

Opinion No. 26-3881

April 23, 1926

BY: FRED E. WILSON, Attorney General

TO: Jos. Schlitz Beverage Co., Milwaukee, Wis.

I have your letter of April 20h, in which you state you are placing on the market a Malt Tonic containing certain Extract matter and alcohol ranging from less than 1/2% to approximately 3 1/2%. You state that the product is to be sold in conformity with the Federal Laws and Regulations and will be distributed mainly thru the drug trade, and you desire to know if there are any statutes prohibiting the marketing of this tonic in New Mexico.

Article 23 of our Constitution is as follows:

"From and after the first day of October, A. D. nineteen hundred and eighteen, no person, association or corporation, shall, within this State, manufacture for sale, barter or gift, any ardent spirits, ale, beer, alcohol, wine or liquor of any kind whatsoever containing alcohol; and no person, association or corporation shall import into this State any of such liquors or beverages for sale, barter or gift; and no person, association or corporation, shall, within this State, sell or barter, or keep for sale or barter any of such liquors or beverages, or offer any of such liquors or beverages for sale, barter or trade; provided, nothing in this section shall be held to apply to denatured or wood alcohol, or grain alcohol when intended and used for medicinal, mechanical or scientific purposes only, or to wine, when intended and used for sacramental purposes only."

Subsequent to the adoption of the above, as a part of the Constitution, the Legislature of 1919 enacted Chapter 151 which follows the language of the Constitution and in addition thereto prescribes certain penalties and contains other enforcement provisions.

A careful consideration of the above constitutional provision and statute will doubtless enable your own attorneys to advise you whether or not the tonic you propose to place on the market may lawfully be sold in this State.

There has never been a decision of our Supreme Court attempting to define the alcoholic content of any of the liquors or beverages mentioned in the Constitutional provision, nor to define exactly what is meant by the term "liquors."

However, it is my opinion that the sale, or marketing, in this State of liquors of any kind whatsoever containing alcohol, except denatured or wood alcohol or grain alcohol, when intended and used for medicinal, mechanical or scientific purposes, or wine intended for used for sacramental purposes, is prohibited. It is also my opinion that the exception mentioned applies only to denatured or wood alcohol or grain alcohol when in their original form and not when mixed with liquor of any kind, ardent spirits, ale, beer,

alcohol or wine. In other words, I think in prohibiting the manufacture and sale of "liquor of any kind whatsoever containing alcohol" the word "liquor" was used in its broad sense and would cover any fluid substance containing alcohol.