the offense. State *v.* Curtwright, 134 Mo. App. 588, 114 S. W. 1146; State *v.* Haney, 151 Mo. App. 251, 132 S. W. 55; State *v.* Spain, 29 Mo. 415; State *v.* Jaques, 68 Mo. 260; State *v.* Ladd, 15 Mo. 430. It would seem that, in reason, the same rule would apply in a prosecution for keeping liquor for another. The word 'sale' *vi ex termini,* includes a person to whom the sale is made, as much so as the phrase 'keep for another' includes such other."

State *v.* Leonard (Mo. App.), 190 S. W. 957.

**Name of Person to Whom Gift Was Made.**—Where a statute makes it unlawful to sell, give away, or otherwise dispose of, whisky, etc., and another statute provides that any indictment charging that prohibited liquors were sold, kept for sale, "or otherwise disposed of," need not allege the person to whom such sale "or other disposition" was made; and section 31, provides that the term "otherwise disposed of" following the word "sold," etc., when used in any indictment, shall include giving away, etc., it was held, construing the several related acts together, that an indictment for giving away whisky, in violation of section 3 of the Car-

michael act, need not allege the name of the person to whom the gift was made.

Grace *v.* State, 1 Ala. App. 211, 56 So. 25.

**Name of Person to Whom Transported or Delivered.**—In an indictment for violation of a statute denouncing the shipment, transportation, or delivery of intoxicating liquors from any other state, territory, or foreign country to another person, firm, or corporation in Arkansas, it is unnecessary to specify the names of the persons to whom the liquor has been transported or delivered.

Winfrey *v.* State, 133 Ark. 357, 202 S. W. 23.
See also, State *v.* Duff, 81 W. Va. 407, 94 S. E. 498.

**Averment That Name Is Unknown.**—While an indictment for selling intoxicating liquors to persons to the grand jurors unknown is authorized, yet the state to procure a conviction must offer evidence tending to prove an actual sale to the unknown persons and in the absence of such proof a conviction will not be supported.

State *v.* Watkins, 164 N. C. 425, 79 S. E. 619.

An indictment stating that accused on a specified date with force and arms in a specified county unlawfully sold intoxicating liquor, gin and beer to persons whose names were unknown to the grand jurors, contrary, etc., sufficiently charged an offense.

State *v.* Dunn, 158 N. C. 654, 74 S. E. 359.

**Omission to Name Known Vendee.**—In New Jersey if an indictment contains an averment of an illegal sale of liquors to persons unknown to the grand jury, it is improper on the trial to admit the evidence as to sales made to them of persons who were subpœnaed to testify or testified before the grand jury, but are not named in the indictment.

State *v.* Smith, 89 N. J. L. 52, 97 Atl. 780.

**Name of Defendant—Idem Sonans.**—In a prosecution of "Philip G." for illegally selling intoxicating liquors, that one count charged him as "Philup G." did not vitiate the indictment, as the names were *idem sonans.*

People *v.* Goldberg, 287 Ill. 238, 122 N. E. 530.

**Names of Witnesses to Sale.**—Where an indictment charges the unlawful sale of intoxicating liquors, it is not necessary to give the names of the witnesses to the sale.

State *v.* John, 129 Lt. 208, 55 So. 766.

15. AVERMENTS OF KIND OF LIQUOR.

The use of the term whisky in an indictment charging the defendant with selling "intoxicating liquor, to wit, whisky," is sufficient to show the sale of distilled liquor, within the statute prohibiting the sale thereof.

Mullins *v.* Commonwealth, 115 Va. 945, 79 S. E. 324.

Under a statute requiring interstate shipments of spirituous, malted, fermented, or other intoxicating liquor to be so labeled as to plainly show the nature of their contents and the quality contained therein, it was sufficient to describe the contents as intoxicating liquor, without specifying the particular kind of liquor.

United States *v.* Hillsdale Distillery Co. (D. C.), 242 Fed. 536.

See also, State *v.* Busick, 90 Ore. 466, 177 Pac. 64.

An indictment for the unlawful carriage of intoxicating liquors, otherwise in due form, is not insufficient or defective because it fails to specify the kind of liquors.

State *v.* Duff, 81 W. Va. 407, 94 S. E. 498.

16. AVERMENTS OF INTOXICATING CHARACTER.

Where a statute provides that on the adoption of local option it shall not be lawful for any person within the limits of the territory covered to sell in any manner any kind of intoxicating liquors or beverage containing alcohol in any quantity whatever, an information for violating the local option law charging a sale of intoxicating liquor, to wit, one pint of cider, a fermented beverage containing alcohol, was not objectionable for failure to charge that the cider sold was intoxicating or contained any quantity of alcohol.

State *v.* Crider, 180 Mo. App. 77, 168 S. W. 315.

"The special presentment charged that the accused did sell and barter for a valuable consideration rum, gin, cider, al-

coholic spirituous malt, and intoxicating bitters, and other drinks, which if drunk to excess will produce intoxication, contrary, to the law, etc., while cider, *eo nomine,* is not presumptively an intoxicating liquor, and the intoxicating quality of a cider alleged to have been sold in violation of law must be proved, still the subsequent conjunctive statement of the present accusation (as part of the charge as a whole) that the defendant sold other drinks which if drank to excess would produce intoxication, involves and impliedly includes a charge that the cider which the accused was alleged to have sold was an intoxicating liquor, the court did not err in overruling the demurrer."

Lewis *v.* State, 17 Ga. App. 445, 87 S. E. 709.

**"Intoxicant."**—An affidavit charging that accused did unlawfully sell one pint of intoxicant liquors will support a conviction, although the word "intoxicant" is a noun meaning that which intoxicates, and should not be used to modify the noun liquors, for accused must have understood that it was intended to charge him with the selling of intoxicating liquors.

Pope *v.* State, 108 Miss. 706, 67 So. 177.

In a Delaware case, the court said: "The second contention is that the allegation of the sale of 'intoxicating liquor, to wit, beer,' is insufficient. In the opinion of the court the word 'beer' without restriction or qualification denotes an intoxicating malt liquor and is within the meaning of the words 'intoxicating liquor,' and the use of the word 'beer' alone in an indictment charging the unlawful sale of intoxicating liquor is presumed to include only that species of beverage. The court will take judicial notice, under our statute, of the fact that 'beer' is the usual name for a malt liquor, and that it is intoxicating, and a charge of an alleged sale of intoxicating liquor is sustained by proof of the sale of beer, without any further description or testimony that it was intoxicating."

State *v.* Li Fieri (Del.), 102 Atl. 77.

And under a statute making persistent violation of the prohibitory law a felony, being supplemental legislation, the procedure authorized by the general intoxicating liquor law gov-

erns, and an information for persistent violation need not state the kind of liquor sold or the name of the person to whom sold.

State *v.* Schmidt, 92 Kan. 457, 140 Pac. 843.

An information charging that defendant sold for beverage purposes a malt product "commonly known as lager beer" and containing as much as one-half of 1 per cent. of alcohol, is good on demurrer, although it did not charge in terms that the article was intoxicating.

United States *v.* Schmauder (D. C.), 258 Fed. 251.

But an information charging one with unlawfully selling certain liquids, without in any way charging that the liquids sold were spirituous, malt, vinous, fermented, or intoxicating liquors, does not state an offense.

Ex parte McKenna, 97 Kan. 153, 154 Pac. 226.

An information under War-Time Prohibition Act Nov. 21, 1918, is fatally defective for failure to allege that the beer sold was in fact intoxicating.

United States *v.* Baumgartner (D. C.), 259 Fed. 722.

**Charging Keeping of Liquor Containing Alcohol.**—An indictment charging accused with keeping a distillery where alcoholic liquors were manufactured sufficiently charges a violation of an act prohibiting the keeping of liquor containing alcohol which if drunk to excess will produce intoxication.

State *v.* Raven, 91 S. C. 265, 74 S. E. 500.

**Indictment for Illegal Manufacture Insufficient in Not Alleging Liquor Intoxicating.**—An indictment charging defendant with the manufacture of a malt liquor having an alcoholic content of one-half of 1 per cent, or more, but not alleged to be intoxicating, is demurrable.

United States *v.* Standard Brewery (D. C.), 260 Fed. 486.

17. AVERMENT OF PRIOR OFFENSES.

"In an information for keeping and maintaining a common nuisance as a second offense, contrary to the provisions

of the prohibition law, the former conviction need not be set forth at length, but a brief allegation of such conviction is sufficient."

State *v.* Webb, 36 N. D. 235, 162 N. W. 358, 359.
See also, State *v.* Dereiko (Wash.), 182 Pac. 597.

An indictment need not allege that the offense charged is a second or subsequent offense to authorize the court to impose an increased punishment for a second or subsequent offense authorized by statute, nor is proof of that fact beyond the record of the former conviction before the court, the two indictments having been tried on succeeding days before the same court, essential to justify the imposition of such punishment.

State *v.* Kelly, 89 S. C. 303, 71 S. E. 987.

An indictment attempting to set up former convictions for similar offenses, charging defendant with "unlawfully selling intoxicating liquors," is insufficient to charge a violation of the law so as to form a basis for enhanced punishment as in charging an offense the indictment must follow the statute.

Brittain *v.* State (Tex. Cr. App.), 214 S. W. 351.

**Of First Offense.**—Under a law providing different penalties for violations of the prohibition law for a first or second offense, it is not necessary that an indictment for a first offense should allege that it is the first offense.

Rosenberg *v.* State, 5 Ala. App. 196, 59 So. 366.

18. INDICTMENTS FOR SPECIAL OFFENSES.

**Unlawful Possession.**—An information charging only that accused kept intoxicating liquors "for unlawful purposes" is too indefinite to charge a felony under Laws 1917, c. 187, § 11.

Wozniak *v.* State (Neb.), 174 N. W. 298.

An information containing recitals warranting classification of defendant as a persistent violator of the prohibitory law and charging that he unlawfully permitted another to keep intoxicating liquors on premises controlled by defend-

ant in violation of Laws 1917, c. 215, § 1, is not subject to motion to quash.

State *v.* Macek, 104 Kan. 742, 180 Pac. 985.

An affidavit charging defendant with having intoxicants in his possession for the purpose of selling or giving same away in violation of law, need only allege those facts which under the statute constitute the crime; so that it need not allege how liquors were obtained, whether C. O. D. or with bill of lading attached, etc.

Gulfort *v.* Martin, 96 Miss. 131, 50 So. 502.

**Keeping Place for Sale.**—"An information that charges a person with 'keeping a place' with the unlawful intention and purpose of bartering, selling, or giving away intoxicating liquors, fails to charge all the essential elements of a crime, in that it does not charge an overt act, resulting from the unlawful intent to violate the law, and a demurrer thereto on the ground that it failed to charge a crime was well taken and should have been sustained."

Proctor *v.* State (Okla. Cr. App.), 176 Pac. 771.

**Keeping Intoxicants Stored.**—An information charging defendant with violating a statute by keeping intoxicants stored in private residence, must charge residence was also place of public resort; but where charge is stored in other than private residence, it is immaterial whether place is public resort or not, and there need be no specification.

People *v.* Labbe (Mich.), 168 N. W. 451.

**Example of Insufficient Charge.**—"A warrant charging that intoxicating liquors are being manufactured, sold, offered, exposed, kept, or stored for sale, or bartered, in a certain suit case, trunk, or other container in the possession of a certain person in the roads, streets, alleys, or room in the county, does not charge the person in whose possession the suit case, trunk or container is alleged to be with manufacturing, selling, etc., nor with having, keeping, or carrying such liquors unlawfully, nor with any other offense under the statute."

Emsweller *v.* Wallace, 78 W. Va. 214, 88 S. E. 787.

**Unlawful Sale, Generally.**—An information averring every element of the offense of selling intoxicating liquor, and only charging one offense and sufficiently informing defendant of the offense he was called upon to answer, was not demurrable.

Bundy *v.* State (Okla. Cr. App.), 184 Pac. 795.

A violation of the prohibitory law by means of a sale is always sufficiently charged by stating that on a specified date the defendant unlawfully sold intoxicating liquor within the county and state. It is not necessary to describe the kind of liquor sold or to name the person to whom the sale was made, or to describe the offense with more particularity in any other respect. The fact that such a violation of law is aggravated in punishment by a previous conviction, or become an element of a crime of a higher grade, does not affect in any way the method of pleading.

State *v.* King, 92 Kan. 669, 141 Pac. 247.

A demurrer to an indictment for the sale of intoxicating liquors made to one Jim Allen, because it did not state whether Allen was white or colored, or at what point the sale was consummated in the county where the transaction was alleged to have taken place (and hence that the defendant was not sufficiently informed to enable him to properly defend against the charge) was properly overruled.

Pines *v.* State, 15 Ga. App. 348, 83 S. E. 198.

An indictment charging a wrongful sale of intoxicating liquor was not demurrable for failure to allege a delivery.

Clopton *v.* Commonwealth, 109 Va. 813, 62 S. E. 1022.

An accusation which charges that the accused did, on a named date, in the county of the prosecution, "sell and barter for a valuable consideration, both directly and indirectly, alcoholic, spirituous, malt, and intoxicating liquors, intoxicating bitters, and other drinks which, if drunk to excess will produce intoxication," is not subject either to general demurrer or to special demurrer on the ground that it does not set out the offense charged with sufficient definiteness.

Brown *v.* State, 8 Ga. App. 691, 70 S. E. 40.

But where the warrant and accompanying affidavit charging an unlawful sale of liquor do not show whether the sale was in violation of the state law or a municipal ordinance, no valid judgment can be pronounced.

State *v.* Lunsford, 150 N. C. 862, 64 S. E. 765.

The sufficiency of specifications in a prosecution for illegal liquor selling is a matter of discretionary determination with the trial court.

State *v.* Truba, 88 Vt. 557, 93 Atl. 293.

**Averment of Fact as to Agency.**—In an indictment charging one with selling liquor in violation of law, it is not necessary to set forth whether the accused was acting as principal or agent, as, if the accused made the sale, he would naturally be in possession of the knowledge as to his capacity at the time of the offense.

State *v.* John, 129 La. 208, 55 So. 766.

**Charging Sale to "S. and Others"—Demurrable.**—An information alleging a wrongful sale of intoxicating liquors to "S. and others," was improper, in that it failed to allege who the others were, or, if not known, that they were unknown but in the absence of demurrer was sufficient to support a conviction on proof of a joint sale.

State *v.* Julius, 29 S. D. 638, 137, 137 N. W. 590.

**Charging Druggist with Unlawful Sale.**—Under a Local Option Act, making it unlawful to sell intoxicating liquors in anti-saloon territory but permitting regularly licensed druggists to sell liquor for medicinal purposes in good faith, on written prescription of a duly licensed physician in active practice, an information charging a licensed druggist with unlawfully selling liquor in anti-saloon territory must identify the offense relied fully sold, bartered and exchanged liquor in anti-saloon territory is sufficient.

Fehringer *v.* People, 59 Colo. 3, 147 Pac. 361.

**Habitual Sales.**—When the facts set forth in an indictment clearly charge in substance and effect the habitual sale of intoxicating liquors contrary to law, it is valid under a law requiring indictment for maintaining a liquor nuisance

to be in form of indictment, for unlawful sale, though the word "habitual" is not employed.

State *v.* Matarazza (N. J. Sup.), 107 Atl. 266.

**Charging Engaged in Business.**—Though the constitution gives the right to demand the nature and cause of the accusation, an information charging that defendant unlawfully engaged in the business of selling intoxicating liquors sufficiently informed him of the nature of the offense charged, although it was not alleged that the offense was committed through agents, since the constitutional provision does not require the state to inform a defendant of the particular evidentiary means the state will use to establish the guilt of defendant.

State *v.* Otto, 38 S. D. 353, 161 N. W. 340.

"A citizen cannot be successfully prosecuted under a charge of engaging generally in the unlawful business of selling whisky. For various and altogether sufficient reasons, in a charge of that character, there must be allegation and proof of specific conduct constituting a breach of the criminal law (State *v.* Tisdale, 145 N. C. 422, 58 S. E. 998, 13 Ann. Cas. 125), a requirement guaranteed by our constitution and necessary in common fairness to enable a defendant to properly prepare his defense and to protect him from a second prosecution on the same state of facts."

State *v.* Allen, 161 N. C. 226, 75 S. E. 1082.

**Charging Common Nuisance.**—An indictment charging that accused at specified times maintained a specified place used for illegal sale and illegal keeping of liquors, where liquors were sold for tippling places, and that the place was a resort where liquors were sold, given away, drunk, and dispensed and a common nuisance, etc., is sufficient under Rev. St. c. 22 1, 2, defining common nuisances, and prescribing punishment for keeping them.

State *v.* Fogg, 107 Me. 177, 77 Atl. 714.

**Charging Offense of Acting as Agent or Assistant in Selling.**—An indictment, charging that defendant sold, offered for sale, kept for sale, or otherwise disposed of prohibited liquors, is sufficiently broad to charge the offense

under a statute providing that any person, who shall act as agent or assisting friend of either seller or buyer in procuring an unlawful sale of intoxicating liquors shall be punishable as if he had sold the prohibited liquors.

Rogers *v.* State (Ala. App.), 73 So. 994.

**Charging Subterfuge for Sale.**—When the state relies on giving away or otherwise furnishing intoxicating liquor as a subterfuge for a sale, the fact must be pleaded in order that the court might determine whether or not a crime has been committed.

Jenkins *v.* State, 11 Okla. Cr. App. 168, 145 Pac. 500.

**Giving Prescription Illegally.**—An indictment for illegally issuing a prescription for intoxicating liquor was sufficient, where the prescription was described in such manner that the court by inspection might pronounce whether it was such an instrument as might be the basis of the offense charged and it was not necessary, after this to set it out in *haec verba.*

McAllister *v.* State, 156 Ala. 122, 47 So. 161.

**Transporting "in" or "into."**—If the word "in" had been used without the word "into" in information charging the defendant with transporting whisky "into and in the state and county," the charge, though imperfect, would have been sufficient to sustain conviction for transporting from one place to another within the state, if no objections had been made.

Whitley *v.* State (Ark.), 215 S. W. 703.

An indictment, charging that liquors were unlawfully transported into prohibited territory, would sufficiently charge an offense to suffice, on application for *habeas corpus,* unless there was no law on which the prosecution could be founded. (Per Morrow, J.)

Ex parte Fulton (Tex. Cr. App.), 215 S. W. 331.

Indictments against a railroad which did not allege that the consignees, to whom liquors were alleged to have been transported and delivered by the road in dry territory, were neither dealers, brewers, nor wholesale dealers, transporta-

tion to which, without certain information on the package, was permissible under the statute, do not state an offense.

Commonwealth *v.* Louisville, etc., R. Co. (Ky.), 215 S. W. 938.

Charge that defendants unlawfully transported over public highway in dry county certain intoxicating liquors in violation of statute did not charge offense under Florida statute making it "unlawful for any common or other carrier to transport any intoxicating liquors over highways of this state into any county," etc., as *non constat* defendant was transporting liquors through, and not into, dry territory, and because not alleging that he was transporting them as a common carrier.

Foxworth *v.* Law (Fla.), 82 So. 55.

Under Virginia Prohibition Act (Acts 1916, c. 146) § 39, the phrases "for use in this state" and "for sale" are not essential ingredients of the offense of bringing liquor into the state nor for transporting from one point to another in the state, and need not be alleged in an indictment.

Burton *v.* Commonwealth, 122 Va. 847, 94 S. E. 923.

**Averment of Attempt.**—An indictment for attempting to introduce intoxicating liquor into the state of Arizona under Const. art. 23, § 1, must aver the ultimate facts constituting the offense, i. e., the intention of accused to pass such liquors into the state from another state or from a foreign country, a direct act done in furtherance of such intention, and the failure of the attempt due to some intervening cause beyond the control of accused.

Baca *v.* State, 18 Ariz. 350, 161 Pac. 686.

A presentment for transporting intoxicating liquor in violation of statute, is not bad because it omits the word "personally" in describing the transporting.

Liquor Transp. Cases *v.* State, 140 Tenn. (13 Thompson) 582, 205 S. W. 423, 424.

**Introducing Liquor into Indian Country.**—In view of Rev. St. § 1025 (U. S. Comp. St. 1916, § 1691), declaring that no indictment shall be deemed insufficient by reason of

any defect or imperfection in the matter of form only, an indictment charging that accused, "in the county of Jefferson, state of Oklahoma, in the district and within the jurisdiction of said court, did * * * unlawfully, knowingly, willfully, and feloniously introduce and carry into the county and district from without the state of Oklahoma * * * intoxicating liquor, * * * the portion of the county and district into which the liquor was so introduced having been within the limits of the Indian Territory and a part thereof prior to admission," must be deemed sufficient to charge the offense of introducing from without intoxicating liquor into that portion of the state of Oklahoma which was formerly the Indian Territory, for, while the indictment was subject to criticism as to form, it was sufficient to advise accused of the offense with which he was charged, and in event of conviction would have supported a plea of former jeopardy.

Dosset *v.* United States, 161 C. C. A. 20, 248 Fed. 902.

19. AMENDMENTS.

**Charge of Additional and Distinct Offense.**—An act providing that the affidavit or complaint in a prosecution for violating laws to suppress intemperance may be amended to meet the ends of justice for any informality, irregularity, or technicality, does not authorize the amendment of an affidavit charging a complete offense and giving defendant notice of the accusation as required by Const. 1901, § 6, so as to charge an additional and distinct offense.

Echols *v.* State (Ala. App.), 75 So. 814.

**Striking Out Name.**—In a prosecution for maintaining an unlawful drinking place where the affidavit charged that the offense was committed by one Jim Kirk, alias Scrap, the allowance of a trial amendment by the solicitor, which consisted of the striking out of the name James Kirk, was not error.

Kirk *v.* State, 10 Ala. App. 216, 65 So. 195.

**Inserting Name.**—A petition, headed "State of Georgia, Whitfield County," directed "To the Superior Court of Said County," and regularly filed with clerk of that court, charg-

ing that a described car was property of defendant, of Catoosa County, and was being unlawfully used by him, and by others with his knowledge and consent, in unlawfully transporting liquors through said county, was properly amended by inserting, after latter word "county," the words "of Whitfield."

Burgan *v.* State (Ga. App.), 99 S. E. 636.

**Changing Place to Which Liquor Conveyed.**—Amendment of information for unlawfully transporting intoxicating liquor, made on motion of county attorney, changing place to which liquor was alleged to have been conveyed from intersection of Western and G. avenues to a place about a quarter of a mile west of that intersection, did not materially change offense charged in original information.

Thayer *v.* State (Okla. Cr. App.), 183 Pac. 931.

**To Conform to Proof.**—Where information charged defendant with transporting whisky "into and in the state and county," and the case was submitted on issue of transportation from one place to another in the state, the information could have been amended or treated as an amendment to conform to the proof.

Whitley *v.* State (Ark.), 215 S. W. 703.

**II. Arrest.**

**Without Warrant.**—An officer may not arrest for a misdemeanor without a warrant on information or suspicion, unless the misdemeanor was actually committed in his presence; and hence an arrest was not justifiable, though the officer suspected that the person arrested had intoxicating liquors in his suit case, in violation of the law prohibiting the illegal manufacture, transportation, and sale of such liquors.

Caffinni *v.* Hermann, 112 Me. 282, 91 Atl. 1009.

**Force Allowable.**—And even conceding that officers may be authorized to arrest without warrant that authority includes the lawful power to use only such force as an ordinarily prudent and intelligent person, with knowledge

and in situation of arresting officer, would have deemed necessary.

Castle *v.* Lewis (C. C. A.), 254 Fed. 917, 918.

**Blanket Warrant.**—The warrant in a prosecution for the unlawful sale of intoxicating liquors cannot be made a blanket for all future offenses within its purview.

Robinson *v.* Commonwealth, 118 Va. 785, 87 S. E. 553.

## III. Defenses.

**Intent.**—The matter of intent is not involved in accusation of selling intoxicating liquor, and defendant would be guilty if he or any one for him actually sold intoxicants on the premises, whether defendant intended to do so or not.

State *v.* Fountain (Ia.), 168 N. W. 285.

Carty *v.* State, 135 Ark. 169, 204 S. W. 207.

People *v.* Emmons, 178 Mich. 126, 144 N. W. 479, Ann. Cas. 1915D, 425.

Hall *v.* State, 7 Ga. App. 186, 66 S. E. 486.

So that the sale of a beverage containing 5, 6 per cent alcohol at a soft drink counter in a local option district was a violation of the act though defendant had been informed and believed that it contained no alcohol, and did not intend to violate the law.

People *v.* Hatinger, 174 Mich. 333, 140 N. W. 648.

Under a constitution declaring that every person who sells any intoxicating liquor shall be guilty of a misdemeanor, and a statute defining the classes of persons capable of committing crimes which excepts those who commit the act under a mistake of fact which disproves any criminal intent, where accused, charged with selling intoxicating liquors, asserted that he did not know of the intoxicating nature of the liquors, it was held that while as respects crimes involving moral turpitude, criminal intent or guilty knowledge is an essential element, that rule does not apply to a violation of the prohibition amendment.

Troutner *v.* State, 17 Ariz. 506, 154 Pac. 1048, L. R. A. 1916D, 262.

"Where one is charged with keeping on hand intoxicating liquor at a place of business or at a public place, it is immaterial for what purpose the liquor was there kept, or, in other words, what may have been the intent of the defendant, since 'the criminal act is the keeping on hand.' Cohen *v.* State, 7 Ga. App. 5, 65 S. E. 1096. Merely to allow liquors to be deposited in one's place of business under peculiar circumstances, followed by an immediate removal of them, might not constitute a violation of the statute. Cassidy *v.* State, 10 Ga. App. 123, 72 S. E. 939."

Griffin *v.* State, 15 Ga. App. 552, 83 S. E. 871.

The belief of one accused of selling ardent spirits without a license as to the character of the beverage sold, or his intention to violate the law, is not material in determining his guilt.

Bracy *v.* Commonwealth, 119 Va. 867, 89 S. E. 144.

**Intention Not to Transfer Right of Property or Possession.**—There was no illegal sale or giving away of intoxicating liquor, unless the delivery of the liquor was accompanied by an intention to transfer the right of property and possession thereon for or without a consideration.

O'Brien *v.* State, 3 Ala. App. 173, 57 So. 1028.

In view of Alabama Acts 1909, Sp. Sess. p. 91, § 31, providing that the term "otherwise disposed of" following the words "sold and offered for sale," etc., when used in any indictment, shall include a barter, exchange, giving away, furnishing, or other manner of disposition, the delivery of a bottle of whisky by accused to an acquaintance to keep for him while accused went before the grand jury to testify would not support an indictment charging that he sold or otherwise disposed of intoxicants contrary to law, in absence of a showing that he intended or consented that such acquaintance could use some part of the liquor.

O'Brien *v.* State, 3 Ala. App. 173, 57 So. 1028.

**That Imported Liquor Was Intended for Accused's Own Use.**—Where the constitution prohibiting the sale of intoxicating liquors or the introduction into the state does not make the drinking of intoxicants an offense, the intro-

duction into the state of intoxicating liquors intended for accused's own use is not an offense and the fact that they were intended for his own use may be shown as a defense.

Sturgeon *v.* State, 17 Ariz. 513, 154 Pac. 1050, L. R. A. 1917B, 1230.

**Carrying for Another.**—"To an indictment charging unlawful carriage of liquors for another it is not a sufficient defense that the carrier is the parent or guardian of a minor for whom the transportation was made."

State *v.* Duff, 81 W. Va. 407, 94 S. E. 498, 499.

**Non-Intoxicating Character of Liquor.**—No acquittal of the charge of selling liquor could be directed in case the jury found that the *person receiving the liquor* would not be intoxicated thereby. The only defense would be that no person could receive any intoxicating effect therefrom; or in other words, that it was not beer of the sort which congress had in mind in using the word "beer" in the meaning of that word as used at the time of the passing of the act—in other words, any kind of malt beer, which was in legal sense an "intoxicating liquor" as congress and public usage understood the term.

United States *v.* Schmauder (D. C.), 258 Fed. 251.

**Entrapment.**—That a seaman in uniform encouraged and incited a defendant to sell him liquor for the purpose of obtaining evidence against him is not a bar to the prosecution, where the act was done because of prior complaints of violation of the law by defendant.

Fetters *v.* United States (C. C. A.), 260 Fed. 142.

As said in another case: "But something more than the mere use of decoys or detectives by the government is necessary to raise an issue of estoppel. Grimm *v.* United States, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550; Goode *v.* United States, 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297. There must be deception of such a character as to make it unconscionable for the government to press its case."

Goldstein *v.* United States (C. C. A.), 256 Fed. 813, 815.

**Misleading Defendant to Believe Act Lawful.**—The selling of liquor to an Indian, in violation of Rev. St. § 1, 2139 (Comp. St. 1916, § 4136a), and Act Jan. 30, 1897, c. 109, § 1, 29 Stat. 506 (Comp. St. 1916, § 4137), is an offense *malum prohibitum*, of which the intent or knowledge of the seller is not an element, and is immaterial; but the government cannot maintain an indictment for such offense, when by its own conduct, through its agents, it misled the defendant into believing that the act was lawful, as that the purchaser was not an Indian, but a Mexican.

Voves *v.* States, 161 C. C. A. 227, 249 Fed. 191.

**Former Acquittal or Conviction.**—The offense of keeping intoxicating liquors for sale, which is charged as being committed between certain dates, is a continuing offense as to such time and an acquittal under such an information will be a bar to a subsequent prosecution for a sale as a beverage within such dates.

State *v.* Lesh, 27 N. D. 165, 145 N. W. 829.

And under a statute declaring certain places to be common nuisances, a conviction for keeping bars other prosecution under the sale section for the period covered by the indictment.

State *v.* Arsenault, 106 Me. 192, 76 Atl. 410.

Where accused, who was indicted for selling spirituous liquor to one M. on the 15th of November, had previously been indicted for a sale on December 5th, and in both cases M. testified that accused had frequently sold him whisky but he could not give the dates of any of the sales, it was held that, as the time charged in the indictment was immaterial, the acquittal in the first prosecution was a bar to the second: it being apparent that the evidence necessary to support the second indictment would have been sufficient to convict the defendant under the first.

State *v.* Freeman, 162 N. C. 594, 77 S. E. 780, 45 L. R. A., N. S., 977n.

"Whether all, several of, or only one of the legal requirements is disobeyed by the carrier in a single delivery of liquor to the single consignee, it will and does constitute

but a single offense under the statute. Manifestly, if in a penal action or indictment against the carrier for a violation of one of the provisions of the section in question or of a specified number of them short of the whole, committed in a single delivery of liquor to the consignee, the conviction or acquittal of the defendant results, such carrier could not, in another penal action or under another indictment growing out of the same delivery of liquor, be convicted of a violation of other provisions of the section than those for which he was tried in the prosecution first disposed of. The judgment in the first prosecution would bar a conviction in the second."

Adams Exp. Co. *v.* Commonwealth, 182 Ky. 748, 207 S. W. 482, 483.

**After Election by State.**—Where the state elected to try its prosecution for illegally selling intoxicants as for an unlawful sale to a particular person, the choice being properly induced, having been made a matter of public record, the conviction can be pleaded in bar to any further prosecution for a sale on such occasion to such person.

State *v.* Wilbur (Ore.), 166 Pac. 51.

**Conviction on One Count as Acquittal on Other Counts.**—Where defendant was convicted of one count of a complaint for violation of prohibition law, this was an acquittal as to charge embodied in other counts.

Oldacre *v.* State (Ala. App.), 75 So. 827.

But verdict of not guilty of the offense charged by the first count of the indictment, the illegal sale of intoxicating liquors, does not bar another trial under the second count, charging that he was an accessory to such a sale by another, if there were errors in the proceedings calling for reversal.

Harris *v.* State (Ark.), 215 S. W. 620.

**Subsequent Prosecution for Different Offense.**—A plea that the accused had been tried and acquitted for furnishing liquor to a minor constituted no bar to a subsequent prosecution for selling liquor illegally.

Webb *v.* State, 13 Ga. App. 733, 80 S. E. 14.

And though on prosecution for sale of intoxicating cider to M., on the issue of the cider being intoxicating, others testified to sales to them of intoxicating cider, the acquttal is not available on subsequent prosecution for sale to them.

Turner *v.* State, 130 Ark. 48, 196 S. W. 477.

**Different Jurisdictions.**—In a prosecution for illegally making alcoholic liquors, a plea that defendant had pleaded guilty in the United States District Court for violating the internal revenue laws was not good as a plea of former jeopardy; the crimes being distinct and the jurisdictions being different.

Tharpe *v.* State (Ga. App.), 100 S. E. 754.

**Charge of Crime and Contempt Different.**—One enjoined from sale of intoxicating liquors and maintenance of a nuisance, by a contempt proceeding for violation of the decree, is not thereby put in jeopardy twice for the same offense, as in one case he is punished for a crime, and in the other for a contempt of court.

State *v.* Kurent (Kan.), 184 Pac. 721.

**Different Charges.**—Defendant acquitted of charge of unlawfully keeping intoxicating liquors is not put in jeopardy a second time by prosecution for permitting another to keep intoxicating liquors on premises controlled by defendant, though the time and place of each offense were charged to be the same.

State *v.* Macek, 104 Kan. 742, 180 Pac. 985.

**Adjudication in Search Warrant Proceedings.**—Adjudication in search warrant proceedings in a justice's court that liquors in a drug store were not kept for illegal sale did not acquit of any offense one, who voluntarily appeared under Code Supplemental Supp. § 2415, as the owner, so as to render Acts 37th Gen. Assem. c. 322, § 2, granting the state a right to appeal in such proceedings, unconstitutional as violating Const. art. 1, § 12, prohibiting a second jeopardy for the same offense; search warrant proceedings being merely *quasi* criminal.

State *v.* Taggart (Ia.), 172 N. W. 299.

**IV. Jurisdiction.**

**Cannot Be Conferred by Consent.**—As jurisdiction cannot be conferred by consent, especially in criminal cases, a stipulation that the court had jurisdiction in a prosecution for unlawfully selling liquor is unavailing, where the other stipulated facts necessarily showed that it was without jurisdiction because the sale occurred in another county.

People *v.* Meloche, 186 Mich. 536, 152 N. W. 918.

**Jurisdiction of Sale by Letter.**—Where a sale of intoxicating liquor is solicited by a communication written or printed, and mailed in one state, as no crime is committed until the delivery of the letter in the state where such solicitation is forbidden, the courts of the county where the letter is received by the addressee of such letter and its contents are ascertained have jurisdiction of such offense.

Rose *v.* State, 4 Ga. App. 588, 62 S. E. 117.

**At Place of Shipment.**—"When intoxicating liquors are delivered for shipment or shipped, or when they are received for shipment to be carried into dry territory, the offense is committed in the place of the shipment."

State *v.* Lieber, 143 La. 158, 78 So. 431.

**V. Continuance.**

Where defendant and his brother were both charged with having possession of intoxicating liquor for the purpose of sale, defendant is not entitled to a continuation because the judge before whom he was tried was the same as the one who tried defendant's brother a week previous.

State *v.* Baldwin (N. C.), 100 S. E. 348.

In a prosecution for the unlawful sale of intoxicants, where the state relied on a sale at a different time from that laid in the indictment, accused, to be entitled to a continuance, must have moved therefor at the earliest possible moment and failure to do so until after a verdict is a waiver of the right.

Peebles *v.* State. 105 Miss. 834, 63 So. 27.

**VI. Election between Offenses Charged.**

Where the evidence tended to prove defendant guilty of each of several offenses charged in the alternative in a single count, under which defendant could be convicted of only one of the offenses, he was entitled, before putting in his defense, to require the state to elect the offense on which it would rely for a conviction.

Warrick *v.* State, 8 Ala. App. 391, 62 So. 342.

See also Moss *v.* State, 3 Ala. App. 189, 58 So. 62.

But where, under indictment charging illegal sale and offering for sale of intoxicating liquors, both the sale and possession were proved as arising from a single transaction, it was not error to refuse to compel the state to elect.

Herring *v.* State (Ala. App.), 75 So. 646.

Each sale of whisky is a separate and distinct offense for which accused may be convicted.

State *v.* Kelly, 89 S. C. 303, 71 S. E. 987.

And under an indictment charging that defendant sold, offered for sale, kept for sale, or otherwise disposed of spirituous, vinous, or malt liquors contrary to law, evidence of any of the offenses charged alternatively may be admitted and the state is not required to elect upon which of the charges it will rely for conviction.

Spigener *v.* State, 11 Ala. App. 296, 66 So. 896.

Upon the trial of an indictment for the unlawful sale of intoxicating liquors, the state may offer evidence of more than one sale to the same person, and the defendant cannot compel an election, although it is within the discretion of the court to allow the motion.

State *v.* Freeman, 162 N. C. 594, 77 S. E. 780, 45 L. R. A., N. S., 977n.

See also, State *v.* Cardwell, 166 N. C. 309, 81 S. E. 628.

Where the statute permits more than one offense against the prohibition law to be charged in a single count, defendants have no absolute right to demand an election of the

offense to be prosecuted, but it is within the discretion of the trial court whether an election will be required.

Pine *v.* Commonwealth, 121 Va. 812, 93 S. E. 652, 653. See also, Allison *v.* State, 1 Ala. App. 206, 55 So. 453.

And where in a prosecution for violating the prohibitory law, the state's solicitor elected to ask a conviction under the second count of the indictment for maintaining an unlawful drinking place during October 1911, and prior to the 27th day thereof, defendant was not entitled to a further election of the particular day during that month on which the alleged offense was committed; the offense charged being one that might consist of and be evidenced by a series of acts or a continuous course of conduct extending over a period of more than a single day.

Warrick *v.* State, 8 Ala. App. 391, 62 So. 342.

Where the indictment charged that defendant sold, offered for sale, kept for sale, or otherwise disposed of prohibited liquors, but the evidence showed only one transaction and one offense, there is no occasion for an election.

Rogers *v.* State (Ala. App.), 73 So. 994.

But under Ark. Act Feb. 6, 1915 (Laws 1915, p. 98), declaring that it shall be unlawful for any person to manufacture, sell, or give away, or be interested in the manufacture, sale, or giving away of, alcoholic liquors, etc., the making of wine and the selling of wine are two distinct offenses, and when charged conjunctively in the same indictment the state should be compelled to elect.

Chronister *v.* State (Ark.), 215 S. W. 634.

**VII. Argument of Counsel.**

In a prosecution for selling intoxicating liquor, the prosecuting attorney's opening statement that "prosecuting witness, after making inquiries and having information as to the defendant's selling whisky," etc., presumably leading up to an outline of the witness' testimony, and not as an attempt to introduce hearsay evidence, and apparently in good faith, must be held not misconduct of counsel; good faith being the general test in passing upon preliminary statements in criminal cases to the jury.

Nelson *v.* State (Ark.), 212 S. W. 93.

**Remarks of Counsel in Argument.**—Where the prosecuting witness on a trial for selling liquor was accustomed to purchase whisky from persons illegally selling it, and he drank to excess, the statement of the solicitor in his closing argument that, if a preacher was snake-bitten, he could not procure liquor from accused, made in response to an argument on behalf of accused that the jury should not believe the prosecuting witness, because he frequented blind tigers, was not ground for reversal.

Roden *v.* State, 3 Ala. App. 193, 58 So. 74.

It is improper for the solicitor in argument to say: "Blind tigers are running * * * and you ought to stop that kind of stuff. The good people * * * are all talking about it, and they are trying to put down these blind tigers, and I ask you to help me convict them."

Hinsman *v.* State, 41 Ga. App. 481, 81 S. E. 367.

In a prosecution for having possession of intoxicating liquor with intent to sell, it was not error to permit the solicitor to restate his contentions while the court was recapitulating them on both sides, and, if the contentions were misstated, the court's attention should have been called to it so that the proper correction could have been made.

State *v.* Baldwin (N. C.), 100 S. E. 345.

**VIII. Misconduct of Court or Officers.**

**Remarks of Judge.**—"The defendant was tried for a violation of what is known as the 'bone dry' law, under an accusation which charged that he did 'unlawfully transport, ship and carry and cause to be transported, shipped, and carried from a point without this state to a point within this state, and from place to place in this state, spirituous, vinous, malted, fermented, and intoxicating liquors; and did have, receive, control, and possess, in this state, spirituous, vinous, malted and fermented liquors.' The evidence shows that there was found at his store a beer bottle about half full of whisky, and at his residence four full quarts of whisky, five bottles, and a gallon jug all partly filled with whisky. He admitted having the whisky in his possession, but sought to excuse himself from criminal liability therefor by claiming that he was ill and that his physician had

prescribed the whisky for him. The special ground of the motion for new trial is as follows: 'The court erred in stating in the presence of the jury, when defendant offered Dr. George H. Lehman, a practicing physician, to prove that as the physician of the defendant he had prescribed a certain amount of whisky for him, deeming it absolutely essential to the preservation of his life, that "such would not be a defense to the present accusation."' Under the facts of this case, the judge did not err in making the above assertion, which was a correct statement of the law. However, if the defendant seeks to take advantage of such alleged error on the part of the judge during the progress of the case, he should do so by a motion to declare a mistrial."

Stapleton *v.* State, 19 Ga. App. 36, 90 S. E. 1029, and cases cited.
Wilcox *v.* State, 19 Ga. App. 83, 90 S. E. 1032.
Perdue *v.* State, 135 Ga. 277, 69 S. E. 184.
Waldemar *v.* State, 21 Ga. App. 504, 94 S. E. 624, 625.

**In Another Trial.**—Where both defendant and his brother were separately convicted of having possession of intoxicating liquor for purpose of sale, the fact that the trial judge, in sentencing defendant's brother a week previous, remarked that in his opinion the two were delivering liquor to people of a particular town, is no ground for reversing judgment of conviction against defendant on the theory that such statement before bystanders and jury in first case was an expression of opinion as to defendant's guilt, for Revisal 1905, § 535, prohibiting the judge from expressing an opinion as to the facts, being in derogation of common law, should be strictly construed, and furthermore section 1959 required that the panel for the first week in which the remark was made should be discharged, so there was no probability that any juror trying defendant heard the remark.

State *v.* Baldwin (N. C.), 100 S. E. 348.

**Presumption That Remarks of Judge in One Case Were Disregarded in Another Case.**—It will be presumed, where the judge in sentencing defendant's brother, who was also convicted of having possession of intoxicants

for purpose of sale, made a remark as to their unlawful sales, that if any one who sat as a juror in the prosecution against defendant heard the remark it was disregarded.

State *v.* Baldwin (N. C.), 100 S. E. 348.

In a prosecution for violation of the prohibition law where the jury had returned in the evening and reported a disagreement at 9:30 the next morning, a lecture by the court urging the jury to reach an agreement and remanding them to the bailiff, after which a verdict of conviction was rendered at 2:35 the same day, is not reversible error.

McLean *v.* People (Colo.), 180 Pac. 676.

**Remarks of Bailiff.**—In a prosecution for violating the prohibition law by the sale of Jamaica ginger, it is improper for the bailiff in charge of the jury to remark in their hearing and presence upon the intoxicating properties of Jamaica ginger.

McLean *v.* People (Colo.), 180 Pac. 676.

**Improper Influences on Jury.**—Where, in a prosecution for bringing intoxicating liquors into the state, certain women sat directly in front of the jury holding large posters condemning the liquor traffic, which the jury saw and read, a new trial should have been granted, since their action was an attempt to impede justice, to deny the defendant a fair and impartial trial, and to influence the jury to arrive at a verdict improperly.

State *v.* Gens, 107 S. C. 448, 93 S. E. 139.

The exhibition, during a trial for introducing intoxicating liqors into the state, of a blackboard showing two other similar indictments against defendant, and collecting in the courtroom large quantities of whisky involved in such other cases was improper, where the sole defense was that accused received the whisky inside the state.

Murray *v.* State, 19 Ariz. 49, 165 Pac. 315.

In a prosecution for violating the prohibition law, it was not prejudicial error to keep a row of jugs of whisky continually in view of the jury without introducing such liquor in evidence; it being admitted that no prejudice would

have resulted if the jugs had been properly identified and offered in evidence.

State *v.* Butler (Ia.), 173 N. W. 239.

**IX. Jury.**

That a juror was acquainted with the prosecuting attorney and had confidence in his ability and integrity and believed in the prohibition law did not disqualify him.

State *v.* Sullivan, 97 Wash. 639, 166 Pac. 1123.

**Timely Objection to Question on Voir Dire Necessary.**—While the question propounded by the solicitor to the jurors on the *voir dire*: "Are you opposed to the enforcement of the law known as the prohibition law in Georgia?" was unauthorized by law yet where no objection was made to the question when propounded, and the accused stated that he had no objection to the panel of jurors as put upon him, either as a whole or separately, he will not be heard, after the verdict, to object to the question.

Rothschild *v.* State, 12 Ga. App. 728, 78 S. E. 201.

**X. Instructions.**

**Statute Definition "Sell"—"Sale."**—"The definition given in section 3188, Gen. St. 1913, of the meaning of the terms 'sell' or 'sale' in chapter 16, Gen. St. 1913 (the law relating to intoxicating liquor), is sufficiently clear and complete, and may be given to the jury without further explanation."

State *v.* Meyers, 132 Minn. 4, 155 N. W. 766.

**"Intoxicating Liquor."**—In a prosecution for the illegal sale of intoxicating liquors, where the evidence showed a sale of whisky it was proper for the court to instruct the jury that whisky is an intoxicating liquor, and where the evidence showed a sale of whisky, it was unnecessary for the court to define intoxicating liquor further.

Johnson *v.* State, 81 Tex. Cr. App. 71, 193 S. W. 674.

In an instruction as to keeping on hand liquor, the term

"liquor" implied intoxicating liquor, and the jury could not have misunderstood the charge.

Brooks *v.* State, 19 Ga. App. 3, 90 S. E. 989.

See also, Mundy *v.* State, 9 Ga. App. 835, 72 S. E. 300.

An instruction to the jury "that in order to make any fluid or liquid an intoxicating drink, it must be capable of producing intoxication in the usual sense and common acceptation of the term intoxication; that is it must have in it a sufficient amount of alcohol to produce intoxication when consumed in sufficient quantities," properly propounds the law in such cases, and it was not error to reject other instructions propounding a different rule of liability.

State *v.* Henry, 74 W. Va. 72, 81 S. E. 569.

In a prosecution for violating the prohibition law by selling Jamaica ginger, instructions to find for defendant if the compound sold be such that its use as a beverage is undesirable or practically impossible by reason of other ingredients and the liquor is used merely as a vehicle for, or preservation of, other ingredients and to hold them in solution, although its use may produce intoxication, or if it is a standard or medical preparation named in the United States dispensatory, was properly refused.

McLean *v.* People (Colo.), 180 Pac. 676.

**As to Intoxicating Character of Cider.**—In a prosecution for violating the local option law, where it was a serious issue whether the cider sold by defendant was intoxicating, the court should have charged the request that before the jury could convict they must be satisfied that defendant sold one quart of cider to the prosecuting witness, and that the cider was intoxicating i. e., when taken into the stomach of an ordinary man in reasonable quantities would intoxicate him.

Salvador *v.* State, 79 Tex. Cr. App. 343, 185 S. W. 12.

**As to Sale of Fermented Cider.**—In a prosecution for a violation of the local option law, an instruction that the sale of fermented cider is a violation of the law was not erroneous for failure to state the exact degree or scientific

standard of fermentation, where it gave the common meaning of the term fermented cider.

People *v.* Emmons, 178 Mich. 126, 144 N. W. 479, Ann. Cas. 1915D, 425.

**Right to Instructions on Theory of Defense.**—Where an accusation names the agent delivering the second shipment of liquor, and the accused defends upon the idea that the person named in the accusation did not make the second delivery, but that it was made by another, and submits proof to sustain this contention, it is error for the court to ignore this theory of the defendant and refuse to give him the benefit thereof in the charge to the jury.

Southern Exp. Co. *v.* State (Ga. App.), 97 S. E. 550.

In a prosecution for a violation of the prohibition law, the admission of evidence of the finding of beer in a building with which defendant was not shown to have had any connection, and the refusal of an instruction that if defendant had no connection with the building, the evidence could not be considered, is improper.

Grider *v.* State, 10 Ala. App. 170, 64 So. 756.

See also, Dosset *v.* United States, 161 C. C. A. 20, 248 Fed. 902.

Kemp *v.* State, 130 Ark. 175, 196 S. W. 918.

A person who is charged with unlawfully conveying intoxicating liquor from one place within this state to another place therein and within the jurisdiction of the trial court, and who, as his defense to the charge, offers testimony to establish the fact that he acted innocently and without knowledge that the packages conveyed contained intoxicating liquor, and without sufficient information to put him on notice to this effect, is entitled to have his defense submitted to the jury by proper instructions of the court.

Golpi *v.* State, 14 Okla. Cr. App. 564, 174 Pac. 288.

In a prosecution for violation of a statute denouncing the shipment, transportation, or delivery of intoxicating liquors from one state, territory, or foreign country to another person, firm, or corporation in Arkansas, it was error for

the court to instruct that if defendants obtained liquors in another state, and from that point brought them into a county of Arkansas, they were guilty, while refusing to instruct that the bringing of liquor into Arkansas for the personal use of the individual who brings it does not constitute an offense.

Winfrey *v.* State, 133 Ark. 357, 202 S. W. 23.

In a prosecution under indictment charging in two counts that defendant unlawfully sold intoxicating liquors and was an accessory to such sale by another, the trial court should have instructed, on defendant's request, that one who assists a purchaser in buying intoxicating liquors is not guilty of any offense, etc., which correctly stated the law, and improperly modified the instruction to limit its application to the first count, which charged an illegal sale by defendant.

Harris *v.* State (Ark.), 215 S. W. 620.

In a prosecution for violating the "blind tiger" law, the trial court erred in refusing to instruct that, before the jury could convict on circumstantial evidence alone, the circumstances must be so convincing as to be inconsistent with any reasonable hypothesis of innocence, while giving no other instruction embodying such proposition.

Robinson *v.* State (Ind.), 24 N. E. 489.

In trial for unlawful transportation of liquor, an instruction leaving no alternative but to convict, though defendant had no knowledge of, or reason to know, contents of a package placed in his automobile by state's witness, which question was raised by defendant's testimony, which, if true, would have entitled him to acquittal, was erroneous as depriving defendant of benefit of his theory of defense.

Peyton *v.* State (Okla. Cr. App.), 183 Pac. 639.

In a prosecution for selling whisky contrary to law, where the court instructed that if defendant acted as an intermediary between the buyer and seller; and thus assisted the seller in making the sale, he was guilty as though he had sold whisky himself, it was error to refuse to instruct that, if defendant had no interest in the sale and in

good faith acted as the mere agent of the purchaser, he was not guilty; that being his theory of defense.

Ellis *v.* State, 133 Ark. 540, 202 S. W. 702.
See also, Cowley *v.* State, 72 Tex. Cr. App. 173, 161 S. W. 471.
Scott *v.* State, 70 Tex. Cr. App. 57, 153 S. W. 871.
Chance *v.* State (Tex. Cr. App.), 210 S. W. 208, 209.

**Confined to Points in Issue.**—In a prosecution for introducing liquor into the state, a charge that under the law, if the evidence warrants it, the jury may find defendant guilty, for any person who introduces into the state any ardent spirits, etc., shall be guilty of a misdemeanor, is not objectionable as requiring the jury to convict even if the liquor was introduced for a lawful purpose, where no issue as to the purpose of introducing the liquor was raised at the trial.

Reynolds *v.* State, 18 Ariz. 388, 161 Pac. 885.

In prosecution for illegal sale of liquor, charge that if defendant knew or had reason to know that his employees were selling liquor he is liable, is erroneous, as attempting to base defendant's liability upon the law of negligence, and not upon criminal intent.

State *v.* Waxman (N. J. Sup.), 107 Atl. 150.

Where evidence in a prosecution for unlawfully having, controlling, and possessing liquors showed finding of such liquors in defendant's residence, and defense was that defendant was not at his residence when liquors were found, or since they were stored, failure to charge on defense of *alibi* was not error.

Hendrix *v.* State (Ga. App.), 100 S. E. 55.

**Instruction as to Point on Which Evidence Undisputed.**—In a prosecution for manufacturing spirituous or fermented liquors in violation of statute, it was not necessary to instruct that the liquor must have been made after January 1, 1916, when the act took effect, where the undisputed evidence showed that to be the case.

Lowery *v.* State, 135 Ark. 159, 203 S. W. 838.

**Instruction Going beyond Indictment.**—In a prosecution for illicit distilling, the gravamen of the offense being the unauthorized distillation of alcoholic spirits, an instruction authorizing conviction if accused distilled rum, brandy, or whisky was not erroneous, though the indictment charged only distillation of whisky, for the specification might be disregarded as surplusage.

Bullard *v.* United States, 158 C. C. A. 177, 245 Fed. 837.

A requested instruction, telling the jury that defendant was not charged with keeping or delivering intoxicating liquors and should not be convicted of such offense, was properly refused where counts charging such offense had been voluntarily dismissed by the state.

State *v.* Yocum (Mo. App.), 205 S. W. 232.

In the trial of an indictment charging solely the sale of intoxicating liquor, it was error to charge the jury, in substance, that, if they believed the accused had intoxicating liquor at his place of business or at a public place, that was a circumstance from which the jury might infer guilt, unless they believed from the evidence that the whisky was not the property of the accused.

Holmes *v.* State, 12 Ga. App. 359, 77 S. E. 187.

In a prosecution for violation of the Bone-Dry Law by inducing a common carrier to transport liquors without revealing the nature and contents of the package, the court in its charge, improperly referred to sections of the statute other than those on which the prosecution was based and told the jury what acts on defendant's part would be sufficient to violate them.

Robertson *v.* State, 130 Ark. 158, 197 S. W. 31.

**Instruction Giving Prominence to Particular Evidence.**—In prosecution for misbranding shipment of whisky as for "medical purposes," the state could not have an instruction to convict if the jury believed from the evidence that the indorsement was false and placed thereon

without directions from the purchaser; it being improper to give special prominence to particular evidence.

Commonwealth *v.* Robinson-Pettet Co., 181 Ky. 702, 205 S. W. 774.

But where state offered evidence of other shipments, in the same year, the court properly based its instruction upon all the evidence.

Commonwealth *v.* Robinson-Pettet Co., 181 Ky. 702, 205 S. W. 774.

In prosecution for possessing intoxicating liquor, where testimony disclosed it was found in a barn, over which two had equal possession and control, and nothing more was shown than joint occupancy and control, and defendant was away from home at time of seizure, and denied ownership or knowledge of its presence, a charge on circumstantial evidence and possession and control over the barn, not alluding to joint occupancy and control, was error, as one may have control with another and yet not know of hidden liquors stored in a house.

McGee *v.* State (Ga. App.), 100 S. E. 733.

In a prosecution for violation of local option law, an instruction necessarily referring to evidence of sales to employees where the price was deducted from their wages, which made the instruction pertinent, is not objectionable as unduly directing attention to that evidence.

People *v.* Silver, 286 Ill. 496, 122 N. E. 115.

**Must Not Be Argumentative.**—In a trial for violating the prohibitory law, an instruction that, in determining the weight to be given the testimony of certain witnesses, the jury could consider that they were deputy sheriffs, and that the sheriff derives his compensation from fees, was properly refused, as being argumentative.

Sapp *v.* State, 2 Ala. App. 190, 56 So. 45.

**Verbal Inaccuracies.**—In prosecution for violation of prohibition laws, an instruction was not objectionable because it contained the term "liquor," instead of "prohibited

liquor" or "intoxicating liquor," where the only liquors referred to in the evidence were of that class.

Stout *v.* State, 15 Ala. App. 206, 72 So. 762.

Where having, controlling, and possessing liquors depended wholly on circumstantial evidence, failure to charge precise language of the statute was not error, where court stated to jury the only possible hypothesis from evidence or defendant's statement consistent with innocence, and said that if found true he should be acquitted.

Hendrix *v.* State (Ga. App.), 100 S. S. 55.

Where the one half pint of whisky found in defendant's residence was put in evidence and taken by jury, an inadvertent charge that he had two half pints in his residence, which had been put in evidence, did not require a new trial, as guilt did not depend upon quantity in his possession.

Barbour *v.* State (Ga. App.), 99 S. E. 782.

**Instructions to Be Construed as a Whole.**—"The instruction to the jury that they should 'look to the evidence to see whether that liquor was kept on hand by this defendant, kept there by himself or through and in connection with other persons,' was not error upon the ground that the court failed to instruct the jury that the keeping of the liquor was not a violation of the law, unless it was kept on hand at the defendant's place of business. The charge of the court is to be construed as a whole, and, so construing it, the jury must have understood from it that, in order to convict the accused, the evidence must show that the liquor was kept on hand at his place of business."

Brooks *v.* State, 19 Ga. App. 45, 90 S. E. 971.

In a prosecution for introducing intoxicating liquors from without into that part of the state of Oklahoma formerly the Indian Territory, where defendant, who, with companions, mortored into the state, claimed that liquor which he placed in the car was consumed before the state line was reached, and that the liquor found was placed in the machine by others, a charge that only that found in the state of Oklahoma should be considered could not, in view

of the other charges, be deemed to have taken the defense from the jury.

Dosset *v.* United States, 161 C. C. A. 20, 248 Fed. 902.

**Cumulative Instructions Unnecessary.**—Where the court instructed that, if the defendants purchased liquor prior to November 1, 1916, and had it for their own use, and not for sale, and did not sell it, they should be acquitted, it was not error to refuse the requested instruction that, if defendants had the liquor prior to such date, their possession thereof created no presumption against them.

Pine *v.* Commonwealth, 121 Va. 812, 93 S. E. 652.

The court having charged the jury that they must be satisfied beyond a reasonable doubt that the liquor found in the defendant's place of business was intoxicating liquor, it was not error to fail to give in *totidem verbis* an instruction to the effect that, if the liquors found were mere imitations of intoxicating liquors, the defendant should be acquitted.

Mundy *v.* State, 9 Ga. App. 835, 72 S. E. 300.

**Necessity for Request.**—In a prosecution for violating the local option law, where the evidence required an instruction submitting the question of the agency of defendant's son in making sale, no request for such instruction was necessary.

Huddleston *v.* Commonwealth, 171 Ky. 261, 188 S. W. 366.

**Necessity for Timely Written Request.**—Where having, controlling, and possessing liquors depended wholly on circumstantial evidence, failure to charge precise statutory language was not error, without a timely written request.

Hendrix *v.* State (Ga. App.), 100 S. E. 55.

And in a prosecution for illegal possession of liquor, the court did not err, in absence of timely appropriate written request in failing to instruct on the law of *alibi.*

Barbour *v.* State (Ga. App.), 99 S. E. 782.

**Opinion on Weight of the Evidence.**—In a prosecution for manufacturing liquor in violation of law, defendant's plea of not guilty denying the truth of all evidence tending to show guilt, the court's charge that defendant himself said he was at the still where he was arrested to haul beer off to assist somebody who had put the beer there, and that he got into bad luck, was erroneous as an opinion on the weight of the evidence, defendant not having testified in his own behalf, and the court manifestly referring to what the state's witnesses had testified defendant told them at the time of his arrest, which was a question of fact for the jury, depending on the credibility of the state's witnesses.

State *v.* Horner, 174 N. C. 788, 94 S. E. 291.

In a prosecution for keeping intoxicating liquor for sale, a charge that the statute making the keeping of liquors in a building not used exclusively as a private residence *prima facie* evidence that they were kept for sale, means that, if the evidence disclosed such fact, it is sufficient on its face to warrant a conviction, is not a charge on the effect of evidence prohibited by statute, since it does not tell the jury that any fact has been proved or that the evidence does not establish certain facts in dispute.

Dunn *v.* State, 8 Ala. App. 410, 62 So. 996.

"In a prosecution for violating the liquor law, where witness testified that his best recollection was that he got whisky at the place in question and that he had bought it from defendant and two others, there is no merit in an exception to a charge as to the weight to be given to direct and circumstantial evidence; the jury being fully and correctly instructed on reasonable doubt and circumstantial evidence."

Brooks *v.* State, 19 Ga. App. 3, 90 S. E. 989.

**Modifying Erroneous Instruction.**—In a prosecution for manufacturing alcoholic liquors, the court may modify defendant's misleading instruction as to evidence of possession of malt grain or other materials out of which alcoholic liquors could be manufactured.

Patterson *v.* State (Ark.), 215 S. W. 629.

**As to Weight of Detective's Evidence.**—In a prosecution for the unlawful sale of intoxicating liquors, where it appeared that a police officer, learning that a certain person had bought from the defendant, swore out a warrant, and to corroborate such person sent him with marked money to purchase more liquor from the defendant, in order to conclusively establish the offense, his credibility was for the jury, and an instruction that the evidence of a detective, or one acting as such should be considered with more than ordinary caution was properly refused.

Robinson *v.* Commonwealth, 118 Va. 785, 87 S. E. 553.

In a prosecution for the illegal sale of intoxicants, a charge that if the witness to the sale was impelled by any desire to catch accused in an unlawful act, his testimony might be weighed in view of that fact, sufficiently covered a requested charge that the testimony of a detective, who testified to the purchase, should be scrutinized with unusual caution.

State *v.* Wainscott, 169 N. C. 379, 85 S. E. 380.

"The court rightly refused to single out the testimony of the detectives and instruct that the same should be closely scrutinized."

State *v.* Meyers, 132 Minn. 4, 155 N. W. 766.

In prosecution for illegal sale of intoxicating liquors, where the only evidence of sale was that of three detectives, instruction that the fact that they were detectives and bought liquor for the purpose of securing evidence could be considered in weighing their testimony, was all that accused was entitled to.

Baumgartner *v.* State (Ariz.), 178 Pac. 30.

**As Expressing Opinion on Facts.**—"An instruction that if, when liquor was found, the business was still carried on at the place, though to a more limited extent, or more privately than before, and liquor was kept there, it would be in his place of business however limited, was not objectionable as expressing an opinion in regard to the facts."

Brooks *v.* State, 19 Ga. App. 3, 90 S. E. 989.

"An instruction that for one to keep liquor in his particular place of business in a building, if he has more than one, would be within the statute forbidding keeping on hand intoxicating liquor; that it is not necessary for the liquor to be kept in any particular room or in the place where the main business is carried on or in a public place, but it might be kept secretly, or in another room, or on a different floor, or in a different building, if kept convenient to the place of business, so as to be available, is not objectionable as an intimation of opinion as to the guilt of the accused or as assuming that he kept on hand liquor contrary to the statute."

Brooks *v.* State, 19 Ga. App. 3, 90 S. E. 989.

Where one is charged with the offense of making alcoholic liquors in violation of law, and the evidence shows that a substance commonly called "beer," made out of cornmeal and water, was found in an outhouse in the possession of defendant and on the premises where he lived, it is not error for the court to charge the jury that they would be authorized in presuming that defendant was in possession of the "beer," and that he owned and made it. This charge instructed the jury that they were only authorized to conclude that the defendant made the substance in question, and did not instruct the jury that they were obliged, as a matter of law, to conclude that he made such substance. This charge is not subject to the objection that it contained an expression of opinion as to what had been proved in the case.

Williams *v.* State (Ga. App.), 99 S. E. 711.

**As Assumption of Fact.**—"An instruction that by 'place of business' is meant a public place of business in the sense of a place to which the public is invited where business is carried on, and it makes no difference whether the amount of business be great or small, does not assume that whisky was sold at the defendant's place of business."

Brooks *v.* State, 19 Ga. App. 3, 90 S. E. 989.

**As to Purpose for Which Evidence Considered.**—An instruction in a prosecution for the illicit sale of whisky, that evidence of defendant's having previously sold and

drunk in places managed by him, was for the purpose of corroborating the contention of the state that he is a liquor dealer and had liquor in his possession, and is to be considered for that purpose only, but not to prove that he sold it to the prosecuting witness in this case, is not erroneous, since the effect allowed to such evidence was properly stated.

State *v.* Boynton, 155 N. C. 456, 71 S. E. 341.

**As to Disregarding False Evidence.**—Where there was only one witness for the state in a prosecution for the sale of liquor, a requested charge that the jury might disregard his entire testimony if they believed he knowingly testified falsely, should have been given.

Harrison *v.* State, 12 Ala. App. 284, 68 So. 532.

Where the only witness testifying as to an unlawful sale of liquor stated that it was his best judgment that the sale was within 12 months before the finding of the indictment, but made other conflicting statements in reference thereto, the court should have given an instruction that, if the jury believe the memory of the witness so defective as to be unreliable, they could disregard his testimony and acquit.

Harrison *v.* State, 12 Ala. App. 284, 68 So. 532.

**Sufficiency and Propriety of Particular Instructions. Affirmative Charge for Defendant.**—Where, in a prosecution for violating the prohibition law, there was evidence that defendant, at his house, within 12 months before being indicted, sold liquor to the state's witness and received pay therefor, and that he had a store connected with his house, an affirmative charge requested by defendant was properly refused.

Moore *v.* State, 12 Ala. App. 243, 67 So. 789.

**As to Proof of Intent.**—In a prosecution for selling cider in violation of the statute, the court's charge, after having previously quoted the statute and explained that the selling of cider was prohibited only when kept and deposited with intent to sell for tippling purposes or as a beverage, that he had told the jury on the last point—the intent of the party—that they must find under the circumstances that

the cider was kept with the design to be sold as a beverage, was sufficient as to the necessity of the government's proving that defendant kept the cider with intent to sell same for tippling purposes or as a beverage.

State *v.* Mathews, 115 Me. 84, 97 Atl. 824.

**As to Name of Liquor Being Immaterial.**—"An instruction that it made no difference by what name the liquor was called so long as it was intoxicating, was clearly proper."

State *v.* Radke, 139 Minn. 276, 166 N. W. 346.

**Instruction as to Liability for Others' Acts.**—In a prosecution for illicit distilling, an instruction that, if defendant allowed the use of his land for the still under agreement giving him control thereof or an interest therein, he was equally responsible with the party in control and operation, was not open to objection, as the charge warranted proof that defendant was engaged with others in illicit distilling.

Bullard *v.* United States, 158 C. C. A. 177, 245 Fed. 837.

Where the testimony in a prosecution for violating the local option law, raised the question of agency, and that question was not covered by the charge, it was error to refuse a requested instruction thereon.

Shepherd *v.* State, 76 Tex. Cr. App. 307, 174 S. W. 609.

Ellis *v.* State, 133 Ark. 540, 202 S. W. 702.

Chance *v.* State (Tex. Cr. App.), 210 S. W. 208.

In a prosecution for pursuing the business of selling intoxicating liquors in local option territory, where there was evidence that defendant was the agent of a certain party, one of the alleged purchasers, and that he bought whisky for that party from another party, and did not himself sell it to such party, the refusal of defendant's requested instruction that, if the sale was not made by himself to such purchaser, but that he bought from another party as the agent of such purchaser, and delivered the whisky under

such circumstances, it would not be considered as evidence of his guilt, was error.

Amonett *v.* State (Tex. Cr. App.), 204 S. W. 438.

Where the evidence on the part of the state will support either the inference that the unlawful sale was entirely consummated by the appellant, or by him and another, it was not improper for the court to instruct the jury as follows: You are instructed that under the laws of Oklahoma any person who in any way knowingly takes part in the sale of intoxicating liquor illegally, whether the act is completed by himself alone, or in conjunction with another, is guilty of violating the law the same as if he had completed the whole illegal act himself.

Womack *v.* State, 130 Okla. Cr. App. 323, 164 Pac. 477.

In a prosecution for selling intoxicating liquors in prohibition territory, a charge that the ownership of the liquor was immaterial, if defendant was exercising control, etc., held correct, and applicable to the case.

Bird *v.* State (Tex. Cr. App.), 206 S. W. 844.

**For Act of Carrier.**—"The court below did not err in instructing the jury, in substance, that if the defendant concealed the nature of the contents of the trunk from the railroad authorities, and they were unaware of the nature of the contents of the trunk, and under those circumstances the railroad company transported it for the defendant, their act in thus transporting the trunk would be the act of the defendant."

Hendry *v.* State, 147 Ga. 260, 93 S. E. 413, 414.

**As to Liability of Employee in Store.**—In prosecution for having unlawful possession of intoxicating liquors at a drug store, requested instruction that to convict, accused must be found to have been in charge of and not an employee of a store was improper; the charge being possession of liquors and not keeping the store.

State *v.* Billingsley, 99 Wash. 445, 169 Pac. 845.

Under a statute providing that an indictment is sufficient if it charges that accused sold, offered for sale, kept for

sale, or otherwise disposed of, liquors contrary to law and that on the trial, any act of selling in violation of law embraced in the charge may be proved and a charge in the form specified shall be held to include any device or substitute for any of said liquors, where a sale was made by an employee of accused in accused's store, it was not necessary to show actual participation by accused in the sale; and an instruction that such participation was required was properly denied.

Rosenberg *v.* State, 5 Ala. App. 196, 59 So. 366.

**As to Sale by Employee—Respondeat Superior.**—In a prosecution for illegally selling intoxicants, the court properly charged that defendant was guilty, if the sale was actually made by his employee, even if without his consent.

State *v.* Wilbur (Ore.), 166 Pac. 51.

**Instruction as to Proof of Character of Liquor Sold.**—An instruction "that it is not necessary that any witness testify positively as to the particular name of the liquor. It is sufficient, if you are satisfied from all the facts and circumstances in evidence that the liquor so sold, if any, was intoxicating liquor of the kind generally known as whisky. The name or lack of name given to such liquor is not material, if the kind and character of such liquor is shown by the evidence to be as alleged in the information," was correct.

Nixon *v.* State, 92 Neb. 115, 138 N. W. 136, 137.

Where it was insisted that the liquor was not alcoholic or intoxicating, and that, if it did in fact at any time become alcoholic, this chemical change resulted from an exposure of the liquor to the action of the air after it was taken from his possession, an instruction given by the court took care of this question of fact by charging the jury as follows: "The court further charges you that you must find that the liquor contained alcohol at the time it was received from the possession of the defendant. Unless you so find beyond a reasonable doubt you should return a verdict in his favor and acquit."

Gramlich *v.* State, 135 Ark. 243, 204 S. W. 848.

The following instruction was not erroneous: "I charge you gentlemen of the jury that rye whisky and gin whisky is as a matter of law alcoholic and intoxicating liquor."

Mundy *v.* State, 9 Ga. App. 835, 72 S. E. 300.

**As to Previous Conviction.**—In prosecution for knowingly, willfully, and unlawfully permitting intoxicating liquors to be kept on certain premises occupied by defendant court properly instructed jury to find whether defendant had been previously convicted.

State *v.* Dereiko (Wash.), 182 Pac. 597.

**As to Liability of Wife for Acts in Husband's Presence.**—On the trial of a husband and wife for selling intoxicating liquor, an instruction, that if the wife made the sale in the presence of the husband and under circumstances that she was acting under his coercion and with his consent and approval she should be acquitted, was properly refused.

State *v.* Seahorn, 166 N. C. 373, 81 S. E. 687.

On trial of a husband and wife for selling intoxicating liquor, instructions that if the wife got the liquor and delivered it in the hearing and with the approval of the husband, the jury could find him guilty, that if she was acting as his agent or co-operating with him in making a sale he would be just as guilty as she was, that ordinarily what the wife did in presence of the husband was presumed to be done with his consent, but that it must appear that it was with his consent, that the court would not charge as requested, that if she made sales under circumstances that she was acting under his coercion and with his consent she should be acquitted, because she testified as to the circumstances; that it was for the jury to pass upon her guilt or innocence, that if they found that she was acting voluntarily, assisting her husband willfully, they should find her guilty, but that if she was acting under the constraint of her husband it was not her own voluntary act, they should acquit the wife, gave her the benefit of the presumption that she was acting under the compulsion of the husband, assuming that she was entitled to such presumption.

State *v.* Seahorn, 166 N. C. 373, 81 S. E. 687.

**As to Admissibility of Evidence Regardless of How Acquired.**—In a prosecution for the unlawful possession of intoxicating liquor, a charge that method in which evidence was acquired, was not a matter for the jury and that evidence was admissible regardless of how it was acquired, was not erroneous, particularly when court charged that credibility of a witness is exclusively for the jury.

Barbour *v.* State (Ga. App.), 99 S. E. 782.

**As to Admission of Evidence of Other Sales.**—In a prosecution for sale of intoxicating liquors by an employee of the defendant, an instruction was requested that evidence had been admitted of sales other than the one charged, and verdict should not be rendered against defendant or either of them by reason of such other sales, and that the material sale is that alleged to have been made on a certain date. The court gave this instruction, adding thereto: "Evidence of other sales was admitted for the purpose merely of aiding in determining whether or not there was a sale on the date alleged." Held, that the instruction as requested and as modified was too general as a definition of the purpose of admitting evidence of other sales.

Elliott *v.* State, 19 Ariz. 1, 164 Pac. 1179.

**Evidence of Two Sales—Instruction Requiring Unanimity as to the Sale Proved.**—Where, in a prosecution for violating the local option law, the state made out *prima facie* two cases, one a sale of liquor to C., and the other a sale to R., and the defendant made out a case contradicting both, it was error to instruct the jury to convict defendant if they believed from the evidence that he "sold C. or R." intoxicating liquors, as under it there need be no unanimity of the jury as to which sale was made.

State *v.* Geist (Mo. App.), 195 S. W. 1050.

**As to Participation or Interest in Sale.**—The requested instruction, that the jury must be satisfied that defendant sold the liquor, or was directly or indirectly interested in the sale, was properly refused; it being misleading in that it required the jury to find that defendant had a pecuniary interest in the sale.

Condit *v.* State, 130 Ark. 341, 197 S. W. 579.

In a prosecution for violating the prohibition law by the sale of Jamaica ginger, it was not error to refuse an instruction that the people must prove beyond a reasonable doubt that a sale was made of intoxicating liquor either by defendant personally or by his agent under his instructions with his full knowledge and consent, in view of Laws 1915, p. 285, § 22, providing that any person whose employee or agent shall violate any of the provisions of the act shall be deemed guilty of a misdemeanor; it being conceded that defendant made sales himself and authorized his clerk to sell the liquor.

McLean *v.* People (Colo.), 180 Pac. 676.

In a prosecution for selling intoxicating liquors, instruction that if accused procured liquor from some one unknown to the buyer he became the seller's agent and was guilty, etc., held proper.

Wilson *v.* State, 130 Ark. 204, 196 S. W. 921.

In a prosecution for selling intoxicating liquors, requested instruction that accused was not guilty if he acted as intermediary between the seller and buyer and had no interest in the sale, etc., held properly refused as misleading and improper in form.

Wilson *v.* State, 130 Ark. 204, 196 S. W. 921.

In a prosecution for selling intoxicating liquor, refusing a requested instruction to acquit if accused merely procured the liquor as an accommodation to the buyer and had no interest in the sale or connection with the seller, held reversible error, where there was evidence tending to establish such facts.

Kemp *v.* State, 130 Ark. 175, 196 S. W. 918.

**As to Insanity.**—Testimony by accused that he was drunk and did not know that he made the alleged sale of whisky is not sufficient to require the giving of a requested charge on insanity from the recent use of intoxicating liquor.

Johnson *v.* State, 81 Tex. Cr. App. 71, 193 S. W. 674.

**As to Intent.**—No error was committed in refusing to instruct that if the liquor was furnished in a spirit of hos-

pitality, with no intent to violate the law, there was no crime, for defendant denied that he furnished the pint of beer, for the illegal sale of which he was tried, either in the spirit of hospitality or for any other purpose.

State *v.* Meyers, 132 Minn. 4, 155 N. W. 766.

**As to Accomplice Testimony.**—It was proper to refuse to instruct on the law of accomplice testimony as applied to a witness, whom the evidence showed was unconnected with the alleged sale of intoxicating liquors except that he was a purchaser of it.

Fisher *v.* State, 81 Tex. Cr. App. 568, 197 S. W. 189.

In a prosecution for the illegal sale of intoxicating liquors, in view of testimony of the state's witness warranting finding that he acted as agent for defendant in selling the liquor he testified he purchased from defendant, the court should have given defendant's requested instruction that the witness was an accomplice.

Malone *v.* State (Ark.), 214 S. W. 36.

**As to Presumption from Possession.**—Where, in a prosecution for violating the prohibition law, there was evidence that the prohibited liquor was kept in a store or shop, the court properly instructed, in accordance with a statute that proof beyond a reasonable doubt and to a moral certainty that defendant had the prohibited liquor on his premises, and that such premises were not used exclusively as a dwelling, would be *prima facie* evidence that he kept the liquor for sale, or with intent to sell the same contrary to law.

Thomas *v.* State, 12 Ala. App. 293, 68 So. 549.

In a prosecution for violation of the prohibition law, an instruction that, if the defendants had in their possession at any time within the time laid in the indictment certain quantities of liquor, this would be *prima facie* evidence that they had it for sale, though acquired prior to November 1, 1916, was free from objection.

Pine *v.* Commonwealth, 121 Va. 812, 93 S. E. 652, 653.

Where the court instructed that, notwithstanding possession of more than one gallon of liquor is *prima facie* evi-

dence of guilt, if the liquor was purchased before November 1, 1916, and stored by defendants for their own use, they should be acquitted, it was not error to refuse the instruction that, if the liquor was so purchased and stored, the *prima facie* evidence of possession is overcome, and the state must prove by clear, distinct, and reliable evidence the illegal purpose.

Pine *v.* Commonwealth, 121 Va. 812, 93 S. E. 652, 654.

An instruction on prosecution of a druggist for maintaining a liquor nuisance, permitting the presumption that intoxicating liquor found on the premises was kept for illegal sale, to be used as evidence, considered with all other instructions given, held not open to complaint.

State *v.* Snyder (Ia.), 171 N. W. 8.

**As to Giving Away Liquor.**—It was proper to give an instruction to the jury concerning giving away intoxicating liquor, as a shift or device for the purpose of evading the provision of the prohibitory liquor law. A person can commit an offense against that law by shift or device, and it does not make any difference whether it is the first offense or the last, nor whether the offender has been prosecuted and convicted before or not. He can make a sale of intoxicating liquor through some shift or device in committing a misdemeanor, or in committing a felony. A felony does not consist in the manner in which the offense is committed, but in the commission of the offense after having been convicted.

State *v.* Compton, 94 Kan. 642, 146 Pac. 1161.

In a prosecution for alleged illegal sale of liquors, where all the testimony concerned a sale, an instruction that the defendants were guilty if they gave away the liquors, though it might have been erroneous had the evidence concerned a giving away, was not misleading.

Pine *v.* Commonwealth, 121 Va. 812, 93 S. E. 652, 653.

**As to Time Covered.**—Where a search warrant charged the keeping of intoxicating liquors for unlawful sale on a certain date, an instruction authorizing conviction if defendant had such liquor for purposes of sale within 12 months

before the warrant was issued, is not erroneous, where, under the statute, it is not necessary to state the time of the commission of the offense accurately, unless time is a material ingredient of the offense.

Frey *v.* Commonwealth, 169 Ky. 528, 184 S. W. 896.

**As to Number of Sales.**—In prosecution for pursuing business of selling intoxicants in local option territory, an instruction that if defendant did not engage in the business of selling as alleged in the indictment and did not make two sales of intoxicants within three years next before the date mentioned in the indictment, or if from the testimony there is a reasonable doubt that he made two sales within said time, the finding should be not guilty, was erroneous, in that it put the burden of proof on defendant and applied the principle of reasonable doubt only to the issue of two sales and not to the issue whether defendant was engaged in the business of selling. (Per Gaines Special Judge).

Alexander *v.* State (Tex. Cr. App.), 204 S. W. 644, 645.

The court's refusal to instruct that two sales of intoxicating liquors to the person mentioned in indictment for pursuing the business of selling intoxicating liquors must be proved is reversible error, where the indictment contained a general allegation of sales to unknown parties, since the jury might conclude that, although only sale to the party named was proved, a sale to an unknown party would justify conviction.

Fisher *v.* State, 81 Tex. Cr. App. 568, 197 S. W. 189.

**As to Liability of Carrier.**—As the carrier is not liable unless the statement that the liquor was intended for personal and family use was false, the carrier cannot be convicted, though its agent believed the statement was false, and an instruction so declaring was improper; the carrier being liable only if the statement was false and it knew or was charged with knowledge of facts which would have informed a reasonably prudent person that the statement the liquor was intended for personal and family use was false.

Adams Exp. Co. *v.* Commonwealth, 174 Ky. 296, 192 S. W. 56.

**Instruction to Disregard Count.**—Where indictment charged illegal sale of liquor in two counts, both covering same offense and only difference being that one was more specific than other in that it contained the unnecessary averment of the name of the person to whom the liquor was sold, court's refusal to instruct jury not to consider the more general count was not error.

Tomlin *v.* Commonwealth (Va.), 97 S. E. 305.

**As to Reasonable Doubt.**—Where there was evidence that another who was out of the state and was not indicted was the party that transported liquor, and not the accused, it was error to refuse to instruct that, if there was reasonable doubt as to which committed the act, "neither could be convicted;" the latter clause not rendering the instruction bad from the fact that the other was not indicted and was beyond the jurisdiction of the court.

Burton *v.* Commonwealth, 122 Va. 847, 94 S. E. 923.

**As to Possession of Liquor for Another.**—"The court did not err in instructing the jury that, if there was another person with the defendant, and that such person carried a grip containing whisky belonging to the defendant and was carrying it for the defendant and in his presence, such possession would in law be the possession of the defendant, and the jury would be authorized to convict."

Duren *v.* State, 21 Ga. App. 524, 94 S. E. 902.

**As to Burden of Proof.**—Accused's requested instruction that the burden was on the commonwealth to prove beyond all reasonable doubt that distilled liquor was contained in the package delivered to him, was properly refused; the records of the express company and affidavits of accused, kept as required by law, excluding every rational hypothesis of accused's innocence.

Cochran *v.* Commonwealth, 122 Va. 801, 94 S. E. 329.

A charge that, where a man is chargeable with the sale of intoxicating liquors, if the burden of proof has been sustained by the state as later charged, he can justify himself only by showing that he made the sale in the manner

authorized by law, is not objectionable as relieving the state of the burden of proving the facts charged.

State *v.* Hampton, 106 S. C. 275, 91 S. E. 314.

It was not error to refuse special charge that the state must prove that bottles introduced in evidence and labeled Budweiser contained intoxicating liquor, where the sales charged had been fully proved by other evidence; the bottles being introduced upon issue of character of business in which defendant was engaged.

Head *v.* State (Tex. Cr. App.), 198 S. W. 581.

In a prosecution for maintaining a liquor nuisance, where it appeared that certain liquor found under a search warrant, and in view of the statute under which the finding of such liquor raises a presumption that it is kept for unlawful purposes, an instruction that the state must prove defendant's guilt beyond a reasonable doubt before a conviction could be justified, and that the statutory presumption was subject to rebuttal, was as favorable as defendant was entitled to ask.

State *v.* See, 177 Ia. 316, 158 N. W. 667.

**Harmless Error.**—Where one was convicted under the prohibition law of unlawfully transporting whisky, he was not prejudiced by an improper instruction concerning the unlawful keeping or storing of whisky.

Carter *v.* Commonwealth, 123 Va. 810, 96 S. E. 766.

Where the evidence showed only illicit distillation of whisky, an instruction authorizing conviction on proof of distillation of rum, brandy, or whisky, was harmless though the indictment specified only whisky.

Bullard *v.* United States, 158 C. C. A. 177, 245 Fed. 837.

An instruction authorizing the jury to convict the defendant for the sale of intoxicants made at any time within 18 months prior to the filing of the information, when the law under which the prosecution was maintained had been in force only a little more than 6 months prior to that time, was improper; but, as the only evidence given against the defendant was of a sale made a little more than a month

after the law was in force, the error was without prejudice and immaterial.

Malick *v.* State (Neb.), 169 N. W. 5.

An indictment charging selling liquor in dry territory to four persons named can be supported only by evidence that the sale was made to all four. In a prosecution for selling liquor in dry territory, an instruction that conviction could be had upon proving sale to any one of the four named in the indictment though error, was not ground for reversal, where the evidence clearly proved sale to all four, such error being harmless under a statutory provision.

Price *v.* State (Tex. Cr. App.), 202 S. W. 948.

In a prosecution for introducing liquor into the state, the defendant could suffer no injury from the failure to instruct as to the defense of lawful purpose of the introduction, when the purpose he was shown to have admitted was unlawful.

Reynolds *v.* State, 18 Ariz. 388, 161 Pac. 885.

A charge that one convicted of the offense of manufacturing liquors is punishable by imprisonment in the penitentiary for a period not less than one nor longer than four years was inaccurate, in that it misstated the maximum penalty, which is five years. The jury could have considered the severity of the penalty prescribed, in determining whether or not they should recommend that the offense be punished as for a misdemeanor. But since the judge could have disregarded such recommendation, and since he sentenced the defendant to a term of only two years in the penitentiary, this misstatement was harmless.

Williams *v.* State (Ga. App.), 99 S. E. 711.

Where the undisputed evidence showed that accused, charged with having intoxicating liquors in his possession for the purpose of sale, had at one time one gallon and three pints of liquor at his home and one pint in his buggy while on his way to his home, the error in a charge that the possession of one gallon was evidence that accused had liquor for sale, though the statute provides that the possession of more than one gallon of liquor at one time, whether in one

or more places, is *prima facie* evidence of guilt, was not prejudicial to accused.

State *v.* Atwood, 166 N. C. 438, 81 S. E. 318.

In prosecution for violation of the "blind tiger" law, refusal to defendant of an instruction that, before the jury could convict on circumstantial evidence alone, the circumstances must be so convincing as to be inconsistent with any reasonable hypothesis of innocence, held not harmless to defendant.

Robinson *v.* State (Ind.), 124 N. E. 489.

In view of fact that defendant, in trial for unlawful transportation of liquors, had borne a reputation as a law-abiding citizen and had held offices in county, it could not be assumed that refusal of an affirmative instruction covering the law applicable to his testimony, which, if true, would entitle him to an acquittal, was not prejudicial.

Peyton *v.* State (Okla. Cr. App.), 183 Pac. 639.

In a prosecution for manufacturing alcoholic liquors and permitting distilling apparatus to be on defendant's premises, error, if any, in instructing that if evidence showed distilling apparatus to be found on premises possessed and controlled by defendant a *prima facie* case was made, held harmless.

Neal *v.* State (Ga. App.), 100 S. E. 12.

Where the offense was committed on May 28, 1918, and both the state and defendant so understood it, though the evidence showed it was committed on May 28th, without stating in what year, but that there was only one offense, a charge that a verdict of guilty might be returned under the prohibition act of 1917, if the jury believed accused to be guilty of the offense charged within two years previous to the indictment, was harmless.

Plair *v.* State (Ga. App.), 99 S. E. 61.

## XI. Verdict.

**Responsiveness of Verdict to Counts.**—In an intoxicating liquor prosecution, it is unnecessary that the verdict or instructions specifically indicate on which of two counts

the defendant was convicted, where one count was completely abandoned at the trial.

State *v.* Smith (Mo. App.), 201 S. W. 942.

**Verdict of Conviction on Several Counts.**—Under an indictment charging in one count that accused sold spirituous, vinous or malt liquors without a license, in another that he manufactured, sold, offered for sale, kept, or had in his possession for sale, etc., such liquors without license, and in three other separate counts that he sold, offered for sale, or otherwise disposed of such liquors, accused could be convicted under more than one count if the evidence justified it.

Loudermilk *v.* State, 4 Ala. App. 167, 58 So. 180.

A general verdict of guilty on an accusation containing two counts, one charging accused with keeping, the other with selling, intoxicating liquors, cannot be sustained, where there is no evidence of guilt as to the charge contained in the second count.

Dozier *v.* State, 14 Ga. App. 473, 81 S. E. 368.

**Verdict of Conviction of Separate Sales.**—Where violations of law are not continuous in their nature separate indictments may be maintained for each one; consequently under indictments for selling intoxicating liquors one may be convicted for each separate sale.

State *v.* Freeman, 162 N. C. 594, 77 S. E. 780, 45 L. R. A., N. S., 977n.

**Verdict Varying from Charge against Accused.**—Where the affidavit or warrant for a violation of the prohibition laws charged a different offense and embraced an entirely different transaction from that of which defendant was convicted, her conviction of an offense not charged or included in the indictment, information or affidavit must be set aside.

Doublin *v.* State, 15 Ala. App. 527, 74 So. 86.

**On Uncertain Plea of Guilty.**—Where one was brought before a justice upon a warrant charging him with selling, giving away, offering, exposing for sale, transporting, and

aiding in procuring ardent spirits contrary to law, a statement by him that he wanted to plead guilty to "the charge" was too uncertain to alone support a conviction for transporting liquor.

Collins *v.* Commonwealth, 123 Va. 815, 96 S. E. 826.

**Verdict Construed as Not a Special Verdict.**—When on an accusation charging the defendant with a violation of the law in several different ways, the verdict finds him "guilty of transporting whisky," it is not a special verdict stopping short of the facts requisite to a conviction, but is a finding that the defendant violated the prohibition law by transporting whisky.

Dunbar *v.* State, 21 Ga. App. 502, 94 S. E. 587.

**Direction of Verdict.**—Where the *res gestæ* of the occurrence showed clearly that defendant had no knowledge that intoxicating liquor was on his premises, and that he had no control over it or title or interest in it, but that another person had hidden the liquor on his premises, where it was found by the officers, a verdict for defendant should have been directed, although if the facts had not been fully explained or the explanation had come after time for meditation and the concoction of an excuse, the case might have been for the jury.

Oldacre *v.* State (Ala. App.), 75 So. 827.

**Submission of Form of Verdict.**—In a prosecution against two defendants for illegally carrying around on their persons and in a vehicle intoxicating liquors with intent to sell and dispose of the same by gift or otherwise, it was not error to submit four forms of verdict, one for conviction and one for acquittal for each of the two defendants.

State *v.* Butler (Ia.), 173 N. W. 239.

## XII. Arrest of Judgment.

**For Failure to Show Offense within Statutory Period.**—The failure of the state to show that the offense of unlawfully manufacturing spirituous liquors was committed within two years should be taken advantage of by

accused by a requested instruction, and is not available in arrest of judgment.

State *v.* Francis, 157 N. C. 612, 72 S. E. 1041.

**For Failure to State Time of Commission of Offense in Indictment.**—Time is not of the essence of the offense of unlawfully manufacturing spirituous liquor, and, under a statute providing that no judgment shall be stayed for the failure of the indictment to state the time of the commission of the offense an indictment need not state the time of the commission of the offense to support it against a motion in arrest.

State *v.* Francis, 157 N. C. 612, 72 S. E. 1041.

**Special Verdict Equivalent to General One No Ground.**—"The fact that upon a trial for the sale of intoxicating liquor the jury returned a verdict finding 'the defendant, Paul Littlefield, guilty of aiding and assisting in the sale of intoxicating liquor' did not render the conviction illegal, and afforded no ground for arresting the judgment. A general verdict of 'guilty' would have been the technically correct form. Since, however, one who aids and assists in selling intoxicating liquor may be found guilty as the principal offender under an indictment or accusation charging him with the sale, the verdict in the instant case is simply a special verdict, equivalent to a general verdict of guilty, and is valid, and the court did not err in overruling the motion in arrest of judgment. See Dunbar *v.* State, 21 Ga. App. 502, 94 S. E. 587."

Littlefield *v.* State, 22 Ga. App. 783, 97 S. E. 259.

**Duplicity in Information No Ground.**—A judgment after verdict for selling intoxicating liquors will not be arrested because of duplicity in the information.

Ray *v.* State (Del.), 100 Atl. 472.

**Defect in Original Search Warrant No Ground.**—The absence of initial jurisdiction by reason of the failure of a search warrant to designate for search the premises on which contraband and outlawed liquors were found and seized, was cured by the actual seizure and presence of the liquors before the court, and it was proper for the trial

court to execute the sentence of the statute without regard to the defect mentioned, although such defect would be fatal to a proceeding against lawful property.

Hemmelweit *v.* State (Ala.), 75 So. 961.

**Defective Indictment.**—A conviction cannot be sustained on an information which attempts to charge a violation of the prohibitory law by simply alleging that the accused did give away whisky in violation of law.

Findley *v.* State, 11 Okla. Cr. App. 275, 145 Pac. 1107.

Where Philip Goldberg was indicted under several counts for unlawfully selling intoxicating liquors, the objection that one count was against Philip Holdberg was properly raised by motion in arrest of judgment.

People *v.* Goldberg, 287 Ill. 238, 122 N. E. 530.

Where defendant in a prosecution for unlawfully selling intoxicating liquors was found guilty under the name of Philip Goldberg in 49 counts and also as Philip Holdberg in 1 count, the entire judgment is erroneous and will be reversed.

People *v.* Goldberg, 287 Ill. 238, 122 N. E. 530.

**XIII. New Trial.**

A defendant, convicted of violating the Indiana "Blind Tiger Law" and sentenced to a fine and imprisonment in the county jail, should present the question as to the place of imprisonment by a motion to modify the judgment, and not by a motion for new trial.

Heier *v.* State (Ind.), 122 N. E. 578.

**Sufficiency of Evidence.**—"The defendant was convicted upon circumstantial evidence of the sale of intoxicating liquors. No error of law is complained of, the evidence excluded every reasonable hypothesis other than that of the guilt of the accused, and the court did not err in overruling the motion for a new trial."

Sangfield *v.* State, 18 Ga. App. 680, 90 S. E. 352.

Where one charged with the offense of selling intoxicating liquor makes the defense that he was acting merely as

agent for the purchaser, it devolves upon the jury trying the case to determine his actual relation to the act charged; and where the evidence is sufficient to sustain the verdict rendered, the discretion of the trial judge in denying a motion for new trial, based entirely on the weakness of the proof offered in behalf of the state, will not be interfered with.

Smith *v.* State, 14 Ga. App. 577, 81 S. E. 801.

In a prosecution for the illicit manufacture of intoxicating liquors, a motion to dismiss as of nonsuit was properly overruled; there being some evidence that defendant knew of existence of the still and fired a gun in the air when he saw an officer approaching the blockade distillery to give warning to the distillers.

State *v.* Killian (N. C.), 101 S. E. 109.

**Admission of Evidence.**—In a prosecution for illegally storing intoxicating liquor, where evidence had been given that certain persons had been seen drinking beer on the premises, a motion for a new trial was properly denied, where it was not claimed that the persons so seen on the premises were not in the county or within reach at the time of the trial, nor that they would have denied the testimony introduced.

People *v.* Calliari, 196 Mich. 475, 163 N. W. 154, 155.

Where evidence, in prosecution for the possession of intoxicating liquor, demanded a verdict of guilty, even if evidence referred to in special ground of motion for new trial was improperly admitted, its admission would not warrant a new trial.

Autrey *v.* State (Ga. App.), 99 S. E. 389.

**Affidavit for as Hearsay.**—An affidavit on a motion for new trial in a prosecution for violating the prohibition law, made by defendant's attorney, that a juror was "heard to say" that the bailiff seemed to know all about the intoxicating properties of Jamaica ginger after listening to his conversation on that subject, was inadmissible as hearsay.

McLean *v.* People (Colo.), 180 Pac. 676.

**Discharge of Accused.**—When a judgment is reversed and case remanded for new trial, the defendant is not entitled to be discharged.

State *v.* Smith, 89 N. J. L. 52, 97 Atl. 780.

## XIV. Sentence and Punishment.

**Double Punishment.**—Where defendant was convicted and sentenced to imprisonment in the county jail, he cannot thereafter be sentenced on the same conviction to another and different punishment, which would in effect be punishing him twice for the same offense.

Blackman *v.* United States, 162 C. C. A. 519, 250 Fed. 449.

**Excessive Punishment.**—In a prosecution for unlawfully keeping intoxicating liquors with intent to sell or give away, a sentence of imprisonment in the county jail for 9 months and in addition to pay a fine of $200 and costs, in default of payment of which in addition to such imprisonment defendant was to be imprisoned for a period not exceeding 60 days, to commence on the expiration of the 9 months' term, is excessive, and would be reduced to a fine of $300 or 90 days, and the payment of costs.

State *v.* Butler (Ia.), 173 N. W. 239.

**Law Applicable.**—One violating the Zone Liquor Law is not entitled to be punished under the later-passed State-Wide Act, fixing a lighter punishment.

Ex parte Roya (Tex. Cr. App.), 215 S. W. 322.

**Sentence.**—Where one verdict assessed a fine of $50 and 30 days' imprisonment, and another a fine of $500 and 6 months' imprisonment, without designating in either verdict the name of either of two defendants jointly tried for possession of intoxicating liquor, the court's maximum sentence against either would be a fine of $50 and an imprisonment of 30 days.

Harris *v.* State (Okla. Cr. App.), 181 Pac. 944.

**XV. Appeal and Error.**

**Law Authorizing Appeal as Ex Post Facto Law.**—That an act authorizing an appeal by the state in proceedings for condemnation of intoxicating liquors, became effective after the owner began keeping the liquors seized in such a proceeding, does not make it *ex post facto* as to such a proceeding; the statute relating only to procedure.

State *v.* Tygart (Ia.), 172 N. W. 299.

**Exceptions and Objections.**—Where it is sought to differentiate the case of an employee from that of his employer, charged together, the points relied on must be brought to the attention of the trial court, and exceptions saved to its rulings, to insure review by the appellate court.

Turner *v.* United States (C. C. A.), 259 Fed. 103.

**Assignments of Error.**—An assignment of error in overruling a defendant's objection to the question set out on page 10 of the record there being on that page six questions, thereof which were objected to, all relating to the shipment of whisky, its receipt and whether or not it was delivered, is too general to warrant consideration.

Flowers *v.* Birmingham (Ala. App.), 83 So. 36.

**Perfection of Appeal.**—An appeal was sufficiently perfected, though a written notice of appeal was stamped as filed by the justice on the same day, but before entry of judgment upon the docket where the statute only requires an oral notice of appeal, which fact must be entered by the justice on his docket.

State *v.* Taggart (Ia.), 172 N. W. 299.

**Question Not Raised Below.**—Where a jury found that cider sold by defendant was intoxicating, upon evidence justifying such an inference, and the defendant did not raise the question whether such a sale came within the language of the statute the conviction must be affirmed.

State *v.* Clifford, 88 N. J. L. 458, 97 Atl. 57.

**Variance in Charge of Offense.**—Where prosecution was begun by affidavit in county court, charging defendant

with manufacturing and defendant was convicted and appealed to the circuit court, in which court the solicitor filed a complaint charging the same offense, defendant cannot complain that the charge in the circuit court was a different charge from the one in the county court.

Norred *v.* State (Ala. App.), 82 So. 559.

**Verdict on Conflicting Evidence.**—An appellate court will not on review of a judgment of conviction, disturb a verdict found by the jury on conflicting evidence as to whether "Bevo" or "Temperance Malt" is capable of producing intoxication as defined in said instruction.

State *v.* Henry, 74 W. Va. 72, 81 S. E. 569.

Where a defendant was convicted of possessing intoxicating liquors in violation of law, and the evidence authorized conviction, no error of law being complained of, the Appellate Court is powerless to set the conviction aside.

Dalton *v.* State (Ga. App.), 100 S. E. 781.

Where evidence was sufficient to justify jury's finding that defendant was in possession of whisky, and material and equipment for making more, and trial court approved verdict, conviction will be affirmed; no error being shown.

Barksdale *v.* State (Ga. App.), 100 S. E. 771.

Where there was evidence, in a prosecution for possession of intoxicating liquors, sufficient to authorize the verdict, and motion for a new trial on ground that verdict was without evidence to support it was denied, the verdict must stand.

Autrey *v.* State (Ga. App.), 99 S. E. 389.

Where evidence in prosecution for selling intoxicating liquor presented a plain conflict, and testimony of state's witnesses clearly supported conviction, and no brief was filed by defendant appellant, and no appearance was made to orally argue cause at submission, and an examination of record discloses no error prejudicial to his substantial rights, the conviction will be affirmed.

Braden *v.* State (Okla. Cr. App.), 181 Pac. 736.

**Sufficiency of Evidence to Support Verdict.**—"When the jury have solved the issues presented in the testimony under a fair and proper charge of the court, and have found that defendant is guilty of unlawfully making the sale alleged, and the verdict has been approved by the trial judge, whose duty it is to set it aside if not satisfied that defendant has been proven guilty as charged, and there is sufficient evidence in the record, if believed, to sustain the verdict, it will not be disturbed on the facts on appeal unless clearly wrong."

Lee *v.* State (Tex. Cr. App.), 204 S. W. 110, 112.

In a prosecution for violation of the bootlegging statute, the credibility of a witness against defendant and if his testimony was for the jury; and, the finding having been against defendant, the Supreme Court should not interfere, even though sitting as a jury they might not have convicted.

State *v.* Alderman (Ia.), 174 N. W. 30.

**Admission of Irrelevant Evidence—Discharge.**—Where an indictment charges illegal sale of liquors to a person named and to others not named, and evidence as to sales to the latter is improperly admitted, the judgment must be reversed, and the record remitted for a new trial. The defendant is not entitled to be discharged.

State *v.* Smith, 89 N. J. L. 52, 97 Atl. 780.

Where facts were proven establishing the legal presumption of guilt arising from the keeping of liquors in a building not used exclusively for a dwelling, a conviction will not be reversed, although a third person testified that the liquor was his, and not the defendant's, and that he had pleaded guilty and had paid a fine.

Maisel *v.* State (Ala. App.), 81 So. 348.

**Harmless Error.**

**Refusal of Continuance.**—In prosecution for selling intoxicating liquor in dry territory, court's refusal to continue trial because of absence of witness was not reversible error, where expected evidence all bearing on question of the intent of accused would have been immaterial; the un-

disputed evidence being that the bottle accused sold contained whisky.

People *v.* Allen (Cal. App.), 174 Pac. 374.

**In Admission of Evidence.**—While evidence of sales of intoxicants subsequent to date alleged in indictment was inadmissible, where the same witnesses testified to numerous sales prior to such date, the evidence was not material to the state, and its admission was without prejudice to defendant. (Per Gaines Special Judge.)

Alexander *v.* State (Tex. Cr. App.), 204 S. W. 644, 645.

In prosecution for soliciting or receiving orders for liquors, the sale of which was prohibited in the state, any error in overruling defendant's objection and motion to exclude a witness' answer that "he told me he was," was without injury, where question related to consignor's status at time of trial, and not at time defendant's order for liquors was made out to him.

Flowers *v.* Birmingham (Ala. App.), 83 So. 36.

A conviction for introducing intoxicating liquors into the state based upon the admissions of accused and attendant circumstances, the sole defense being that the liquor was received inside the state, will not be reversed because the jury was erroneously informed that other similar charges were pending against accused and the liquor involved in such cases was shown them.

Murray *v.* State, 19 Ariz. 49, 165 Pac. 315.

**In Excluding Testimony.**—In prosecution for second violation of prohibitory liquor law, error in excluding defendant's question to prosecuting witness, on cross-examination, as to whether he was not paid to secure evidence, was harmless, where defendant's testimony so corroborated that of witness as to make his interest immaterial.

Files *v.* State (Okla. Cr. App.), 182 Pac. 911.

In a prosecution for a second violation of the prohibitory liquor laws, the refusal to permit defendant, on cross-examination of prosecuting witness, to ask if he was not paid

to secure evidence in the case, intended to show witnesses' interest, was error.

Files *v.* State (Okla. Cr. App.), 182 Pac. 911.

**Error in Verdict as Harmless.**—Where one was convicted of unlawful transportation and also sale of ardent spirits, error of court in declining to set aside verdict as to "selling" ardent spirits because unsupported by evidence was harmless, where penalty imposed was the minimum penalty for transporting spirits.

Collins *v.* Commonwealth, 123 Va. 815, 96 S. E. 826, 827.

**Error Cured by Withdrawal from Jury.**—"Even if the testimony of the deputy sheriff touching the arrest of the accused and the seizure of certain whisky, which the witness understood was to be used in connection with another case (not then on trial), was irrelevant, notwithstanding it might tend to corroborate the testimony as to the alleged sale under investigation, because the time when the whisky was found in the defendant's possession was not definitely shown, the error, if any, in admitting this testimony, was sufficiently cured by its withdrawal by the court from the jury."

Bishop *v.* State, 18 Ga. App. 714, 90 S. E. 369.

**Where Fair Trial Not Had.**—Where there is no doubt that the conduct of the audience in the courtroom during a prosecution for illegal transportation of liquor was so irregular that the defendant did not obtain a fair and impartial trial, the appellate court will grant a new trial.

State *v.* Gens, 107 S. C. 448, 83 S. E. 139.

**Refusal of Court to Comply with Request of Jury to Have Certain Evidence Re-Read to Jury.**—Defendant accused of selling intoxicating liquor is not prejudiced by the refusal of the court to re-read to the jury on their request the testimony of a witness as to sales made by accused and for which he had been convicted.

State *v.* Hampton, 106 S. C. 275, 91 S. E. 314.
In instructions, see ante, this section.

**Correction of Error by Lower Court.**—In a prosecution for having possession of intoxicating liquor with intent to sell, where the trial court promptly corrected his erroneous statement that the law presumed an intent or purpose to sell from the bare fact of possession of more than a quart and stated the correct rule, the error was sufficiently retracted.

State *v.* Baldwin (N. C.), 100 S. E. 345.

**Invited Error.**—In a prosecution for selling intoxicating liquor, defendant could not complain of the refusal to exclude evidence of other sales in his place of business, near the time of the sale alleged, where the evidence was elicited and invited on cross-examination by his counsel.

Bundy *v.* State (Okla. Cr. App.), 184 Pac. 795.

**Abandonment.**

**Brief—Abandonment of Right to Raise by Demurrer.**—A question sought to be made by demurrer but not argued in the brief of plaintiff in error, will be treated as abandoned.

Burgan *v.* State (Ga. App.), 99 S. E. 636.

**After Plea of Guilty.**—Where defendant entered a plea of guilty to a charge of the unlawful manufacturing of intoxicating liquors, and was assessed the lowest penalty, he is not in a position to urge as a ground for reversal the insufficiency of the evidence to prove his guilt.

Coats *v.* State (Tex. Cr. App.), 215 S. W. 856.

**Certiorari.**—Where the evidence was sufficient to support the inference that a sale of whisky had been consummated by delivery in exchange for an agreed purchase price accepted by the defendant at the time, an appellate court cannot hold that the judge of the superior court erred in overruling a *certiorari* where error was assigned upon general grounds only.

Stocks *v.* State, 19 Ga. App. 607, 91 S. E. 944.
See also, Barbour *v.* State (Ga. App.), 99 S. E. 782.

A judgment adjudicating a contempt for violation of a liquor injunction is not reviewable *de novo* on certiorari,

despite the concession of defendant, judge of the district court which adjudicated the contempt, that it is so reviewable.

Bird *v.* Sears (Ia.), 173 N. W. 925.

**Writ of Prohibition.**—Where a lower court is proceeding out of its jurisdiction in attempting to try indictments against a carrier under a statute, and defendant, if convicted, would have no adequate remedy by appeal, and would receive irreparable injury, a writ of prohibition to prevent such trials must issue.

Adams Exp. Co. *v.* Young, 184 Ky. 49, 211 S. W. 407.

**XVI. Costs and Expenses.**

Where a claimant unsuccessfully defends a suit for forfeiture of liquors shipped without proper labels, the court may, where the facts justify it, adjudge the costs and expenses against him.

Williams *v.* United States (C. C. A.), 254 Fed. 48.

In a prosecution in Colorado for violating the prohibition law, a taxation of jury fees, bailiff's fees, meals for jury, and bailiff and stenographer, is improper.

McLean *v.* People (Colo.), 180 Pac. 676.

The words, "expenses incurred and disbursements made by and under the direction of district attorney," have reference to ordinary expenses, including amounts actually disbursed, or for which he made himself personally liable, such as hotel bills, railroad fare, etc., incurred while prosecuting violaters of Prohibition Law, but does not include employment of agents by the month to travel over the county to ferret out possible offenders and gather evidence. (Per Bennett, J.)

Irwin *v.* Klamath County (Ore.), 183 Pac. 780.

## Evidence.

**I. Presumptions and Burden of Proof.**

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6. Generally as to Illegal Acts.

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17. Possession of Tax Receipt.
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23. Proof of Lawfulness of Possession.
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**VII. Weight and Sufficiency of Evidence.**

1. Weight of Circumstantial Evidence.
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4. To Prove Manufacture or Possession of Apparatus.
5. To Prove Sale or Offering for Sale.
6. To Prove Unlawful Possession.
7. To Prove Introduction, Transportation or Delivery.
8. Miscellaneous Questions of Sufficiency.

**VIII. Impeachment of Witnesses.**

SEC. 33. After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provision of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any ac-

tion concerning the same to prove that such liquor was lawfully acquired, possessed, and used.

**I. Presumptions and Burden of Proof.**

1. CONSTITUTIONALITY OF PROVISION.

It being within the Legislature's power to fix the rules of evidence, where it makes possession of liquor *prima facie* evidence of guilt of violation of the prohibition statute, it does not deprive defendant of due process of law.

Dees *v.* State (Ala. App.), 75 So. 645.
State *v.* Tincher, 181 W. Va. 441, 94 S. E. 503.

The law making the possession of more than one gallon of spirituous liquor *prima facie* evidence of keeping it for sale in violation of law, is constitutional.

State *v.* Randall, 170 N. C. 757, 87 S. E. 227, Ann. Cas. 1918A, 438.

A statute, making the possession of more than a certain amount of intoxicating liquor *prima facie* evidence of an intent to violate provisions of the prohibitory law, is not unconstitutional as invading the province of the judiciary, and depriving the accused of the presumption of innocence, or as making *prima facie* evidence of guilt a fact which has no relation to, or does not tend to prove, the criminal act.

Sellers *v.* State, 11 Okla. Cr. App. 588, 149 Pac. 1071.
Le Clair *v.* White, 117 Me. 335, 104 Atl. 516.

**Cannot Be Made Conclusive.**—But a law which provides that the liquors in the possession of any person may be seized and shall be conclusive evidence of the unlawful keeping, storing and selling of same by the person having such liquors in his possession, so far as it makes such possession conclusive evidence is unconstitutional and void.

State *v.* Sixo, 77 W. Va. 243, 87 S. E. 267.

Within certain limitations, the Legislature may enact that when specified facts have been proved, they shall be *prima facie* evidence of the guilt of the accused, and shift the burden of proof upon him.

Griffin *v.* State, 142 Ga. 636, 83 S. E. 540.
Kunsberk *v.* State, 147 Ga. 591, 95 S. E. 12.

Thus a statute making the possession of more than a certain amount of intoxicating liquor *prima facie* evidence of an intent to violate the provisions of a prohibitory law is not unconstitutional as invading the province of the judiciary and depriving the accused of the presumption of innocence, nor as making *prima facie* evidence of guilt a fact which has no relation to, or does not tend to prove, the criminal act.

Caffee *v.* State, 11 Okla. Cr. App. 485, 148 Pac. 680.
Southern Exp. Co. *v.* Whittle, 194 Ala. 406, 69 So. 652, L. R. A. 1916C, 278.

2. POSSESSION PRESUMPTIVELY ILLEGAL.

By statute in a number of states the finding of liquor in unusual quantity, or in quantity above a certain specified amount, in the possession of the accused or in a building or upon premises under his control, creates a presumption that the liquor is kept for sale or other unlawful purpose and places upon him the burden of showing the contrary.

See Campbell *v.* State (Ala. App.), 78 So. 715.
State *v.* Blackwell, 103 Wash. 337, 174 Pac. 646.
True *v.* Hunter, 174 Ia. 442, 156 N. W. 363.
Nies *v.* Jepson, 174 Ia. 188, 156 N. W. 292.
State *v.* Jarvis (Ia.), 165 N. W. 61.
Nies *v.* District Court (Ia.), 161 N. W. 316.
State *v.* Theodore (Mo.), 191 S. W. 422.
State *v.* Rawlings, 232 Mo. 544, 134 S. W. 530.
State *v.* Bunker (Mo. App.), 206 S. W. 399.
Carter *v.* Commonwealth, 123 Va. 810, 96 S. E. 766.
State *v.* Tincher, 81 W. Va. 441, 94 S. E. 503.

Thus it is held that the keeping of whisky in a building not used exclusively for a dwelling is *prima facie* evidence that it is kept for sale, or other unlawful disposition.

Campbell *v.* State (Ala. App.), 78 So. 715.

And in a prosecution for having in excess of one-half gallon of intoxicating liquors other than beer the burden of rebutting the statutory presumption arising from possession of excess was on accused.

State *v.* Blackwell, 103 Wash. 337, 174 Pac. 646.

So where a grip containing fifteen pints of whisky was found in defendant's hotel premises, and in his possession, the presumption was that the whisky was kept there by defendant for sale, putting the burden on him to explain the possession and show that the whisky was not kept with intent to sell.

State *v.* Jarvis (Ia.), 165 N. W. 61.

Under the Mapp prohibition law of Virginia prohibiting the transportation, receipt or possession of liquor except under certain specified conditions, the state makes out a case by showing the possession of the liquor. The burden is then upon the accused to prove any defense he may have to offer.

Carter *v.* Commonwealth, 123 Va. 810, 96 S. E. 766.

If unlawful sales of intoxicating liquor are shown, it is presumed the liquor was kept with an unlawful intent.

Bowers *v.* Maas, 154 Ia. 640, 135 N. W. 25.

Such presumptions are not objectionable as constructive findings of guilt and they may be made applicable to contempt proceedings for violation of injunctions against the sale of intoxicants.

Nies *v.* District Court (Ia.), 161 N. W. 316.

**Presumption as to Ownership of Liquor Found in Possession.**—There is a presumption that whisky in the possession of and sold by a merchant belongs to him.

Rash *v.* State, 13 Ga. App. 262, 69 So. 239.

**Weight of Statutory Presumption.**—The term "*prima facie* evidence," as used in a statute making proof of certain facts *prima facie* evidence of guilt, is such evidence as in the judgment of the law, is sufficient to establish the fact, if it be credited by the jury, and which, unless rebutted or the contrary proved, remains sufficient for that purpose. Whether or not such evidence is sufficient to overcome the presumption of innocence of a defendant and to establish his guilt beyond a reasonable doubt, when all the evidence

including the presumptions are considered, is for the determination of the jury.

Huff *v.* State, 12 Okla. Cr. App. 138, 152 Pac. 464.
Caffee *v.* State, 11 Okla. Cr. App. 485, 148 Pac. 680.
Sellers *v.* State, 11 Okla. Cr. App. 588, 149 Pac. 1071.
Wilson *v.* State, 11 Okla. Cr. App. 510, 148 Pac. 823.
Conley *v.* State (Okla. Cr. App.), 179 Pac. 480, 483.

Acts 1915, p. 9, § 4, providing that keeping of prohibited liquors in any building not used exclusively for a dwelling shall be *prima facie* evidence that such liquors are kept for sale, etc., creates a presumption of law which rebutting evidence does not nullify or destroy; such presumption of guilt being an evidential fact for consideration in determining the guilt or innocence of the defendant.

Maisel *v.* State (Ala. App.), 81 So. 348.

Such presumptions have been held not to create a new rule of evidence, but to merely enlarge the application of an existing rule of evidence.

State *v.* Butler (Ia.), 173 N. W. 239.

The presumption of Code of Iowa, § 2427, that the finding of liquor creates the presumption that it was kept with unlawful intent does not create a new rule of evidence, but merely enlarges the application of a rule of evidence.

State *v.* Butler (Ia.), 173 N. W. 239.

Under presumptions of this character the jury is to consider the case in the light of all the evidence including the statutory presumption of guilt on the one hand and the presumption of innocence on the other. In short, the presumption raised by the statute may be rebutted or the contrary may be shown.

Caffee *v.* State, 11 Okla. Cr. App. 485, 148 Pac. 680.
Neal *v.* Commonwealth (Va.), 98 S. E. 629.
Pine *v.* Commonwealth, 121 Va. 812, 93 S. E. 652.
Lane *v.* Commonwealth, 122 Va. 916, 95 S. E. 466.
Aaron *v.* State, 18 Ariz. 378, 161 Pac. 881.

The *prima facie* presumption of the unlawful introduction of intoxicating liquor into Indian Territory, etc., de-

clared by Act May 18, 1916, § 1 (Comp. St. § 4144a), may be rebutted by evidence to the contrary.

Castle *v.* Lewis (C. C. A.), 254 Fed. 917, 918.

Under a provision declaring that the keeping in excess of a certain amount of intoxicating liquor shall be *prima facie* evidence of an intention to convey, sell or otherwise dispose of such liquors, evidence of such possession is sufficient to establish the unlawful intent, unless rebutted, or the contrary proved, yet it does not make it obligatory upon the jury to convict after the presentation of such proof but such evidence is competent and sufficient to justify a jury in finding a defendant guilty, provided it does in effect satisfy them of his guilt beyond a reasonable doubt.

Caffee *v.* State, 11 Okla. Cr. App. 485, 148 Pac. 680.

"In the case of Pine *v.* Commonwealth, 121 Va. 812, 93 S. E. 652, this court decided that the Prohibition Act does not interdict the possession in a home for private use of distilled liquor, wine, beer, or other malt liquor, the possession of which was lawfully acquired, but merely declares that the possession of more than the specified quantity shall be *prima facie* evidence of a 'purpose of sale.' This presumption is simply a rule of evidence, and, like other presumptions, may be rebutted."

Neal *v.* Commonwealth (Va.), 98 S. E. 629.

"Possession of more than the specified quantity of ardent spirits 'shall be *prima facie* evidence of a purpose of sale, merely establishes a rule of evidence * * * The presumption is merely *prima facie* and may be rebutted.' When the commonwealth has proved the possession of more than the specified quantity of ardent spirits, etc., and there is no rebuttal evidence of that fact, and none that it was lawfully acquired, and was in the possession of the accused in his home for private use and not for sale, the *prima facie* presumption prescribed by the Prohibition Act that it was kept for the purpose of sale would generally be sufficient to warrant a conviction. We say generally, because it is possible to conceive a situation in which the commonwealth's own evidence of possession might be such as to repel the presumption that it was unlawful. As in negligence cases, it sometimes happens that plaintiff's evi-

dence develops such a case of contributory negligence as would bar a recovery. In the present case as observed, the evidence on behalf of the accused tends to show the lawful acquisition and possession of the beverages in question; and the jury was confronted by a *prima facie* presumption that the decoction was in the possession of the accused for the purpose of sale, on the one hand and by the presumption of innocence fortified by rebuttal evidence on the other. In such case, the burden of proof to establish the guilt of the accused beyond a reasonable doubt rested on the commonwealth, and constituted a continuing burden, which inheres in every stage of the prosecution."

Neal *v.* Commonwealth (Va.), 98 S. E. 629, 630.

"In the case of State *v.* Wilkerson, 164 N. C. 431, at page 435, 79 S. E. 888, at page 890, in a similar prosecution under the Prohibition Act of that State (the language of which in the matter here involved is practically identical with that of our own statute) the court says: The jury were instructed that the fact of his (accused) having in his possession more than one gallon of the liquor made out a *prima facie* case against the defendant. If the court had stopped here, and not qualified this instruction, it would have been correct: but it did not do so, but went beyond the terms of the statute and the law when it further charged that it then was duty of the defendant to go forward and satisfy the jury, by the greater weight of the evidence, that he did not have the liquor in his possession for the purpose of sale. In this further instruction we think there was error. The court then proceeds to show that it was the province of the jury to consider the case in the light of all the evidence, giving weight to the *prima facie* presumption on the one side, the presumption of innocence on the other, and all the evidence adduced. This case was approved and followed in State *v.* Russell, 164 N. C. 482, 80 S. E. 66, where it was held. Where the statute makes the possession by one person of a certain quantity of spirituous liquor *prima facie* evidence of an unlawful intent to sell, the burden of the issue remains on the state to show the guilt, as charged in the indictment, beyond a reasonable doubt; and when the *prima facie* case has been established, under the provision of the statute, it does not forestall the verdict, for it only

means that as evidence it is sufficient to establish the ultimate fact of guilt, and the jury may convict if they find that it is not explained or rebutted. The presumption of innocence is still with the prisoner, and the burden continues to rest upon the state to show guilt beyond a reasonable doubt."

Neal *v.* Commonwealth (Va.), 98 S. E. 629, 631.

In the absence of rebutting evidence the statutory presumption is in and of itself sufficient to support a conviction, and, logically, should prevail, and it has been held in some jurisdictions that, unrebutted, it must prevail.

Gillespie *v.* State, 96 Miss. 856, 51 So. 811.
Aaron *v.* State, 18 Ariz. 378, 161 Pac. 881.

Under a statute providing that the fact that any person has in his possession appliance adapted to retailing liquors shall be presumptive evidence that the person owning the same is engaged in illegally selling intoxicating liquors, such presumption must prevail in the absence of any proof in denial of the charge.

Gillespie *v.* State, 96 Miss. 856, 51 So. 811.

Where the state has shown an introduction of intoxicating liquor in violation of the constitutional prohibition amendment, it has made out a *prima facie* case authorizing a conviction of the person or persons introducing it, and such person to escape conviction, must successfully and satisfactorily show that the liquor was introduced for a lawful purpose.

Aaron *v.* State, 18 Ariz. 378, 161 Pac. 881.
State *v.* Tincher, 81 W. Va. 441, 94 S. E. 503.

Under other statutes, even if the accused kept liquors on the premises of another without his consent such keeping when shown, would be *prima facie* evidence that the keeping was for sale or with intent to sell the same contrary to law, and the fact of ownership or possession of the property where such liquors were kept would be merely a matter of evidence pertinent to the question as to who was responsible for such keeping.

Stout *v.* State, 15 Ala. App. 206, 72 So. 762.

**Whether Building Used Exclusively as a Dwelling.**—A statute providing that the keeping of prohibited liquors in any building not used exclusively for a dwelling shall be *prima facie* evidence that they are kept for sale, does not apply where a jug of whisky was hid in a patch of weeds back of the garden of defendant's brother, whom defendant was visiting at the time.

Willingham *v.* State, 11 Ala. App. 205, 65 So. 847.

Whether or not a building was a dwelling, or used exclusively as a dwelling, is generally, in the absence of statutory definition or description, a question for the jury.

Stokes *v.* State, 5 Ala. App. 159, 59 So. 310.
Bare *v.* Commonwealth, 122 Va. 783, 94 S. E. 168, 169.

Where there was evidence that accused had a store and a house on the same premises, that men not members of accused's family ate and slept in the house, that liquors in convenient packages for illicit sale were found in the house, and that men under influence of intoxicants were frequently seen on his premises, it was a question for the court sitting as a jury whether the house was a building not used exclusively for a dwelling within Act Aug. 25, 1909 (Acts Sp. Sess. 1909, p. 64), § 4 providing that the keeping of prohibited liquors in a building not so exclusively used shall be *prima facie* evidence that they are kept for sale, or with intent to sell contrary to law, and hence the admission of evidence that the liquors were found in the house was competent.

Stokes *v.* State, 5 Ala. App. 159, 59 So. 310.

In a prosecution for unlawfully dispensing cider containing more than 1 per cent of alcohol, in violation of the Mapp prohibition law, cider having been made by defendant from his own fruit, if there is a doubt as to whether the building wherein the cider was given away was part of defendant's *bona fide* home, the question should be submitted to the jury, to determine from the evidence the question of fact whether such was the case.

Bare *v.* Commonwealth, 122 Va. 783, 94 S. E. 168, 169.

Proof that defendant kept whisky in his home, not used

exclusively for a dwelling, made a *prima facie* case against him under the express provision.

Dunn *v.* State, 8 Ala. App. 382, 62 So. 379.

**Limits of Presumption; Rebuttal.**—The accused may by any competent evidence rebut the presumption arising from the possession of liquors seized, and must do so to escape conviction under such indictment.

State *v.* Tincher, 81 W. Va. 441, 94 S. E. 503.

**Effect of the Legal Presumption.**—Under a statute declaring that the keeping in excess of a certain amount of intoxicating liquor "shall be *prima facie* evidence of an intention to convey, sell, or otherwise dispose of such liquor," it is error to charge that "the keeping in excess of one gallon of spirituous liquor constitutes *prima facie* evidence of intent to convey, sell, or otherwise dispose of such liquor, and places upon the defendant the burden of raising a reasonable doubt of his guilty intent to so convey, sell, or dispose of such liquor," since the statute only means to make such evidence competent and sufficient to establish the unlawful intent, unless rebutted or the contrary proved; yet it does not make it obligatory upon the jury to convict after the presentation of such proof. Whether or not such evidence is sufficient to overcome the presumption of innocence of a defendant, and to establish his guilt beyond a reasonable doubt, when all the evidence including the presumptions is considered, is for the determination of the jury.

Butler *v.* State, 12 Okla. Cr. App. 530, 159 Pac. 1090.

The finding of liquor on Sunday in the locked room of a hotel kept by the defendant's wife and the presence of men in the room with the liquor raised no presumption against him; he not being the proprietor.

Nies *v.* Jepson, 174 Ia. 188, 156 N. W. 292.

Under a statute, providing that the finding of intoxicating liquors in unusual quantities in a private dwellng or its dependencies of any person keeping a tavern, public resort, house, grocery, or other place of public resort, shall be presumptive evidence that such liquors are kept for illegal sale, no presumption arises, from the finding of large quantities

of beer in the residence of an individual not engaged in one of the numerated businesses, that the liquors were kept for sale in violation of law.

True *v.* Hunter, 174 Ia. 442, 156 N. W. 363.

Where the liquors were found in possession of a teamster who worked for a druggist and there was no showing that the teamster had knowledge of their being intended for an unlawful purpose, and it was further shown that it was possible that they might have been intended for the purpose of filling prescriptions lawfully given, it was held that the presumption, if any, was rather that they were intended for a lawful purpose, and that a conviction could not be had.

State *v.* Bunker (Mo. App.), 206 S. W. 399, citing State *v.* Theodore (Mo.), 191 S. W. 422; State *v.* Richardson (Mo. App.), 182 S. W. 782; State *v.* Rawlings, 232 Mo. 544, 134 S. W. 530.

But that defendant acknowledged to searching officer that she had liquor in her house and told where it was, was not conclusive of her innocent purpose in having it in her possession.

Merriwether *v.* Tuscaloosa, 13 Ala. App. 651, 69 So. 258.

**Sufficiency of Explanation of Receipt or Possession of Liquor.**—Where the accused offers such explanation of his receipt or possession of liquor as would, if true, constitute a good defense under the law, the question whether it is true is for the jury.

State *v.* Bradley, 109 S. C. 411, 96 S. E. 142.
State *v.* Fountain (Ia.), 168 N. W. 285.
Rogers *v.* State, 133 Ark. 85, 201 S. W. 845.
Wilson *v.* Commonwealth, 181 Ky. 370, 205 S. W. 391.

In a prosecution for possession of malt liquor for the purpose of sale in violation of local option law, evidence showing shipment to defendant of unusual quantities of intoxicating liquor without satisfactory explanation of its disposition held to present a question for the jury.

Wilson *v.* Commonwealth, 181 Ky. 370, 205 S. W. 391.

In such a prosecution, it is a question for the jury whether

accused received whisky by express and used it unlawfully in her restaurant, or whether it had been given her and was being kept temporarily in the restaurant until she could take it home.

State *v.* Bradley, 109 S. C. 411, 96 S. E. 142.

Whether defendant was keeping whisky with intent to sell or to give to his employees solely as a gratuity, or to induce them to continue in his employment at lower wages than otherwise he must have paid, held under the evidence for the jury.

State *v.* Fountain (Ia.), 168 N. W. 285.

Evidence regarding the taking of intoxicating liquor to accused's premises, where it was found hidden, etc., held to make a jury question whether accused received the liquor for storage, distribution, or on consignment for another.

Rogers *v.* State, 133 Ark. 85, 201 S. W. 845.

**Accused Claiming to Have Merely Purchased for Another.**—On the trial of one charged with selling whisky, proof that he received money from another person, accompanied by a request to procure whisky for the latter, and thereafter went off, and returned, and delivered a quart of whisky to that person, would cast on the accused the burden of showing where, how, and from whom he got the whisky. Whether he successfully carried this burden, either by his own uncorroborated testimony or otherwise, would be a question for determination by the jury.

Grant *v.* State, 87 Ga. 265, 13 S. E. 554.
Mack *v.* State, 116 Ga. 546, 42 S. E. 766, 59 L. R. A. 602.
Gaskins *v.* State, 127 Ga. 51, 55 S. E. 1045.
Benton *v.* State, 9 Ga. App. 422, 71 S. E. 498.
Touchstone *v.* State, 17 Ga. App. 333, 86 S. E. 744.
See also, Smith *v.* State, 14 Ga. App. 577, 81 S. E. 801.

Where the state offered evidence that accused delivered intoxicating liquor to a third person and receiving payment, and accused claimed that he delivered the liquor in good faith under an agreement that he should order it for such person, the question of his good faith was for the jury.

State *v.* Bailey, 168 N. C. 168, 83 S. E. 711.

Where on trial for having possession of intoxicating liquor for the purpose of sale, the evidence tended to show that accused purchased the liquor in another state as agent for other persons who sent him there for the purpose of buying it for them, and who gave him the money with which to pay therefor and paid him for his service, and that he brought it within the state for the purpose of distributing it to them, his intent, and whether the transaction was a sale, were questions for the jury.

State *v.* Wilkerson, 164 N. C. 431, 79 S. E. 888.

Whether one accused of selling whisky was acting solely as agent of the purchaser, or had a pecuniary interest in procuring the purchase, was for the jury.

Snead *v.* State, 134 Ark. 303, 203 S. W. 703.

And, where the evidence although insufficient to satisfy the jury beyond a reasonable doubt that the accused participated in the sale of whisky, was of such a nature as to compel the conclusion that the accused was participating in the illegal sale of lager beer, unless the transaction could be satisfactorily explained, the question as to whether the explanation was satisfactory was one solely for the jury.

Dent *v.* State, 14 Ga. App. 269, 80 S. E. 548.

3. PROOF OF INTOXICATING CHARACTER.

It being a matter of common knowledge that whisky is an intoxicating liquor, and that liquors containing no more than 1 per cent of alcohol are not intoxicating, it need not be shown that the whisky found in defendant's place of business contained more than 1 per cent of alcohol in order to secure conviction.

State *v.* Bradley, 109 S. C. 411, 96 S. E. 142.

But when the alleged violation of a prohibition law consists in a sale of beer, the prosecution must prove directly or circumstantially that it was a malt or an intoxicating beer.

Lumpkin *v.* Atlanta, 9 Ga. App. 470, 71 S. E. 755.
Cripe *v.* State, 4 Ga. App. 832, 62 S. E. 567.
Du Vall *v.* Augusta, 115 Ga. 813, 42 S. E. 265.
Martin *v.* Rome, 9 Ga. App. 574, 71 S. E. 879.

Elsewhere it is held that where the liquor in defendant's possession is proven to be beer, which is a malt liquor, the court will presume that it is intoxicating without proof of that fact, though defendant may rebut such presumption.

Hoskins *v.* Commonwealth, 171 Ky. 204, 188 S. W. 348.

To warrant a conviction for the sale of malt liquor and other liquors specifically enumerated in a statutory definition of intoxicating liquors, it is only necessary to prove that the thing sold was one of the classes named; but as to other liquors, or liquids, capable of being used as a beverage, it is necessary to prove their intoxicating property.

State *v.* Hemrich, 93 Wash. 439, 161 Pac. 79, L. R. A. 1917B, 962n.

Where defendant was indicted for being interested in the sale of intoxicating liquor called, "Buk," it was necessary for the state to prove the sale of such liquor, and that it was intoxicating, and a conviction could not be based upon evidence showing that defendant was interested in the sale of beer.

Carleton *v.* State, 129 Ark. 361, 196 S. W. 124.

In a prosecution under a statute making it unlawful to sell vinous liquors except for medicinal or sacramental purposes, under an indictment charging accused with selling to a specified person, not for medicinal or sacramental purposes, a certain vinous liquor, the correct name of which was to the grand jurors unknown, but which was then and there called cider, the state must prove to the jury's satisfaction that the accused was the person named in the indictment, that the liquor was a vinous liquor commonly called cider and that it was not sold for medicinal or sacramental purposes.

State *v.* Coverdale, 1 Boyce's (24 Del.) 555, 77 Atl. 754.

Where the liquor is shown to be a beverage made in accordance with a certain formula and sold generally to the trade under a trade name, it will be presumed that all of it is made in accordance with the formula and that it is of uniform character and quality.

State *v.* Clark, 124 La. 965, 50 So. 811.

**Question for Jury.**—The intoxicating character of the liquor which the accused is charged to have sold or possessed

is a question for the jury under proper definitions and instructions from the court.

Turner *v.* State, 14 Ala. App. 29, 70 So. 971.
Malick *v.* State (Neb.), 169 N. W. 5.
State *v.* Coverdale, 1 Boyce's (24 Del.) 555, 77 Atl. 754.
Cooper *v.* State, 19 Ariz. 486, 172 Pac. 276.

The court must instruct the jury as to what constitutes intoxicating liquor within the contemplation of the statute. This is not a matter left to the determination of each separate jury and juror.

United States *v.* Schmauder (D. C.), 258 Fed. 251.

Under the evidence, the question as to whether the liquor described in the information was intoxicating was a question for the jury.

Malick *v.* State (Neb.), 169 N. W. 5.

In a prosecution for selling malt liquors contrary to law, the case was for the jury where the state's evidence tended to show a sale of "Schlitz" beer by the defendant.

Turner *v.* State, 14 Ala. App. 29, 70 So. 971.

In a prosecution for illegal sale of vinous liquors, not for medicinal or sacramental purposes, it is for the jury to determine whether the liquor in question was or was not vinous, adopting as correct the definition of vinous liquor as given by the court.

State *v.* Coverdale, 1 Boyce's (24 Del.) 555, 77 Atl. 754.

4. PRESUMPTION AS TO AGENCY.

The rule is well settled that proof that one charged with selling intoxicating liquors, who receives money from another person, accompanied with a request to procure whisky for the latter, and shortly thereafter delivers whisky to such other person, has the *onus* upon him of explaining where, how, and from whom he got the liquor, and that, if the explanation offered by him is supported only by his own statement, the jury are authorized to find him guilty if they

believe his explanation to be a mere subterfuge to cover up an illegal sale by himself.

Farmer *v.* State, 18 Ga. App. 54, 88 S. E. 797.
Scott *v.* State, 18 Ga. App. 309, 89 S. E. 349.
Langston *v.* Hazelhurst, 9 Ga. App. 449, 71 S. E. 592.
Gaskins *v.* State, 127 Ga. 31, 55 S. E. 1045.
Simpson *v.* Eastman, 16 Ga. App. 185, 84 S. E. 721.
Smith *v.* State, 14 Ga. App. 577, 81 S. E. 801.
Mulling *v.* State, 17 Ga. App. 828, 88 S. E. 709.
Lane *v.* Millen, 18 Ga. App. 18, 88 S. E. 748.
Grant *v.* State, 87 Ga. 265, 13 S. E. 554.
White *v.* State, 93 Ga. 47, 19 S. E. 49.
Mack *v.* State, 116 Ga. 546, 42 S. E. 776, 59 L. R. A. 602.
Bray *v.* Commerce, 5 Ga. App. 605, 63 S. E. 596.
Highsmith *v.* Waycross, 7 Ga. App. 611, 67 S. E. 677.
Cheatwood *v.* Buchanan, 9 Ga. App. 828, 72 S. E. 284.
Myers *v.* State, 16 Ga. App. 266, 85 S. E. 206.
Cowart *v.* State, 14 Ga. App. 763, 82 S. E. 313.
Jones *v.* State, 12 Ga. App. 564, 77 S. E. 892.
Shaw *v.* State, 3 Ga. App. 607, 60 S. E. 326.
McGovern *v.* State, 11 Ga. App. 267, 74 S. E. 1101.
Johnson *v.* State, 13 Ga. App. 371, 79 S. E. 178.
Cooper *v.* Ft. Valley, 13 Ga. App. 169, 78 S. E. 1097.
Starr *v.* State, 12 Ga. App. 360, 77 S. E. 205.
Jackson *v.* State, 13 Ga. App. 147, 78 S. E. 867.
Slaughter *v.* State, 17 Ga. App. 332, 86 S. E. 741.
Touchstone *v.* State, 17 Ga. App. 333, 86 S. E. 744.
Wolf *v.* State, 16 Ga. App. 250, 85 S. E. 86.
Fletcher *v.* State, 12 Ga. App. 809, 78 S. E. 478.
Morgan *v.* Cedartown, 13 Ga. App. 139, 78 S. E. 863.
George *v.* State, 17 Ga. App. 555, 87 S. E. 814.
State *v.* Bailey, 168 N. C. 168, 83 S. E. 711.

This *onus* is not shifted, so as to require a verdict of not guilty, simply by the statement of the accused that he acted merely as agent for the purchaser, and obtained the whisky from another person mentioned. It is for the jury to determine the actual relation of the defendant to the act charged.

Smith *v.* State, 14 Ga. App. 577, 81 S. E. 801.
Mulling *v.* State, 17 Ga. App. 828, 88 S. E. 709.

Simpson *v.* Eastman, 16 Ga. App. 185, 84 S. E. 721.
Langston *v.* Hazlehurst, 9 Ga. App. 449, 71 S. E. 592.
Starr *v.* State, 12 Ga. App. 77 E. S. 205.

"The rebutting evidence does not destroy or nullify the presumption arising out of the proven facts, and itself make an evidential fact for consideration by the jury, but leaves the question for the determination of the jury under all of the circumstances. 16 Cyc. 1070; Marston *v.* Biegelow, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; National Mason Acci. Ass'n *v.* Burr, 57 Neb. 437, 77 N. W. 1098."

Wynn *v.* State, 11 Ala. App. 182, 65 So. 687.

The fact that, when paying the money to the accused, the person who purchased the whisky instructed him to procure the whisky from a particular person, and that the accused went to that person and procured the whisky from him, does not remove the *onus* resting on the defendant to show how he procured the whisky, and therefore fails to negative the reasonable inference that he was an agent of the seller as well as of the buyer, and received a commission on the sale.

Scott *v.* State, 18 Ga. App. 309, 89 S. E. 349.

Such evidence in behalf of the state, if credible to the jury, authorized the inference that defendant was the agent of one who unlawfully sold whisky, and cast upon him the burden of rebutting this possible inference.

George *v.* State, 17 Ga. App. 555, 87 S. E. 814.

This burden would be successfully carried by the accused if, in corroboration of his own statement, he proved by an unimpeached witness, that he had, in fact, bought the whisky from another person and paid him for it.

Bray *v.* Commerce, 5 Ga. App. 605, 63 S. E. 596.
Farmer *v.* State, 18 Ga. App. 54, 88 S. E. 797.
Cowart *v.* State, 14 Ga. App. 763, 82 S. E. 313.
Lane *v.* Millen, 18 Ga. App. 18, 88 S. E. 748.

Indeed, it has been held that unless the testimony of the corroborating witness be impeached, there is no case for the jury.

Cowart *v.* State, 14 Ga. App. 763, 82 S. E. 313.

The court cannot assume, however, merely as a matter of law, that a witness who exchanged whisky and money between the defendant and the purchaser was an accomplice to the sale, where the evidence left this question in doubt.

Fisher *v.* State, 81 Tex. Cr. App. 568, 197 S. W. 189.

5. PRESUMPTION FROM TAX RECEIPT.

It is competent for the state to make the possession of a license to sell or the possession of a federal tax receipt, *prima facie* evidence that the liquor is kept for sale, or even of the unlawful sale itself.

Taylor *v.* State, 14 Ga. App. 114, 80 S. E. 292.

In the above case it was conceded that the defendant, in behalf of an association known as the "Seminole club," and as its nominal secretary, obtained a United States tax receipt, or license, authorizing that club to sell intoxicating liquor at retail; and hence it was held that the documentary evidence upon this point placed upon the defendant the burden of proving that he did not in any wise participate in any of the sales shown to have been made in the club.

Taylor *v.* State, 14 Ga. App. 114, 80 S. E. 292.

6. GENERALLY AS TO ILLEGAL ACTS.

**Burden on State.**—In a prosecution for the illegal sale of intoxicants, the burden is upon the state to prove the sale; and as the presumption is in favor of innocence, the sale must be established by something more than a mere inference from facts not necessarily implying guilt.

Scoggin *v.* Morrilton, 124 Ark. 585, 187 S. W. 445.

In a prosecution for illegal sale of liquor, averments in the indictment that defendant sold, caused, suffered, and knowingly permitted liquor to be sold must be proven in order to sustain a conviction.

State *v.* Waxman (N. J. Sup.), 107 Atl. 150.

And where the offense defined by the statute is a sale, the *onus* is upon the prosecution to prove a sale, including the receipt or promise of a price or consideration. In other words, the state must negative the idea of a mere gift or loan.

Flood *v.* State, 12 Ga. App. 702, 78 S. E. 268.

It must be shown that the sale was after the passage of the statute prohibiting such sales.

Wilson *v.* State, 130 Ark. 204, 196 S. W. 921.

And that the sale occurred prior to the filing of the indictment therefor.

Wales *v.* State (Tex. Cr. App.), 212 S. W. 503.

But under a local option law which makes prohibition the rule and license the exception, the presumption is that all sales are illegal, and after the proof of the sale in a given case, the burden is then upon the accused to show that it was made under a license.

State *v.* Hays, 38 S. D. 546, 162 N. W. 311.
State *v.* Tygarts Valley Brewing Co., 71 W. Va. 38, 75 S. E. 149.

**Evidence Must Connect Accused with Sale as Guilty Party.**—It is hardly necessary to state that the burden is upon the prosecution to connect the accused with the illegal sale as the guilty party. The state must prove the illegal sale, the *corpus delicti,* and as the presumption of innocence is with the accused, it must prove beyond a reasonable doubt that he made it.

Scoggins *v.* United States (C. C. A.), 255 Fed. 825.

**Sale in Defendant's Presence.**—Although it be shown by the evidence on the trial of one charged with the sale of intoxicating liquor that a sale of such liquor was made in the presence of the defendant, it is error to charge the jury that, if such a sale was made in his house by some other person, that would raise a presumption that it was the defendant's business, and the burden would be upon him to show that he had no connection with it.

Whitley *v.* State, 14 Ga. App. 577, 81 S. E. 797.

**Presumption of Intent from Sale.**—The general rule that crime involves intention is applicable to a law prohibiting sales of liquor to a minor, intoxicated person, person in the habit of becoming intoxicated, Indian, and posted person, by any person except a druggist, and making the fact of sale *prima facie* evidence of an intent of the seller to violate the law.

People *v.* Dann, 183 Mich. 554, 149 N. W. 1002.

In a prosecution for illegal sale of liquor, where there is evidence beyond reasonable doubt that accused sold the liquor, an intent to violate the law will be implied.

People *v.* Allen (Cal. App.), 174 Pac. 374.
See also, Cooper *v.* State, 19 Ariz. 486, 172 Pac. 276.

Where the liquor sold was shown to be Jamaica ginger and the defendant set up that it was sold by him in good faith as such the burden was upon him to prove it to the satisfaction of the jury.

State *v.* Hastings, 2 Boyce's (25 Del.) 482, 81 Atl. 403.

Where the prosecution is for being in control or possession of intoxicating liquors, in violation of statute, and the defense is that defendant had no knowledge of the presence of the liquor found in his possession, it raises a question of fact, and it will be reasonably presumed that he had knowledge thereof.

Jackson *v.* Gordon (Miss.), 80 So. 785.

Where the charge is the shipment of liquor into prohibition territory concealed in barrels of alleged empty bottles, the burden is upon the state to establish a guilty intent by showing that the accused knew that the liquor was in the barrels shipped.

State *v.* McCowen (Mo. App.), 189 S. W. 618.

Under the Arkansas statute, Acts 1917, p. 41, Sec. 1, prohibiting persons from transporting liquor for another or others over any public highway, the *onus* is upon the state to show that the accused was transporting the liquor for another and not for himself, it was intended for illegal sale.

Lacey *v.* State, 135 Ark. 470, 205 S. W. 814.

**Burden of Proving Legality of Express Deliveries.**—The mere fact that the defendant delivered different shipments to different persons of the same name did not place on it the burden of showing legality of all deliveries to consignees of that name.

Adams Exp. Co. *v.* Commonwealth, 178 Ky. 59, 198 S. W. 556.

**Of Proving Physician Duly Licensed.**—In a prosecution for illegally issuing a prescription for intoxicating liquors in the name of a licensed physician, the state had the burden of showing that the physician was licensed though such averment may have been unnecessary.

McAllister *v.* State, 156 Ala. 122, 47 So. 161.

**Presumption of Wife's Duress.**—Where husband and wife were arrested for bringing 6 or 8 sacks of whisky, containing 20 quarts each, into the state in an automobile, the facts were sufficient to rebut any presumption, if it existed, that the wife was acting under the husband's duress.

Morton *v.* State (Tenn.), 209 S. W. 644.

In a prosecution against a physician for the unlawful issuing of a prescription for intoxicating liquor, the burden is upon the state to show a violation of the statute beyond a reasonable doubt.

State *v.* Morton, 38 S. D. 504, 162 N. W. 155, 156.

**Burden of Proving Former Conviction.**—In order to warrant the imposition of the increased penalty imposed for a second conviction, it is necessary that a former conviction should have been alleged in the indictment and also proven. The court cannot take judicial knowledge of a former conviction for the purpose of imposing the penalty prescribed for a second conviction.

State *v.* Davis, 68 W. Va. 142, 69 S. E. 639, Ann. Cas. 1912A, 996, 32 L. R. A., N. S., 501.

But where record evidence of the former conviction of one of similar name as defendant is offered, it is not necessary for the state to prove that the person named in such former conviction, and the defendant on trial, is one and the same person.

Files *v.* State (Okla. Cr. App.), 182 Pac. 911.

**Presumption That Officers Did Their Duty.**—There is a presumption that, in the enforcement of the prohibition law, the officers charged with the carrying out of its provisions have done their duty.

Thornton *v.* Skeleton (Ga.), 99 S. E. 299.

Thus where officers found a barrel of whisky under defendant's stable and two other barrels buried near by, under Acts Ex. Sess. 1915, p. 88, § 20, it being their duty to seize the same to be forfeited, it will be presumed that they discharged such duty.

Thornton *v.* Skeleton (Ga.), 99 S. E. 299.

## II. Questions of Law and Fact.

**Question for Court.**—The sense in which the statute providing that all places "used" for the illegal sale or keeping intoxicants are common nuisances, uses the quoted word, is a question for the court.

State *v.* Gastonguay (Me.), 105 Atl. 402.

**Question for Jury.**—Ordinarily the weight and sufficiency of all evidence tending to show a violation of the law, or to rebut the evidence tending to show such violation, is for the jury. For example, in a prosecution for maintaining a nuisance within the purview of the liquor laws, whether or not the accused kept intoxicating liquor in his hotel for purpose of sale in violation of law, or whether he actually sold the same, is to be determined by the jury.

State *v.* Jarvis (Ia.), 165 N. W. 61.

In a prosecution for violating the liquor laws the jury is not bound to accept as true the testimony of accused or that of the witnesses in his behalf, but may consider all the facts and circumstances of the case and return a verdict of guilty if justified by such facts and circumstances, though contrary to the direct evidence.

Begley *v.* Commonwealth, 176 Ky. 796, 197 S. W. 448.

In a prosecution for violation of the law prohibiting the sale of intoxicating liquors, the credibility of the state's witness was a question for the jury, and where he testified to the sale, it cannot be said that there was no substantial evidence to support the verdict.

Nelson *v.* State (Ark.), 212 S. W. 93.

In a prosecution for violation of the law against selling intoxicating liquors, where defendant was introduced as a witness and denied that he sold whisky and contradicted

state's witnesses, it was for the jury to determine whether or not defendant was beyond a reasonable doubt guilty of the offense charged.

Nelson *v.* State (Ark.), 212 S. W. 93.

**Credibility of Testimony of Detective.**—In prosecution for illegal sale of liquor, credibility of testimony of detectives employed to discover violations is for the jury.

Baumgartner *v.* State (Ariz.), 178 Pac. 30.

In prosecution for maintaining liquor nuisance, credibility of police officers as witnesses, who had purchased the whisky and made the arrest, was for the jury.

State *v.* Shelton (Ia.), 169 N. W. 351.

**Existence of Guilty Knowledge or Intent.**—It is generally held that the question of guilty knowledge or unlawful intent—e. g., whether the accused knew the liquor was on his premises or not—is for the jury.

Jackson *v.* Gordon (Miss.), 80 So. 785.
State *v.* Cox, 91 Ore. 518, 179 Pac. 575.
Holt *v.* State (Ala. App.), 78 So. 315.
Cooper *v.* State, 19 Ariz. 486, 172 Pac. 276.

In prosecution of pressing shop proprietor for having intoxicating liquor in his possession, the question of whether the defendant proprietor was conscious of the possession of the liquor which had been found in his shop was, under the evidence, a question for the jury.

Jackson *v.* Gordon (Miss.), 80 So. 785.

Where evidence showed that defendant kept a rooming house in which there were a large number of rooms let to others who lived in them, whether liquor procured in raid on defendant's place was in her possession was a jury question.

Holt *v.* State (Ala. App.), 78 So. 315.

In a prosecution of a hotel porter for having in his possession, while transporting to the hotel, baggage containing whisky, it was a question of fact for the jury to find from the evidence beyond a reasonable doubt whether the defendant knew or had reasonable ground to know or believe that

the suitcase contained intoxicating liquor when taking it into his possession.

State *v.* Cox, 91 Ore. 518, 179 Pac. 575.

### III. Judicial Notice.

**Of Intoxicating Character of Certain Liquors.**—It is a matter of common knowledge which the court will notice judicially that alcohol is an intoxicant and that it is the intoxicating element of all intoxicating liquors.

McLean *v.* People (Colo.), 180 Pac. 676.
State *v.* Klein (Ia.), 174 N. W. 481.

The court also judicially notices the fact that whisky is an intoxicating liquor and that the word so implies.

State *v.* Killeen (N. H.), 107 Atl. 601.
Coats *v.* State (Tex. Cr. App.), 215 S. W. 856.
Harwell *v.* State, 12 Ala. App. 265, 68 So. 500.

In a prosecution for the unlawful manufacturing of intoxicating liquors, where defendant admitted that he made whisky, further proof was not required to show that the whisky was intoxicating.

Coats *v.* State (Tex. Cr. App.), 215 S. W. 856.

It is a matter of common knowledge to all well-informed men that Jamaica ginger is an "intoxicating liquor."

McLean *v.* People (Colo.), 180 Pac. 676.
State *v.* Agalos (N. H.), 107 Atl. 314.
State *v.* Intoxicating Liquors and Vessels (Me.), 106 Atl. 771.

And the court will take judicial notice that grape wine is an intoxicating liquor.

Frey *v.* Commonwealth, 169 Ky. 528, 184 S. W. 896.

But the court cannot take judicial notice that mead or metheglin is an alcoholic, spirituous, vinous, malt, or intoxicating liquor or beverage, or that, if drunk to excess, it will produce intoxication.

Marks *v.* State, 159 Ala. 71, 48 So. 864, 133 Am. St. Rep. 20.

**Judicial Notice of Ordinance.**—Where the prohibition ordinance of a city, which defendant is charged with violating, is not introduced in evidence, nor proof with reference thereto offered, a judgment of conviction will be reversed, and the cause remanded. Courts do not take judicial notice of ordinances of cities or towns, and proof of the prohibition ordinances of a city is essential in prosecutions for the violation thereof.

Benjamin *v.* Montgomery (Ala. App.), 81 So. 145.

**Of Prohibition Territory.**—The appellate court will take judicial notice that a certain county in the state was prohibition territory during certain years, and that no business concern could have been engaged legally in buying and selling whisky and beer therein during those years.

Cumming *v.* Funkenstein Co. (Ala. App.), 81 So. 343.

**IV. Proof of Time.**

**Not Ordinarily of Essence.**—Under an indictment charging the illegal sale of liquor, or the keeping of liquor for the purpose of illegal sale, time is not ordinarily of the essence of the offense, and the evidence need not show a sale on the precise date laid in the indictment.

State *v.* Mostella, 159 N. C. 459, 74 S. E. 578.
State *v.* Truba, 88 Vt. 557, 93 Atl. 293.
Peebles *v.* State, 105 Miss. 834, 63 So. 271.

Thus where it was charged that the offense was committed on Saturday, February 7th, evidence that it was on a Friday between the 1st and 15th of February was held to have been properly admitted.

State *v.* McGuire, 139 La. 88, 71 So. 239.

So it was permissible to ask a witness whether he bought whisky or beer from the accused, or from anyone else in the hotel operated by the accused, "within the last few weeks."

Allison *v.* State, 1 Ala. App. 206, 55 So. 453.

Evidence of receipt of shipment of whisky by defendant within three years of the filing of the indictment for engaging in the business of selling liquors in prohibition territory

is not too remote, the offense though laid on or about a certain day covering the whole of that period.

Jackson *v.* State (Tex. Cr. App.), 200 S. W. 150.

"The offense of being a common seller of intoxicating liquors may be established by the acts of the party done on a single day. (Commonwealth *v.* Gardner, 7 Gray [Miss.] 494, 497.) And where the offense is alleged to have been committed on a particular day, 'and continually thereafter up to the day of the finding of this indictment,' such allegations may be supported by proof of the commission of the offense on the particular day named, or during any part of the period covered by the *continuando*. (State *v.* Small, 80 Me. 452, 14 Atl. 942; Commonwealth *v.* Wood, 4 Gray [Mass.] 11.)"

State *v.* Jones, 115 Me. 200, 98 Atl. 659.

Upon the preliminary examination of a person charged with the offense of keeping and maintaining a common nuisance, the prosecution is not restricted in its proof to the date alleged in the criminal complaint, but may introduce evidence tending to show the commission of the offense charged at any time prior to the date of such preliminary examination and within the period of limitations.

State *v.* Webb, 36 N. D. 235, 162 N. W. 358.

In a prosecution for the sale of liquor to soldiers in uniform, where the government's evidence showed a sale on a date other than that laid in the indictment, it was proper to submit to the jury the question whether a sale occurred on the date testified to or on some other day; the jury considering the testimony as to the date on question of the witnesses' credibility.

Young *v.* United States, 162 C. C. A. 133, 249 Fed. 935, 936.

Where, under an indictment for the sale of liquor, a bill of particulars alleged a sale on January 20th, testimony of the prosecuting witness that he could not remember the exact date, but that it took place after January 1st, at which time the town became dry, and before the finding of the indictment is not a variance from the bill of particulars.

State *v.* Doucet, 136 La. 180, 66 So. 772.

**Specifically Alleged Sales.**—Where an indictment alleges the making of a sale to each of two named persons within three years next preceding its filing, a charge that, though one of the sales alleged is not proven, defendant may be convicted if he made two other sales within said three years' period, is erroneous, since the making of the sales must be proven as alleged in the indictment.

Robinson *v.* State, 81 Tex. Cr. App. 448, 196 S. W. 186.

Where the charge is the false labeling of a shipment as being "for medical purposes" the offense may be shown to have been any time within twelve months preceding the date laid; but the state cannot, after having attempted to prove the offense on a date different to that laid in the indictment, insist upon the date alleged and then rely upon the other evidence as showing intent and guilty knowledge.

Commonwealth *v.* Robinson-Pettet Co., 181 Ky. 702, 205 S. W. 774.

**Sales before Defendant Owned the Premises.**—Testimony that witness bought whisky from an alleged employee of the accused in a certain house in January, 1910, which was long before its occupancy by the accused, and long before the alleged employee had any connection with accused as his servant, employee or agent, is irrelevant, there being no offer by further evidence to connect the accused with the building or with said alleged employee in January, 1910.

Hughes *v.* State, 61 Fla. 32, 55 So. 463.

**Where Statute Limits Time.**—Of course where the statute limits the proof of the unlawful sale to a period within twelve months of the date specified in the indictment such requirement is controlling, and the evidence must be limited to a sale or sales within that period, though not to the exact date laid in the indictment.

Harrison *v.* State, 12 Ala. App. 284, 68 So. 532.
Curry *v.* State, 117 Md. 587, 83 Atl. 1030.
State *v.* Francis, 157 N. C. 612, 72 S. E. 1041.

Under an indictment for having possession of intoxicating liquors, the state may prove such possession at any time

prior to finding of indictment and subsequent to the date of approval of act, under which defendant was indicted, though when the act is two years old the possession within two years immediately prior to return of indictment must be proved.

Autrey *v.* State (Ga. App.), 99 S. E. 389.

**Proof of Sale after Date Laid.**—Under a statute providing that, in a prosecution for unlawfully selling liquors, the state may show any sale within two years before the day laid in the indictment or affidavit, it is error to admit proof of sale after that day, though before the indictment was returned.

Moses *v.* State, 100 Miss. 346, 56 So. 457.

Where indictments charged sales of whisky on October 15th and on June 23d following, respectively, and the extent of a variance in the proof as to the date alleged in the first indictment was not disclosed, and the record did not show whether the indictments were found at the same or at different terms of court, accused, complaining of a conviction under the first indictment, had the burden of showing that the variance was prejudicial to him.

State *v.* Kelly, 89 S. C. 303, 71 S. E. 987.

**Different Sales on Same Day.**—Where a warrant was issued for the sale of intoxicating liquor on the morning of a certain day, and before it was served accused on the same day made a second unlawful sale, whereupon the warrant was served and he was arrested, the accused might be tried under the warrant for the later offense, since it charged a sale on that day and was notice of all sales on that day.

Robinson *v.* Commonwealth, 118 Va. 785, 87 S. E. 553.

**V. Variance.**

**Variance as to Mode of Sale.**—The variance between an allegation that the liquor was sold out of the pocket of the accused and the proof upon the trial to the effect that the accused purchased the liquor from a towel held under her arm, was immaterial, in a prosecution under a city or-

dinance directed against the unlawful possession upon the person of intoxicating liquor for the purpose of sale.

Collins *v.* Milledgeville, 17 Ga. App. 817, 88 S. E. 716.

Where an indictment alleged the sale of one quart of alcoholic liquor under a statute prohibiting sale of any alcoholic liquor, it was immaterial that the proof showed a sale of two half-pint bottles of whisky.

Strozier *v.* State, 127 Ark. 543, 192 S. W. 884.

**Proof of Either Gift or Sale.**—An indictment alleging that accused sold, offered for sale, kept for sale, or otherwise disposed of intoxicating liquor contrary to law, can be supported by proof of either a gift or a sale of liquor.

Roden *v.* State, 3 Ala. App. 199, 58 So. 72.

**Proof of Sale to Other than Person Named in Indictment.**—Where the indictment charges a sale to a certain designated person, proof of sale to some other person will not support a conviction.

McElwee *v.* State, 73 Tex. Cr. App. 445, 165 S. W. 927.
Amonett *v.* State (Tex. Cr. App.), 204 S. W. 438.
State *v.* Julius, 29 S. D. 638, 137 N. W. 590.

Thus proof that S. approached defendant and asked him if he knew where he (S.) could get a quart of whisky, and that defendant replied that he thought he did, whereupon S. gave defendant $1.50, and told him to deliver the whisky to S.'s son, which he subsequently did, showed a sale of whisky to S., and was therefore insufficient to support an indictment charging a sale to the son.

McElwee *v.* State, 73 Tex. Cr. App. 445, 165 S. W. 927.

And under an information charging an illegal sale of intoxicating liquors to several persons jointly, defendant can not be convicted of an illegal sale to one only of the persons named.

State *v.* Julius, 29 S. D. 638, 137 N. W. 590.

But it has been held that where a count of an information charged a sale of intoxicating liquors to three persons named therein, and the proof established a sale to one of

such persons, there was no fatal variance; since the essential element of the offense was the sale.

Ray *v.* State (Del.), 100 Atl. 472.

And in a prosecution for pursuing the business of selling intoxicating liquors, proof of a sale to a purchaser not named in the indictment, while not sufficient to support a conviction, was admissible as tending to show that defendant was pursuing such business.

Amonett *v.* State (Tex. Cr. App.), 204 S. W. 438.

**Evidence That Portion of Money Furnished by a Third Person.**—While it is true that where the sale of intoxicating liquor is alleged to have been made to an individual, the proof must correspond in this respect with the allegation, nevertheless evidence that another person furnished part of the money with which the liquor was paid for, did not create any variance between the allegation and the proof for the reason that the jury were authorized to infer that if any money was furnished by a person other than the alleged buyer, it might have been a loan of money, and for the further reason that there was no evidence tending to show that the seller had any knowledge of the participation of any other person than the participant in the actual purchase.

Wilburn *v.* State, 8 Ga. App. 28, 68 S. E. 460.

**Variance as to Person to Whom Liquor Illegally Transported Was Delivered.**—In a prosecution for transporting liquor into the state and delivering it to another, proof to show that the liquor was transported by one defendant into the state for delivery to another defendant, and was delivered to him for such purposes, was a variance from the allegations of the indictment charging a delivery to some person other than the three persons named in the indictment.

Winfrey *v.* State, 133 Ark. 357, 202 S. W. 23.

Under such statutes the evidence as to the quantity delivered and the consignee must correspond to the indictment.

Adams Exp. Co. *v.* Commonwealth, 178 Ky. 59, 198 S. W. 556.

**Variance as to Person for Whom Liquor Illegally Kept.**—Under a complaint charging keeping intoxicating liquors for persons specifically named, defendant could not be convicted of keeping liquor for his son who was not named.

State *v.* McCowen (Mo. App.), 189 S. W. 618.

**Proof of Place of Sale.**—Where an indictment alleged the sale of liquor between certain buildings in a town, though the allegation was needlessly specific, the evidence of the offense should be confined to the limits alleged in the indictment.

Ragan *v.* State, 9 Ga. App. 871, 72 S. E. 441.

Variance between indictment for transporting liquor into a prohibition state, charging transportation to a certain point therein, and proof that defendant's journey ended two or three miles short of that point, he being arrested in his journey, was immaterial.

Bishop *v.* United States (C. C. A.), 259 Fed. 195.

**Proof of Different Sale or Other Offense.**—Where a statute creates and provides the punishment for the two several offenses of transporting liquor illegally and of having them in separate containers, a conviction cannot be had under a charge of the first offense on proof of the second.

State *v.* Little, 171 N. C. 805, 88 S. E. 723.

Under an indictment charging an unlawful sale of intoxicants, accused cannot be convicted of the offense of procuring liquor for another.

Woods *v.* State, 114 Ark. 391, 170 S. W. 79.

One charged with unlawfully selling intoxicating liquors to a person named cannot be convicted of violating Revisal 1908, § 3534, punishing unlawful sales through agents, or of violating section 3527a, punishing soliciting of orders for intoxicating liquors, or under the federal Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1088 [U. S. Comp. St. Supp. 1911, p. 1588]).

State *v.* Cardwell, 166 N. C. 309, 81 S. E. 628.

But notwithstanding charge is for manufacture of spirituous liquors, a conviction for aiding and abetting can be had.

State *v.* Ogleston (N. C.), 98 S. E. 537.

Nor is the state limited to the proof of only one sale under an indictment in three counts, each charging a sale of the prohibited liquor.

Harwell *v.* State, 11 Ala. App. 188, 65 So. 702.

And where the prosecution is for taking orders for the sale of intoxicants in nonlicence territory, the state need not limit its proof to any particular order, but may show any and all orders taken within a year prior to the date of the prosecution.

Sanders *v.* State, 115 Ark. 376, 171 S. W. 142.

**Variance in Proof of Character or Description of Liquors.**

**"Spirituous Liquors."**—Proof that accused made a sale of spirituous liquors does not constitute a variance from the affidavit charging a sale of spirituous, vinous, and malt liquors.

Rash *v.* State, 13 Ala. App. 262, 69 So. 239.

**"Liquor"—"Whisky."**—In a prosecution for illegal sale of whisky, a way bill showing a shipment of liquor to defendant is immaterial, where it cannot be shown to be whisky.

State *v.* Ryan, 1 Boyce's (24 Del.) 23, 75 Atl. 869.

**"Bourbon"—"Rye."**—Where the owner of pool hall was accused of selling Bourbon whisky illegally, the fact that a keg of rye whisky was found in the basement of his pool hall was admissible in evidence and proper for consideration of the jury.

Baumgartner *v.* State (Ariz.), 178 Pac. 30.

**"Corn Liquor."**—Evidence that prosecuting witness purchased corn liquor from accused was sufficient to sustain a conviction under an indictment charging the unlawful sale of whisky, brandy, gin, beer, malt liquors, and mixtures thereof.

Mullins *v.* Commonwealth, 115 Va. 945, 79 S. E. 324.

**"Alcohol"—"Ethyl Alcohol."**—In a prosecution for the illegal sale of intoxicating liquors, designated in the indictment as "ethyl alcohol," as "alcohol" and "ethyl alcohol" are practically synonymous, there is no merit in the contention that in disclosing merely a sale of alcohol there was a failure of proof, and that the court erred in instructing the jury that "ethyl alcohol" is, as a matter of law, intoxicating liquor.

State *v.* Newlin (Ore.), 165 Pac. 225.

**"Whisky"—"Gin."**—"There was evidence from which the jury could infer that the intoxicating liquor sold was 'whisky,' as charged in the accusation, and not 'gin,' as contended by the plaintiff in error. The testimony of various witnesses for the state referred to the liquor sold as 'whisky,' and one witness said, 'it was gin whisky;' and, notwithstanding other testimony to the effect that the liquor was gin, there was no such variance between the proof submitted and the allegations in the accusation as to require the grant of a new trial."

Anderson *v.* State, 20 Ga. App. 747, 93 S. E. 237.

**"Intoxicating Liquor"—"Beer."**—In a prosecution for keeping intoxicating liquor with intent to sell, there was evidence that when the respondent's premises were searched large quantities of beer, whisky, and porter were found. The respondent objected to the evidence as to the beer, claiming the word used alone should not be understood as an intoxicating liquor. But whether or not beer was an intoxicating liquor, the evidence was proper, as evidence of finding a large quantity of beer, alone with whisky and porter, had a tendency to show the respondent's intention to sell these liquors, and that they were not kept for his own.

State *v.* Barr, 84 Vt. 38, 77 Atl. 914, 48 L. R. A., N. S., 302 N.

**"Bevo" and "Temperance Malt."**—Proof of sale of "Bevo" and "Temperance Malt," if proven to be drinks of like nature to spirituous liquors, wines, porter, ale and beer, and to be intoxicating in the common acceptation of that word, may be given in evidence under an indictment charging defendant in the language of the statute, with the un-

lawful sale, offer and exposure for sale of spirituous liquors, wines, porter, ale and beer, and drinks of like nature; and a count charging such drinks to be intoxicating is unnecessary.

State *v.* Henry, 74 W. Va. 72, 81 S. E. 569.

**Self-Serving Declarations.**

**Inquiry by Defendant as to Obtaining Liquor.**—An inquiry made by defendant of a third person as to whether he knew where liquor could be had is a self-serving declaration and is incompetent on the part of the defendant in a prosecution for sale of intoxicating liquor.

Dean *v.* State, 130 Ark. 322, 197 S. W. 684.

**Refusal to Sell to Other Persons.**—In a prosecution for the sale of intoxicating liquors without a license evidence that accused had refused to sell liquor to a particular individual is not admissible.

State *v.* Zagone, 135 La. 550, 65 So. 737.
State *v.* Fountain (Ia.), 168 N. W. 285.

Thus where the defendant offered to show by a witness that on the same day he was charged with selling whisky to the state's witness he declined to sell a bottle to him, there was no error in rejecting this testimony. It was not in conflict with the evidence for the state. Proof of a sale of whisky to one person is not rebutted by proof of refusal to sell to another. There might be many reasons why the defendant refused to sell to one, while selling to another.

Donaldson *v.* State, 3 Ga. App. 451, 60 S. E. 115.

**Sale by Defendant's Firm, Partner, Agent, Employee, etc.**—In support of an indictment charging an accused with having illegally sold intoxicating liquors, it was competent for the state to show that the sale was made by a commercial firm of which the accused was a member and with his consent.

State *v.* Hollingsworth, 134 La. 554, 64 So. 409.

Such a sale, whether made by the principal, or by his clerk, is all that is necessary to be proved to make out the offense, provided the sale made by the clerk is made in the

conduct of the business with which he is charged by the principal.

O'Donnell *v.* Commonwealth, 108 Va. 882, 62 S. E. 373.

Where in a prosecution for wrongful sale of intoxicating liquors without a license, the state showed that defendant was proprietor of a restaurant, the back of which was curtained off to form a private room and opened into another room, where quantities of intoxicating liquors, beer, and whisky were kept on ice ready to serve, evidence of sales made to customers in such back room by a negro, though not in defendant's presence, was admissible against him.

Carson *v.* State, 3 Ala. App. 206, 58 So. 88.

But it was error for the court to permit a witness, over proper objection, to testify that he bought whisky from a person other than the defendant, that lived on the same premises with the defendant, when the witness testified that he had never bought any whisky from the defendant, and that the defendant was not present and had no connection with the sale.

Holmes *v.* State, 12 Ga. App. 359, 77 S. E. 187.
Windom *v.* State, 19 Ga. App. 452, 91 S. E. 911.

And it was also error on trial of a defendant for selling liquor to a member of the military forces in uniform, to exclude testimony of defendant, who did not personally take the order, that he was told by the person who took the order that the liquor was ordered by, and was for, a woman, to whom he charged it.

Fetters *v.* United States (C. C. A.), 260 Fed. 142.

**Acts of Confederates, Co-Conspirators, etc.**—In prosecution for violation of the prohibition laws, after evidence had been introduced tending to show that defendant and another were confederates, illegally operating a still, testimony by a witness that defendant's confederate went with him to get a jug of whisky near the still is admissible as independent evidence, not in the nature of a confession, tending to prove the *corpus delicti.*

Walker *v.* State (Ala. App.), 81 So. 179.

**No Profit as Evidence of No Sale.**—In a prosecution for selling intoxicating liquors in prohibition territory, it is no defense that the seller made no money, or that the liquor did not belong to him; therefore evidence as to whether defendant got anything out of the sale was properly excluded.

Bird *v.* State (Tex. Cr. App.), 206 S. W. 844.

**To Show Character of Sale, as Interstate, etc.**—Where the defendant claimed that he acted only as agent for a foreign firm, and that the sale was an interstate transaction, evidence that defendant collected empty beer cases, containing beer when delivered, on orders taken by him, was relevant to show defendant's method of business.

State *v.* Gross, 76 N. H. 304, 82 Atl. 533.

**Evidence to Show Time and Place.**—On a trial for selling whisky in prohibition territory, the time and place where the prosecuting witness claimed to have bought the whisky from accused were directly in issue and properly shown.

Engman *v.* State, 77 Tex. Cr. App. 595, 179 S. W. 569.

And where a witness testified to a purchase of whisky from accused at a day subsequent to the indictment, a question asked him, whether he remembered being before the grand jury and whether he did not buy the whisky before that time and before the indictment was found, was neither incompetent, immaterial, nor irrelevant.

Shaneyfelt *v.* State, 8 Ala. App. 370, 62 So. 331.

Where the state's witness did not definitely locate the date of the alleged sale, and testified that he only obtained whisky from defendant once, the court should have permitted defendant to introduce witnesses to substantiate his own testimony that the sale occurred in another county.

Mosley *v.* State, 107 Miss. 158, 65 So. 124.

**Witness Receiving Money to Buy Liquor and Returning with Liquor.**—In a prosecution for violating the prohibition law, testimony of a police officer that he gave a person $1 to see if he could buy some whisky, and that he went and returned with a bottle of whisky and another

bottle half full, was admissible in connection with testimony of the person referred to as to having delivered the whisky.

Grusin *v.* State, 10 Ga. App. 149, 75 S. E. 350.

**Witness May Testify Where He Got Liquor.**—Where defendant was accused of furnishing witness liquor to be sold for their mutual benefit, it was proper to ask witness where he got the liquor; such testimony being relevant and material under the charge.

Quinn *v.* State, 15 Ala. App. 635, 74 So. 743.

## VI. Admissibility, Relevancy and Competency.

1. RELEVANCY MUST APPEAR.

Perhaps in no other class of cases is so much rambling, disconnected, irrelevant testimony sought to be introduced as in prosecutions under prohibitory laws. From a study of the cases it would seem that lawyers generally are under the impression that some peculiar rule as to relevancy and competency obtains in prosecutions of this character. It is hardly necessary to state that in the absence of statute creating some peculiar or different rule, the principles relating to relevancy and competency are the same in this class of cases as elsewhere.

Pine *v.* Commonwealth, 121 Va. 812, 93 S. E. 652.
State *v.* Walters, 178 Ia. 1108, 160 N. W. 821, 822.
Henley *v.* State, 3 Ala. App. 215, 58 So. 96.
Bird *v.* State (Tex. Cr. App.), 206 S. W. 844.
Sapp *v.* State, 2 Ala. App. 190, 56 So. 45.
Loudermilk *v.* State, 4 Ala. App. 167, 58 So. 180.

In a prosecution for violation of the prohibition law, where two witnesses had testified to buying liquor from a third person, testimony of such third person that the witnesses had broken into his house and stolen the liquor was properly excluded as irrelevant.

Pine *v.* Commonwealth, 121 Va. 812, 93 S. E. 652, 653.

In a prosecution for unlawfully selling liquor, where the prosecuting witness testified that he drank no beer in the house of defendant, that he took it away, and that neither he nor his daughter drank it, the exclusion of evidence as

to who did drink the beer, on the ground that it was irrelevant and immaterial, was not error.

State *v.* Walters, 178 Ia. 1108, 160 N. W. 821, 822.

In a prosecution for violation of the law prohibiting the sale of intoxicating liquors in prohibition territory, evidence as to the number of defendant's family held immaterial.

Bird *v.* State (Tex. Cr. App.), 206 S. W. 844.

A grocer on trial for maintaining a liquor nuisance is not entitled to show the amount of his weekly sales in the grocery business. Such evidence has no probative force in support of his innocence.

State *v.* Fortin, 106 Me. 382, 76 Atl. 896, 21 Ann. Cas. 454.

In a trial for violating the prohibition laws, accused was not entitled to show on cross-examination of two of the state's witnesses that a man could drink a dozen and a half or two dozen bottles of beer in a day, in explanation of the quantity of beer found in accused's room; he having given uncontradicted testimony as to how much he could drink.

Loudermilk *v.* State, 4 Ala. App. 167, 58 So. 180.

In a prosecution for a violation of the prohibition law, permitting a state's witness to answer, over objection, whether he know of any whisky being carried between two towns prior to a certain date, was prejudicially erroneous, where it was not shown that the whisky alleged to have been sold by plaintiff was any part of that which was the subject of the inquiry or that the defendant had a knowledge of or agency in its carriage.

Henley *v.* State, 3 Ala. App. 215, 58 So. 96.

In a trial for violating the prohibitory law, evidence as to how many other warrants were issued as a result of a visit by the state's witness to a certain place on a particular occasion and at how many other places he purchased whisky, was properly excluded.

Sapp *v.* State, 2 Ala. App. 190, 56 So. 45.

**Second Conviction.**—In trial for second violation of the prohibitory liquor law, it is error to admit proof of a prior conviction when judgment of such conviction has been appealed and execution of such judgment has been legally suspended and appeal is undetermined.

McAlester *v.* State (Okla. Cr. App.), 180 Pac. 718.

In trial for second violation of prohibitory liquor law, where the only evidence of the former violation charged was a conviction from which an appeal was taken, the judgment and conviction suspended, and the appeal undetermined, it was insufficient to sustain a conviction.

McAlester *v.* State (Okla. Cr. App.), 180 Pac. 718.

In prosecution for second violation of prohibitory liquor laws, where record evidence of former conviction of one of similar name as defendant is offered, it is not necessary for state to prove that person named in such former conviction, and defendant on trial is one and the same person.

Files *v.* State (Okla. Cr. App.), 182 Pac. 911.

2. STATUTORY REGULATION.

The provision of the Fuller Act (Act Sp. Sess. 1909, p. 90, § 29½ regulating the admissibility of evidence under an indictment for violation of the prohibition law, was not affected by subsequent legislation regulating the liquor traffic.

Spigener *v.* State, 11 Ala. App. 296, 66 So. 896.

3. OFFENSES CHARGED IN ALTERNATIVE.

Where one count in an indictment charges the defendant with selling intoxicating liquor to a person named and another count charges him with keeping such liquor on hand at his place of business, evidence tending to establish his guilt under one count may be considered by the jury, though entirely irrelevant to the other count.

Reddick *v.* State, 15 Ga. App. 437, 83 S. E. 675.

And where the indictment charges in one count a sale and in another that the accused sold, offered for sale, or otherwise disposed of intoxicants, evidence of both offenses was admissible.

Thames *v.* State, 10 Ala. App. 210, 64 So. 648.

In prosecution for violation of prohibition law, where the affidavit charged that defendant "sold, offered for sale, kept for sale, or otherwise disposed of spirituous, vinous, or malt liquors," and the state had proved sale was made, it was not error to permit evidence of defendant's possession of whisky at a different time and place, the sale and possession being charged in the alternative, though the state could be compelled to elect upon which charge it would rely.

Howze *v.* State (Ala. App.), 75 So. 624.

4. RES GESTAE.

In cases of this character proof of defendant's having prohibited liquor, ordering it, and all similar facts and acts at or about the time of the transaction in question, are admissible in evidence for the purpose of throwing light on the transaction and to show the identity of the defendant as the guilty party, and to connect him with the commission of the offense.

McIntosh *v.* State, 140 Ala. 137, 37 So. 223.
Untreinor *v.* State, 146 Ala. 133, 41 So. 170.
Guarreno *v.* State, 148 Ala. 637, 42 So. 833.
Scott *v.* State, 150 Ala. 59, 43 So. 181.
Sadler *v.* State, 165 Ala. 109, 51 So. 564.
Smith *v.* State, 2 Ala. App. 216, 56 So. 39.

Where, in a prosecution for selling fermented cider in violation of the local option law, defendant denied that the cider was fermented and claimed that its intoxicating qualities were due to whisky being mixed with it subsequent to the sale, evidence that the parties who bought the cider had whisky in their possession was admissible as part of the *res gestæ* in support of defendant's claim.

People *v.* Emmons, 178 Mich. 126, 144 N. W. 479, Ann. Cas. 1915D, 425.

Where the witness went twice to defendant before getting the liquor, a statement of defendant the first time that the whisky would be $1.25 a pint was admissible as part of the *res gestæ*.

Berry *v.* State (Tex. Cr. App.), 203 S. W. 901.

5. CIRCUMSTANTIAL EVIDENCE.

Circumstantial evidence is admissible to prove offenses against the liquor laws as in other cases, and the connection of the accused with an illegal sale of intoxicants may be established by circumstances as well as by direct proof.

Gales v. State, 14 Ga. App. 450, 81 S. E. 364.
Kerney *v.* State, 21 Ga. App. 500, 94 S. E. 625.

Thus where there was direct evidence of a sale of intoxicating liquors, which would have authorized the conviction of the accused, it was not error to admit proof of circumstances which apparently indicated that the sale of intoxicating liquors was being conducted in a house under the control of the defendant and occupied by him as a residence, although there was no direct evidence of his presence at the house at the time that unusual quantities of liquor were being taken therefrom.

Gales *v.* State, 14 Ga. App. 450, 81 S. E. 364.

The court did not err in admitting in evidence a certain envelope the defendant had given to the witness, bearing the address of the concern from which the whisky was shown to have been ordered by the defendant in the witness' name.

Kerney *v.* State, 21 Ga. App. 500, 94 S. E. 625.

Neither did the court err in admitting in evidence a piece of pasteboard, torn from a carton found in the defendant's residence, by a witness, bearing the name of the person in whose name the defendant was charged with having ordered the whisky.

Kerney *v.* State, 21 Ga. App. 500, 94 S. E. 625.

Testimony as to the existence of a push button in a store, to which was attached a wire leading to the room of the defendant in the same building, was relevant, in view of testimony that people were seen "going in and out of that store appearing to be drinking," as tending to sustain the theory that considerable quantities of intoxicating liquors were stored in this building in the room of the defendant and that she was the custodian thereof, and therefore of the particular intoxicants found in her room.

Littleton *v.* State, 20 Ga. App. 746, 93 S. E. 230.

6. CONFESSIONS AND ADMISSIONS.

Permitting a witness in a prosecution for a violation of the prohibition law to testify as to a confession of the defendant was proper, after the court had determined that its predicate was proper.

Henley *v.* State, 3 Ala. App. 215, 58 So. 96.

If a defendant accused of violating the prohibition laws by selling liquor to a certain person stands mute while the charge is being made in his presence and hearing that "he sold the whisky" to that person, it is an inculpatory admission in the nature of a confession directly relating to the facts and circumstances of the crime and was therefore *prima facie* involuntary and inadmissible.

Braxton *v.* State (Ala. App.), 82 So. 657.

A note found on top of 4½ cases of beer found in defendant's room, reading as follows: "Frank: Please put this beer in the lounge and make Elvira burn the boxes and go to sleep and don't talk. B."—is not admissible in evidence where it is not shown that it was written by the defendant or at his instance, or that he had anything to do with the placing of the note there, other than evidence to the effect that he had stolen the beer.

Edmunds *v.* State (Ala. App.), 81 So. 847.

**Communications between Husband and Wife.**—In a prosecution for unlawfully selling liquor, evidence of an officer that at the time of defendant's arrest at his home, his wife stated in his presence that she had tried to keep him up and he had continued bootlegging, and she was through, was not inadmissible on the ground that a wife may not testify against her husband since the rule of privilege does not cover conversation between husband and wife being testified to by a third person who overhears them.

State *v.* Randall, 170 N. C. 757, 87 S. E. 227, Ann. Cas. 1918A, 438.

7. INCRIMINATING QUESTIONS—PRIVILEGE.

In a prosecution for unlawfully selling intoxicating liquors, an order of immunity entered by the circuit court against

prosecution on account of any testimony given before the grand jury in a separate investigation as to bribery of the state's attorney did not protect defendant, notwithstanding the offenses for which he was being prosecuted were those the state's attorney had been bribed not to prosecute and of which evidence had been given at the bribery investigation.

People *v.* Goldberg, 287 Ill. 238, 122 N. E. 530.

See also, under this same statute, People *v.* Argo, 237 Ill. 173, 86 N. E. 679.

A witness, in a prosecution for having in possession intoxicating liquors, who made no claim of privilege upon the ground that his testimony might incriminate him or upon any other ground, was not "compelled" to testify within the meaning of Laws 1915, p. 9, § 13, providing that no person shall be prosecuted or punished on account of any transaction or matter or thing concerning which he shall be compelled to testify in such a prosecution.

State *v.* Whalen (Wash.), 183 Pac. 130.

Where a witness, in a prosecution for being in unlawful possession of intoxicating liquors, made no claim of privilege upon the ground that his testimony might incriminate him, sureties on his bail bond, he having been arrested by reason of having given testimony that incriminated him, cannot claim the privilege for him in a proceeding to forfeit bail, although Laws 1915, p. 9, § 13, provide that no person shall be prosecuted as to matter concerning which he is compelled to testify in such a prosecution.

State *v.* Whalen (Wash.), 183 Pac. 130.

8. EVIDENCE AT FORMER TRIAL.

The court did not abuse its discretion, on the trial of a charge of illegal selling, by excluding the testimony of an absent witness given on a former trial before a justice of the peace where the facts suggested a lack of diligence to procure the attendance of such witness.

Hicks *v.* State (Ark.), 215 S. W. 685.

In a contempt proceeding for violation of a decree enjoining the sale of liquor and the maintenance of a nuisance, the defendant could not complain of the admission of testi-

mony, which had formerly been taken and transcribed in the criminal proceeding, where he had stipulated that the evidence might be so used.

State *v.* Kurent (Kan.), 184 Pac. 721.

9. FORMER ACQUITTAL OR CONVICTION.

Where there was evidence of a sale to one of the alleged purchasers, evidence that defendant had been acquitted of the charge of such sale was admissible.

Amonett *v.* State (Tex. Cr. App.), 204 S. W. 438.

A sale for which defendant had been tried and convicted, would constitute no violation of the law.

Amonett *v.* State (Tex. Cr. App.), 204 S. W. 438.

Rejection of testimony that the same liquors were involved in a prior prosecution and acquittal, though such testimony was competent, was not prejudicial, where a number of other witnesses testified to the same effect as witness would have done, if permitted.

Lemon *v.* Commonwealth, 171 Ky. 822, 188 S. W. 858.

But where there were two sales of the same whisky, one by defendant to a stool pigeon, and one by the stool pigeon to the officer who employed him, evidence that the stool pigeon had been indicted for making the sale to the officer, and convicted on his plea of guilty, was inadmissible, not being a relevant or material fact on the issues on trial.

Canales *v.* State (Tex. Cr. App.), 215 S. W. 964.

Where, in a prosecution for taking orders for the sale of intoxicants in nonlicense territory, the state's evidence covered all orders taken within a year prior to the date of the prosecution, an acquittal was a bar to any subsequent prosecution based upon orders taken within that period.

Sanders *v.* State, 115 Ark. 376, 171 S. W. 142.

10. INDICTMENT OR CONVICTION FOR DIFFERENT OFFENSES.

It is error to require a defendant, charged with violating the liquor law, to testify that he had been previously indicted for a similar offense.

Shepherd *v.* State, 76 Tex. Cr. App. 307, 174 S. W. 609.

**Where General Reputation in Issue.**—Where accused, charged with selling whisky in a prohibition county, filed his sworn plea for suspension of sentence, if convicted, he thereby put his general reputation in issue, and the state could show that he had been indicted for various offenses, including unlawful sales of liquor in prohibition territory, and that indictments other than the one under which he was being tried, were pending against him.

Martoni *v.* State, 74 Tex. Cr. App. 90, 167 S. W. 349.

**Second Conviction Carrying Heavier Penalty.**—But when a person under prosecution for a second offense carrying a heavier penalty, is charged in the information under one name, it is not error to admit evidence of a former conviction under a different name for the like offense, when the proof is clear that the defendant is one and the same person.

Wilkins *v.* State (Fla.), 78 So. 523.

In a prosecution under Initiative Measure No. 3 (Laws 1915, p. 6) § 8, providing that it shall be unlawful for a physician, after he has been convicted a second time of a violation of any of the provisions of the act, to thereafter write any prescriptions for the furnishing, delivery, or sale of intoxicating liquor, it was not error to permit the state to show that defendant had been three times convicted of violating the prohibition law.

State *v.* Emonds (Wash.), 182 Pac. 584.

**Conclusiveness of Record of Former Conviction.**—In prosecution for permitting liquor to be kept upon premises for the purpose of sale or other disposition, where previous conviction was charged, defendant was not entitled to go behind the record of the former conviction and introduce evidence to show that he was not guilty of the charge upon which that conviction was based.

State *v.* Dereiko (Wash.), 182 Pac. 597.

11. SCIENTER AND INTENT.

When, by statute, an act is made an offense under the liquor laws without regard to the intent with which it is done, evidence on the subject of intent, is not material, and on trial

of one charged with the violation of such statute there is no error in rejecting such evidence.

State *v.* Ross, 70 W. Va. 549, 74 S. E. 670, 39 L. R. A., N. S., 814n.
Bacot *v.* State, 94 Miss. 225, 48 So. 228, 21 L. R. A., N. S., 524n.
O'Donnell *v.* Commonwealth, 108 Va. 882, 62 S. E. 373.

Thus where aside from an exception in the case of pharmaceutical preparations, the law punished the fact of selling intoxicants regardless of the intent of the seller; evidence that the liquor was represented to accused to be nonintoxicating and that he believed it to be so was inadmissible.

Bacot *v.* State, 94 Miss. 225, 48 So. 228, 21 L. R. A., N. S., 526n.

In such cases, proof of the sale as charged and the intoxicating character of the liquor is all that is required. Intent is conclusively presumed when the sale is proved.

Montgomery *v.* State, 11 Okla. Cr. App. 415, 142 Pac. 1048.

**Good Faith as a Mitigating Circumstance.**—But while intention, good faith, and want of knowledge that the liquor sold was intoxicating are not defenses, such elements do have a bearing on severity of punishment.

Nies *v.* District Court (Ia.), 161 N. W. 316.

**How Intent, etc., Shown When Relevant.**—In prosecutions for illicit dealing in intoxicating liquors, and crimes committed for profit, it is competent to prove intent, where the intent is material, by showing matters of like nature before and after the offense, such crimes having been committed with deliberation, in defiance of law, and for the motive of making profit thereby.

State *v.* Simons (N. C.), 100 S. E. 239.

Proof of previous acts of the same kind is admissible for the purpose of proving defendant's guilty knowledge or intent.

People *v.* Bullock, 173 Mich. 397, 139 N. W. 43.

Thus in a prosecution for unlawfully transporting liquor into a prohibition state by automobile, evidence of a prior trip made by the same persons between the same places a few days before, and connected with the one charged, held admissible, being a part of the same scheme, and as showing motive and intent.

Malcolm *v.* United States (C. C. A.), 256 Fed. 363.
See *contra*: Ford *v.* United States (C. C. A.), 259 Fed. 552.

In general, it is permissible to show any facts and circumstances legitimately bearing upon the question of intent or guilty knowledge, as the arrangement and adaptation of the premises to the illegal business, the acts of the accused at the time of his arrest, etc.

Overton *v.* State, 11 Okla. Cr. App. 1, 140 Pac. 1135.
State *v.* Billingsley, 99 Wash. 445, 169 Pac. 845.
State *v.* Baldwin (N. C.), 100 S. E. 348.
State *v.* Simons (N. C.), 100 S. E. 239.

In prosecution for unlawfully keeping liquor at a drug store, evidence that accused also had a warehouse with paraphernalia for putting up whisky for sale and that large quantities of whisky were found in the warehouse, is admissible as showing the intent with which accused possessed liquors at the drug store.

State *v.* Billingsley, 99 Wash. 445, 169 Pac. 845.

In Bondurant *v.* State, 14 Okla. Cr. App. 388, 171 Pac. 488, it was held that such testimony was admissible, where one was charged with having possession of liquor with intent to violate the provisions of the prohibitory liquor law, for the purpose of showing the unlawful intent.

Balfe *v.* People (Colo.), 179 Pac. 137, 138.

In a prosecution for having intoxicating liquor in his possession for the purpose of sale, the jury might consider that, when officers were proceeding to take and carry off the liquor which defendant had brought to his brother's residence, the defendant, who had escaped, returned and locked his car which the officers were about to use.

State *v.* Baldwin (N. C.), 100 S. E. 348.

In prosecution for having possession of intoxicating liquor for purpose of sale, where more than one gallon of liquor was found in defendant's possession at time of arrest, creating presumption that liquor was for purpose of sale, under Pub. Laws 1913, c. 44, § 2, evidence of defendant's denial of possession, his attempt to shoot officer making arrest, and his being found later making a still is competent in support of the presumption.

State *v.* Simons (N. C.), 100 S. E. 239.

In prosecution for having possession of intoxicating liquor for purpose of sale, evidence that, two months after such liquor had been found in defendant's possession, defendant had constructed a new still, and was working on another, was competent.

State *v.* Simons (N. C.), 100 S. E. 239.

In determining the purpose for which accused sold Jamaica ginger, the jury must consider all the evidence concerning the facts and circumstances surrounding the sale, including the amount sold and statements made by the purchaser, as well as any actual knowledge the accused had.

State *v.* Hastings, 2 Boyce's (25 Del.) 482, 81 Atl. 403.

In a prosecution for violating the prohibition law by selling Jamaica ginger, evidence that he sold the liquor as medicine in good faith was properly excluded, where defendant had made no attempt to comply with the provisions of Const. art. 22, or the statute regulating the handling of intoxicating liquor for medicinal purposes.

McLean *v.* People (Colo.), 180 Pac. 676.

**The Carrying Away of Empty Barrels from Premises.**—In a prosecution for having liquor with intent to sell, evidence of a truckman that he carried away empty barrels similar to those filled with liquor found in possession of respondent held admissible to show intent.

State *v.* Barr, 84 Vt. 38, 77 Atl. 914, 48 L. R. A., N. S., 302n.

**Inquiries as to Character of Liquor, Legality of Delivery, etc.**—In a prosecution for the illegal sale of vinous liquors, not for medicinal or sacramental purposes, under

the local option statute (24 Del. Laws, c. 65) accused may show in defense any effort made by him to ascertain whether the sale of the liquor sold by him was vinous liquor prohibited by law, and if he had reasonable grounds to believe and in fact did believe that the liquor he sold was not vinous, it would be a good defense; the burden being upon him, however, to show clearly and satisfactorily that a reasonable and careful man, anxious to obey the law, would have believed under the circumstances that the liquor sold was not vinous, and that accused did in fact entertain such belief (adopted by a divided court.)

State *v.* Coverdale, 1 Boyce's (24 Del.) 555, 77 Atl. 754.

In a prosecution against defendant express company for delivering whisky not for personal use, it was competent to permit question to be asked of defendant's agent relative to his inquiries about the propriety of delivering the whisky, and what information he received.

Adams Exp. Co. *v.* Commonwealth, 177 Ky. 159, 197 S. W. 630.

**Expectation of Meeting Owner with Trucks to Receive the Liquor.**—Testimony that the owner of whisky was expected, by those taking it by boat from Missouri down the Mississippi, to meet them at one of two points in Tennessee, with two trucks on which to unload it, was evidence that it was intended for transportation into Tennessee, for permanent stay there, in violation of Act March 3, 1917, § 5 (Comp. St. 1918, § 8739a).

Bishop *v.* United States (C. C. A.), 259 Fed. 159.

Statement of helper, in presence of owner of boat, and not questioned by him, when officers came on board and asked the destination of whisky thereon, that they expected the owner of the whisky to meet them at one of two points in Tennessee with two trucks on which to unload it, is admissible against the boat owner, prosecuted for transporting the whisky into Tennessee in violation of Act March 3, 1917, § 5 (Comp. St. 1918, § 8739a).

Bishop *v.* United States (C. C. A.), 259 Fed. 159.

**Parol Evidence as to Check Given in Payment.**—In a prosecution for introducing intoxicating liquor into that part of Oklahoma which was formerly Indian Territory, in violation of Act March 1, 1895, c. 145, where the connection of defendant with the purchase and shipment of the liquor was clearly and indisputably shown, and it was proven without contradiction that one of the defendants gave his check on an Oklahoma bank in payment for the liquor, the admission of oral testimony as to the amount of the check and the bank on which it was drawn was harmless.

De Moss *v.* United States, 162 C. C. A. 259, 250 Fed. 87.

12. POSSESSION AS EVIDENCE.

**Possession as Evidence of Unlawful Manufacture.**—In a prosecution of a defendant, charged with violation of the law prohibiting manufacture of intoxicating liquors, as accessory after the fact, evidence that defendant took two bottles and a jug from under a public road culvert shortly before the still was discovered, is admissible.

Higgins *v.* State (Ark.), 206 S. W. 440.

In a prosecution for manufacturing alcoholic liquors, testimony by witnesses that a negro man had come out of defendant's house shortly before she was arrested with "Choc" beer, which was intoxicating, which he sold to witnesses, was competent as tending to show that "Choc" beer was made by some one in the house of defendant.

Patterson *v.* State (Ark.), 215 S. W. 629.

**Possession as Evidence of Unlawful Possession or Transportation.**—On trial of a person charged with having unlawful possession of intoxicating liquor with intent to sell the same, the quantity and kind of liquor, the size and number of packages, the occasion upon and circumstances under which it is found, the conduct and demeanor of the accused at the time and prior to the discovery, and any and all other circumstances reasonably calculated to throw light on the purpose and intent with which the liquor was possessed, are admissible in evidence, and are all entitled to consideration by the jury in arriving at a verdict.

Overton *v.* State, 11 Okla. Cr. App. 1, 140 Pac. 1135.
Kirk *v.* State, 14 Ala. App. 44, 70 S. E. 990.

Defendant's declaration with reference to the liquor found and testimony tending to show concealment inconsistent with keeping for personal use is admissible.

Kirk *v.* State, 14 Ala. App. 44, 70 S. E. 990.

In a prosecution for having liquor in possession with the intent to sell the same, the quantity in possession is a circumstance which may be considered in determining the existence or absence of the intent to sell.

Conley *v.* State (Okla. Cr. App.), 179 Pac. 480, 483.
Billingsley *v.* State, 4 Okla. Cr. App. 597, 113 Pac. 241.
Watson *v.* State, 8 Ala. App. 414, 62 So. 997.

In a prosecution for keeping intoxicating liquors in a drug store with intent to sell unlawfully, it is not error to admit evidence as to quantity and kind kept on hand, notwithstanding the druggist is the sole judge under the law of the kind and quantity of intoxicating liquors the needs of his business require, as it may be a material link in the chain of circumstances tending to show his guilt.

State *v.* McCaskey, 97 Wash. 401, 166 Pac. 1163.

Evidence that a suit case, seized while in the possession of defendant when arrested, and opened after a warrant was issued charging him with violation of the law regulating the transportation of ardent spirits, contained liquor, is admissible.

Lucchesi *v.* Commonwealth, 122 Va. 872, 94 S. E. 925.

In a prosecution for carrying around on defendant's person and in a vehicle intoxicating liquors with intent to sell and dispose of the same by gift or otherwise, that defendant carried four gallons of liquor in a suit case was competent on the question of intent.

State *v.* Butler (Ia.), 173 N. W. 239.

In prosecution for unlawful possession of intoxicating liquor, where exhibits of bottles of liquor were offered in evidence by state, which had been found and seized when nobody was in possession of premises, it was within trial court's discretion to admit exhibits and to allow state to subsequently connect defendant with their possession.

High *v.* State (Okla. Cr. App.), 180 Pac. 572.

**Possession as Evidence of Unlawful Sale.**—Proof of the possession of whisky or other intoxicating liquor by the accused at or about the time of the alleged sale is admissible.

Bishop *v.* State, 18 Ga. App. 714, 90 S. E. 369.
State *v.* Boynton, 155 N. C. 456, 71 S. E. 341.
Dean *v.* State, 130 Ark. 322, 197 S. W. 684.
Jackson *v.* State (Tex. Cr. App.), 200 S. W. 150.
Mills *v.* State, 11 Ga. App. 383, 75 S. E. 266.
Harwell *v.* State, 12 Ala. App. 265, 68 So. 500.
Martoni *v.* State, 74 Tex. Cr. App. 90, 167 S. W. 349.
Wooten *v.* State, 17 Ga. App. 333, 86 S. E. 740.
Cooper *v.* Gadsden, 10 Ala. App. 609, 65 So. 715.
Holmes *v.* State, 12 Ga. App. 359, 77 S. E. 187.
Moore *v.* State, 12 Ala. App. 243, 67 So. 789.
D'Amico *v.* State (Del.), 102 Atl. 78.

In general, the circumstances under which liquors are kept and that they are kept at other places may be shown.

State *v.* Boynton, 155 N. C. 456, 71 S. E. 341.

Evidence that prior to the sale charged, defendant had whisky in his possession at different places in the city and that at the places under his control whisky was being sold and drunk, and that persons who had been in his places of business had seen whisky and beer therein, is admissible to show that defendant had whisky on hand in prohibited territory and was prepared to make the illegal sale charged by the indictment.

State *v.* Boynton, 155 N. C. 456, 71 S. E. 341.

Testimony on a prosecution for engaging in the business of selling liquor in prohibition territory, that on one occasion when witness bought whisky of defendant he had on hand 5 or 6 quarts and on another occasion 7 or 8 pints is admissible.

Jackson *v.* State (Tex. Cr. App.), 200 S. W. 150.

In the trial of one charged with the sale of intoxicating liquor, it was not error to allow the introduction in evidence of a number of quart bottles containing whisky and a number of empty bottles which had contained whisky, all of the bottles having been found in the house where the sale was alleged to have taken place.

Holmes *v.* State, 12 Ga. App. 359, 77 S. E. 187.

"There was no error in admitting testimony, over objection of counsel for the defendant, to the effect that the defendant's house was searched and several bottles of whisky were found therein, notwithstanding the fact that the whisky itself was not produced in court. Proof as to the possssession of whisky by the defendant at or about the time of the alleged sale tended to corroborate the direct evidence showing a sale, and this testimony was not inadmissible because irrelevant."

Bishop *v.* State, 18 Ga. App. 714, 90 S. E. 369.

In a prosecution for violating the prohibition law, a witness' testimony that, when he bought whisky from defendant he saw three bottles of beer in defendant's store, was admissible as *prima facie* evidence under the express provisions of Acts 1909, p. 64, § 4, that defendant, who had no liquor license kept liquors for sale contrary to law, and was proper to be considered in connection with evidence tending to show sale of whisky to the witness.

Moore *v.* State, 12 Ala. App. 243, 67 So. 789.

In a prosecution for selling liquor without license and contrary to law, evidence of the finding of whisky concealed under a window in defendant's bedroom in connection with other evidence as to the method of its concealment and as to a sale by defendant, was admissible as tending to show the keeping of liquors for sale, and thereby corroborating the evidence on the main issue.

Harwell *v.* State, 12 Ala. App. 265, 68 So. 500.

In a prosecution for illegal sale of intoxicating liquors in the barrel, it was permissible for a witness to say that shortly before the sale there was no barrel of liquor at the place at which defendant delivered it, as preliminary to showing that after the alleged sale there was a barrel at such place.

D'Amico *v.* State (Del.), 102 Atl. 78.

Evidence concerning whisky taken from the defendant immediately prior to the sales for which he was being prosecuted was admissible as tending to show what defendant's business was at the time of the sales.

Dean *v.* State, 130 Ark. 322, 197 S. W. 684.

A witness for the state having testified that he bought intoxicating liquor from the accused a large number of times during the two years immediately preceding the finding of the bill of indictment, it was not erroneous to admit, in corroboration of this evidence, the testimony of another witness that during this period he had seen the accused several times with his pockets loaded with whisky.

Mills *v.* State, 11 Ga. App. 383, 75 S. E. 266.

On a trial for selling whisky in violation of a city prohibition ordinance, evidence that just prior to the leaving of a bottle of whisky where the prosecuting witness received it accused's pockets were bulging with something like the bulk of bottles was admissible as a part of the circumstance culminating in the sale testified to.

Cooper *v.* Gadsden, 10 Ala. App. 609, 65 So. 715.

On a trial for selling whisky in a prohibition county, evidence that officers under a search warrant found in accused's trunk about 76 pint bottles of whisky was admissible.

Martoni *v.* State, 74 Tex. Cr. App. 90, 167 S. W. 349.

Evidence that a large quantity of whisky, in pint bottles, belonging to the defendant, was discovered in his trunk was admissible on his trial for the offense of selling intoxicating liquors.

Wooten *v.* State, 17 Ga. App. 333, 86 S. E. 740.

**Nearness in Point of Time.**

See also ante, "Scope of Inquiry,"

The possession of intoxicating liquors by the defendant at or about the time of the alleged sale is a circumstance of corroboration of more or less weight according to its nearness or remoteness to the matter under investigation.

Wooten *v.* State, 17 Ga. App. 333, 86 S. E. 740.

Evidence that there had been found on defendant's premises, about a year before the alleged sale about 2½ pints of whisky, several old bottles which had previously contained whisky, two large cartons which had been opened, and about

15 old bottles in a loft, was irrelevant; yet the error in the admission of such testimony did not require the grant of a new trial, there being positive evidence authorizing a finding that the sale, as alleged in the indictment, had taken place.

Jackson *v.* State, 12 Ga. App. 480, 77 S. E. 651.

Testimony that on the day following the alleged sale accused had in his possession liquor of the same kind and in similar containers, was admissible.

Porras *v.* State, 19 Ariz. 131, 166 Pac. 288.

Evidence that when arrested on the second day after the sale, defendant had an unopened pint of whisky on his person, was admissible as a circumstance to show that he made the sale as charged.

McCuen *v.* State, 75 Tex. Cr. App. 108, 170 S. W. 738.

Since precise time at which crime committed need not be stated in an information it is not error, in a prosecution for keeping intoxicating liquors in a drug store with intent to sell unlawfully, to admit evidence as to result of search of defendant's premises by police officers four days after date fixed as that of commission of crime.

State *v.* McCaskey, 97 Wash. 401, 166 Pac. 1163.

The testimony of defendant and his witnesses being in direct contradiction of that for the people on prosecution for violation of prohibition law, evidence of the finding of liquors on the premises several days after date of alleged offense was admissible in corroboration and on credibility.

Lakomy *v.* People (Colo.), 178 Pac. 571.

Evidence of a search of defendant's shop made by the officers thirteen days after the alleged unlawful sale, and of the whisky and empty bottles then found there, was admissible, as tending to show that intoxicating liquor had been kept there for illegal traffic, and as connecting defendant in ownership with the whisky sold at the time alleged.

State *v.* Legendre, 89 Vt. 526, 96 Atl. 9.

On the trial of one charged with illegally selling whisky it is not error to admit evidence that the house where the

accused lived was searched by an officer subsequently to the day on which the alleged sale was made, and that bottles of whisky and empty bottles which had contained whisky were found therein. Cole *v.* State, 120 Ga. 485, 48 S. E. 156; Taylor *v.* State, 5 Ga. App. 237, 62 S. E. 1048. The fact that the direct evidence was of a sale some months previous to the search of the house where the accused lived would only affect the weight or probative value of the circumstances that whisky and empty whisky bottles were found in the house; and the further fact that the accused was a married woman living with her husband in the house where the whisky and empty whisky bottles were found would not render the evidence inadmissible, where the positive evidence showed that she, and not her husband had previously sold the whisky.

Beaty *v.* State, 7 Ga. App. 327, 66 S. E. 808.
Craig *v.* State, 9 Ga. App. 233, 70 S. E. 974.

Such evidence seems to be admissible to show guilty knowledge or intent, and it is error to admit it for other purposes.

Weinberg *v.* State, 81 Tex. Cr. App. 306, 194 S. W. 1116.
Phillipps *v.* State (Okla. Cr. App.), 183 Pac. 521.
State *v.* O'Toole (Me.), 108 Atl. 99.

Admission of testimony that the sheriff took from defendant's residence some beer, wine, and whisky some time subsequent to alleged sale was reversible error.

Weinberg *v.* State, 81 Tex. Cr. App. 306, 194 S. W. 1116.

In a prosecution for unlawful possession of intoxicating liquor, it was error to permit prosecution to prove that three or four weeks after filing of information the officers found intoxicating liquors at same place.

Phillips *v.* State (Okla. Cr. App.), 183 Pac. 521.

In prosecution for having possession of intoxicating liquor, with intent to unlawfully sell it, the discretion of the trial judge was not wrongly exercised in admitting evidence that some 18 months before the date alleged in the complaint persons were seen going in and coming out of defendant's place, and that on one day about three months

later defendant had intoxicating liquor in her possession; the jury being instructed that the evidence was competent only in relation to the intent with which defendant kept the liquor in question.

State *v.* O'Toole (Me.), 108 Atl. 99.

**Liquor Found by Means of Unlawful Search.**—In a prosecution for unlawfully keeping intoxicating liquor for sale, where the sheriff searched the defendant's store after 6 o'clock, but while it was still open, testimony that the defendant agreed to let him search the upstairs room, but refused to open a little room at the back of the store where the liquor was subsequently found, was not inadmissible on the ground that the defendant had a right to refuse a search after 6 o'clock, since Gen. Acts Sp. Sess. 1909, p. 77, § 22, subd. 7 permits such a search where the premises are open and the room was a part of the store premises.

Patterson *v.* State, 8 Ala. App. 420, 62 So. 1023.

Even if it was error to allow a witness to swear, "We had a search warrant to search Gene Page's house for liquor," the admission of this evidence could hardly have affected the jury and caused them to find a verdict of guilty, if without this evidence they would not have done so. Moreover, evidence obtained by an illegal and unauthorized search is admissible against the defendant. Calhoun *v.* State, 144 Ga. 679, 87 S. E. 893. In addition, this ground of the motion states that when this testimony was objected to there was "no ruling by the court." A failure to renew and insist upon the motion to reject the evidence will be considered as a waiver of the objection. Lindsay *v.* State, 138 Ga. 818, 76 S. E. 369, and cases cited; Thurman *v.* State, 14 Ga. App. 543, 81 S. E. 796, and cases cited.

Page *v.* State (Ga.), 99 S. E. 55.

**Return on Search Warrant.**—Where the sheriff had seized a large quantity of liquor under a search warrant against the defendant, and could not remember the description of it without reference to his return, which he knew to be correct when he made it, the return was admissible, both as a means of refreshing his recollection and as documentary evidence.

Patterson *v.* State, 8 Ala. App. 420, 62 So. 1023.

13. POSSESSION OF PREMISES.

Where defendant was charged with selling intoxicating liquor in a prohibition district at a particular time and place, evidence tending to show that the defendant was in charge of said place shortly before the date of the alleged offense is relevant to the issue.

State *v.* Stanley, 134 La. 131, 63 So. 850.

In prosecution for violation of prohibition law, testimony of two witnesses for the state that accused was in possession of the premises where they found liquor, sufficiently connected accused with both the premises and the possession of the liquor to render their testimony admissible, notwithstanding testimony of several witnesses for accused that she was not in possession of such premises.

Bridgeforth *v.* State (Ala. App.), 77 So. 77.

In a prosecution for unlawfully receiving alcoholic liquors, testimony that liquor was found on accused's premises is competent where witnesses had previously testified that they took liquor to such premises after the law's enactment.

Rogers *v.* State, 133 Ark. 85, 201 S. W. 845.

**Liquor on Adjacent Premises, Across Street, etc.**—Evidence of the finding of beer in a building across the street from accused's place of business is inadmissible, where there was no evidence connecting accused with the place or of keeping liquor in that place.

Cravey *v.* State, 10 Ala. App. 168, 64 So. 756.

The court did not err in refusing to rule out the testimony of a city policeman to the effect that he found two baskets full of whisky in a house immediately adjacent to the defendant's place of business, or in admitting in evidence the whisky alleged to have been so found. It was for the jury to say whether the house where the whisky was found was or was not a nearby place or room used by the proprietor in connection with his business for keeping therein such liquors as he might desire to furnish others in violation of the prohibition law.

McAllister *v.* State, 17 Ga. App. 159, 86 S. E. 412.

**Ownership of Building or Premises.**—While, in a prosecution for having in possession intoxicating liquors for illegal sale, it is immaterial whether accused owned the building in which they were stored, or the liquors, if he had possession, such facts are admissible as tending to show the fact of possession.

Lemon *v.* Commonwealth, 171 Ky. 822, 188 S. W. 858.

But in prosecution for having unlawful possession of intoxicating liquors at a drug store, cross examining a witness to show whether he noticed a certificate of registration in another's name at the drug store was improper.

State *v.* Billingsley, 99 Wash. 445, 169 Pac. 845.

The certificate of registration of a drug store under Rem. Code 1915, § 8464, making declaration of ownership presumptive evidence of ownership, was not admissible; the charge being the keeping of intoxicating liquors for an unlawful purpose, and not keeping the drug store for an unlawful purpose.

State *v.* Billingsley, 99 Wash. 445, 169 Pac. 845.

**Ownership of Liquor Sold or Found in Possession.**—Where a state's witness testified that he bought whisky from accused, who personally delivered it and received the money paid by the witness, the ownership of the whisky was immaterial, and the exclusion of evidence of ownership of whisky taken away by the witness on another occasion was proper.

Roden *v.* State, 3 Ala. App. 197, 58 So. 74.

And in prosecution for violating an ordinance of a city by having in possession more than two quarts of intoxicating liquor other than beer, the ownership of the liquor found in defendant's possession was immaterial.

Seattle *v.* Brookins, 98 Wash. 290, 167 Pac. 940.

Neither the ownership of the whisky found in the cellar of a storeroom, in which was conducted a business of which defendant had charge as general manager, nor the opinion on that subject of the officer who seized it, is

material on a prosecution for keeping prohibited liquors for a sale.

Brigman *v.* State, 8 Ala. App. 400, 62 So. 980.

Evidence that the accused did not own the intoxicating liquor found in his place of business, or that it was there without his knowledge or consent, was relevant to his defense, and therefore testimony offered by the accused to prove that the intoxicating liquor found in his place of business was in fact bought by one of his employees for persons not connected with the place of business, and which tended to show also that the liquor was not in the actual possession of the accused, but was in the temporary possession of his employee, for the purpose of being delivered by the employee to those for whom he had bought it, was relevant and material, and should have been admitted.

Bloodworth *v.* Mulledgeville, 12 Ga. App. 560, 77 S. E. 1131.

A conviction for keeping intoxicating liquors for sale cannot be predicated on evidence showing that defendant's boarder kept such liquor locked in a trunk in his room.

Fair *v.* State (Ala. App.), 75 So. 828.

**Affidavit as Admission of Ownership.**—In a prosecution for keeping intoxicating liquors for sale, where it was proved that the sheriff had seized a large quantity of liquor from a room adjoining defendant's store, an affidavit claiming the liquor, made thereafter by the defendant, was competent as an admission of his keeping the liquor under circumstances which Gen. Acts Sp. Sess. 1909, p. 64, § 4, makes *prima facie* evidence of an unlawful purpose.

Patterson *v.* State, 8 Ala. App. 420, 62 So. 1023.

**Kegs, Jugs, Bottles, etc., about Premises.**—On the issue of unlawful sale of liquor, or the keeping of liquor for unlawful sale or other unlawful purpose, it is competent for the state to show that there were found on or about the defendant's premises quantities of empty whisky barrels, or beer kegs, jugs or bottles. Such circumstance is corroboratory and is proper to go before the jury in con-

nection with other evidence tending to show unlawful sale or the unlawful possession of prohibited liquors.

Thomas *v.* State, 13 Ala. App. 246, 68 So. 799.
Smith *v.* State, 12 Ga. App. 482.
State *v.* Manship, 174 N. C. 798, 94 S. E. 2.
State *v.* Turner, 171 N. C. 803, 88 S. E. 523.
Borders *v.* Macon, 18 Ga. App. 333, 89 S. E. 451.

On the trial of one charged with the sale of intoxicating liquor, evidence that on the premises where the sale was alleged to have been made were found numerous empty bottles which had contained whisky, and other bottles and jugs which did contain whisky, was admissible in corroboration of the testimony in behalf of the state that a sale had been made.

Smith *v.* State, 12 Ga. App. 482, 77 S. E. 651.

On a trial for retailing spirituous liquors, the testimony of the sheriff that just outside defendant's store he found a box of bottles and a sack full of bottles, both of which were placed before the jury, and which he testified corresponded in appearance and labels with the bottles which the prosecuting witness testified he purchased from defendant, was admissible.

State *v.* Manship, 174 N. C. 798, 94 S. E. 2.

In a prosecution for having in his possession intoxicating liquors for the purpose of sale, evidence of the condition of defendant's premises and the liquor corks, etc., stored therein, is competent to show purpose of defendant in having the liquor.

State *v.* Baldwin (N. C.), 100 S. E. 345.

In a prosecution for selling liquor and having liquor in possession for sale, evidence of a witness that he had much complaint from the neighborhood where defendant lived, and went out and searched and found empty liquor kegs and jugs a couple of hundred yards in the woods behind defendant's house, and also some liquor in his pantry, was admissible.

State *v.* Turner, 171 N. C. 803, 88 S. E. 523.

"It was not improper to permit a witness to testify that he had seen drays 'coming there and taking away stuff, apparently whisky; there were empty whisky barrels and packages wrapped in paper shaped like bottles' that negroes went and came with packages; that a dray carried off two or three loads of empty bottles; that they were whisky barrels, to the best of his knowledge and belief and that there was 'a pretty strong odor' of whisky at the place. The evidence was not inadmissible as a conclusion, and was not irrelevant and immaterial."

Borders *v.* Macon, 18 Ga. App. 333, 89 S. E. 451.

The mere finding of empty beer bottles, however, creates no presumption of illegal sale or keeping for sale.

Nies *v.* District Court (Ia.), 161 N. W. 316.

**Presence of Still or Bar Equipment; General Arrangement and Adaptation of Premises to Liquor Business.**—The defendant being charged with the sale of whisky or with having it in his possession, there is no error in admitting testimony that apparatus for distilling whisky was found on his premises. This is a circumstance which may properly be considered by the jury.

Trentham *v.* State, 22 Ga. App. 134, 95 S. E. 538.
Compapre Craig *v.* State, 9 Ga. App. 233, 70 S. E. 974.
Cole *v.* State, 120 Ga. 485, 48 S. E. 156.

Evidence that a bar, which was almost a perfect imitation of a soloon bar, was maintained on the premises, was a circumstance which the jury might take into consideration in determining whether the place was used for the purpose of keeping for sale or selling intoxicating liquors.

State *v.* Fountain (Ia.), 168 N. W. 285.

Where the defense was that the place where the alleged nuisance was being maintained was only a lodgeroom where the members occasionally had a keg of beer on tap, the evidence of the officer serving the warrant, which showed the situation of the premises, the crowd, the liquors, and paraphernalia of the place, and the presence of the defendant and his acts, was competent, although the

information may have been filed the day before the officer served the warrant.

State *v.* Berger, 97 Kan. 366, 155 Pac. 40.

That the place where liquors were found bore evidence of having been used before for the purpose of storage or sale is admissible as a statement of a collective fact.

Harwell *v.* State, 12 Ala. App. 265, 68 So. 500.

Where a large quantity of liquor was found in a room back of defendant's store, it was proper in a prosecution for unlawfully keeping prohibited liquors, to introduce evidence showing that the room was inclosed by a high solid fence, as a circumstance showing that an unlawful business was being carried on there.

Patterson *v.* State, 8 Ala. App. 420, 62 So. 1023.

**Evidence of "Saloon" Sign.**—Under Acts 1909 (Sp. Sess.) p. 94, § 33½ which permits proof, in a trial of a dealer of intoxicating liquors for unlawful sale, etc., that he maintained a sign having the word "saloon," the state is not entitled to show that one prosecuted as a bottler permitted such a sign to remain over his place of business; it having been there when he rented the premises.

Sheppard *v.* State, 5 Ala. App. 178, 59 So. 333.

**Photographs and Diagrams of Premises.**—In a prosecution for the illegal manufacture of liquor, a witness who was endeavoring to show how the parts of the distillery found in defendant's house might be assembled so as to make a complete apparatus for manufacturing liquor, could use a photograph for that purpose, as well as a diagram, having testified that the protograph was an accurate picture of the implements found in defendant's house.

State *v.* Jones, 174 N. C. 709, 95 S. E. 576.

**Telephone Arrangement.**—In a prosecution for selling and keeping on hand liquor, contracts for a telephone in the place in question, one signed by accused and the other by a third person, were properly admitted in evidence, the latter contract being but a continuance of the former for the same place and telephone.

Brooks *v.* State, 19 Ga. App. 3, 90 S. E. 989.

14. CHARACTER OF DEFENDANT'S BUSINESS.

**Character of Defendant's Business.**—In prosecutions, illegal selling or engaging in the business of selling, it is competent to show that such, in fact, is the character of the defendant's business.

State *v.* Moore, 166 N. C. 284, 81 S. E. 294.
State *v.* Seahorn, 116 N. C. 373, 81 S. E. 687.

The question asked of a witness by the state, on prosecution for engaging in the business of selling liquor, as to what business defendant was engaged in, is relevant to show that defendant was not a druggist, within the exception to the statute declaring it unlawful to engage in such business.

State *v.* Moore, 166 N. C. 284, 81 S. E. 294.

On a trial for selling intoxicating liquor to a detective posing as a whisky drummer, evidence that the person who accompanied the detective to defendants' place introduced him to defendants as a whisky drummer and said he could take some orders was not hearsay, but was admissible as tending to show that defendants were engaged in the liquor traffic.

State *v.* Seahorn, 166 N. C. 373, 81 S. E. 687.

**Character and Reputation of Place.**—Where the evidence discloses the possession of intoxicating liquors in a place of public resort fitted up with all the fixtures and appurtenances of a liquor saloon, the general reputation of such place as a place where intoxicating liquors are kept for sale, is admissible on the question of intent; the crime charged being the unlawful possession of intoxicating liquors with intent to sell the same.

Ward *v.* State (Okla. Cr. App.), 175 Pac. 557.
Davis *v.* State (Okla. Cr. App.), 182 Pac. 908.
Caffee *v.* State, 11 Okla. Cr. App. 263, 145 Pac. 499.

In prosecution for maintaining an unlawful drinking place it being shown accused was the owner and occupant of the place, evidence tending to show the character of the place is admissible.

Martin *v.* State (Ala. App.), 78 So. 322.

But on a trial on an information charging that the defendant did have the possession of intoxicating liquors with the

intent to sell the same, evidence of the general reputation of his home was incompetent to prove the charge.

Brokhaus *v.* State, 11 Okla. Cr. App. 625, 150 Pac. 510.

**Place Frequented by Persons Desiring to Purchase Liquor; Persons Bringing Liquor Away, etc.**—That people in the community desiring to purchase beer and other intoxicating and prohibited liquors frequented accused's place is an evidentiary fact tending to prove the *corpus delicti.*

Martin *v.* State (Ala. App.), 78 So. 322.

And it was not error to permit a witness to testify that he "had seen others go to the place of business of defendant and come away with whisky." This evidence was not a conclusion, but the statement of a fact, which was clearly admissible as a circumstance corroborative of other evidence in the case.

Reddick *v.* State, 15 Ga. App. 437, 83 S. E. 675.
Gary *v.* State, 7 Ga. App. 502, 67 S. E. 207.
Bonner *v.* State, 2 Ga. App. 711, 58 S. E. 1123.
Cole *v.* State, 120 Ga. 485, 48 S. E. 156.
Quinn *v.* State, 22 Ga. App. 632, 97 S. E. 84.

In another case the evidence objected to tended to characterize the place as a resort for persons having no visible business there and it was held that this, in connection with other testimony, not objected to, that the dwelling house in which the respondent was alleged to have sold and furnished intoxicating liquor, was away from the main street, and had a well-beaten path to it in the rear and in front of it, had a tendency to make it more probable that the persons going there were in pursuit of the same object that the evidence of the state tended to show induced others to go there. It was a circumstance to be weighed by the jury, and was within the wide latitude allowed in the reception of circumstantial evidence in criminal cases. State *v.* Ryder, 80 Vt. 422, 68 Atl. 652. It was said in this case that the state's attorney evidently tried the case on the theory that, if he failed to establish a sale of intoxicating liquor at the dwelling house of the respondent, he might be able to prove that it was furnished at that place, and hold the respondent liable therefor because of her house becoming a place of public resort;

and that though he failed to make out such a case as justified the court below in submitting that question to the jury, it nevertheless did not make the reception of that evidence reversible error.

State *v.* Avicolli (Vt.), 102 Atl. 1037, 1038.

But testimony that various persons were seen to go at different intervals at night from a neighboring house, where an entertainment was in progress, to the house of the accused, shut the door, and remain some time, was not admissible; there being no evidence that any liquor was sold in that house on the occasion referred to.

Holmes *v.* State, 12 Ga. App. 359, 77 S. E. 187.

And where accused charged with selling intoxicating liquor sought to show that he served the liquor to his guests, evidence as to persons not going to the place where the liquor was received unless invited by accused was properly excluded in the absence of any reference as to the time when persons did not enter the place unless invited.

People *v.* Sue Chung Kee, 26 Cal. App. 732, 148 Pac. 529.

**Drinking and Presence of Drunken Persons on Premises.**—In a prosecution for illegally storing intoxicating liquor, or for keeping intoxicating liquors for unlawful sale, it is competent for the state to show that certain persons were seen on the place drinking intoxicants or that other persons were seen going to defendant's place sober and coming away intoxicated; especially when such evidence is limited to the purpose of showing the intoxicating character of the liquor kept by the defendant.

Frey *v.* Commonwealth, 169 Ky. 528, 184 S. W. 896.
People *v.* Calliari, 196 Mich. 475, 163 N. W. 154, 155.

And in a prosecution for the unlawful sale of intoxicants it is competent for the state to show that various people had been seen on defendant's premises drinking and in an intoxicated condition.

State *v.* Ceresa (Vt.), 102 Atl. 1040.
State *v.* Pierce, 88 Vt. 277, 92 Atl. 218.
Medlock *v.* State, 79 Tex. Cr. App. 322, 185 S. W. 566.
Stramler *v.* State, 15 Ala. App. 600, 74 So. 727.
Herman *v.* State, 125 Ark. 278, 188 S. W. 541.

Evidence that one of the persons to whom accused was charged with selling liquor was seen drinking and under the influence of intoxicants at the house of accused, is admissible.

State *v.* Pierce, 88 Vt. 277, 92 Atl. 218.

Evidence that those attending defendant's dance hall made much noise in the middle of the night and were under the influence of liquor is competent.

Medlock *v.* State, 79 Tex. Cr. App. 322, 185 S. W. 566.

That drunken persons were seen in defendants' place of business may be shown on a prosecution for illegal sales of liquor.

Herman *v.* State, 125 Ark. 278, 188 S. W. 541.

Testimony of a witness for the state that he was in respondent's house with another witness for the state and another and saw respondent there and had some whisky there that day, but did not know who brought it out or who had called for it, and that the others were drinking, in connection with the testimony of the other witness for the state, was material as tending to show respondent's guilt.

State *v.* Ceresa (Vt.), 102 Atl. 1040.

Where the evidence against the defendant was purely circumstantial, it was competent to show that liquor was sold at defendant's residence by defendant's daughter, and that people had gone in the direction of defendant's house sober and come away from there drunk; and evidence tending to show that this condition of affairs had existed continuously for a period beyond the statutory limitation and up to the time of the indictment, or within the period covered by the indictment, was admissible.

Allison *v.* State, 1 Ala. App. 206, 55 So. 453.
Lane *v.* Tuscaloosa, 12 Ala. App. 599, 67 So. 778.
Snider *v.* State, 59 Ala. 64.
Stramler *v.* State, 15 Ala. App. 600, 74 So. 727.

But in a prosecution for an unlawful sale of such liquors at the residence of the accused in a small village, proof of disorderly or riotous conduct by intoxicated persons assembled or passing along a public street in front of but not upon

his premises is inadmissible, unless the testimony discloses some immediate or causal connection between such conduct and the unlawful possession or sale of liquors by the accused, or facts from which such relation may reasonably be inferred.

State *v.* Tincher, 81 W. Va. 441, 94 S. E. 503.

In a prosecution for maintaining a liquor nuisance, where there was no dispute as to the business carried on by defendant and his partner, no issue as to defendant's want of knowledge or whether witness operating shop next door obtained intoxicants, such witness was properly not permitted to state whether he had observed any whisky sales, drinking, or congregating on the premises, or whether he attempted to purchase whisky and was refused.

State *v.* Fountain (Ia.), 168 N. W. 285.

**Flight of Customers upon Approach of Officers.**—Where a deputy sheriff testified that he discovered a bar in operation in plaintiff's place of business, testimony that the customers fled upon his approach, leaving only accused, is admissible in a prosecution for the maintenance of an unlawful drinking place, for the action of the crowd was part of an occurrence in which accused was a participant; their acts being part of the *res gestæ* and tending to show that the drinking place was unlawful.

Kirk *v.* State, 10 Ala. App. 216, 65 So. 195.

**That Officers Were Waiting or Watching because They Had "Been Told," or "Had Heard," etc.**—In a prosecution for carrying on the business of a retail dealer without having paid the special tax therefor, it was prejudicial error to permit the prosecuting witness on direct examination to testify that he undertook to buy liquor from defendant because he had been told that defendant was selling. In such cases as this, no doubt the presence or absence of any previous sale is a relevant fact to be proved one way or the other by witnesses competent to speak; but this may not be done by hearsay.

Biandi *v.* United States (C. C. A.), 259 Fed. 93.

The proof that the officers were waiting at the point where the arrest was made, because they had been told that liquor

was to be brought in by some one, was not an attempt to prove the guilt of these defendants by hearsay testimony, within the principle. Biandi *v.* United States (C. C. A.), 259 Fed. 93, opinion filed February 5, 1919.

Robilio *v.* United States (C. C. A.), 259 Fed. 101.

15. REPUTATION AS SELLER OF INTOXICANTS.

On a trial for selling intoxicating liquors, evidence of the reputation of the accused in the community relative to selling whisky is not admissible, as the only fact that his reputation would have a tendency to prove would be his character, and the character of accused cannot be gone into until he puts it in issue.

State *v.* Peters, 142 La. 249, 76 So. 702.

Likewise, it is error to permit a witness to state that he had heard people say that they believed accused was selling whisky.

Sasser *v.* State, 73 Tex. Cr. App. 539, 166 S. W. 1160.

In a search and seizure proceeding, it is improper to permit the state to show that, before issuance of the search warrant, defendant had more than once been arrested for violation of the prohibition laws.

Cheek *v.* State, 3 Ala. App. 646, 57 So. 108.

But it was proper to allow testimony as to a conversation between the accused and the witness, prior to a preceding sale, as to where the witness might obtain liquor, to remain in evidence, as tending to prove defendant was dealing in liquors and the subsequent sale by the accused to the witness.

Ragan *v.* State, 9 Ga. App. 871, 72 S. E. 441.

And where the prosecution is a penal action under Ky. St. 2569b, for knowingly delivering intoxicating liquor intended for sale, evidence of the reputation of the consignee as an illicit vender of intoxicating liquors is admissible.

American Exp. Co. *v.* Commonwealth, 171 Ky. 1, 186 S. W. 887.

**Where Accused Puts His Character in Evidence.**—Where accused has put his character in issue by offering witnesses of his good character, it is permissible to ask witnesses if they have not heard that the defendant had the reputation of being a "bootlegger," or if they had not heard that he had been convicted for violation of the law in this respect.

Stout *v.* State, 15 Ala. App. 206, 72 So. 762.

Testimony that one has the reputation of being a bootlegger is not a conclusion, but a statement of fact.

Medlock *v.* State, 79 Tex. Cr. App. 322, 185 S. W. 566.

In a prosecution under the search and seizure law for having in his possession intoxicating liquors with intent to sell them, the sheriff who testified on cross-examination that accused's character was good except that he would drink, might properly on redirect examination be examined as to whether accused's character was not bad with respect to the illegal selling of intoxicants.

State *v.* Cathey, 170 N. C. 794, 87 S. E. 532.

The reply of the sheriff to such question that, "It is bad for dealing in liquor," was properly admitted.

State *v.* Cathey, 170 N. C. 794, 87 S. E. 532.
State *v.* Butler (N. C.), 98 S. E. 821.

"The defendant introduced evidence to show his good character. The chief of police of Greensboro, Horace Foushee, witness for the state, was asked if he knew the general character of Walter Butler, and replied that he did. He was then asked, 'What is it.' The witness replied, 'It is bad for selling whisky.' The defendant's counsel objected to the answer and moved that it be stricken out as incompetent and not responsive to the question. This the court declined to do, and the defendant excepted. This is the only question presented by the appeal. The witness doubtless could not answer broadly that the defendant's character was bad. He was on oath, and it was competent for him to state of his own motion, as he did, 'It is bad for selling whisky.' He doubtless gave the only answer that his conscience permitted. The state could not ask whether it was bad or good for a particular offense, but the witness in

the interest of truth could qualify his answer as he did. The witness could not say that the defendant's character was good. Doubtless he could not say it was bad, altogether. He therefore gave the only answer that he could. In the interest of the administration of justice and in the investigation of the truth of the charge before the court, the answer could not be stricken out. The jury were entitled to the information."

State *v.* Butler (N. C.), 98 S. E. 821.

In Missouri, however, it has been held error to admit evidence of defendant's reputation as a violator of the local option law, even after he had offered evidence of his good reputation for truth and veracity.

State *v.* Lyons (Mo. App.), 215 S. W. 484.

**Crime of Different Nature.**—On the trial of one charged with the sale of intoxicating liquor, it was error to admit testimony that he had been living in a state of adultery with a named woman.

Holmes *v.* State, 12 Ga. App. 359, 77 S. E. 187.

In a prosecution for violation of the state prohibitory laws, evidence that defendant was the keeper of a house of prostitution was inadmissible.

Ryan *v.* People (Colo.), 180 Pac. 84.

**Intoxication of Accused.**—The admission of testimony that a witness had seen the defendant drunk on the streets before the time of the raid was held not to require the grant of a new trial. The fact that the defendant was seen in the condition at least established her familiarity with and use of intoxicants, and tended to corroborate other testimony as to the presence of intoxicants alleged to have been found in her room and their ownership by her, since it is more reasonable to infer that a drinking person would keep intoxicants in his or her possession than one unaccustomed to their use.

Littleton *v.* State, 20 Ga. App. 746, 93 S. E. 230.

16. PROOF OF OTHER SALES BY ACCUSED.

The rule that evidence of one illegal sale of intoxicating

liquors should not be received as evidence that another such sale had been made exists only where the sales are entirely distinct transactions, the one having no fair tendency to establish the other, and not where the testimony tends to show that defendant habitually kept liquor on hand for the purpose of making illegal sales. Especially is such evidence admissible to show guilty knowledge, intent, acquiescence or consent, and to show the character of the business conducted by the accused.

State *v.* Boynton, 155 N. C. 456, 71 S. E. 341.
State *v.* Stanley, 38 N. D. 311, 164 N. W. 702.
Sweatt *v.* State, 153 Ala. 70, 45 So. 588.
State *v.* Gesell, 137 Minn. 41, 162 N. W. 683.
Rash *v.* State, 13 Ala. App. 262, 69 So. 239.
State *v.* Stanley, 38 N. D. 311, 164 N. W. 702.
Sweatt *v.* State, 153 Ala. 70, 45 So. 588.
State *v.* Busick, 90 Ore. 466, 177 Pac. 64.
Elliott *v.* State, 19 Ariz. 1, 164 Pac. 1179.
Vance *v.* State, 80 Tex. Cr. App. 197, 190 S. W. 176.
Hill *v.* State, 19 Ariz. 78, 165 Pac. 326.
Rosenberg *v.* State, 5 Ala. App. 196, 59 So. 366.
State *v.* Lafargue, 141 La. 936, 75 So. 998.
Spigener *v.* State, 11 Ala. App. 296, 66 So. 896.
Curry *v.* State, 117 Md. 587, 83 Atl. 1030.
State *v.* Laymon (S. D.), 167 N. W. 402, 403.
Reddick *v.* State, 15 Ga. App. 437, 83 S. E. 675.
State *v.* Winner, 153 N. C. 602, 69 S. E. 9.
Allison *v.* State, 1 Ala. App. 206, 55 So. 453.
State *v.* Van Vleet (Minn.), 165 N. W. 962.
State *v.* Holland, 99 Wash. 645, 170 Pac. 332.

Evidence of prior sales in the same place and of prior shipments may be admitted in a prosecution for the crime of bootlegging in order to show purpose, intent, and plan, and when the defense is that the transaction was a joint purchase and treat and not a sale.

State *v.* Stanley, 38 N. D. 311, 164 N. W. 702.

In a trial for unlawfully selling intoxicants, evidence of a sale at a time other than charged was proper, not to convict of the specific sale, but as tending to show that the specific transaction was a sale—that defendant was a seller

and not a mere agent; in other words, as shedding light on defendant's *bona fides*.

Sweatt *v.* State, 153 Ala. 70, 45 So. 588.

In a prosecution for unlawful sale of intoxicants, evidence of other like sales was admissible to show character of business done by accused, etc.

State *v.* Busick, 90 Ore. 466, 177 Pac. 64.

In a prosecution for the illegal sale of intoxicating liquors by an employee of defendant, evidence of other sales of intoxicating liquors by such employee both before and after the sale charged was properly admitted to show knowledge, consent and acquiescence in the sales by the defendant.

Elliott *v.* State, 19 Ariz. 1, 164 Pac. 1179.

In a prosecution for pursuing the occupation of selling intoxicants in prohibition territory, persons not named in the indictment were properly allowed to testify that they purchased whisky from the defendant.

Vance *v.* State, 80 Tex. Cr. App. 197, 190 S. W. 176.

In a prosecution for selling cider found to be intoxicating, evidence that defendant had, at prior times, made similar sales was properly admissible to show intent, and that the cider was sold in the usual course of business.

Hill *v.* State, 19 Ariz. 78, 165 Pac. 326.

In a prosecution for the illegal sale of intoxicating liquors by an employee of defendant, although a conviction could not be upon other sales, evidence of other sales not personally made by defendant were competent to show *scienter* or knowledge on his part; it being a reasonable and fair inference that if liquor was frequently disposed of at his place of business he must have known of it.

Elliott *v.* State, 19 Ariz. 1, 164 Pac. 1179.

In a prosecution for the violation of the prohibition law by an employee of accused, evidence that beer and whisky were found in accused's place of business, and that other sales had been made when he was present, was properly admitted, where the court limited its consideration to the question of accused's connection with the sale charged.

Rosenberg *v.* State, 5 Ala. App. 196, 59 So. 366.

Under an information charging defendant with keeping a grog or tippling shop retailing spirituous and intoxicating liquors without a license, evidence of sales on days other than that named in the affidavit and information admissible, since the offense of keeping a tippling shop is continuous in its nature, and its continuity may be established by proof of sales on every day within the period during which it continues.

State *v.* Lafargue, 141 La. 936, 75 So. 998.

In prosecution for having possession of intoxicating liquor with intent to unlawfully sell it, evidence, confined within reasonable limits, of a previous breach of the liquor laws by defendant, was admissible with regard to the unlawfulness of her possession of the liquor in question.

State *v.* O'Toole (Me.), 108 Atl. 99.

The offense of having possession of intoxicating liquor with intent to unlawfully sell it being in its nature a continuing one, sales by defendant before, after, and at the time of the alleged keeping might have been shown to the limited extent of shedding light upon intent to sell liquor in question.

State *v.* O'Toole (Me.), 108 Atl. 99.

The one who sent the purchaser for the whisky may also testify that he sent him on that occasion, that the purchaser went into the defendant's yard and after a short time came back with two bottles of whisky, and that he had sent the same purchaser and other purchasers to defendant's place on similar errands at other times.

Spigener *v.* State, 11 Ala. App. 296, 66 So. 896.

In a prosecution under an indictment charging accused with the unlawful sale of intoxicating liquor to the prosecuting witness at defendant's place of business, evidence that she sold such liquor at her home to other persons than the prosecuting witness, was admissible to show that her home where the liquor was obtained was her place of business, and that she kept liquor for sale at the place where the prosecuting witness testified he bought it.

Curry *v.* State, 117 Md. 587, 83 Atl. 1030.

In a prosecution for unlawful sale of intoxicating liquors, where some sales would be lawful, the intent could not be inferred from the act, and it was proper to introduce evidence of other violations of the law by the defendant similar to that charged.

State *v.* Laymon (S. D.), 167 N. W. 402, 403.

Where an indictment charged the defendant with keeping on hand intoxicating liquor at his place of business, and in another count with the sale of such liquor to a person named, proof that on the days alleged in the indictment and in the vicinity of his place of business, he offered to sell intoxicating liquor to a person other than the one named in the indictment, was admissible in support of the charge of keeping intoxicating liquor on hand at his place of business, since it was a circumstance tending to show that he had such liquor in his possession, and tended to corroborate a witness who testified that the defendant kept intoxicating liquor on hand at his place of business, though, in the absence of evidence connecting the offer, or the person to whom it was made, with a sale of liquor by the defendant to the person named in the indictment proof of the offer would not be admissible for the purpose of establishing the alleged sale.

Reddick *v.* State, 15 Ga. App. 437, 83 S. E. 675.

Where accused was prosecuted for selling liquor without a license by means of a dumb waiter in a cut-off compartment in his place of business and prosecutor testified that, having made known his presence and thirst a tin cup appeared in a hole in the wall, that after putting money in the cup it disappeared and in a few seconds a bottle of whisky appeared the state was entitled to show by an other witness in corroboration that he had purchased whisky at the same place by means of the same device prior to the purchase by prosecutor, to show defendant's knowledge that the illicit traffic was being carried on in his place of business.

State *v.* Winner, 153 N. C. 602, 69 S. E. 9.

Defendant was tried on an affidavit charging that he sold, offered for sale, kept for sale or otherwise disposed of, spirituous, vinous, or malt liquors contrary to law, or sold,

offered for sale, kept for sale prohibited liquors and beverages contrary to law. The state offered evidence that defendant was the proprietor of a hotel, that several raids were made, and on several occasions whisky and beer were found there; that on one of the raids several bottles of beer were found in one of the rooms stored in an ice box, one full cask of beer and another partly filled and that on the same occasion some whisky was taken from the building, and on one occasion officers seized two trunks in defendant's bedroom, which were filled with whisky. There was other evidence that on one occasion a deputy sheriff bought a bottle of beer from a negro in the hotel, and on another occasion a deputy sheriff went into the dining room and saw a negro waiting on the diners, who heard one of them say to the negro. "Why in the —— don't you bring those drinks?" that on the occasion of one of the raids a deputy, after whisky and beer had been seized and taken from the building, heard defendant say to another deputy that he had just as well close up, that we had put him out of business. Held, that since in the affidavit defendant was not charged with a single offense but with many offenses of the same general character, all of the evidence was relevant as tending to show that defendant was in fact keeping prohibited liquors for sale in the hotel, and that he was operating a blind tiger.

Allison *v.* State, 1 Ala. App. 206, 55 So. 453.

In prosecution for selling intoxicating liquor, evidence of other sales in defendant's place of business, near time of the sale charged, was competent to show that part of defendant's business, in connection with alleged cigar store, was the sale of whisky, and to show that he knew of them, and that liquors were intermingled with other goods as tending to show that particular sale was a part of defendant's business.

Bundy *v.* State (Okla. Cr. App.), 184 Pac. 795.

"Defendant had been interested in the soft drinks parlor at which this alleged illegal sale was made four or five weeks prior thereto. He denied the sale. On cross-examination he was asked whether he had ever sold whisky to Sorenson, the prosecuting witness. Sorenson was called in rebuttal and testified over defendant's objection, to buying whisky

of defendant on two different occasions before the date of the sale named in the indictment. This was not impeachment on a collateral issue; whether in this soft drink parlor defendant kept whisky for sale had an important bearing upon the sale in question. The time of these other sales was not too remote, having in mind the short period that defendant had been connected with the place. In the charge the effect of this testimony of former sales was quite clearly and correctly limited."

State *v.* Van Vleet (Minn.), 165 N. W. 962.

**Unlawful Sale by Druggist—Druggists' Record of Sales.**—In a prosecution of defendant druggist for violation of prohibitory law, defendant's record of sales, other than that upon which information was based, was properly admitted upon issue of defendant's good faith.

State *v.* Holland, 99 Wash. 645, 170 Pac. 332.

In a prosecution for violation of the prohibition law by selling Jamaica ginger, evidence of other sales than the one specifically charged was admissible under an information charging defendant with selling and keeping for sale intoxicating liquor.

McLean *v.* People (Colo.), 180 Pac. 676.

**To Contradict Accused.**—Defendant having testified, on direct examination, that he had neither sold nor manufactured liquor, he could not complain that the state was allowed to contradict him by evidence showing that he had sold liquor.

Lowery *v.* State, 135 Ark. 159, 203 S. W. 838.

**Rumors of Sales; Sales Heard of; Statements in Absence of Accused, etc.**—In a prosecution for having unlawful possession of liquors, cross-examination as to whether witness had ever heard of any sales of liquor at the location involved, was improper.

State *v.* Billingsley, 99 Wash. 445, 169 Pac. 845.

In prosecution for maintaining an unlawful drinking place, statements by persons in accused's absence that they

had been getting beer before at accused's place, was inadmissible as hearsay.

Martin *v.* State (Ala. App.), 78 So. 322.

In a prosecution for carrying on the business of a retail liquor dealer without having paid special federal tax, the refusal of the trial court to allow proffered witnesses to testify as to whether they had ever heard of liquor being sold at defendant's place of business cannot be held error, where the record did not disclose the opportunity such witnesses had for knowing the defendant's reputation or the reputation of his place of business.

Faraone *v.* United States (C. C. A.), 259 Fed. 507.

**That Persons Came in and Sought to Buy.**—For such purpose, evidence is admissible that, when officers were making a raid on the place, several soldiers entered and asked to buy some beer.

Martin *v.* State (Ala. App.), 78 So. 322.

17. POSSESSION OF TAX RECEIPT.

Under Acts 1911, p. 180, declaring that, in a prosecution for the unlawful sale of intoxicating liquors, a federal internal revenue special tax receipt for the sale of liquors shall be *prima facie* evidence of the guilt of the person in possession thereof, or who made application therefor, or to whom it was issued, the original tax receipt found in the possession of accused is admissible, for the statute does not require the state to procure a certified copy, and such copy, if procured, would only be secondary evidence.

Haar *v.* State, 14 Ga. App. 548, 81 S. E. 811.

In a prosecution for the unlawful transportation of intoxicating liquor, the admission of the certified copy of United States internal revenue collector's register of taxpayers for liquor dealers in a city, showing that defendant had paid both a retail and wholesale liquor dealer's tax, was proper, as tending to rebut his testimony that he was conveying the liquor for other parties.

Smith *v.* State (Okla. Cr. App.), 181 Pac. 942.

In a prosecution for unlawfully conveying intoxicating liquors, payment of a retail and wholesale liquor dealer's internal revenue tax in the name of "John B. Smith" was sufficiently identified with defendant, where he testified that his true name was "John B. Smith," and authorized admission of such payment.

Smith *v.* State (Okla. Cr. App.), 181 Pac. 942.

**Near Beer License.**—In a trial under an indictment charging a violation of the prohibitory law contained in section 426, of the Penal Code of 1910, evidence that at the time the offense is alleged to have been committed the accused had a license to sell *near beer* from the state, county and municipal corporation in which the law is alleged to have been violated, is irrelevant.

Abbott *v.* State, 11 Ga. App. 43, 74 S. E. 621.

18. PROOF OF INTOXICATING CHARACTER OF LIQUOR.

**Chemical Analysis and Testimony of Experts.**—Testimony of experts as to the amount of alcohol in liquor sold by the defendant, as shown by chemical tests, is admissible on prosecution for violation of the prohibition acts.

Hall *v.* State (Ariz.), 165 Pac. 300.

And where the defendant showed that the beer sold by him was the same as that sold by another, samples of which were tested and found not to require an internal revenue license, the state may show that chemists had it analyzed and found it intoxicating.

Hall *v.* State (Ariz.), 165 Pac. 300.

**Statutory Provisions for Analysis by State Chemist.**—Under the Mapp prohibition law (Acts of Va., 1916, c. 146, § 30½), making it the duty of the state commissioner of agriculture, on the written request of the proper official, to cause an analysis to be made of any mixture supposed to contain ardent spirits, and to return to the officer the certificate of the chemist making the anlysis, though only the certificate of the chemist is made evidence by the statute, it is not evidence unless the commissioner of agriculture caused the analysis to be made, nor unless he also

returned the chemist's certificate to the officer who requested the analysis; so that, in a prosecution for dispensing cider, the commissioner's letter, returning the state chemist's certificate of analysis to the officer, was evidence, and so much of it as appeared above the commissioner's signature not to be disregarded, though it was dated December 5th, while the date of the affidavit of the chemist was December 15th, a variance which should have been explained.

Bare *v.* Commonwealth, 122 Va. 783, 94 S. E. 168, 169.

The Va. Const., 1902, (Code 1904, p. ccix) providing that "in all criminal prosecutions a man hath the right to be confronted with the accusers and witnesses," is not violated by the "Byrd Law" (Acts 1908, c. 189), providing that the certificate of the state chemist showing an analysis of a mixture supposed to contain alcohol, when signed and sworn to by him "shall be evidence in all prosecutions under the revenue laws."

Bracy *v.* Commonwealth, 119 Va. 867, 89 S. E. 144.

**Opinion Evidence.**—The drinking of whisky is so common an occurrence that liquor can be *prima facie* shown to be whisky by the opinions of persons accustomed to its use.

People *v.* Allen (Cal. App.), 174 Pac. 374.

A witness for the state may testify that the bottles which he found in defendant's house contained whisky without producing the bottles, since whisky is a commodity whose characteristics are matters of common knowledge and of which the court can take judicial notice.

Harwell *v.* State, 12 Ala. App. 265, 68 So. 500.

On a trial for carrying intoxicating liquor into prohibition territory, the testimony of an officer, who seized the accused and the liquor which he had carried into the prohibition territory, that the bottles in the valise contained whisky, was admissible.

Johnson *v.* State, 75 Tex. Cr. App. 177, 171 S. W. 211.

A farmer of average intelligence, who had resided for years on a farm with his family in the apple-growing regions of the state and was familiar with the popular terms ap-

plied to cider in its process of aging, was competent to testify whether cider drank by him was fermented.

People *v.* Emmons, 178 Mich. 126, 144 N. W. 479, Ann. Cas. 1915D, 425.

But in a prosecution for having violated the local option law by selling cider, testimony of witnesses that 40 or 50 years ago in Tennessee and Georgia they had made cider which would not intoxicate when fresh, but would if it became hard cider, was inadmissible as irrelevant.

Salvador *v.* State, 79 Tex. Cr. App. 343, 185 S. W. 12.

A witness who testified that he knew the difference between the taste of whisky, wine, and brandy is qualified, if any qualifications as an expert are necessary to testify that the liquor which the defendant was accused of selling was wine.

People *v.* Mueller, 168 Cal. 526, 143 Pac. 750.

The court should have excluded that portion of the testimony of a witness to the effect that certain bottles seen by him contained intoxicating liquors, because where it was evident from the answer of the witness that he was merely expressing his opinion; but in view of the conclusive nature of the competent evidence in the record, which supported the opinion of the witness, this error was deemed immaterial.

Gales *v.* State, 14 Ga. App. 450, 81 S. E. 364.

**Color, Taste, Odor, Appearance, etc.**—Testimony that the beverage found had a color like whisky, in connection with testimony that the bottles were labeled "whisky," and that there was an odor of whisky in the place, is admissible on a prosecution for violation of the prohibition law.

Woodward *v.* State, 5 Ala. App. 202, 59 So. 688.

In a prosecution for engaging in the business of a retail liquor dealer in violation of the prohibitory law, evidence having been introduced to prove that defendant paid for a government license covering the place and period of time involved in the charge against him, and authorized by Acts Sp. Sess. 1909, pp. 63, 84, § 221½ and that his place of

business within such time emitted the odor of a barroom, it was permissible to prove that the beverage sold by defendant had the color of whisky or of beer.

Warrick *v.* State, 8 Ala. App. 391, 62 So. 342.

"In a prosecution for selling and keeping on hand liquor, a witness' testimony that he bought something that looked like whisky was admissible."

Brooks *v.* State, 19 Ga. App. 3, 90 S. E. 989.

A witness may testify that he smelled and tasted liquor and that it was alcohol.

Feagin *v.* Andalusia, 12 Ala. App. 611, 67 So. 630.

But while evidence that a beverage has the color, odor, and general appearance of whisky, for instance, or that it has the taste, color, and general appearance of beer, has some tendency to prove that it is a prohibited liquor within the meaning of the statute, it cannot be said that proof of the mere color of a beverage has a logical or legitimate tendency to identify it as a prohibited liquor. It is not believed that it is within the intention of the statute to permit one to be convicted of an offense against the liquor laws by evidence having no more tendency to identify a beverage disposed of by him as whisky than it has to identify it as tea. It is a matter of common knowledge that evidence going no further than to show that a beverage looks like liquor, does not legitimately tend to show that it is in fact a prohibited liquor.

Wright *v.* State, 4 Ala. App. 150, 58 So. 803.

**Intoxicating Effect.**—The state's witness may properly testify to the intoxicating effect of the liquor purchased.

Marks *v.* State, 159 Ala. 71, 48 So. 864, 133 Am. St. Rep. 20.
Brantly *v.* State, 91 Ala. 17, 8 So. 816.
Carl *v.* State, 87 Ala. 17, 6 So. 118, 4 L. R. A. 380.
Knowles *v.* State, 80 Ala. 9.
Johnson *v.* State, 3 Ala. App. 155, 57 So. 499.

When any drink alleged to be intoxicating is sold in labeled bottles, as put up by the manufacturer, and has a commercial name or designation, the evidence of persons

who have purchased it from the defendant and drunk it, whether at the same time or on different days and occasions as to whether it is intoxicating is admissible both for the state and the defendant.

State *v.* Cool, 66 W. Va. 86, 66 S. E. 740.

Thus where a particular beverage, sold under a trade-name, to the trade generally, was claimed to be intoxicating, evidence of its intoxicating effects when sold at other places than that of accused charged with the illegal sale of intoxicating liquors was admissible after a foundation had been laid by proof that the beverage sold at such other places was manufactured and sold to the trade generally by the same concern that manufactured the beverage sold by defendant, and that it was of the same brand and in the same condition in which it was received from the manufacturer.

State *v.* Clark, 124 La. 965, 50 So. 811.

On the trial of a defendant charged with selling intoxicating liquor within a prohibited territory, the article sold being a liquid put up in labeled bottles, which defendant received packed in barrels, purporting on the labels to be nonintoxicating, and not shown to be a distilled, malt, or vinous liquor, where the prosecution introduced witnesses who testified that the contents of some of the bottles drank by them had an intoxicating effect, defendant was entitled to show by other witnesses that the contents of other bottles similarly labeled and from the same barrel, which they drank, had no effect upon them; the weight of such evidence being for the jury.

Cihak *v.* United States, 146 C. C. A. 509, 232 Fed. 551.

In a prosecution for manufacturing alcoholic liquors, testimony that a short time before the accused was arrested, and while a keg of "Choc" beer was in her house, a negro man came out of the house with "Choc" beer, which he sold to witnesses, and that it was intoxicating, was competent as tending to show that the "Choc" beer was intoxicating.

Patterson *v.* State (Ark.), 215 S. W. 629.

**Jamaica Ginger.**—In a prosecution for violating the prohibition law by selling Jamaica ginger, any evidence as to its nature and constituent elements, its ordinary use, its susceptibility to use as an intoxicant, and the extent of such use, is admissible to determine whether the liquor sold is intoxicating or not.

McLean *v.* People (Colo.), 180 Pac. 676.

**Exhibiting Actual Liquor, Containers, etc.**—The character of the containers and their contents is a relevant and material fact which the jury may properly determine from an actual inspection of such containers and their contents. It is proper, therefore, for the court to permit, in connection with other evidence, the introduction of the actual liquor itself in evidence.

Clark *v.* State, 5 Ga. App. 605, 63 S. E. 606.
State *v.* Sullivan, 97 Wash. 639, 166 Pac. 1123.
Thomas *v.* State, 13 Ala. App. 246, 68 So. 799.

Where on a trial for carrying into prohibition territory intoxicating liquor, there was evidence that a valise containing whisky was the property of accused, and that he had transported the same into prohibition territory from a point in the state, the action in the court in allowing the district attorney to open the valise in the presence of the jury, and to introduce it and the whisky contained therein in evidence was proper.

Johnson *v.* State, 75 Tex. Cr. App. 177, 171 S. W. 211.

But permitting the state to exhibit one by one sixteen bottles of whisky in the presence of the jury, after defendant had admitted every material and admissible fact that could have been established by the exhibition of the whisky, was error. (Per Gaines, Special Judge.)

Alexander *v.* State (Tex. Cr. App.), 204 S. W. 644, 645.

Where, in a case involving the question as to whether a certain liquid is an intoxicating liquor, the state introduces in evidence the liquor itself, it is proper for the court to instruct the jury that they may make personal inspection of the liquid, may apply their own senses to it, may look

at it, taste of it, and thereby determine whether it is or is not an intoxicating liquor, subject to the limitation that they must not drink such a quantity as that, if it were intoxicating liquor, it would make them drunk.

Morse *v.* State, 10 Ga. App. 61, 72 S. E. 534.

And a compliance with a request of the jury that bottles of liquor in evidence should be sent to the jury room is held not to afford sufficient grounds for reversal.

State *v.* Watson, 92 Kan. 983, 142 Pac. 956.

**Proving Liquor to Be Same That Accused Sold or Possessed.**—It is not error to refuse to permit a witness to taste the contents of a bottle to see if they are the same as the contents of another bottle purchased from the accused by the witness.

State *v.* Trione, 97 Kan. 365, 155 Pac. 29.

Where the liquor, defendant was accused of selling, was taken out of a box in a basket, evidence that the basket containing the box and bottles was afterwards examined on the same day and found to contain 11 bottles of whisky, was admissible on an issue as to the contents of the bottle sold.

Berry *v.* State (Tex. Cr. App.), 203 S. W. 901.

That the officer who found whisky in a bucket in accused's place of business poured it into a large bottle, because he thought the bucket might overturn, would not exclude the whisky as evidence in a prosecution for unlawfully keeping liquor for sale, when offered in the bottle to prove that the contents of the bucket was whisky.

State *v.* Mostella, 159 N. C. 459, 74 S. E. 578.

The fact that other employees had keys to a lock box in which a bottle of whisky sold by defendant was being kept by the deputy sheriff as an exhibit, was insufficient to deprive it of all evidentiary force, where the deputy sheriff identified the bottle, and testified that he frequently went to the lock box, and that the bottle was always in apparently the same condition.

State *v.* Hays, 38 S. D. 546, 162 N. W. 311.

**Marks and Labels as Evidence.**—In a prosecution for the illegal sale of liquor, labels on boxes and barrels received by defendant from a common carrier were some evidence of the contents thereof.

Hodge *v.* State, 11 Ala. App. 185, 65 So. 676.

Evidence that packages delivered by an express company to defendant were billed and marked "whisky" was some evidence that they contained whisky.

Herring *v.* State, 11 Ala. App. 202, 65 So. 707.

Permitting a state's witness, who engaged in the search of defendant's store to identify bottles labeled "gin" and "whisky" as those found in such store, was proper, since an ordinary trade label on an article for the purpose of indicating its nature and contents is competent evidence thereof, as against the person in possession, the inference as to the contents being a question of fact for the jury.

Thomas *v.* State, 13 Ala. App. 246, 68 So. 799.

In defense of an indictment for selling intoxicating drinks the article sold being labeled "Temperance Beer," the defendant has right to show that it is not intoxicating.

State *v.* Durr, 69 W. Va. 251, 71 S. E. 767, 46 L. R. A., N. S., 764.

But where the prosecution is for introducing liquors into the state, and the sole defense is that accused received it within the state, labels and internal revenue stamps showing the liquor to be whisky and time and place of bottling the same, are inadmissible.

Murray *v.* State, 19 Ariz. 49, 165 Pac. 315.

**Self-Serving Declarations as to Character of Liquor.**—In prosecution for selling intoxicating liquors, declarations of defendant that he had emptied the whisky out of a bottle, and that it contained cider when sold, were inadmissible, being self-serving.

Berry *v.* State (Tex. Cr. App.), 203 S. W. 901.

**Improper Cross-Examination.**—Where county attorney testified that he received a pint bottle from prosecuting witness; that the next morning the defendant came in and

told him that if he would open the bottle he would find it was not whisky; that when he looked he found it was broken, and the liquor spilled smelled like cider—an effort to prove on cross-examination that defendant told him he had emptied out the whisky and put in cider before he sold it, was not germane to the direct examination, and an objection was properly sustained.

Berry *v.* State (Tex. Cr. App.), 203 S. W. 901.

19. PROOF OF SOLICITATION OF ORDERS.

**Letters, or Copies Thereof.**—In a prosecution for soliciting or receiving orders for liquors the sale of which was then prohibited, a letter or conceded copy thereof, ordering a nonresident consignor to deliver liquors to certain persons in city, was properly admitted in connection with the other evidence as to defendant's guilt.

Flowers *v.* Birmingham (Ala. App.), 83 So. 36.

In action for violation of ordinance by soliciting or receiving orders for liquors, the sale of which is prohibited in the state, the prosecution, having a letter purporting to be an order from defendant to a named person for liquors to be sent to certain persons in city, obtained by witness from defendant's office in his presence under a search warrant, might show that person addressed was engaged in liquor business in Chattanooga, and that shortly after date of letter the kind and quantity of liquors referred to therein were received by common carriers, billed to persons named therein.

Flowers *v.* Birmingham (Ala. App.), 83 So. 36.

**Records of Carrier.**—In prosecution for soliciting or receiving orders for liquors the sale of which was then prohibited in the state, defendant's objection "to the introduction of each of said records" of two carriers in evidence was unavailable.

Flowers *v.* Birmingham (Ala. App.), 83 So. 36.

**Identification of Books by Express Employees.**—In prosecution for soliciting and receiving orders for liquors the sale of which was prohibited in the state, testimony of a witness formerly in employ of the express company that

book shown him was made in company's office while he was in charge, but that he did not make the book or do the writing therein, was not objectionable.

Flowers *v.* Birmingham (Ala. App.), 83 So. 36.

20. ORDERING AND RECEIVING LARGE QUANTITIES OF LIQUOR.

The receipt of large quantities of liquor is at least some evidence of the receipt of such liquor for unlawful purposes. Accordingly, it is generally held that it is competent for the state to show a criminal purpose, either of possession or sale, by proving that the accused has ordered or received liquor in quantities larger than would ordinarily be required for personal use.

State *v.* Gordon, 32 N. D. 31, 155 N. W. 59, Ann. Cas. 1918A, 442.
Brigham *v.* State, 8 Ala. App. 400, 62 So. 980.
Wilson *v.* Commonwealth, 181 Ky. 370, 205 S. W. 391.
Watson *v.* State, 8 Ala. App. 414, 62 So. 997.
Bragg *v.* State, 15 Ga. App. 623, 630, 84 S. E. 82.
Hayes *v.* State, 18 Ga. App. 68, 88 S. E. 752.
State *v.* McKone, 31 N. D. 547, 154 N. W. 256.
Coates *v.* State, 5 Ala. App. 182, 59 So. 323.
Borders *v.* Macon, 18 Ga. App. 333, 89 S. E. 451.
State *v.* Blauntia, 170 N. C. 749, 87 S. E. 101.
Dunn *v.* State, 8 Ala. App. 382, 62 So. 379.
Webb *v.* State, 13 Ga. App. 733, 80 S. E. 14.
Clark *v.* State, 74 Tex. Cr. App. 464, 169 S. W. 895.
Springer *v.* State, 129 Ark. 106, 195 S. W. 376.
Dunn *v.* State, 18 Ga. App. 95, 89 S. E. 170.

This is especially true where the liquor alleged to have been unlawfully sold is shown to be of the same character and put up in packages or containers of the same size and description as the liquor received by the accused.

Webb *v.* State, 13 Ga. App. 733, 80 S. E. 14.

The weight of such evidence depends in no little degree upon its nearness or remoteness in point of time to the matter under investigation.

Webb *v.* State, 13 Ga. App. 733, 80 S. E. 14.

**Illustrative Cases.**—Evidence of frequent large importation of liquors by appellant on dates immediately prior to the date charged in the information was admissible, as tending to show a criminal purpose as charged in importing the liquors on such date.

State *v.* McKone, 31 N. D. 547, 154 N. W. 256.

In a prosecution for violating the prohibitory law, evidence that whisky had frequently been seen at the railroad station shipped to accused, admitted without objection was a circumstance that could be looked to in determining the question of defendant's violation of the law.

Coates *v.* State, 5 Ala. App. 182, 59 So. 323.

Where a witness testified that he had frequently seen a barrel of whisky at E. shipped to defendant, that the last time he saw a barrel at the depot was on the preceding Thursday, and that it was hauled out on Friday by defendant's son and was marked "Glass, 12½ gallons," defendant was not prejudiced by the court permitting the witness to further testify, over objection, that he had seen other shipments to the defendant, some in barrels and some in drums, and that he saw a shipment about a week before the one concerning which he had previously testified.

Coates *v.* State, 5 Ala. App. 182, 59 So. 323.

There was no error in allowing a witness to testify that he had hauled some barrels for the accused, and that the accused paid him therefor, though he "could not tell how many gallons to the barrels." This evidence was relevant and material, and was not objectionable upon the ground that the contents of the barrels were not identified as intoxicating liquor.

Borders *v.* Macon, 18 Ga. App. 333, 89 S. E. 451.

It was proper to permit a drayman to testify that he had taken two barrels for the accused to the building in question and also that he carried to the same place a little box of case goods, making two dray loads that were carried there, although he testified that he was not personally acquainted with the accused; the witness testifying that "that gentleman (the accused) looks like him." Such testimony was not immaterial and irrelevant, and was not objection-

able upon the ground that the witness had not identified the accused as the person employing him, and that it was not shown that the goods were intoxicating liquors.

Borders *v.* Macon, 18 Ga. App. 333, 89 S. E. 451.

In a prosecution for unlawfully having spirituous liquor to sell in violation of law, where a witness testified that a man told him to take the barrels containing whisky to defendant had given similar directions about another barrel, and that barrels and empty bottles resembling the barrels and bottles seized were found at defendant's house, the statement of the first witness that some one had told him to take the whisky to the defendant's house was relevant, though he could not identify defendant as the man who gave him the bills of lading to secure the whisky from the carrier.

State *v.* Blauntia, 170 N. C. 749, 87 S. E. 101.

The admission of evidence for the state that at the time defendant ordered the whisky (a part of which was found in his store) he ordered 48 half pints was not erroneous.

Dunn *v.* State, 8 Ala. App. 382, 62 So. 379.

Evidence that large quantity of whisky contained in pint bottles had been claimed by the accused and delivered to him was admissible on his trial for the offense of selling intoxicating liquor. Especially is this so where the liquor alleged to have been sold was of the same quantity as the liquor contained in the bottles. It is a circumstance of corroboration of more or less weight according to its nearness or remoteness to the matter under investigation.

Webb *v.* State, 13 Ga. App. 733, 80 S. E. 14.

**Same; Nearness or Remoteness in Point of Time.**—In a prosecution for the unlawful sale of intoxicating liquor, the state may cross examine the defendant as to the number of times within the last six months or a year he had gone away and brought back with him intoxicating liquors for the purpose of proving that he had, from time to time procured and had on hand such liquor.

Clark *v.* State, 74 Tex. Cr. App. 464, 169 S. W. 895.

On a trial for the illegal sale of intoxicating liquor in July or August, evidence that during the months of January to June, inclusive, defendant received consignments of liquor in larger quantities than would be required for his personal use, was properly admitted.

Springer *v.* State, 129 Ark. 106, 195 S. W. 376.

Proof that the accused had received from the express company within two years next preceding the indictment, between 500 and 1,000 gallons of whisky is competent. This fact may be considered only by the jury as a corroborative value of other evidence which may tend to show the defendant's guilt.

Dunn *v.* State, 18 Ga. App. 95, 89 S. E. 170.

**Liquor Ordered in Another's Name.**—In a prosecution for selling whisky, the fact that defendant ordered whisky several times in another's name was a material circumstance tending to prove that defendant was in the liquor business.

Holt *v.* State, 126 Ark. 223, 190 S. W. 101.

**Evidence That Others Had Received Large Quantities Also.**—On a trial for the illegal sale of intoxicating liquor where the alleged purchaser was well acquainted with defendant, and the question between them was one of veracity and not of identity, evidence that other persons had received liquor in as large quantities as defendant was shown to have received, was properly excluded.

Springer *v.* State, 129 Ark. 106, 195 S. W. 376.

21. RECORDS OF EXPRESS AND RAILWAY COMPANIES.

Upon a trial for illegal sale of intoxicating liquor, it is not error to admit in evidence express receipts as tending to show shipments of liquor to defendant.

State *v.* Gesell, 137 Minn. 41, 162 N. W. 683, 684.

**Delivery and Receipt Book with Defendant's Signature.**—The delivery book of an express company in which various consignments of liquor were receipted for by the defendant, is admissible in evidence in a prosecution

for unlawfully keeping intoxicating liquor for sale, and in spite of the fact that the original bills of lading or shipping bills were not introduced, where the signature of such defendant appears in such book as a receipt for such liquor and is proved to be his.

State *v.* Gordon, 32 N. D. 31, 155 N. W. 59, Ann. Cas. 1918A, 442.

The depot agent may properly testify that the receipts for the liquor are in defendant's handwriting; it tending to show that defendant actually received the liquors.

Hodge *v.* State, 11 Ala. App. 185, 65 So. 676.

**Sufficiency of Identification of Consignee.**—Whether, in a prosecution for using the name of another in ordering or receiving intoxicating liquor, the evidence identifies the defendant, to the satisfaction of the trial judge, with a receipt such as that mentioned is a question for the trial judge alone to determine. The receipts in such case constitute merely a link in the chain of evidence, and are admissible.

State *v.* Ferris, 142 La. 198, 76 So. 608.

**Evidence to Show Liquor Ordered by Others in Name of Consignee.**—Evidence on prosecution of a negro for engaging in the business of selling liquors in prohibition territory, that white people often ordered whisky in the names of negroes and then got it from the express office, or, finding it had come, got them to sign for it, is inadmissible for defendant, not being connected with him.

Jackson *v.* State (Tex. Cr. App.), 200 S. W. 150.

**Other Records and Books of Entry; Identification of Entries; Present Recollection, etc.**—Where the witness testifies that he had made an entry in the books of an express company purporting to show delivery of a package marked "whisky," that he knows the defendant was there in person and received it, and that he knows the entry was correct when made, but that he has no recollection of the transaction apart from the entry, the entry is admissible in evidence.

Herring *v.* State, 11 Ala. App. 202, 65 So. 707.

The admission of such a memoranda of delivery of a package marked whisky is not prejudicial where another witness, who testifies to its correctness, states the delivery as a fact recollected apart from such entry.

Herring *v.* State, 11 Ala. App. 202, 65 So. 707.

Express records showing shipments of liquor to defendant are admissible, although the particular entry is in the handwriting of another than the witness, but with whose handwriting witness is familiar.

Fisher *v.* State, 81 Tex. Cr. App. 568, 197 S. W. 189.

Express records being admissible in a prosecution for pursuing business of selling intoxicating liquors, it is not reversible error to permit the witness to state that the books show the entries in question; such statement being merely cumulative of the facts disclosed by the book.

Fisher *v.* State, 81 Tex. Cr. App. 568, 197 S. W. 189.

**Agent May Explain Abbreviations.**—No error is committed in a prosecution for the unlawful keeping for sale of intoxicating liquor in allowing the express agent who delivered the goods to testify as to the meaning of abbreviations in his receipt book, such as "lig.," "cs.," "Bx."

State *v.* Gordon, 32 N. D. 31, 155 N. W. 59, Ann. Cas. 1918A, 442.

**Records Made Admissible by Statute.**—The books required to be kept by express companies, railroads, and other transportation companies under the provisions of section 6 of chapter 70, Session Laws 1911, when properly identified by the person in possession and control of the same are admissible in evidence in a case where the defendant is charged with a violation of the prohibitory liquor laws of this state.

Fletcher *v.* State, 13 Okla. Cr. App. 563, 165 Pac. 907.

The original records of liquor shipments of express companies, railroad companies, public or private carrier, prepared in accordance with section 6, c. 27, p. 126, Sess. Laws 1913, are admissible in evidence under the laws of this

state, without identification of the signature of the consignee.

State *v.* Maguire, 31 Idaho 24, 169 Pac. 175.

**Affidavits, etc., Made Prima Facie Evidence.**—Under Va. Acts, 1916, c. 146, making them *prima facie* evidence, and independent thereof, the affidavits of receiver of liquors, made a part of express records, are competent evidence of all facts which they tend to prove, including the *corpus delicti.*

Cochran *v.* Commonwealth, 122 Va. 801, 94 S. E. 329.

In prosecution for receiving liquor from an express company in excess of quantity allowed by Acts 1916, c. 146, § 40, the contention that the records of the express company, and affidavits, which are a part thereof, of the person receiving the liquor, are not admissible until the *corpus delicti* has been otherwise proven, is without merit.

Cochran *v.* Commonwealth, 122 Va. 801, 94 S. E. 329.

**Not Violative of Right of Confrontation.**—The admission of the express records, showing receipt of liquor by accused, is not a violation of the right to be confronted with accusers, as provided by the Va. Const. § 8 (Code 1904, p. ccix); such constitutional provision not being intended to exclude proper documentary evidence.

Cochran *v.* Commonwealth, 122 Va. 801, 94 S. E. 329.

22. TESTIMONY OF EXPRESS AND RAILWAY AGENTS.

The testimony of an express agent that defendant received from his certain shipments of whisky is admissible.

Fugate *v.* Commonwealth, 171 Ky. 227, 188 S. W. 324.

In prosecution for having unlawful possession of intoxicating liquors, the agent of the express company can testify as to the dates on, and amounts in, which accused received liquors.

State *v.* Bradley, 109 S. C. 411, 96 S. E. 142.

And it was proper to admit testimony of railroad and transfer agents showing that during the period in which

defendants were charged with selling intoxicating liquors illegally, they at different times received and delivered to defendants large quantities of intoxicating liquors consigned to defendants or to other persons for them.

Gage *v.* State, 125 Ark. 256, 188 S. W. 803.

**Proof of Handwriting, Signatures, etc.**—A witness who had examined a large number of delivery orders each day for ten years, to determine whether the signatures thereon were those of the consignees, is qualified to testify that in his opinion the signatures on orders for liquor were all written by the same person.

State *v.* Killeen (N. H.), 107 Atl. 601.

A former employee of the express company may identify books and records offered in evidence as being the books and records made and kept in the company's office, though he did not actually make them himself.

Flowers *v.* Birmingham (Ala. App.), 83 So. 36.

**Policy as to Baggage Containing Liquor.**—It is not error to refuse to allow the agent of the defendant railway company to testify what his policy was, and what he had done on previous occasions relative to baggage containing whisky. (Compare Donaldson *v.* State, 3 Ga. App. 451, 60 S. E. 115).

Seaboard Air Line Railway *v.* State (Ga. App.), 97 S. E. 549.

**Testimony of Agent of Wholesale Drug Company.**—In prosecution for having possession of intoxicating liquors with intent to dispose of them unlawfully, testimony of an agent of a wholesale drug company that he always dealt with accused for a retail drug company, that certain quantities of alcohol and cologne spirits were sold to such drug store on orders signed by accused, declaring an intent to use same for chemical and mechanical purposes, and coupled with complete identification of all sales not actually witnessed by him, was not inadmissible as hearsay.

State *v.* Billingsley, 99 Wash. 445, 169 Pac. 845.

23. PROOF OF LAWFULNESS OF POSSESSION.

Where the defendant claims that the whisky found in his place of business was some that he ordered three weeks before for his own use, it is competent to show how long it had been since he had ordered whisky prior to that order, since that was a circumstance tending to rebut the statutory presumption arising from the presence of whisky in his place of business.

Freeney *v.* Jasper, 8 Ala. App. 469, 62 So. 385.

**Poverty of Defendant as Showing Liquor Not Intended for Personal or Other Lawful Use.**—In a prosecution for the violation of the prohibition law, evidence as to the quantity of intoxicating liquor, the number of the deliveries of it to defendant within a short period, and as to the meagerness of his means of making such purchases for his personal use, was admissible as tending to show that he received it for sale or other unlawful disposition.

Herring *v.* State, 11 Ala. App. 202, 65 So. 707.

Where on a trial for violating the prohibition law there was evidence that accused on November 10th received four cases of liquor, and on October 5th, 12th, 14th, 17th, 20th, and 28th respectively, and that his only employment at that time and on November 10th was that of a buggy boy, was properly admitted as a basis for the inference that he was receiving liquor for sale or other illegal disposition.

Watson *v.* State, 11 Ala. App. 199, 65 So. 689.

**Evidence That Packages Marked for Personal Use.**—Evidence that each of the packages delivered to defendant by the express agent was marked for personal use, as required by Ky. St. 2569b, subsec. 3, of an independent act regulating transportation and delivery by carriers, was inadmissible.

Combs *v.* Commonwealth, 171 Ky. 231, 188 S. W. 326.

24. SALES AS EVIDENCE OF UNLAWFUL POSSESSION.

Where a person is charged with the offense of unlawfully keeping intoxicating liquor for sale, evidence of sales by

him is admissible as a circumstance tending to prove the crime charged.

State *v.* Gordon, 32 N. D. 31, 155 N. W. 59, Ann. Cas. 1918A, 442.
Kirk *v.* State, 14 Ala. App. 44, 70 So. 990.
Cheek *v.* State, 3 Ala. App. 646, 57 So. 108.
Spigener *v.* State, 11 Ala. App. 296, 66 So. 896.
Borok *v.* Birmingham, 191 Ala. 75, 67 So. 389, Ann. Cas. 1916C, 1061.

A witness who has testified to purchasing whisky from defendant on a particular occasion may also testify that he purchased it on previous occasions, such testimony tending to support the charge that defendant was keeping liquors for sale contrary to law.

Spigener *v.* State, 11 Ala. App. 296, 66 So. 896.

Where the issue was whether defendant kept at his storehouse prohibited liquors with intent to sell the same contrary to law, a question to a witness, whether he bought liquor at that location recently before the offense alleged and after the passage of the ordinance, was an evidential fact bearing on defendant's guilt.

Borok *v.* Birmingham, 191 Ala. 75, 67 So. 389, Ann. Cas. 1916C, 1061.

Where proof is made that liquor was on several occasions delivered to customers at the shop of the defendant, it is immaterial that the liquor itself was stored at some other place.

State *v.* Gordon, 38 N. D. 31, 155 N. W. 59, Ann. Cas. 1918A, 442.

Under a complaint which, besides charging the offense of selling prohibited liquors, charged in different counts and in the alternative in each of such counts of the offense of keeping prohibited liquors for sale, evidence of several different sales at different times was admissible to show that such liquors were kept for sale in violation of the statute.

Kirk *v.* State, 14 Ala. App. 44, 70 So. 990.

In a proceeding to search a hotel for liquors unlawfully kept for sale or other disposition, under Act Aug. 25, 1909,

(Gen. & Loc. Laws Sp. Sess. 1909, p. 74, § 22) the state could show that liquors had recently been sold there, and hence it was proper to admit proof that the sheriff sent a negro with no whisky on his person into the hotel, and remained in front of and near the hotel until the negro returned with whisky, and that he gave the negro money, and directed him to go into the hotel and buy whisky and bring it to him.

Cheek *v.* State, 3 Ala. App. 646, 57 So. 108.

**Proof of Conspiracy to Sell.**—In prosecution for unlawful possession of intoxicating liquors, evidence tending to show that defendant and another were conspirators engaging in the unlawful traffic of prohibited liquors was admissible.

Campbell *v.* State (Ala. App.), 78 So. 715.

**As Evidence of Unlawful Manufacture.**—In such prosecution testimony of a witness that he had purchased from the defendant liquor of the same kind as defendant was charged with making was admissible, though defendant had been acquitted of selling liquor to the witness.

Lowery *v.* State, 135 Ark. 159, 203 S. W. 838.

25. UNLAWFUL ISSUANCE OF PRESCRIPTIONS.

**Diploma as Evidence of License to Practice.**—The testimony of a physician that he has a diploma authorizing him to practice medicine is incompetent to show that he is a licensed physician.

McAllister *v.* State, 156 Ala. 122, 47 So. 161.

**Druggist's Record; Best Evidence; Oral Testimony.**—Where every reasonable effort by means of a subpœna *duces tecum* had been made to have the record book of a drug store and its prescription file brought into court in a prosecution for having issued a prescription without having reason to believe that the person to whom it was issued was sick, etc., oral testimony as to the contents of the record and file was admissible.

Seattle *v.* Hewetson, 95 Wash. 612, 164 Pac. 234.

**Other Prescriptions; Number of Prescriptions.**—In a prosecution of a physician for having issued a prescription for whisky without having reason to believe that the person to whom it was issued was sick, or that the liquor was required as medicine, testimony relating to prescriptions other than that on which the charge is laid is admissible as material on defendant's good faith.

Seattle *v.* Hewetson, 95 Wash. 612, 164 Pac. 234.

Evidence as to the number of prescriptions issued by him about the time of the offense charged is admissible on the question of good faith.

Everett *v.* Cowles, 97 Wash. 396, 166 Pac. 786.
Seattle *v.* Hewetson, 95 Wash. 612, 164 Pac. 234.

"The trial judge permitted the introduction of testimony showing the giving of some 56 other prescriptions than those given to the party named in the information and at about the same time. Appellant had issued to his patient 5 prescriptions between the 26th day of August, 1917, and September 11, 1917, each calling for one quart of whisky. On each prescription the patient is directed to take one ounce of the remedy in water three times a day. As these prescriptions obviously call for a greater quantity of liquor than was necessary to meet the needs of the patient if 'taken as directed,' the good faith of the physician, the issue in this class of cases, was clearly tendered by the state, and to further sustain the issue the other prescriptions were offered. 'The rule is that, in cases of this character, such evidence is competent. The real issue in such a case is whether the prescription was given in good faith, and, as bearing upon this question, the number of prescriptions given by the accused, within a specified time, for intoxicating liquor, to various persons, as found on the file of the druggist, in whose store the appellant kept his office, is competent.' Seattle *v.* Hewetson, 95 Wash. 612, 164 Pac. 234; Everett *v.* Cowles, 97 Wash. 396, 166 Pac. 786. It is urged that this procedure is violative of the rule that proof of crimes independent and in no way related to the crime charged cannot be established to prove a specific offense. It would be so if the crime charged rested alone in the doing of the act charged. But the *gravaman* of the offense is not in the doing of the

deed, but in the faith in which it was done. The rule seems to have grown out of the necessities of the statute, for the act itself is presumptively a lawful act sanctioned by statute. It is rendered unlawful when, and only when, the writer of the prescription abuses the confidence that is reposed in him and by the injection of the subtle quality of bad faith thwarts the police power of the state. From the nature of things, good or bad faith can only be proved by resort to circumstances and sidelights. If it were otherwise —if the mere giving of a prescription or a number of prescriptions by a licensed physician would bar further inquiry—the law would be emasculated of its purpose. It is not going beyond the range of judicial vision to say that liquor has not always been regarded as a cure-all or touchstone of health, but that it has grown in popular favor as a remedy as the chance of procuring it has grown remote; and, although a physician who prescribes it may be imposed upon at times, a general dispensation of the remedy at or about the time charged is sufficient to put him to the defense of his good intention before a jury of his countrymen."

State *v.* Raub (Wash.), 173 Pac. 1094.

26. MISCELLANEOUS QUESTIONS OF RELEVANCY.

**Defendant's Good Character.**—In a prosecution of a physician for having prescribed whisky for a patient with good reason to believe that the latter intended to use it as a beverage, the jury could consider evidence of defendant's good character, not only in case of doubt of guilt, but also to create a doubt.

People *v.* Humphrey, 194 Mich. 10, 160 N. W. 445, 446.

## VII. Weight and Sufficiency of Evidence.

1. WEIGHT OF CIRCUMSTANTIAL EVIDENCE.

A conviction for a violation of the liquor laws, either unlawful possession, possession for the purpose of unlawful sale, or for the unlawful sale itself, may be supported by circumstantial evidence alone.

Reismier *v.* State, 148 Wis. 593, 135 N. W. 153.
Butler *v.* Washington, 11 Ga. App. 133, 74 S. E. 858.
Cage *v.* State, 11 Ga. App. 318, 75 S. E. 160.
Smith *v.* State, 21 Ga. App. 143, 94 S. E. 62.

Verdicts may rest upon rightful inference as well as upon direct testimony.

Robilio *v.* United States (C. C. A.), 259 Fed. 101.
Laughter *v.* United States (C. C. A.), 259 Fed. 94.

In determining whether the evidence is sufficient to sustain the verdict of the jury, or the finding of the court, the court will consider, not only the positive testimony of the witnesses, but also such inferences as flow naturally from established facts. Chicago, etc., R. Co. *v.* Lake County, etc., Sav. Co., 186 Ind. 358, 362, 114 N. E. 454; Southern Products Co. *v.* Franklin, etc., Co., 183 Ind. 123, 124, 106 N. E. 872; Union Nat. Bank *v.* Finley, 180 Ind. 470, 475, 103 N. E. 110; Goodman *v.* State (Ind.), 121 N. E. 826. The evidence is amply sufficient to sustain the finding of the Marion criminal court. No error appearing in the record the judgment is affirmed.

Schulmeyer *v.* State (Ind.), 124 N. E. 490.

A charge of having possession of spirituous liquor for purpose of sale may be supported by circumstantial, as well as by direct evidence.

Woods *v.* Commonwealth, 171 Ky. 200, 188 S. W. 350.

The *corpus delicti* may be established by circumstantial evidence; its sufficiency being for the jury.

Pappenburg *v.* State, 10 Ala. App. 224, 65 So. 418.
Reynolds *v.* State, 18 Ariz. 388, 161 Pac. 885. (Unlawfully introducing liquor into state.)

In a prosecution for the unlawful keeping of intoxicating liquor for sale, circumstantial evidence proving facts which without doubt lead to the conclusion that defendant did have possession of the intoxicating liquor as alleged, and kept it at the place charged for the unlawful purpose charged, and that he was making such sales in violation of such law, is sufficient competent evidence to support the finding of guilt.

Schulmeyer *v.* State (Ind.), 124 N. E. 490.

A degree of evidence, circumstantial and insufficient to convict of other offenses, may be sufficient to show the of-

fense of having intoxicating liquors in possession for unlawful sale.

Lemon *v.* Commonwealth, 171 Ky. 822, 188 S. W. 858.

But when such evidence is relied on it must be inconsistent with defendant's innocence.

Flood *v.* State, 12 Ga. App. 702, 78 S. E. 268.

Thus where the evidence in a prosecution for possessing and controlling intoxicating liquors as to defendant's connection with the whisky was entirely circumstantial and failed to exclude every reasonable hypothesis save that of her guilt and was consistent with the theory of her innocence, a denial for her motion for a new trial was erroneous.

Mullins *v.* State (Ga. App.), 100 S. E. 755.

A judgment of conviction for possession of intoxicating liquor with unlawful intent, resting solely upon slight circumstantial evidence, which is offset by the positive denial of the defendant, whose good character is unquestioned, is not warranted by the evidence.

Silva *v.* State, 11 Okla. Cr. App. 12, 141 Pac. 235.

While a sale may be proved by circumstantial evidence, the circumstances must warrant the inference that there was a seller and a purchaser and compensation for the thing sold.

Scoggin *v.* Morrilton, 124 Ark. 585, 187 S. W. 445.

**Corroboration.**—Where there was direct evidence of violation of the local option law, the defendant's possession of an unusual quantity of liquor, which he permitted to be drunk in the house, constituted corroborative circumstances, justifying instructions on circumstantial evidence.

People *v.* Silver, 286 Ill. 496, 122 N. E. 115.

2. EVIDENCE OF DETECTIVE, ACCOMPLICE, ETC.

The testimony of a detective employed by an anti-saloon league in proceedings to enjoin liquor nuisances is to be weighed in the light of that fact and of his interest in the result of the case.

Barber *v.* Buonanni Co., 179 Ia. 642, 161 N. W. 688.

The uncorroborated evidence of a detective, however, if believed by the jury, is sufficient to support a conviction.

Condit *v.* State, 130 Ark. 341, 197 S. W. 579.

The uncorroborated evidence of a detective who admitted that he induced accused to make the sale in order to detect him in a violation of law, though contradicted by accused, will support a conviction for violation of the local option law.

Looper *v.* State, 74 Tex. Cr. App. 144, 167 S. W. 432.

In a nuisance prosecution for selling intoxicating liquors, testimony of a so-called informer employed for the express purpose of procuring evidence, who was corroborated to some extent, warrants a conviction.

State *v.* Hoffman (Ore.), 166 Pac. 765.

The requirement of corroboration of an accomplice's testimony does not apply to testimony of a mere purchaser of liquor illegally sold, for, not being a participant in the offense, he cannot be treated as an accomplice.

William *v.* State, 129 Ark. 344, 196 S. W. 125.

Witnesses who procure the sale of whisky to secure evidence against defendant are not accomplices as a matter of law requiring corroboration of their testimony.

Huggins *v.* State (Tex. Cr. App.), 210 S. W. 804.

By Texas Pen. Code 1911, art. 602, a stool pigeon, who, at the direction of an officer, purchased intoxicating liquor from defendant, who sold it in violation of the local option prohibition law, was not an accomplice of defendant, to require corroboration of his testimony.

Canales *v.* State (Tex. Cr. App.), 215 S. W. 964.

And it has been held that though a purchaser of spirituous liquor from one who sells it in violation of law participates in the unlawful sale, and is an accomplice, a jury may convict on his uncorroborated testimony, if satisfied beyond reasonable doubt that his testimony is true.

State *v.* Ryan, 1 Boyce's (24 Del.) 23, 75 Atl. 869.

3. TO PROVE INTOXICATING CHARACTER.

**Marks and Labels.**—The label upon a bottle required by the Pure Food Laws of the United States (U. S. Comp. St. §§ 8717-8728), stating the component parts of the contents of said bottle, is presumptive evidence of what the bottle contains, and such bottle, contents, and label thereon may be legally introduced in evidence in a prosecution for a violation of the prohibitory liquor laws of this state, and, if not rebutted, such evidence is *prima facie* sufficient to establish the character of the contents of such bottle in so far as the statement contained in said labels are required by law.

Gilliland *v.* State (Okla. Cr. App.), 179 Pac. 786.

**Bill of Lading Calling for Whisky.**—Where a bill of lading issued by a common carrier calls for the delivery of a certain package said to contain whisky, and a package is found in the possession of the carrier corresponding in number and weight to the description in the bill of lading and having thereon marks indicating that it contains intoxicating liquor, a *prima facie* case is made out that the package in fact contains such liquor.

Shaw *v.* Atlanta, 11 Ga. App. 391, 75 S. E. 486.

**Looks, Color, Taste, Smell, etc., as Proof That Liquor Was Whisky.**—Proof that a defendant sold "liquor" is sufficient to show, in the absence of adverse testimony, that he sold intoxicating liquor. Especially is this true where the proof further shows that it looked like rye whisky.

Carswell *v.* State, 7 Ga. App. 198, 66 S. E. 488.

In a prosecution for the sale of spirituous and intoxicating liquor called whisky in violation of the statute, evidence that the liquor sold, without a license, to the prosecuting witnesses, was intoxicating, that it looked like whisky and tasted like whisky, is sufficient to sustain a conviction.

White *v.* State, 88 Neb. 177, 129 N. W. 259.
Nixon *v.* State, 92 Neb. 115, 138 N. W. 136.

Where it was shown that, at the time accused was seen to deliver a half pint bottle containing liquor, he had in the buggy in which he was then riding two suit cases contain-

ing half-pint bottles of whisky, it sufficiently appeared that the liquor in the bottle so delivered was whisky.

Snead *v.* State, 7 Ala. App. 118, 61 So. 473.

Testimony that a witness purchased whisky from accused supported a conviction for selling intoxicating liquor, although the witness was unable to state whether the liquor purchased contained one-half of one per cent of alcohol or not; this not showing that he did not know that it was whisky.

Shaneyfelt *v.* State, 8 Ala. App. 370, 62 So. 331.

Where there was conflicting testimony as to whether the bottle admitted in evidence was the same that was taken from defendant's person, and whether it contained the same whisky, or any whisky, it was not error for the court to charge: "this case is not, as has been said, a wholly circumstantial case. There are circumstances, but the mass of testimony is conflicting positive testimony."

Guignard *v.* United States (C. C. A.), 258 Fed. 607.

**Looks, Taste, Color, Smell, etc., as Proof That Liquor Was Beer.**—Upon trial of an indictment for selling intoxicating drinks if the evidence show a sale of beer, the state has made a *prima facie* case for conviction, and need not give evidence that the beer is intoxicating; but the defendant may give evidence to prove that the beer sold is not intoxicating.

State *v.* Durr, 69 W. Va. 251, 71 S. E. 767, 46 L. R. A., N. S., 764.

While the courts do not take judicial cognizance of the fact that liquor not otherwise denominated than as beer is intoxicating (Lumpkin *v.* Atlanta, 9 Ga. App. 470, 472, 71 S. E. 755), still, in a prosecution under a municipal ordinance forbidding the keeping of intoxicants for the purpose of illegal sale, evidence to the effect that the beer alleged to have been purchased by a witness was the kind that he bought in barrooms, and that six or seven bottles of such beer would make him drunk, may be sufficient to support the inference that the liquid in question was intoxicating.

Bledsoe *v.* Jackson, 16 Ga. App. 479, 85 S. E. 676.

In a proceeding for contempt for violating an injunction against maintaining an intoxicating liquor nuisance, evidence that a liquor sold looked like beer, tasted like beer, and that the witness believed it was beer, and that there was malt in the liquor sold to another witness, is sufficient to justify a finding of the sale of intoxicating liquor.

State *v.* Trione, 97 Kan. 365, 155 Pac. 29.

In a prosecution for the selling of intoxicating malt liquor without license, where the witnesses testified they did not know whether the liquor was intoxicating or not, the evidence is insufficient to sustain a conviction.

Wales *v.* State (Tex. Cr. App.), 212 S. W. 503.

**To Prove Jamaica Ginger an Intoxicant.**—The evidence examined and held to be sufficient to sustain a finding that Jamaica ginger is an intoxicating liquor, notwithstanding it has a medicinal use, the formula for its preparations given in the United States dispensatory, and it is here classified with lemon, vanilla, cinnamon, cloves, camphor, cologne, paregoric, wintergreen and like tinctures, extracts, and essences.

State *v.* Miller, 92 Kan. 994, 142 Pac. 979, L. R. A. 1917F, 238, Ann. Cas. 1916 B, 365.

4. TO PROVE MANUFACTURE OR POSSESSION OF APPARATUS.

Where a still was in active operation and defendants, charged with unlawful manufacture of spirituous liquors, were the only persons present, jury was warranted in returning verdict of guilty; the inference being permissible that defendants were in charge of and operating the still.

State *v.* Ogleston (N. C.), 98 S. E. 537.

Upon a trial under an accusation based upon section 22 of the act of the General Assembly of Georgia approved March 28, 1917 (Acts of Extraordinary Session March 20-28, 1917, p. 18), when the evidence for the state shows that the apparatus for the distilling or manufacturing of whisky was found upon the defendant's premises, and that defendant was in actual possession of the premises, such evidence, by the express terms of the act, is *prima facie* evidence that the defendant had knowledge of the fact that

the apparatus was located upon his premises; and the burden of proof is then upon him to show that he had no such knowledge.

Carter *v.* State, 21 Ga. App. 493, 94 S. E. 630.

The defendant was indicted for distilling, manufacturing and making alcoholic, intoxicating, and spirituous liquors, and malted liquor and mixed liquor and beverages, part of same being alcoholic. The jury were authorized, and did find, that the defendant had in his house an outfit that had been when assembled, and could be, used to distill whisky, and had in his house beer that is used for distillation; that such beer was intoxicating; and that such concoction at the time it was so found was fermenting in a barrel, over the head of which a quilt was placed; that the still outfit had been in recent use, and that "low wine," or the first run of whisky, had been through the still and pipes. Such evidence, under appropriate charge of the court, was sufficient to authorize a verdict of guilty against the defendant. The trial judge having approved the verdict and no error of law being assigned which requires a new trial, the judgment is affirmed.

Jenkins *v.* State (Ga. App.), 100 S. E. 763.

Evidence that apparatus for manufacturing liquors prohibited by law and a barrel of "beer," which had fermented and was alcoholic and would produce intoxication were found in a house on the premises of the defendant where he lived, and he admitted that such apparatus and "beer" were in his possession, and that he intended to use the same for the purpose of making liquor, is sufficient to authorize his conviction of making liquor in violation of law.

Williams *v.* State (Ga. App.), 99 S. E. 711.

**Illicit Distilling.**—Evidence that witnesses found whisky, molasses, meal, a 60 gallon barrel half full of meal and molasses, and a 20 gallon iron pot on the fire full of stuff which looked as if it had been boiled, and which defendant overturned before they could secure a sample, held sufficient to sustain a conviction for illicit distilling.

Smiling *v.* United States (C C. A.), 258 Fed. 235.

The testimony against the defendant was, in substance, this: On March 20, 1918, the witnesses Fanning, Austin, and Coleman, federal and state officers, and one Whitworth, while driving along a community road in Lexington county in a northerly direction toward Columbia, saw two men come out of a swamp about 250 yards from the road they were on. The automobile was stopped, and Austin and Fanning pursued the two men, who had turned and run back into the swamp upon seeing them. By tracks and the noise he made in going through the thick undergrowth, Fanning was able to follow defendant across the swamp where he had stopped upon being hailed. Fanning identified him as the taller of the two men he had seen run from the opposite side of the swamp. Defendant was then brought back to the point from which he had run, and thence was taken some 50 yards along the creek or swamp to the still which he is charged with having in his possession and operating. At the still, two fermenters, some beer, caps, several jugs containing a small quantity of illicit whisky, a worm, and other distilling apparatus were found. The pots, or stills, were warm, and their supports too hot to handle. Defendant was placed under arrest and carried back to the automobile. A flask containing a small quantity of illicit whisky was found on him, and his clothes were soiled with soot and beer at the time of his arrest. Held sufficient to support a conviction.

Guignard *v.* United States (C. C. A.), 258 Fed. 607.

**Attempts to Manufacture.**—In a prosecution for manufacturing liquor in violation of Pub. Laws of N. Car. 1917, c. 157, the state need not show spirituous liquor was actually produced at the still where defendant was arrested. If the persons operating it were caught in the act of making the liquor, they could be convicted, though the process had not reached its final stage.

State *v.* Horner, 174 N. C. 788, 94 S. E. 291.

Under an indictment for manufacturing intoxicating liquor the defendant was found guilty of "attempting to make whisky." The evidence was amply sufficient to show that the accused had done more than make mere preparation for the commission of the crime, and that he was guilty of

overt acts in furtherance of his attempt to manufacture intoxicating liquor. Held, that the evidence was sufficient to support a conviction, and that the trial judge did not err in overruling the motion for a new trial based upon the general grounds that the verdict was contrary to the evidence, etc.

Pruett *v.* State, 18 Ga. App. 313, 89 S. E. 378.

**Permitting Distilling Apparatus on Premises.**—Under indictments for permitting or allowing any one to have, possess, or locate on his premises any apparatus for distilling or manufacturing liquor, etc., evidence that there was a copper still in running order, except the worm and condensor, did not show that a "complete still" was found on the premises, as alleged in indictment.

Davis *v.* State (Ga. App.), 100 S. E. 782.

Under a general indictment for the possession of intoxicating liquors, the state may show any number of "possessions" of the liquors.

Autrey *v.* State (Ga. App.), 99 S. E. 389.

5. TO PROVE SALE OR OFFERING FOR SALE.

While a sale may be proved by circumstantial evidence, the circumstances must warrant the inference that there was a seller, a purchaser, and a consideration for the thing sold.

Scoggin *v.* Morrilton, 124 Ark. 585, 187 S. W. 445.

It is not necessary that any particular price should be agreed on.

Smith *v.* State, 9 Ga. App. 230, 70 S. E. 969.
Finch *v.* State, 6 Ga. App. 338, 64 S. E. 1007.
Cage *v.* State, 11 Ga. App. 318, 75 S. E. 160.

And a sale on credit is as much a violation of the law as a sale for cash.

Finch *v.* State, 6 Ga. App. 338, 64 S. E. 1007.
Cage *v.* State, 11 Ga. App. 318, 75 S. E. 160.

It is immaterial that the seller made no profit on the transaction, or that the liquor did not belong to him. Neither of these elements is essential to a sale, and evidence on

these points is immaterial for the purpose of proving or disproving a sale.

Bird *v.* State (Tex. Cr. App.), 206 S. W. 844.

"But it is indispensable to the maintenance of this verdict and judgment that there should have been substantial evidence of a sale or of an offer to sell some of the whisky by the defendant. 'A sale is a contract for the transfer of property from one person to another for a valuable consideration.' 7 Words and Phrases, 'Sale,' pp. 6291, 6292. 'To constitute such a sale, there must be the assent of the two parties; there must be a vendor and a vendee. But no words need be proved to have been spoken. A sale may be inferred from the acts of the parties, and no disguise which the parties may attempt to throw over the transaction, with a view of evading the penalty of the law, can avail them, if in truth such sale is found to have taken place.' Commonwealth *v.* Thayer, 49 Mass. (8 Metc.) 525, 526. But one party cannot make a contract of sale. No such contract can be made without assent of the minds of two parties at the same time to the sale and to the terms of the sale, to the subject matter and the consideration of the sale; and as the alleged contract here was illegal, and its making criminal, the legal presumption was that the defendant did not make it, and this presumption prevailed until he was proved to have done so beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction."

Scoggins *v.* United States (C. C. A.), 255 Fed. 825, 827.

Evidence that money passed and whisky was delivered as a single transaction is sufficient to support a verdict.

Donaldson *v.* State, 3 Ga. App. 451, 60 S. E. 115.
Hollingsworth *v.* State, 17 Ga. App. 725, 88 S. E. 213.
Cowart *v.* State, 18 Ga. App. 677, 90 S. E. 286.

**Evidence Held Sufficient to Show Guilt.**—Evidence showing that witness laid a dollar on defendant's leg while latter was sitting in an automobile, and that they went to defendant's house, and defendant gave him a pint bottle, shown to contain whisky, all of which the defendant de-

nied, held to justify a conviction on charge of engaging in business of selling intoxicating liquors without license; the question being one of credibility of witnesses.

State *v.* Hays, 38 S. D. 546, 162 N. W. 311.

Uncontradicted testimony that defendant, while operating a rooming house, told guests that he would have some whisky the following day, which he would retail, and that guest, given a marked bill by police, gave it to defendant and received a bottle of whisky and his change, and that whisky was found in the house, warranted a conviction of an unlawful sale.

Holden *v.* State (Okla. Cr. App.), 180 Pac. 969.

**Corroborating Prima Facie Presumption from Possession of Tax Receipt.**—In a prosecution for unlawfully selling intoxicating liquors, evidence, when coupled with the *prima facie* presumption of guilt raised by accused's possession of a federal license, held sufficient to support a conviction.

Haar *v.* State, 14 Ga. App. 548, 81 S. E. 811.

**Evidence of Offer to Sell.**—Evidence of a single sale of whisky is sufficient to sustain a charge of offering it for sale, since an offer for sale is necessarily included in the completed sale; it being none the less an offer, even though it was made in response to an indicated desire by another to buy.

Slaten *v.* State, 10 Ala. App. 185, 65 So. 85.

**Evidence Held Insufficient to Show Guilt.**—In a prosecution, under Comp. St. §§ 5971, 5973, for selling whisky in less quantities than five wine gallons without paying a tax as a retail liquor dealer, evidence held insufficient to show the sale and sustain a conviction.

Scoggins *v.* United States (C. C. A.), 255 Fed. 825.

In a prosecution for the selling of malt intoxicating liquor without license, a showing only by witness' belief that defendant did not have a license is insufficient to sustain a conviction; the statute requiring a license for the selling of malt drinks, both intoxicating and nonintoxicating.

Wales *v.* State (Tex. Cr. App.), 212 S. W. 503.

In prosecution for violating prohibition law, by selling or otherwise disposing of bottle of whisky to certain person, evidence that witness had visited defendant with such person, who had produced bottle of whisky after the two had left defendant and gone about quarter of mile from her house, is insufficient for submission to jury of whether liquor had been received from defendant, where witness did not know but what such person had liquor before going to defendant's house.

Braxton *v.* State (Ala. App.), 82 So. 657.

6. TO PROVE UNLAWFUL POSSESSION.

See also ante, "Presumption and Burden of Proof."

**Necessity for Proving Guilty Knowledge, Purpose or Intent.**—Whether mere proof of possession of intoxicating liquors above a certain specified quantity or in any quantity is sufficient to make out a case against the accused depends upon the statute in that jurisdiction. Unless there is some provision in the statute upon which to base it, mere proof of possession by the accused of intoxicating liquor, without proof of the purpose of selling or giving away the same in violation of law, will not support a conviction.

Jackson *v.* State, 107 Miss. 153, 65 So. 123.

McAlester *v.* State (Okla. Cr. App.), 174 Pac. 1106, 1107, and cases cited.

"To justify or sustain a conviction of having possession of intoxicating liquors with intent to violate any of the provisions of the prohibitory law, there must be evidence sufficient to prove possession, and also evidence of the criminal intent. When the verdict is manifestly contrary to the evidence, the judgment of conviction will be reversed."

Ward *v.* State (Okla. Cr. App.), 175 Pac. 60.

The evidence in a Georgia case conclusively showing that the intoxicating liquor was found in the defendant's place, but that it was there without his knowledge or consent, and that he was in no wise connected therewith, the verdict of conviction was held to be without evidence to support it, and was therefore unauthorized by law.

Sewell *v.* State, 11 Ga. App. 754, 75 S. E. 1135.

Where there was no evidence to authorize the inference that the accused in any way acquiesced or participated in the illegal sales which necessarily constituted the evidentiary foundation of the charge of keeping intoxicants for illegal sale, and no testimony which indicated that he knew that these sales were to be made or had been made, the conviction was held to be unwarranted.

Pitts *v.* Atlanta, 14 Ga. App. 399, 81 S. E. 249, distinguishing Wright *v.* State, 14 Ga. App. 185, 80 S. E. 544; Deal *v.* State, 14 Ga. App. 121, 80 S. E. 537.

But under the ruling of the majority of the court in Cohen *v.* State, 7 Ga. App. 5, 65 S. E. 1096, one who *intentionally* carries whisky to his place of business, and keeps it there for what reason or for what purpose, may be convicted of the offense of keeping intoxicating liquors on hand at his place of business.

Nowell *v.* State, 18 Ga. App. 143, 88 S. E. 909.

**Sufficiency to Show Guilty Knowledge, Purpose or Intent; Generally.**

**Evidence Held Sufficient.**—In a prosecution for storing intoxicating liquors, where it appeared that the building in which the hiding place was found had formerly been used as a saloon by the present occupant; that the liquor had affixed to it a tag with the name of the accused; that the quantities were too large to justify the inference that it was kept for medicinal purposes; that the opening to the hiding place was under a rug in the floor; that it bore evidence of having been frequently opened; that intoxicating liquor had been served on the premises;—it was not error to fail to direct a verdict of acquittal.

People *v.* Galliari, 196 Mich. 475, 163 N. W. 154.

The testimony of several witnesses, to the effect that when they made a raid on defendant's place of business they found him in the rear of his store breaking up bottles of corn whisky, authorized the verdict of guilty of having liquor in his possession; and the trial judge did not err in overruling the motion for new trial.

Parks *v.* State, 21 Ga. App. 506, 94 S. E. 628, 629.

Where there was evidence that liquor in unlawful quantities was found on premises searched by officers, and defendant admitted that premises and liquor seized were his, and made no defense to prosecution for its unlawful possession, a conviction would not be disturbed for want of sufficient proof of the *corpus delicti.*

High *v.* State (Okla. Cr. App.), 180 Pac. 572.

Evidence held sufficient to show unlawful possession with intent to sell in the following cases:

Davis *v.* State (Okla. Cr. App.), 182 Pac. 909.
Pate *v.* State (Okla. Cr. App.), 180 Pac. 559.
Belchner *v.* State (Okla. Cr. App.), 183 Pac. 925.
State *v.* Baldwin (N. C.), 100 S. E. 345.
Stubblefield *v.* State (Okla. Cr. App.), 180 Pac. 252.
Hendrix *v.* State (Ga. App.), 100 S. E. 55.
Stubblefield *v.* State (Okla. Cr. App.), 180 Pac. 251.
Morris *v.* State (Okla. Cr. App.), 180 Pac. 561.
Davis *v.* State (Okla. Cr. App.), 182 Pac. 908.

**Evidence Sufficient to Go to the Jury.**

Freeman *v.* State (Okla. Cr. App.), 183 Pac. 626.
State *v.* Bachtold (Wash.), 180 Pac. 896.

Under Rem. Code 1915, § 6262—23, making possession of more than two quarts of intoxicating liquor *prima facie* evidence that it was held for unlawful sale, proof that 23 quarts of whisky were found in defendant's possession is sufficient to take to the jury the question of defendant's intention to sell.

State *v.* Conner (Wash.), 182 Pac. 602.

**Evidence Insufficient to Sustain Conviction.**—The unloading by a public drayman of a barrel of whisky on a vacant lot is not sufficient proof, against the owner of the lot, of the unlawful possession with intent to sell whisky to warrant a conviction of the owner of such lot, in the absence of proof that the whisky belonged to him, or that acts of ownership were exercised by him over the whisky.

Telico *v.* State, 13 Okla. Cr. App. 608, 166 Pac. 76.

The accused was convicted of keeping intoxicating liquors in his place of business. The evidence shows that he

received a package of whisky by express and delivered it to a hackman, with instruction to take it to his residence and to deliver it to his wife. The hackman carried the whisky to the home of the accused, and, finding, no one there, took it across the street and deposited it in a restaurant, which was being conducted by the accused. The accused was absent, and did not know that the hackman had not left the whisky at his residence, but had deposited it in the restaurant. About 10 minutes after the whisky was left in the restaurant, its presence was discovered by a policeman, and the accused was arrested while on his way to the restaurant from some point in the city. There was no evidence that the accused knew until after his arrest that the whisky had been placed in the restaurant. Held that the conviction was unauthorized, and should have been set aside on motion for a new trial.

Johnson *v.* State, 13 Ga. App. 654, 79 S. E. 758.
Smith *v.* State (Okla. Cr. App.), 182 Pac. 730.

**Inference from Mere Possession Not Conclusive.**—Where one is charged with the offense of keeping on hand at his place of business alcoholic, spirituous, malt, or intoxicating liquors prohibited by law, and intoxicating liquors are shown to have been found at his place of business, such evidence is sufficient to support the inference that the forbidden liquors were kept by the owner of the place of business, but such inference is not conclusive, for it may be shown, among other things that the forbidden liquors were not the property of the accused, that they had been temporarily deposited in his place of business by some other person without his knowledge or consent and that the owner of the place of business had no knowledge of their presence or existence.

Lewis *v.* State, 6 Ga. App. 205, 64 S. E. 701.
Autrey *v.* State, 18 Ga. App. 13, 88 S. E. 715.

**Property Not Used Exclusively as Dwelling.**—Where a building was not used exclusively for a dwelling, the keeping therein of alcoholic liquors or beverages, forbidden by the laws of the state to be manufactured, sold, or otherwise disposed of, was *prima facie* evidence that the

same was kept for sale or with intention to sell contrary to law.

Jones *v.* Montgomery (Ala. App.), 77 So. 969.
Thomas *v.* State, 13 Ala. App. 246, 68 So. 799.
Johns *v.* State, 13 Ala. App. 283, 69 So. 259.

Evidence of such possession at a place other than in his dwelling while sufficient to sustain a conviction of keeping or having in possession for sale, does not sustain a conviction of an actual sale.

Johns *v.* State, 13 Ala. App. 283, 69 So. 259.

**Sufficiency to Prove Place a Dwelling.**—Where accused lived in a house containing two rooms, one of which was not occupied, and the other containing a bed, stove, trunk, and an ice box, and the sheriff found in the house a number of barrels labeled "beer," and containing bottles labeled "beer," and also beer bottles in the ice box, the jury could find that the house was a place not used "exclusively" as a dwelling within Act of 1909 (Sp. Sess.) p. 64, § 4 providing that the keeping of prohibited liquors in a building not used exclusively for a dwelling shall be *prima facie* evidence that they are kept for sale.

Carmichael *v.* State, 11 Ala. App. 209, 65 So. 694.

**Proof of Actual Sale Unnecessary.**—The offense of keeping intoxicating liquors for unlawful sale may be established without evidence of either a sale or an attempt to sell.

Commonwealth *v.* Tay, 146 Mass. 146, 15 N. E. 503.
Commonwealth *v.* Ahern, 228 Mass. 547, 117 N. E. 827.

This is also true under the Kentucky statute; evidence of possession with intent to sell being sufficient.

Wilson *v.* Commonwealth, 181 Ky. 370, 205 S. W. 391.

**Proof of One Sale Sufficient.**—Where one is charged with keeping a liquor nuisance, proof that liquor was actually sold by him upon his hotel premises, is conclusive proof that he kept such liquor with the intent to sell.

State *v.* Jarvis (Ia.), 165 N. W. 61.

Where the accused is charged with a violation of a valid municipal ordinance prohibiting the keeping in possession of intoxicating liquors for the purpose of illegal sale, the possession of the liquor and proof of one sale will authorize a conviction.

Sawyer *v.* Blakely, 2 Ga. App. 159, 58 S. E. 399.
Cooper *v.* Ft. Valley, 13 Ga. App. 169, 78 S. E. 1097.
Seabrooks *v.* Macon, 17 Ga. App. 348, 86 S. E. 781.
Jefferson *v.* Perry, 18 Ga. App. 689, 90 S. E. 365.

"Under repeated rulings of the Supreme court and of this court, one sale of whisky is sufficient to authorize a mayor or recorder, sitting as both judge and jury, to find that the seller had the whisky for the purpose of sale."

Jefferson *v.* Perry, 18 Ga. App. 690, 90 S. E. 366.

In prosecution under Rev. St. of Me. c. 23, § 1, providing that all places used for the illegal sale or keeping of intoxicants are common nuisances, the jury may, from a single act of keeping or selling, be justified in finding a custom or habit, or keeping, or selling essential to conviction.

State *v.* Gastonguay (Me.), 105 Atl. 402.

**Sufficiency of Railway or Express Receipts to Show Unlawful Possession or Receipt.**—In prosecution for the unlawful receipt of liquor from a transportation company, affidavits of accused, signed when receipting for liquor, were insufficient, standing alone, to prove the *corpus delicti.*

Cochran *v.* Commonwealth, 122 Va. 801, 94 S. E. 329.

And in such prosecution express records, showing receipt, by some person having the same name as accused, of whisky in excess of one quart within one calendar month, were *prima facie* evidence of the *corpus delicti,* which, in the absence of rebutting evidence, became conclusive.

Cochran *v.* Commonwealth, 122 Va. 801, 94 S. E. 329.

**Large or Unusual Quantity as Evidence of Unlawful Purpose.**—Ten gallons of whisky is an unusual quantity to be found in a private dwelling house, within Code, § 2427, making finding of unusual quantities presumptive evidence that the liquors are kept for unlawful sale.

McMillan *v.* Anderson, 183 Ia. 873, 167 N. W. 599.

Under a statute providing that the fact that any person not authorized to sell intoxicating liquors, shall keep such liquor in unusual quantities, shall be presumptive evidence of the maintenance of a liquor nuisance, where defendant had on hand 230 pints of whisky, 22 pints of brandy and 24 pints of gin, the presumption arose in his case.

State *v.* Kiefer, 172 Ia. 306, 151 N. W. 440.

"Evidence that the defendants, acting conjointly, every day or so for several months received intoxicating liquors in large quantities, in three days aggregating 6 casks of beer and 49 cases of whisky, shipped to them in fictitious names, and so receipted for by the defendants, is sufficient evidence to sustain the finding of the jury that the defendants had such beer and whisky with intent to sell the same."

Conley *v.* State (Okla. Cr. App.), 179 Pac. 480.

Proof that defendant had in his possession 25 gallons of whisky made a *prima facie* case that the liquor was kept for purposes of unlawful sale or disposition.

State *v.* Bachtold (Wash.), 180 Pac. 896.

In a prosecution for carrying liquor on defendant's person, or in a suit case with intent to sell or give away, that defendant carried four gallons of liquor in a suit case established *prima facie* that he kept such liquors with intent to violate the statute under the presumption established by Code, § 2427.

State *v.* Butler (Ia.), 173 N. W. 239.

That a person subject to a liquor injunction carried 48 quarter pint bottles of whisky in a sack, which he dropped and ran when an officer was seen, was ample proof of intent to use the liquor unlawfully, and so to violate the injunction.

Bird *v.* Sears (Ia.), 173 N. W. 925.

"The three pints of whisky discovered at the defendant's home were not sufficient in quantity to raise a legal presumption that he had the same for an unlawful purpose, and the prosecuting witness, Boyd, is nowhere corroborated by any competent evidence that tends to establish the fact that the defendant had any intention whatever to unlaw-

fully sell the three pints of whisky found at his home, or any other whisky. The corroboration of the accomplice is only to the effect that the defendant had three pints of whisky at his home. Proof of possession merely is not sufficient to authorize a conviction. Lindsey *v.* State, 9 Okla. Cr. App. 730, 132 Pac. 1194; Ren *v.* State, 9 Okla. Cr. App. 671, 132 Pac. 1131; Johnson *v.* State, 6 Okla. Cr. App. 490, 119 Pac. 1019; Guiaccimo *v.* State, 5 Okla. Cr. App. 371, 115 Pac. 129; Quinn *v.* State, 8 Okla. Cr. App. 478, 128 Pac. 1104."

McAlester *v.* State (Okla. Cr. App.), 174 Pac. 1106, 1107.

7. TO PROVE INTRODUCTION, TRANSPORTATION OR DELIVERY.

**Sufficiency to Raise Prima Facie Presumption.**—In a prosecution for transporting contraband liquor, where defendant was found at a church selling liquor from bottles in his possession, the presumption is that he carried it there.

State *v.* Pope, 79 S. C. 87, 60 S. E. 234.

In a prosecution for transporting prohibited liquors, the possession of the liquors by the person to whom defendant was charged to have transported them, was *prima facie* evidence of ownership.

Pappenburg *v.* State, 10 Ala. App. 224, 65 So. 418.

**To Warrant Instruction or Take Case to Jury.**—In a prosecution for bringing intoxicating liquors into the state, evidence that accused when arrested while driving from the state line with intoxicating liquors, stated that it cost him an additional amount to have such liquors brought and delivered to him within the state, warrants an instruction that persons aiding, etc., in the introduction of liquor into the state are guilty as principals.

Murray *v.* State, 19 Ariz. 49, 165 Pac. 315.

Evidence in a prosecution for introducing liquors into a prohibition state held sufficient to justify submission of the case to the jury.

Weems *v.* United States (C. C. A.), 257 Fed. 57.

**To Sustain Conviction.**—Testimony of a police captain that on certain date he met defendant near corner of Third and Santa Fé Streets, and said to him, "Charley, I want that whisky," and searched defendant, and found a quart and two half pints of whisky on him, supported a conviction for unlawful conveyance of whisky to corner of Third and Santa Fé streets.

Jones *v.* State (Okla. Cr. App.), 183 Pac. 519.

In a prosecution for unlawfully transporting intoxicating liquor, evidence that defendants were appprehended on a road in a Ford car containing about 200 quarts of whisky, gin, and wine, and that one said they came from Wichita Falls and were going to Oklahoma City, is sufficient to sustain a verdict of guilty.

High *v.* State (Okla. Cr. App.), 182 Pac. 907.

Merely from the common knowledge regarding the nature of the Mississippi and its winding channel, the jury would be entitled to infer that a considerable part of the journey down it, for over 100 miles constantly opposite Tennessee, of defendant's light draft small power boat, the natural effort of which would be to make as straight a course as possible, had been within the limits of Tennessee. (On a charge of bringing liquor within limits of dry state.)

Bishop *v.* United States (C. C. A.), 259 Fed. 195.

In a prosecution for introducing intoxicating liquor into an Oklahoma county, evidence held sufficient to sustain the conviction.

Bradley *v.* United States (C. C. A.), 254 Fed. 289.
Bishop *v.* United States (C. C. A.), 259 Fed. 195.
Whitley *v.* State (Ark.), 215 S. W. 703.
Ross *v.* State (Okla. Cr. App.), 180 Pac. 573.
Hale *v.* State (Okla. Cr. App.), 181 Pac. 735.

**Evidence Insufficient.**—Where federal officers shot one of a party in attempting to arrest such persons in Osage county, Okl., for suspected violation of laws relating to intoxicating liquors, evidence held, in *habeas corpus* proceedings in the federal court, to show that none of the party, in

the presence of the officers, committed the offense of introducing intoxicating liquor into the county.

Castle *v.* Lewis (C. C. A.), 254 Fed. 917, 918.

In a prosecution for attempting to introduce intoxicating liquor into the state in violation of Const. art. 23, § 1, evidence held insufficient to show that that defendant, who was apprehended at the state boundary line, committed any act within the state for the purpose of introducing intoxicating liquors into the state.

Baca *v.* State, 18 Ariz. 350, 161 Pac. 686.
Carrico *v.* State (Okla. Cr. App.), 180 Pac. 870.

**Unlawful Delivery—Scienter.**—To prove that a carrier "knowingly" delivered liquor to a person in dry territory, or to a minor, in violation of Ky. St. 2596b, proof of such facts and circumstances as would excite the suspicion of an ordinarily prudent person, and such as might have been verified by a reasonable effort, is sufficient.

Adams Exp. Co. *v.* Commonwealth, 177 Ky. 449, 197 S. W. 957.

**Unlawful Delivery—Name of Expressman.**—Although it may not be necessary, in an accusation of this kind, to name the agent of the express company who delivered the liquor, yet when the name is alleged it becomes "descriptive of the identity of that which is legally essential to the claim or charge," and cannot be rejected as surplusage, but must be proved as alleged.

Southern Exp. Co. *v.* State (Ga. App.), 97 S. E. 550.

8. MISCELLANEOUS QUESTIONS OF SUFFICIENCY.

**Preponderance of Witnesses.**—In a prosecution for unlawfully selling intoxicating liquor, where the witnesses in behalf of defendant outnumbered those for the state, but the circumstances of defendant's evidence indicated an attempt to frame favorable evidence, the jury was warranted in finding a verdict of guilty, notwithstanding the numerical preponderance of defendant's evidence.

State *v.* Walters, 178 Ia. 1108, 160 N. W. 821.

**Confessions and Plea of Guilty.**

If the defendant has pleaded guilty and there is evidence that he sold intoxicating liquors in violation of the statute, he is not in a position to complain that the evidence was not sufficiently specific in showing his guilt.

Terretto *v.* State (Tex. Cr. App.), 215 S. W. 329.
Berryman *v.* United States (C. C. A.), 259 Fed. 208.
Robilio *v.* United States (C. C. A.), 259 Fed. 101.

**Sufficiency to Overcome Statutory Presumption.**

See also ante, "Weight of Statutory Presumption."
State *v.* Butler (Ia.), 173 N. W. 239.

In action to enjoin maintenance of liquor nuisance, defendant's mere denial that the 36 quarts of whisky and the 96 quarts of beer, found in his residence garage, were kept for purpose of sale, is insufficient, under circumstances of case, to overcome presumption that it was kept for purpose of illegal sale.

McMillan *v.* Miller (Ia.), 174 N. W. 259.

**Proof of Former Conviction; Second Offense, etc.**—Where the record of a previous conviction relied on to support a charge of persistent violation discloses that the conviction was for violation of the prohibitory liquor law, the record is *prima facie* proof which warrants a finding of previous conviction, without introducing the complaint or information on which it was based.

State *v.* Schmidt, 92 Kan. 457, 140 Pac. 843.

Evidence that previous to filing of information defendant was convicted and sentenced for violation of prohibitory liquor laws, and that subsequent thereto quantities of beer and whisky were found in his residence at time averred in present information, showed a second violation of prohibitory liquor law beyond a reasonable doubt.

Browder *v.* State (Okla. Cr. App.), 180 Pac. 571.

**Conspiracy to Violate Statute.**—Evidence that defendant had whisky for sale, although he had not paid special

tax as a retail liquor dealer, and sold whisky to a third person through an acquaintance, who brought the orders, held sufficient to sustain a verdict for conspiracy with the acquaintance to violate the statute.

Villers *v.* United States (C. C. A.), 255 Fed. 75.

**Evidence Showing Trick or Device to Avoid Color of Sale.**—In a prosecution for selling intoxicating liquor in a county where the local option law was in force, a trick, such as leaving money on the top of a table to pay for liquor, will not be permitted to work a miscarriage of justice.

Huddleston *v.* Commonwealth, 171 Ky. 261, 188 S. W. 366.

**Evidence Identifying Accused or Connecting Him with Sale or Unlawful Possession.**—Where on a trial for selling intoxicating liquor, the person who bought the liquor testified that to the best of his recollection the accused, with whom he had no acquaintance, was the one who sold the liquor, but that he could not say positively that he was the man, there was positive evidence of the identity of accused as the guilty person sufficient for submission to the jury.

Hollingworth *v.* State, 3 Ala. App. 153, 57 So. 501.

In a prosecution for selling intoxicating liquors in prohibition territory, testimony by the alleged buyer that he found the whisky in his barn, but did not know to whom it belonged, and that he had previously loaned money to the defendant, but nothing was said at that time about whisky, is not sufficient to sustain a conviction, although a justice of the peace testified that the witness had sworn before him that he purchased the whisky from the defendant.

Barnhill *v.* State, 74 Tex. Cr. App. 97, 167 S. W. 348.

In proceedings for contempt for violation of a liquor injunction, evidence identifying the person proceeded against with a person who carried a sack full of quarter pint bottles of whisky is sufficient to sustain an adjudication of contempt.

Bird *v.* Sears (Ia.), 173 N. W. 925.

**Sale by Firm, Partner, Agent, Employee, Child, etc.**—In a prosecution for illegally engaging in the business of

selling intoxicants under an information charging defendant with having committed the offense, evidence showing the acts to have been done by means of agents or employees of defendant is proper and sufficient to sustain conviction, but it is necessary to identify the seller as the agent or employee of defendant, or at least to adduce evidence from which the jury may reasonably infer such connection between them.

State *v.* Otto, 38 S. D. 353, 161 N. W. 340.

The fact that one who was behind the counter of a "near beer" saloon sold whisky without hindrance or protest on the part of the proprietor or any of his agents may authorize the inference that the seller is an agent of the proprietor of the saloon and it is certainly sufficient to place the burden upon the saloon keeper to show that this seller was not in fact his agent.

Bragg *v.* State, 15 Ga. App. 623, 84 S. E. 82.

Where a defendant was lying on a lounge in a room in his house, and another person sold liquor in his presence, the law infers in the absence of any evidence of duress or insanity that the sale was made with his consent and connivance.

State *v.* Denton, 154 N. C. 641, 70 S. E. 839.

That the indictment charges that defendant, a druggist sold liquor, while the proof shows that a clerk in his drug store sold it, is not a fatal variance.

State *v.* Clark (Mo. App.), 203 S. W. 627.

Evidence on prosecution for maintaining a liquor nuisance at a drug store held to authorize finding that defendant by himself or through another, with his knowledge and consent, sold intoxicating liquor as a beverage, and was therefore guilty.

State *v.* Synder (Ia.), 171 N. W. 8.

Where a witness asked accused to sell him whisky, and accused told his eight year old daughter to get the whisky, which she delivered to the witness in the presence of accused, who picked up the money put on the table by the witness in payment, accused was guilty of selling whisky in violation of Acts 1909, Sp. Sess. p. 96, section 37 of which pro-

vides that the act shall be liberally construed to accomplish the purpose thereof, and to prevent evasions of the law.

Lynn *v.* State, 10 Ala. App. 223, 65 So. 92.

**To Prove Defendant the Seller and Not Mere Agent to Procure, etc.**

See also ante, "Where Accused Claims to Have Acted as Agent or Procurer for Buyer, and Not as Seller" (Under I, "Presumption and Burden of Proof.")

Under an indictment for unlawfully selling liquors, proof that defendant only purchased or aided the purchaser presents a fatal variance.

Payne *v.* State, 124 Ark. 20, 186 S. W. 612.

In such prosecution evidence that defendant bought the whisky as the agent of another and delivered it to him and did not sell it to such person could not form the basis of a conviction.

Amonett *v.* State (Tex. Cr. App.), 204 S. W. 438.

Where accused offered no evidence, and the testimony for the state showed that he was given $2.00 to buy whisky for another, which he did, delivering the whisky and the change, an instruction that if accused received money from another, and delivered whisky to such person, he was guilty, is not misleading in view of the evidence, though the mere delivery of the whisky itself is not ordinarily sufficient to constitute a sale.

Pope *v.* State, 108 Miss. 706, 67 So. 177.

"If the defendant had proved by an unimpeached witness that he did in fact buy the whisky from James, he would have carried successfully the burden of rebutting the inference that he was himself the seller, which was authorized by his receiving the money and delivering the whisky. Bray *v.* Commerce, 5 Ga. App. 605, 63 S. E. 596."

Cannington *v.* State, 14 Ga. App. 814, 82 S. E. 356.

**Unlawful Possession as Evidence of Sale.**—The Virginia Act of 1916, c. 146, § 65, providing that possession of a certain amount of intoxicating liquor is *prima facie* evidence that it is possessed for the purpose of sale, does not

warrant a conviction of "selling" ardent spirits merely from the fact of possession.

Collins *v.* Commonwealth, 123 Va. 815, 96 S. E. 826, 827.

"The *prima facie* presumption raised by such statute from the possession by any person of any ardent spirits at any place other than his home (which the evidence for the commonwealth in the instant case showed was true of the accused), extends no further, however, than the presumption 'that such person possesses such distilled liquor * * * for the purpose of sale.' Pine *v.* Commonwealth, 121 Va. 812, 93 S. E. 652. Such possession does not of itself furnish any evidence of any sale actually made, it being *prima facie* evidence only of the contemplated selling thereof by such possessor of the liquor. Such possession, with such purpose, does, it is true, constitute in itself an offense under the statute."

Collins *v.* Commonwealth, 123 Va. 815, 96 S. E. 826, 829.

**Proof of Sale as Affected by Proof of Ownership.**—"One may be a violator of the law prohibiting the sale of intoxicants as well when the intoxicant sold by him is in fact the property of another as if it were his own (Hendrix *v.* State, 5 Ga. App. 819, 63 S. E. 939; Toles *v.* State, 10 Ga. App. 444, 73 S. E. 597; Brown *v.* State, 11 Ga. App. 813, 76 S. E. 360), and this despite the fact the sale may have been made merely as an accommodation to the owner and the purchaser. Hence proof that an intoxicant, alleged to have been sold in violation of law, was not property of the person who delivered it in pursuance of the sale is a mere circumstance which may point to the identity of the real seller, but the probative value and effect of the circumstance is for the jury."

Pitts *v.* State, 17 Ga. App. 836, 88 S. E. 712.
Accord: Bird *v.* State (Tex. Cr. App.), 206 S. W. 844.

Under an indictment for liquor sold prior to Acts 1917, p. 41, it was not sufficient to show a sale of liquor of which defendant was a part owner by another part owner, because

the defendant must be shown to have had an interest in the sale.

Holmes *v.* State, 132 Ark. 135, 200 S. W. 1038.

**Proof of Time and Place of Sale.**

See also ante, "I, Scope of Inquiry;" "V, 42 Evidence to Show Time and Place."

An accused cannot be convicted of violating the prohibition law in absence of proof that the liquor was sold within the punishable period.

Doss *v.* State, 7 Ala. App. 121, 61 So. 748.

Likewise the *venue* must be proved to the extent of bringing the alleged offense within the territorial jurisdiction of the court.

Cagle *v.* State, 106 Miss. 370, 63 So. 672.

Where the evidence in a prosecution for unlawful sale of intoxicating liquors did not fix the *venue* of the offense within the city where the prosecution was begun before the mayor as *ex officio* justice of the peace, or show that a sale testified to occurred prior to the date of the affidavit, a conviction was unauthorized.

Cagle *v.* State, 106 Miss. 370, 63 So. 672.

The charge of keeping prohibited liquors for sale could be supported by evidence of defendant doing so at the place named in the written charge as to which the state offered evidence, or at another place, where he testified he kept liquor which he received during the period covered by the indictment.

Brigham *v.* State, 8 Ala. App. 400, 62 So. 980.

The indictment having been returned January 23, 1911, and the trial had at the May term 1911, testimony that the accused sold intoxicating liquor within the last two years does not show with sufficient certainty that the sale took place before the indictment was found.

White *v.* State, 93 Ga. 47, 19 S. E. 49.
Abbott *v.* State, 11 Ga. App. 43, 74 S. E. 621.

Where in a prosecution for wrongful sale of liquor, the prosecuting witness testified that the sale took place during the year 1910, and before he went before the grand jury, and the indictment under which the defendant was being tried was found by the grand jury at the September, 1910, term of the court, and the trial was in the spring 1911, the evidence sufficiently showed the time of the sale.

Carson *v.* State, 3 Ala. App. 206, 58 So. 88.

**To Sustain Condemnation or Forfeiture.**

Armington & Sons *v.* State (Ga. App.), 100 S. E. 15.

**Sufficiency to Show Maintenance of Nuisance.**—Evidence consisting principally of hearsay testimony is insufficient to prove that drug store proprietor, alleged to be engaged in the illegal sale of liquor, was guilty of maintaining a public nuisance.

Alton *v.* Salley (Mo.), 215 S. W. 241.

In suit to restrain maintenance of public nuisance, wherein defendant was charged with illegal sale of intoxicating liquors, testimony of witnesses who had seen intoxicated persons, and who had merely heard or suspected that the liquor had been obtained from defendant, but had no actual knowledge thereof, is practically worthless.

Alton *v.* Salley (Mo.), 215 S. W. 241.

**Sufficiency to Sustain Alleged Excessive Sentence.**—One convicted of unlawfully selling intoxicating liquor cannot complain that the maximum sentence is excessive and unusual for a first offense, where there was testimony that this was not his first offense, and where the jury were justified in finding from the testimony that he put the state to the burden and expense of trying him when he was guilty, that he produced perjured testimony to sustain his defense, and that the same was obtained by a campaign amounting to conspiracy on the part of those who favored him.

State *v.* Walters, 178 Ia. 1108, 160 N. W. 821, 822.

**VIII. Impeachment of Witnesses.**

See also ante, "Character and Reputation of Accused as a Seller of Intoxicants."

**Questions Tending to Incriminate or Degrade Witness, or Prove Him Guilty of Other Offenses.**—Where one of the alleged purchasers testified for the state, the refusal to permit the accused to prove on cross-examination that he had been arrested for violations of the prohibition laws and imprisoned was erroneous, especially where the evidence was conflicting and the case was close.

Amonett *v.* State (Tex. Cr. App.), 204 S. W. 438.

Under the Acts of —, 1915, pp. 23, 24, § 22, subd. 13, approved January 23d, providing that in a trial of proceedings to condemn liquor one who answers claiming an interest in liquors seized, shall be excused from attending and testifying in court on the ground that the testimony may tend to convict him of crime, does not apply to voluntary statements out of court.

Phelps *v.* State (Ala. App.), 75 So. 877.

Where the defendant, being prosecuted for selling intoxicating liquors, took the stand as a witness, it was proper on cross-examination for the prosecuting attorney to ask the defendant concerning the commission of other offenses, for the purpose of reflecting upon his credibility.

Nelson *v.* State (Ark.), 212 S. W. 93.

In a prosecution for illegally disposing of alcoholic liquor, the prosecuting attorney was properly permitted on cross-examination to ask defendant if he had not tried to escape, and had not brought some saws into the jail and given them to other persons, etc., since a witness may be cross-examined as to his particular acts relevant to the impeachment of his character for truth, though disconnected with the charge.

Webb *v.* State (Ark.), 212 S. W. 567.

**Independent Testimony; Proof of Other Offenses, etc.**—Where the accused testified in his own behalf, the state can attack his general reputation and show that he has been indicted for various offenses, including sales of intoxicating liquors in prohibition territory, and that indictments therefor are pending against him, to affect his credibility.

Martoni *v.* State, 74 Tex. Cr. App. 90, 167 S. W. 349.

It is not reversible error to exclude evidence of specific sales of liquor by a witness for the state, where such witness admits that he has made many sales thereof.

Dean *v.* State, 130 Ark. 322, 197 S. W. 684.

As the offense of selling intoxicating liquor is not of those offenses involving moral turpitude, a witness cannot be impeached by proof that he has violated this law. Wheeler *v.* State, 4 Ga. App. 325, 61 S. E. 409. The court did not err in excluding testimony to the effect that a witness whom it was sought to impeach was considered a liquor seller, and that his reputation about selling liquor was bad.

Edenfield *v.* State, 14 Ga. App. 401, 81 S. E. 253.

**Impeachment of Co-Defendant.**—In a prosecution of two for unlawfully conveying intoxicating liquors, appellant's claim of error in admitting evidence to impeach his co-defendant, who was used as a witness in his behalf, was without merit, where court limited jury's consideration of such evidence solely to impeaching the co-defendant as a witness, and where impeaching evidence was material to the issues.

Hale *v.* State (Okla. Cr. App.), 181 Pac. 735.

**Evidence to Show Bias of Detective Accomplice, etc.**

See also ante, "Evidence of Accomplice, Detective, etc.

In a prosecution for the sale of liquor, a witness for the state may be cross-examined as to whether to his knowledge one in whose employ he admittedly was, did not take an active interest in the prosecution.

Harrison *v.* State, 12 Ala. App. 284, 68 So. 532.

But the court properly refused to require a witness to answer whether he had not taken a "pretty active stand" on the whisky question, and prosecuted people for violating the prohibitory law, as too general to show bias of the witness against accused.

Coates *v.* State, 5 Ala. App. 182, 59 So. 323.

Where a witness for the state testified that he bought whisky from defendant under instruction from an employee of the excise commission of the city, who was engaged in running down blind tigers, and that the commissioner had not paid him specially for buying whisky from the defendant, defendant was entitled on cross-examination to inquire what he was to be paid for it.

Harwell *v.* State, 11 Ala. App. 188, 65 So. 702.

It was not error to exclude testimony of the prosecuting witness on cross-examination that he was told by police officers that they would turn him loose if he told where he got the beer, since such testimony had no material bearing as to whether the witness was falsely accusing defendant.

State *v.* Walters, 178 Ia. 1108, 160 N. W. 821, 822.

In a prosecution for a second violation of the prohibitory liquor laws, the refusal to permit defendant, on cross-examination of prosecuting witness to ask if he was not paid to secure evidence in the case, intended to show witnesses' interest, was error.

Files *v.* State (Okla. Cr. App.), 182 Pac. 911.

**Limiting Number of Impeaching Witnesses.**—In a prosecution for manufacturing whisky, court did not abuse its discretion in limiting the number of witnesses for the purpose of impeaching testimony of prosecuting witness to five in number, especially where he announced his intention to so do before any of the witnesses were called.

Kindrix *v.* State (Ark.), 212 S. W. 84.

**Evidence to Sustain Reputation of Accused.**—In prosecution for illegal sale of intoxicating liquors, where the prosecution does not attack accused's reputation for truth and varacity, evidence to sustain his credibility is not admissible.

Baumgartner *v.* State (Ariz.), 178 Pac. 30.

**Effect of This Act on Existing Laws.**

SEC. 35. All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

**State Regulations.**—Subsequent federal legislation having made certain shipments of whisky illegal and placed them under the police power of the state, the state may

make further regulations not conflicting with but in addition to the federal requirements.

State *v.* Seaboard Air Line R. Co., 169 N. C. 295, 84 S. E. 283.

**Webb-Kenyon Act.**—The movement of liquors in interstate commerce for purposes prohibited by the laws of the state, having expressly been divested of its immunity as such by the Webb-Kenyon Act, the enforcement of the state's prohibition laws does not conflict with the commerce clause of the federal Constitution.

State *v.* Frazee (W. Va.), 97 S. E. 604.

The Webb-Kenyon Law March 1, 1913, withdraws from the operation and effect of the commerce clause of the federal Constitution and brings within the police power of the state, as soon as they cross the state line, shipments of intoxicating liquors into prohibition territory with intent to violate the laws thereof.

State *v.* Seaboard Air Line R. Co., 169 N. C. 295, 84 S. E. 283.

Any immunity from the prohibitions of W. Va. Code, 1915, chap. 7, § 7, laws 1915, 2d Ex. Sess. p. 660, § 34, against the shipment from without the state of intoxicating liquors intended for personal use, and the receipt and possession of liquors so transported, which the interstate character of such a shipment might otherwise give, was taken away by the provisions of the Webb-Kenyon Act of March 1, 1913 (37 Stat. at L. 699, Chap. 90, Comp. Stat. 1913, 8739), forbidding the interstate shipment or transportation of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the law of the state to which the liquor is transported, although individual use may not have been prohibited by the West Virginia law.

Clark Distilling Co. *v.* Western Maryland R. Co., 242 U. S. 311, 37 Sup. Ct. 180.

**Constitutionality.**—There is nothing repugnant to the due process of law clause of U. S. Const. 5th Amend. in

the provision of the Webb-Kenyon Act, March 1, 1913 (37 Stat. at L. 699, chap. 90, Comp. State. 1913, 8739), under which an interstate shipment of the intoxicating liquor, though intended for personal use, may be subjected to the state prohibitory laws, and Congress did not exceed its power under the commerce clause enacting the provision of the Webb-Kenyon Act of March 1, 1913 (37 Stat. at L. 699, chap. 90, Comp. Stat. 1913, 8739), forbidding the interstate shipment or transportation of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold, or in any manner, used, either in the original package or otherwise, in violation of any law of the state into which the liquor is transported.

Clark Distilling Co. *v.* Western Maryland R. Co., 242 U. S. 311, 37 Sup. Ct. 180.

The Webb-Kenyon Law March 1, 1913, c. 90, 37 Stat. 699 (U. S. Comp. St. 1913, 8739) prohibiting the transportation from one state or territory into another of intoxicating liquor intended by any person interested therein to be received, possessed, sold or used in the original package or otherwise, in violation of any law of such state or territory, is constitutional.

State *v.* Seaboard Air Line R. Co., 169 N. C. 295, 84 S. E. 283.

**Reed-Jones Amendment.**—The Reed-Jones Amendment, § 5 (U. S. Comp. St. 1918, §§ 8739a, 10387a-10387c), declaring that whoever shall cause intoxicating liquors to be transported in interestate commerce, except for certain purposes, into any state the laws of which prohibit the sale and manufacture of intoxicating liquors, shall be punished, did not deprive the state of Virginia of jurisdiction to prosecute one who brought intoxicating liquors into the state in violation of prohibition law, where the bringing of such liquor into the state was not shown to constitute interstate commerce.

Sickel *v.* Commonwealth (Va.), 97 S. E. 783.

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