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"While Under the Influence of Intoxicating Liquor"

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COMMENTS

"WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR"

The legislature of 1925 enacted two statutes, each making it an offense to operate a motor vehicle "upon any public highway of this state while under the influence of intoxicating liquor." One is the Motor Vehicle Statute of March 14, 1925,[1] and the other is the Intoxicating Liquor Statute of March 4, 1925.[2]

The Intoxicating Liquor Statute was approved March 4, 1925, and has no emergency clause, but has a general repealing section. The Highway Statute was approved ten days later, and has an emergency section.

It results that both Section 40 of the Intoxicating Liquor Statute and Section 9 of the Highway Statute went into force at the same time; but as the latter statute is ten days later in point of time, under the well known rule with respect to repeals, Section 40 repeals Section 9.

Further, under the well known rule with respect to repeals, where a later statute in point of time covers the whole subject matter of a prior statute, such prior statute is repealed by the later. Section 40 covers the whole subject of operating a motor vehicle upon a highway "while under the influence of intoxicating liquor or narcotic drugs," and therefore repeals Section 9.[2a]

Prosecutions, therefore, for so operating a vehicle upon a highway must be brought under Section 40 as amended in 1927.[2b]

It is to be observed that the Act of March 14, 1925, contains no definition of "intoxicating liquor or narcotic drugs;" while the definition of "intoxicating liquor," and other definitions, in the Act of March 4, 1925, are confined to the provision of that Act. They do not apply to the Act of March 14.

The question arises in prosecutions under Section 40, what condition must a driver of a motor vehicle on a highway be in

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[1] Acts 1925, p. 570, Sec. 40; Burns' R. S. 1926, Sec. 10141.

[2] Acts 1925, p. 144, Sec. 9; Burns' R. S. 1926, Sec. 2725.

[2a] So decided by the Supreme Court in *Newbauer v. State*, 161 N. E. 826, after this article was written.

[2b] Acts 1927, p. 562.

to be "under the influence of intoxicating liquor or narcotic drugs"?

A fluid or liquor that does not fall within the meaning of "intoxicating liquor" or "narcotic drugs" is not covered by Section 40. Tea and coffee have a stimulating effect, yet no one worthy of consideration can claim they are intoxicating liquors.

The Supreme Court of Michigan has said "intoxicating liquors" is a broad term, which embraces all liquors used as a beverage, which when so used, will or may intoxicate.[3]

A statute providing that a divorce may be granted "in case of habitual intoxication" means, it has been held, a drunkenness produced by the use of alcoholic liquors, and not a condition resulting from the excessive use of opiates;[4] and in Vermont, it has been said that the word "intoxicated," in the common and ordinary signification, means intoxicated on spirituous liquor.[5]

I have not seen any discussion of the question so far as it relates to the phrase "under the influence of narcotic drugs," but the question so far as it relates to "under the influence of intoxicating liquors" has received considerable attention by the courts.

When is a man under the influence of intoxicating liquor, or to what extent must he be under its influence to violate the statute?

A person who is a strict prohibitionist will say, in all likelihood, any one who swallows any amount of intoxicating liquor, especially whiskey, however small the amount, is in some degree under the influence of such liquors. It may not have the slightest visible effect upon him, so far as observable; and he may not have the slightest feeling that he has drunk such liquor, and yet the strict prohibitionist may say he is under the influence of intoxicating liquor, that it quickened the movement of his heart, the flow of blood in his veins, and affected his intellectual faculties.

"It is doubtless true that not any and every 'influence' produced by intoxicants will subject one to the penalties prescribed

[3] *People v. Hawley*, 3 Mich. 330; See *People v. Sweetser*, 1 Dak. 308; 46 N. W. 452, 455; *State v. Oliver*, 26 W. Va. 422, 431, 53 Am. Rep. 79; *Sebastian v. State*, 44 Tex.; Crim. Rep. 508, 72 S. W. 849, 850; *Commonwealth v. Kyre*, 162 Mass. 146, 38 N. E. 62.

[4] *Ring v. Ring*, 112 Ga. 854, 38 S. E. 330, 331.

[5] *State v. Kelly*, 47 Vt. 294.

by the statute for this offense," as was said by the Wisconsin Supreme Court in Bakalars vs. Continental Casualty Company.[6]

'The influence of "intoxicants" is a very elastic term.' There the court was considering the meaning of the phrase "under the influence of any intoxicant," as used in an accident insurance policy. Upon the question of the discernible effects of intoxicating liquors, the Wisconsin court further said: 'We are told by physicians and experimenters that the most trifling quantity of alcohol has some effect and that its effect persists for days, if not permanently, so that one is literally under the influence from a single ordinary potion. We know, as a matter of common knowledge, that one of the first influences may be to stimulate those very faculties of observation and alertness which would improve the capacity of the subject to shield himself from danger, or escape, and that some such degree of influence of an intoxicant would not in any respect increase the peril of injury."' If as stated by the learned author of the opinion in this Wisconsin case, the most trifling quantity of alcohol produces an influence that will persist for days, if not permanently, it is a natural and almost necessary assumption that the words 'under the influence of intoxicating liquors' were not inserted in the Motor Vehicle Act for the purpose of fastening guilt in the case of every and any "influence" due to the use of intoxicating liquors, however slight."[7]

Such an interpretation of the words "under the influence of intoxicating liquors" cannot be accepted. They must be given a reasonable interpretation—a practical or workable definition. The courts cannot accept the interpretation of such a strict prohibitionist.

We can do no better than quote what the courts have said in several cases.

"A person is drunk in legal sense when he is so far under the influence of intoxicating liquors that his nerves are visibly excited or his judgment impaired by the liquor."[8]

"Intoxicated condition" means that if the person "were in such a state that he was incapable of giving the attention to what he was doing, which a man of prudent and reasonable intelligence would give."[9]

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[6] 141 Wis. 43, 122 N. W. 721; 18 Ann. Cas. 1123, 25 L. R. A. (N. S.) 1241.

[7] *People v. Dingle*, 56 Cal. App. 445, 205 Pac. 705.

[8] *State v. Pierce*, 65 Iowa 85, 88.

[9] *Kenny v. Rhinelander*, 28 N. Y. App. Div. 246, 50 N. Y. Supp. 1088.

"When it appears that a person is under the influence of liquor, or when his manner is unusual or abnormal, and his inhibited condition is reflected in his walk or conversation, when his ordinary judgment and common sense are disturbed, or his usual will power is temporarily suspended, when they or similar symptoms result from the use of liquors and are manifest, then the person is 'intoxicated.' It is not necessary that the person would be so-called 'dead-drunk' or hopelessly intoxicated. It is enough that his senses are obviously destroyed or distracted by the use of intoxicating liquors within the meaning of the statute authorizing recovery of damages against a saloon keeper who sells liquors to an intoxicated person."[10]

"Under the law a man is intoxicated whenever he is so much under the influence of spirituous or intoxicating liquors that it so operates upon him, that it so affects his acts, or conduct or movement, that the public or parties coming in contact with him could readily see and know that it was affecting him in that respect. A man to that extent under the influence of liquor that parties coming in contact with him, or seeing him, would readily know that he was under the influence of liquor, by his conduct or his words or his movements, would be sufficient to show that such party was intoxicated."[11]

This was an instruction to the jury, and it was approved on appeal.

"To be under the influence of whiskey is not necessarily to be intoxicated. One may well be said to be under the influence of strong drink when he is to *any extent* affected by it—when he feels it; and this condition may result from portions so small as not to impair any mental or physical faculty, and when the passions are not visibly excited, nor the judgment or any physical function impaired. This is very far short of 'intoxication' which is the synonym of 'inebriety,' 'drunkenness,' implying or evidenced by undue and abnormal excitation of the passions, or the impairment of the capacity to think and act correctly and efficiently."[12]

In a charge to the jury the court said:

"To be under the influence of intoxicating liquor is not necessarily to be intoxicated. One may well be said to be under the influence of intoxicating liquor when he is to any extent

[10] *Laffler v. Fisher*, 121 Mich. 60, 79, N. W. 934.

[11] *Sapp v. State*, 116 Ga. 116, 42 S. E. 410.

[12] *Standard Life, etc. Ins. Co. v. Jones*, 94 Ala. 434, 10 So. 530, quoted in *Freeburg v. State*, 92 Neb. 346.

affected by it, when he feels it; and this condition may result from portions so small as not to impair any mental or physical faculties, and when the passions are not visibly excited nor the judgment of any physical function impaired. This is very far short of intoxication which is the synonym of drunkenness; implying or evidenced by undue or abnormal excitation of the passions or feelings, or the impairment of the capacity to think and act correctly and efficiently. That, I take it, is what is meant by under the influence of liquor * * * Had the liquor that he had taken influenced him to any perceptible degree [at the time of the accident]? If it had, he is guilty. If it hadn't, he is not guilty."[13]

"I take it that being under the influence of intoxicating liquor means this: That the defendant at the time was influenced in some perceptible degree by the intoxicating liquor he had taken, and that is about all that it does mean. The expression "under the influence of intoxicating liquor" covers not only all the well known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors and which tends to deprive him of the clearness of intellect and control of himself which he would otherwise possess."[14]

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[13] *Commonwealth v. Lyseth*, 250 Mass. 555, 146 N. E. 18.

There are a number of other cases on this point that tempt me to quote them, but I can only cite them:

People v. Dingle, 56 Cal. App. 445, 205 Pac. 705; *People v. Ekstromer*, 71 Cal. App. 239, 235 Pac. 69; *Hart v. State*, 26 Ga. App. 64, 105 S. E. 383; *People v. Weaver*, 188 App. Div. 395, 177 N. Y. Supp. 71; *Mason v. State*, 1 Ga. App. 535, 58 S. E. 139; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *Coldwell v. State*, 112 Ga. 75; *Marks v. State*, 159 Ala. 71, 81; 48 So. 864, 133 Am. St. 20; *Mason v. State*, 56 Tex. Cr. Rep. 261, 119 S. W. 852; *Murray v. State*, 56 Tex. Cr. Rep. 420, 120 S. W. 438; *Decker v. State*, 36 Tex. Cr. Rep. 20; *Arbuthnot v. State*, 56 Tex. Cr. Rep. 517, 120 S. W. 478; *Pearce v. State*, 48 Tex. Cr. Rep. 35.

[14] *Commonwealth v. Lyseth*, 250 Mass. 555, 146 N. E. 18.

"The expression 'under the influence of intoxicating liquors' covers not only all the well known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors, and which tends to deprive him of that clearness of intellect and control of himself which he would otherwise possess." *State v. Rodgers*, 91 N. J. L. 212, 102 St. 433.

"For the purpose of the statute under which defendant was convicted, he is intoxicated when he has imbibed enough liquor to render him incapable of giving that attention and care to the operation of his automobile that a man of prudence and reasonable intelligence would give." The dis-

In a charge to a jury in a Pennsylvania case it was said:

"Now what do we mean by a man being drunk or intoxicated? We often have very contradictory testimony on the subject. One man will say a person was drunk at the time of a certain occurrence. Another will say that he was not drunk; that he was sober. A great deal of testimony can be explained by the different ideas those persons have as to what is meant by drunkenness or intoxication."[15]

And the court then proceeds in what is the clearest discussion on the subject that I have seen:

"There are degrees of intoxication or drunkenness, as every one knows. A man is said to be dead drunk when he is perfectly unconscious—powerless. He is said to be stupidly drunk when a kind of stupor comes over him. He is said to be staggering drunk when he staggers in walking. He is said to be foolishly drunk when he acts the fool. All these are cases of drunkenness, of different degrees of drunkenness. So it is a very common thing to say a man is badly intoxicated, and again that he is slightly intoxicated. There are degrees of drunkenness, and therefore many persons may say that a man was not intoxicated because he could walk straight; he could get in and out of a wagon. What is meant, gentlemen of the jury, by the words in the statute [furnishing intoxicating drinks] which make it a penal offense, and also the party liable in a civil suit for damages, for giving liquor to a man that is 'drunk or intoxicated'? Whenever a man is under the influence of liquor so as not to be entirely at himself, he is intoxicated; although he can walk straight; although he may attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk, yet if he is under the influence of liquor so as not to be at himself, so as to be excited from it, and not to possess that clearness of intellect and that control of himself that he otherwise would have, he is intoxicated."[16]

The last sentence quoted gives us a practical and workable

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trict attorney's definition which was approved by the court. *People v. Weaver*, 118 App. Div. 395, 117 N. Y. Supp. 71.

It is not necessary to show that the defendant was "drunk," for a conviction may be had upon showing that he was under the influence of intoxicating liquor to some perceptible degree. *State v. Noble*, 119 Ore. 674, 250 Pac. 833.

[15] *Elkin v. Buschner*, 16 Atl. (Pa.) 102.

[16] *Elkin v. Buschner*, 16 Atl. (Pa.) 102.

definition of the phrase "under the influence of intoxicating liquor."[17]

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[17] "A person may be so far under the influence of intoxicating liquor that, to an appreciable degree, there is an impairment of his ability to operate his automobile in the manner that an admissibly prudent and cautious person, in the full possession of his faculties, would operate a similar vehicle under like conditions; and yet the person not be so drunk that the public, or persons coming in contact with him, could 'readily' see and know that the intoxicating liquor was affecting his acts or conduct or was being reflected in his walk and conversation. The drink may have impaired his ability to drive his car properly by imparting to him a dash of dangerous recklessness without in any way manifesting itself in his speech, or in his walk, or be noticeable in his intellectual processes." *People v. Dingle*, 56 Cal. App. 445, 205 Pac. 705.

"Intoxication affects different men in different ways. In some it quickens the intellectual faculties and sharpens the physical senses, and in others the intellectual faculties are for a time destroyed and the physical senses blunted. The effects of intoxicating liquors depend on the character of the man and the nature of the liquor." *Texarkana & Ft. S. Ry. Co. v. Freigie*, 43 Tex. Civ. App. 48, 95 S. W. 563.

"It is a matter of common knowledge that the drinking of intoxicating liquors, even in small quantities, has some effect upon the person drinking it, and that this effect continues for a longer or shorter period, according to the amount drunk, and the individual drinking it. Probably the same may be said of anything else taken into the human stomach. For that reason, if no other, proof of the drinking of intoxicating liquor is not alone sufficient to sustain a conviction under the statute, and such has been the ruling of the courts under similar statutes." *State v. Noble*, 119 Ore. 674, 250 Pac. 833; *Commonwealth v. Lyseth*, 250 Mass. 555, 146 N. E. 18; *People v. Weaver*, 188 App. Div. 395, 177 N. Y. Supp. 71; *People v. Dingle*, 56 Cal. App. 445, 205 Pac. 705.

"It is not necessary to prove the degree of intoxication, but in each case the question as to whether the defendant was 'under the influence of intoxicating liquor' is one of facts to be determined by the jury from all the circumstances of the case." *People v. Ekstromer*, 71 Cal. App. 239; 235 Pac. 69.

"We think we are well within the bounds of accuracy in saying that if intoxicating liquor has so far affected the nervous system, brain, or muscles of the driver of an automobile, as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions, then such driver is 'under the influence of intoxicating liquor' within the meaning of the statute." *People v. Dingle*, 56 Cal. App. 445, 205 Pac. 705; *People v. Ekstromer*, 71 Cal. App. 239, 235 Pac. 69.