University of Missouri Bulletin Law Series

Volume 39 *November 1928* Article 3

1928

Meaning of "Hootch, Moonshine, Corn Whiskey" in the Missouri Prohibition Law, The

Ben Ely Jr.

THE MEANING OF "HOOTCH, MOONSHINE, CORN WHISKEY" IN THE MISSOURI PROHIBITION LAW

Even before the adoption of the Eighteenth Amendment to the Federal Constitution the various constituent commonwealths of the Union possessed, as a part of the so-called police power, the right to pass statutes regulating or prohibiting the manufacture, transportation, and sale of intoxicating liquors.[1] The Eighteenth Amendment itself in general terms declared that the transportation, importation, exportation, manufacture, and sale of such liquors should be prohibited[2]. It is beyond the scope of the present paper to discuss in detail the jural effects of this amendment. It is sufficient for our present purpose to say that it laid upon the government of both the Federal Union and the states the duty of passing some adequate legislation to make criminal the act of a person dealing in the prohibited manner with any species of intoxicants[3]. The amendment did not itself make such deal-

1. *Mugler v. Kansas*, (1887), 123 U. S. 623, 8' Sup. Ct. 273, 31 L. Ed. 205.
2. The words of the amendment are:

   "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 territories subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

   Section 2. The congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

   Section 3. This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislature of the several states as provided in the Constitution within seven years of the date of the submission hereof to the states by the congress."

3. Exception to this statement has been taken by certain friends who have done me the honor to discuss this part of the article. It is said that the amendment placed no duty upon either the state or federal governments in respect to the passage of enforcement legislation. The theory as stated is about as follows: The Constitution contains a grant of power by the states to the federal government. (The states are entities which existed before their creature the United States, and which are themselves sovereign, or at least the primary repository of power coming from the sovereign people). The states had always had the power to regulate and deal with the liquor traffic even to the extent of prohibiting it. (*Mugler v. Kansas* supra, note 1). The federal government, possessing only enumerated powers, (Const. U. S. Amd. X, *Kansas v. Colorado*, (1907), 206 U. S. 46, 51 L. Ed. 951; *McCullock v. Maryland*, (1819), 4 Wheat. 316, 4 L. Ed. 519; *Collector v. Day*, (1870), 11 Wall. 113, 20 L. Ed. 122) had no power to prohibit the manufacture and sale of liquor. The amendment therefore merely served to create in congress a new power —the power to prohibit dealing in intoxicating liquors. As an argument for this position it is asserted that there is no means of coercing the state legislature (nor for that matter congress) into passing enforcement legislation and hence they cannot be said to be under a duty to enact such legislation.

It is believed that this argument is unsound. Particularly is this true if the nature of law as understood by students of modern jurisprudence is borne in mind. Long ago the physical sciences gave up the idea that "natural laws" were immutable principles for the governance of the universe. Instead, natural laws are seen only to be generalized statements descriptive of past observed phenomena upon the basis of which some future phenomenon lying within the same narrow field may with a certain degree of probability be predicted. Now the social sciences under the lead of behavioristic psychology have taken a similar position. (Watson, *Behaviorism* (1926) p. 6; Meyer, *The Fundamental Laws of Human Behavior*. (1911); Chaps. 1 and 17. See also Bernard *The Transition to an Objective Standard of Social Contract* Chap. 1

ing criminal. I. e., it did not direct the agencies of government charged with handling the problem of crime to treat as criminal, persons who manufactured, sold, or transported the prohibited liquors. It fixed no punishment for such persons. The details in this respect of prohibition enforcement were left to the national and state legislatures with power in each to act concurrently.

It is obviously within the power of a legislative body in fulfilling its duty to enact enforcement legislation, to create different classes of intoxicants, and to punish differently persons dealing with these different classes. E. g., it would be possible to punish as a misdemeanor the sale of liquor containing more than one and less than five percent of alcohol by volume, and to punish as a felony the sale of liquor containing more than five per cent of alcohol.

The legislature of the State of Missouri, in performance of the duty thus constitutionally imposed upon it, has enacted three state enforcement acts.[4] The original act of 1919 was not expressly repealed by that of 1921, and the act of 1923 did not purport to repeal either that of 1919 or that of 1921. Each of these three acts, then, in so far as it is not in direct conflict with the terms of later legislation, is still in force.[5] The original act of 1919 defined intoxicating liquors as spiritous, malt, or vinous liquors containing more than one half of one per cent of ethyl alcohol by volume which were "potable and fit for beverage purposes"[6], and this definition still stands. The act of 1921, by a section which still is in force, made the possession,

The modern jurists who twenty-five years ago had discarded the outworn notions of Blackstone and Austin, that law was a sovereign command, (Lowell, *The Limits of Sovereignty*, (1889), 2 Harvard Law Review 70), have come to look upon the rules with which they deal as merely formulae descriptive of past observed behavior of certain members of society whom we choose to call state officers, upon the basis of which we may sometimes predict their future actions. (Cook, *Scientific Method and the Law*, American Bar Association Journal, July, 1927, *Ib. The Logical and Legal Basis of the Conflict of Laws*, (1923), 33 Yale Law Journal 45). Bingham, *What is the Law*, (1912), 11 Mich. Law Rev. 1 and 109. Cf. Baumstark, *Was ist das Recht.*) Now it is plain that state legislative and executive officers do ordinarily act in such a manner that they appear constrained by rules of constitutional and international law, even where no physical restraint could be imposed upon them. Hence they can be said clearly to be under duties, and, if we choose to use the metaphysical and fictional term "the state" as representing a conceptual personification of politically organized society, we can say that this imaginary creature too is the *servus* of duties and other jural litigations, (See Duguit, *Law and the State*, (1918), 31 Harvard Law Review 1, also his *Le Droit Constitutionnel.* Kocourek, *Jural Relations*, (1927), p. 154.)

As we have seen, the first section of the amendment "prohibits" the manufacture, sale, and transportation of liquor. This clearly does more than create a power in the federal congress. It is meant to create duties in someone. Yet it is clear that these duties can never become real ones (or to use Kocourek's phrase zygnomic) unless some statute is passed to create sanctions for them; for without such statute there can be no governmental action against violators, and hence no real rule of law and no jural relationships (law and jural relationships being as we have shown dependent on the action of societal agents). In the second section, congress is given power, and the states are left with powers, of which the grant to congress might have deprived them but for the words of the constitutional provision. This was done with the sole purpose that sanctions might be provided for the duties created by Section 1. Hence these sections created, both as to the states and the federal congress, both powers and duties in respect to the same subject matter. These relations are, as Kocourek would say, conjunctive congruent ones. *Op Cit.* p. 105.

4. Art. 7 Chapter 52 R. S. Mo. 1919; Act of March 28, 1921, Laws of 1921 p. 413 *et sec.*; Act of April 3, 1923, Laws of 1923 p. 236; (both of the later acts are set out in 1927 Supplement to R. S. Mo. at 208 *et sec.*).

5. See e. g. *State v. Clark*, (1927), 289 S. W. 963.

6. Section 6602 R. S. Mo. 1919.

transportation, gift, manufacture, or sale of any intoxicating liquor, as so defined, a misdemeanor, punishable by fine or imprisonment in the county jail or both.[7] The act of 1923, however, attempted to punish more severely dealing in certain specified kinds of intoxicants thought to be more dangerous to the public health and safety than the general run of such liquors. Section 20 of that act provided that the maker or seller of "hootch, moonshine, corn whiskey, or other intoxicating liquor" which caused the death of any person, or caused insanity or blindness, should be punished by imprisonment in the state penitentiary for a term of from two years to life. Section 21, with which we are here more particularly concerned, provided that:

> "If any person shall manufacture, make, brew, distill, sell, give away or transport any hootch," "moonshine," corn whiskey," shall be guilty of a felony, and, upon conviction thereof, punished by imprisonment in the state penitentiary for a period of not less than two years nor more than five years, or by either a fine of $500.00 or imprisonment in the county jail for a term of not less than three months nor more than twelve months, or both. Provided: That this section shall not apply in the case of corn whiskey lawfully manufactured, transported, or sold."

It will be noticed that the language of this section follows that of section 20, save and except that section 21 omits the words "or other intoxicating liquors."[8] The fact that the legislature used the terms "hootch, moonshine, corn whiskey" without connecting them or any of them by means of a conjunction of any kind, coupled with the fact that at least two of these words, 'hootch' and 'moonshine', have as yet no scientific definition, makes the construction of the section difficult.

Difficult as it is, however, it is a problem of the greatest practical importance. Altho as yet no cases under section 20 have reached the Supreme Court of the state, and as far as we have been able to learn, no cases under this section have been tried in the state, a very large percentage of liquor cases are brought under section 21. Almost every term of court in most of the counties of the state sees the trial of one or more cases under this section, but as yet the courts are at a loss properly to define the terms therein used.

For the lawyer, the fact that the terms used in the statute are not ones to which the science of chemistry has hitherto given an exact definition is of little importance. Terms used in stating a legal proposition (statutory or otherwise) are mere mathematical symbols which stand for certain fact situations in the physical world.[9] So long as it is reasonably clear to everyone concerned just what fact situations are denoted by the terms used, the rules will serve their practical purpose of enabling us to predict the future action of courts and other state officers within the field dealt with. On the other hand, particularly when we are dealing with a criminal statue, it is highly desirable that the courts so definitely define the terms employed in the act that everyone affected can with reasonable certainty tell what acts are within and what without the terms of its prohibition. Yet any attempt at a prior definition even in the field of criminal law is dangerous. Here as in the realm of constitutional

7. Laws of 1921, p. 414; 1927 Sup. p. 281.

8. It may be possible that the legislature intended to include the whole phrase in Section 21 and that thru a clerical error the last portion of it was omitted. This would, however, seem improbable.

9. See the discussion of the usefulness and meaning of terms in Sturges and Clark *Legal Theory and Real Property Mortgages* (1928) 37 Yale L. Jour. 691, citing Whitehead, *Symbolism its meaning and Effect* (1927) 26, Bertrand Russell, *Philosophy* (1927) 53, Ogden and Richards, The Meaning of Meaning (1927) 42.

law it is best for terms to be defined by the gradual process of "judicial inclusion and exclusion". Our problem of construcion then resolves itself in to this: under the actual holdings of the courts, what kinds of intoxicating liquor are to be deemed included within the prohibition of the statute, and what kinds are held not to be hootch, moonshine and corn whiskey. Our attempt to solve this problem will be based upon a purely inductive study of the decisions. Before attempting such a study it will be well for us to analyze the factual problem. We must see just what kinds of intoxicating liquors are ordinarily met with in the work of prohibition enforcement. We can then ask, in the light of the actual decisions of the courts, which of these fall within the prohibited class.

The toxic quality of liquors dealt with in prohibition enforcement is due to the fact that they contain ethyl alcohol. They are all what are known as alcoholic liquors. Now ethyl alcohol which is to be used as a beverage is produced generally by what is known as a process of fermentation. The prime materials for this process are various forms of vegetable matter such as corn, rye, potatoes, fruit juice, rice, etc. This vegetable matter contains the organic compound known as starch which can be broken down by chemical action into various sugars. These sugars in turn will be converted by the actions of certain rather obscure organic substances called enzyms, into ethyl alcohol and carbon dioxide.[10] In the case of a number of alcoholic beverages, this process of fermentation, together with filtering, straining etc., completes the course of manufacture. Such liquors are known as fermented or brewed liquors, and contain a comparatively small per cent of ethyl alcohol (3% to 15%).[11]

When a higher alcoholic content is desired the liquor must be treated by the further process of distillation. The fermented liquor is placed in a container and heated to a point a little higher than 78° centigrade (the boiling point of ethyl alcohol). The alcohol is vaporized, passing off at the top of the container or still, thru what is generally known as a goose neck, whence it is led thru a copper coil or worm, where it is cooled and condensed again into liquid form. The resulting liquor is comparatively rich in ethyl alcohol (50% of alcohol in bonded whiskey and from 30% to 60% in illegally made whiskey).[12]

The distilled liquors dealt with again are of two varieties. First, there are lawfully produced liquors which have either been made in a government inspected distillery and then diverted to unlawful uses or unlawfully imported to this country from abroad. Second, there are vast quantities of distilled liquors produced illegally in this country for the bootleg trade.

10. The statement in the text is slightly inaccurate in the case of liquor made from fruit. Where liquor is made from corn or other grain the starch which this grain contains is combined with water to produce maltose and dextrine. The maltose is then converted into ethyl alcohol and carbon dioxide. The process thus involves two steps represented by the following equations: (1) $3C_6H_{10}O_5 + H_2O = C_{12}H_{22}O_{11} + C_6H_{10}O_5$ and (2) $C_{12}H_{22}O_{11} + H_2O = 4C_2H_5OH + 4CO_2$. In the case of fruit only the latter process is gone through with, here fruit sugar or fructose breaks down directly into ethyl alcohol and carbon dioxide the equation being $C_6H_{12}O_6 = 2C_2H_5OH + 2CO_2$. These two different processes shown in equations (1) and (2) are brought about by two different enzymes. The first, known as diastase, which is found in the sprouting grain itself, produces the change from starch to maltose, while the latter, known as zymase, and which is secreted by the yeast plant, produces the change from maltose or other forms of sugar to alcohol and carbon dioxide. This difference in the process of the formation of alcohol in grain mash and in fruit juices may possibly account for the difference in the number and amount of secondary constituents present in fruit whiskey as distinguished from grain whiskey.

11. Wine, 8 to 16 %; beer, 3.5 to 4.5%.

12. Molinari, Industrial Chemistry, (1913) II, p. 132 et sec.

The illegally distilled liquor differs considerably in chemical composition from the legally distilled liquor. The former contains a larger percentage of certain substances which are produced in the process of fermentation along with the ethyl alcohol, among others fusil oil,[13] the various aldehydes, and other organic compounds. For this reason, and because of the unsanitary methods of manufacture, it has been noted that the toxicity of illegally produced liquors is about twice as great as that of legal liquors.[14]

There are in some instances slight differences in chemical composition, physical properties and biological reactions as between liquors produced from corn, rye, fruit, and other various prime materials.[15] These differences are comparatively hard to detect. The principal classification then is into liquors which are only fermented or brewed and those which are distilled, the latter class being subdivided into legally and illegally distilled liquors. In our discussion, then, we shall attempt to determine which of these kinds of liquors come within the class denoted by the terms, "hootch, moonshine, corn whiskey".

Certain questions obviously occur when the language of the statute is considered. The legislature, as we have seen, failed to use a conjuction of any kind between the last members of the series "hootch, moonshine, corn whiskey". What conjunction is to be understood? Are the words to be taken as synonymous? If they are, does this mean that the liquor meant to be designated thereby must invariably be made from corn? If not, what is the difference between "hootch" and "moonshine" on the one hand and "corn whiskey" on the other? Is the sale of all whiskey made from corn, without regard to the legality of its manufacture, made a felony by the act?

I.

The statutes of other states bear little resemblance to our own in this regard. Little help is therefore to be expected from an examination of their decisions. In point of fact, some three or four cases have discussed incidentally the meaning of the term moonshine. In two cases in Montana[16] and one in North Carolina,[17] the courts have defined moonshine as whiskey which has been illegally made. These cases are of value only as establishing the general doctrine that illegality of manufacture is one of the necessary elements which must be present before a given liquor is to be classified as moonshine. But they do not attempt to define whiskey, this having been unnecessary to the decision. In like manner, the general dictionaries of the English language had for many years defined moonshine as illegally distilled spirits. Little help is to be gotten from such definitions.

13. Fusil oil is a mixture of propyl alcohol C_3H_5O, isobutyl alcohol $2CH_3$ CH. CH_2OH, and amyl alcohol $C_5H_{11}OH$.

All whiskey contains some fusil oil and it has been shown that this fusil oil increases rather than decreases with age. Yet it remains true that in illegal whiskey in the manufacture of which "fractional distillation" is never used, and which is produced by the most careless methods. the percentage of fusil oil is much greater than in bonded whiskey. The percentages in various kinds of bonded whiskeys are given in Woodman, *Food Analysis*, (1915) p. 474. The statements given in regard to the analysis of moonshine whiskey are based upon analysis made of moonshine taken in raids by the sheriff of Marion County during the prohibition period. The work was done by Mr. Leonard Rubison, chemist, of Hannibal, Missouri, who has also looked over the portions of this article dealing with chemical questions.

14. Fisher, Prohibition at its Worst, (1926) p. 28.

15. E. g., fusil oil seems generally to be lacking in liquors produced from fruit.

16. *State v. Sedlaeck*, 239 Pac. 1002; *State v. Chareth* 242 Pac. 343, 75 Mont. 78.

17. *State v. Tuter*, 131 N. C. 701, 42 S. E. 443, see also *Weller v. State*, 132 Atl. 624, 150 Md. 278.

II.

Our real task therefore must be the analysis of the Missouri cases. The judicial construction of the act starts with the decision of *State v. Brown*[18], in June 1924, slightly less than a year after the act took effect.[19] The opinion of the court in that case was written by Judge White. The information filed in the court below had charged that the defendant did feloniously sell certain moonshine. This information was attacked in the upper court on two grounds: (1) that the act under which it was drawn was unconstitutional; and (2) that the information failed to state that the moonshine sold was intoxicating liquor. A discussion of the definition of moonshine was not therefore directly necessary to the decision. In a sense, much that was said about moonshine may be considered as obiter dictum. Yet as the case had for a long time a very considerable influence on future decisions, the court's language must be noted. Judge White says, speaking of the three terms used in the section, "These words not being connected by a disjunctive or a conjunctive, must be taken as synonymous; hootch, moonshine, and corn whiskey are different expressions describing the same kind of liquor." Again he says, "Legally, "moonshine" in context like the language of the information, has as definite a significance as the term whiskey. It means liquor manufactured illegally." This last remark seems to be directly in point and a part of the reasoning on which the decision was actually based. It is therefore to be given more weight than the obviously *obiter* remark about the terms being synonymous.

In *State v. Gatlin*,[20] the information had charged the felonious transportation of "corn whiskey", and the evidence was to the effect that defendant had transported whiskey. The Court properly held that the defendant's demurrer to the evidence should have been sustained. The case merely stands for the proposition that there are other kinds of whiskey than corn whiskey. It does not tend to support the *dicta* in the *Brown* case, and would be law no matter what view is taken of the relation between the terms "corn whiskey" and "moonshine" as used in Section 21.

In the case *State v. Combs*[21], the information merely charged sale of "moonshine". The evidence as to the kind of liquor sold came from a chemist. He stated that it was a distilled liquor containing 52 per cent of ethyl alcohol by volume, that it was potable and that it "could be designated as moonshine'. Defendant filed a motion to quash the information on the ground that section 21 was unconstitutional as being so vague and uncertain in meaning that it constituted a denial of due process in violation of the Fourteenth Amendment. It does not appear from the report of the decision whether or not he filed a demurrer to the evidence or requested a directed verdict, but he offered no evidence on his own behalf. From a verdict of guilty he appealed alleging as error the failure of the trial court to sustain his motion to quash. In the Supreme Court counsel for the defendant argued that the words of the statute, "if any person shall make.....any hootch, moonshine, corn whiskey, shall be guilty of a felony," could only be construed to mean that, whenever any person made or sold moonshine, then in that event corn whiskey would be guilty of a felony; and that this being an absurd proposition of law, the statute was so indefinite as to constitute a denial of due process.

The court held that the word "or" must be understood between the word "moonshine" and the words "corn whiskey"; that with this addition it is plain that the statute means to punish only a natural person and is sufficiently plain in its mean-

18. (1924) 262 S. W. 710, 304 Mo. 78.
19. The Act took effect June 3, 1923..
20. (1924) 267 S. W. 797.
21. (1925) 273 S. W. 1037.

ing. The court does not discuss what moonshine may be, and by inference holds that the evidence in regard to the nature of the liquor sold is sufficient. The construction placed on the section seems somewhat out of harmony with the theory that the three terms are synonymous.

In *Hull's*[22] case, decided the same day as the *Combs* case, the court merely decided that Section 21 did not repeal the first section of the act of 1921 punishing as a misdemeanor the sale of any kind of intoxicating liquor. By inference it held that, as moonshine is intoxicating liquor, the illicit vendor of this substance may be prosecuted either for a felony under Section 21 of the act of 1923 or for a misdemeanor under Section 1 of the act of 1921.

In December of the same year, the court decided three cases, all reported in 279 S. W., which made a distinctly new contribution to our understanding of the terms here under discussion. *State v. Griffth*[23] was a prosecution for manufacture of "intoxicating liquor commonly called 'hootch', 'moonshine', 'corn whiskey". The information and instructions of the trial court were attacked. In discussing the propriety of the information, the Supreme Court, speaking thru Judge Walker, said that hootch, moonshine, and corn whiskey mentioned in Section 21 were merely kinds of intoxicating liquor as generally defined in the previous legislation. That "their meaning is familiar to anyone of general intelligence as designating *intoxicating liquor illicitly distilled for beverage purposes.* (Our italics) An instruction defining intoxicating liquor, and requiring the jury to find that the defendant manufactured "intoxicating liquor commonly called 'hootch' 'moonshine' or 'corn whiskey' ", was proper, and that it was unnecessary for the trial court in his instructions to define these terms. The court stated that in its definition of the terms it was expressly modifying the definition given in the *Brown* case.

In the *Morris*[24] case, the same form of information was used and again held valid. The trial court had here given an instruction defining the terms in controversy. This instruction was as follows:

> "The court instructs you that the words 'hootch', 'moonshine', 'corn whiskey' mean intoxicating liquor manufactured illegally, that is to say, without lawful permission from the United States government and without lawful permission from the state government."

In commenting on this instruction, Judge Higbee says that it is in harmony with *State v. Brown*[25] and *State v. Combs.*[26] The evidence in the case had been that the defendant had made "moonshine whiskey". There was no evidence that the whiskey was made from corn. While therefore purporting to follow *State v. Brown* the case is clearly inconsistent with the theory of that case to the effect that the three terms under consideration are synonymous.

The opinion in *State v. Pinto*[27] was written by Judge White who had spoken for the court in *Brown's* case. Defendant was charged with the felonious manufacture of "corn whiskey". In instruction numbered three, the trial court told the jury that defendant was charged with manufacturing intoxicating liquor illegally. In the next instruction however, he attempted to define corn whiskey. He said that the manufacture of corn whiskey was "the commingling of some ingredients with corn in some form so that the process of fermentation will take place and a potable

22. (1925) 273 S. W. 1039.
23. (1925) 279 S. W. 135.
24. (1925) 279 S. W. 141.
25. Supra, Note 18.
26. Supra, Note 21.
27. (1925) 279 S. W. 144.

beverage containing more than one half of one per cent of alcohol will be the final result thereof." These instructions were attacked as not properly defining "corn whiskey". In holding them improper, Judge White argued that the manufacture of "corn whiskey" denounced by Section 21 did not include all kinds of illegally manufactured liquor. "By corn whiskey was undoubtedly meant a liquor entirely distinct from those synthetic liquors which are made from alcohol whether reclaimed or otherwise." Again: "In the case of *State v. Brown* we attempted to define 'moonshine' which has caused some misunderstanding and confusion, because the definition of 'moonshine' has been applied to 'corn whiskey'. On further consideration of the matter, in view of the provisions above referred to, we are convinced that we were wrong in holding the terms 'hootch', 'moonshine' and 'corn whiskey' to be synonymous. From the well-known use of those terms, it is probable that the word 'or' should be understood between 'hootch' and 'corn whiskey' as they appear in Section 20 (*sic*) of the Act of 1923. As a matter of common knowledge, *moonshine is a name applied to other liquors than corn whiskey*. It is a broader term, and includes the corn whiskey denounced by the statute. The same may be said of 'hootch'. That is what we should have said in the *Brown* case as our understanding of the legislative intent. *All illegal corn whiskey is moonshine, but all moonshine is not corn whiskey*." (Our italics).

So far, the court's position seems reasonably clear. Yet in the next paragraph the learned Justice seems again to becloud the issue a little when he says:

> "Therefore corn whiskey must be whiskey, not some other kind of liquor; it must be made of corn, or a product of corn must be an ingredient of its composition. *The fact that the Legislature chose to call it also moonshine does not enlarge the content of the term 'corn whiskey'*. If the lawmakers, as further descriptive of it, had used the definitive and well understood term 'white mule', probably less doubt would have arisen over the kind of liquor meant."

If, as stated in the preceding paragraph, the terms are not used as synonymous, then the legislature did not call corn whiskey moonshine but merely denounced an offense which could be committed in two (or rather more than two) different ways; i. e. by the manufacture or sale of moonshine, or by the manufacture or sale of corn whiskey. The last paragraph of the opinion seems, however, to make clear the court's position and to declare emphatically that the terms refer to different liquors:

"We are not called upon now to define the terms 'hootch' and 'moonshine', because they are applied in this case, and in all other cases where the matter has come before us, to 'corn whiskey'. If those terms are applied to some other alcoholic drink in a case that may come before us, it will be time enough to define them."

The decision in *State v. Brock*[28] merely reiterated the doctrine of the *Griffith* case as to the sufficiency of an information, and further held that evidence that a witness "supposed" that the liquor in question was "commonly called moonshine" was sufficient to sustain a conviction. The case adds little to the development of the law.

In February 1926, the court took a definite forward step in clearing up the law. The opinion in the case of *State v. Wright*[29] was written by Commissioner Railey. This opinion was adopted by division two as the opinion of the court; but a separate opinion was filed by Judges White and Blair, so that only Judge Walker and Commissioner Higbee can be said to have concurred in the reasoning of the principal opinion. The defendant was charged under the statute with the manufacture of

28. (1926) 280 S. W. 48.
29. (1926) 280 S. W. 703.

"white corn whiskey". The proof was to the effect that he manufactured "whiskey". Defendant objected that there was a fatal variance between the pleading and the proof. The Supreme Court affirmed his conviction. Judge Railey argued that the court would take judicial notice that whiskey was an intoxicating liquor and was potable and fit for beverage purposes. That the words 'hootch', 'moonshine', 'white mule', etc., are generally used in connection with the *unlawful* manufacture of *whiskey*". That therefore an information which merely charged the unlawful or felonious manufacture of whiskey necessarily charged the manufacture of moonshine and accused defendant of a felony under the law. Therefore the proof of the manufacture of "whiskey" alone without showing that the whiskey was "white corn whiskey" was sufficient. He cited with approval the portion of the opinion in the *Pinto* case which modified the definition given in the *Brown* case. At first glance, it would seem that the ruling in the *Wright* case was inconsistent with the actual holding of the court in *Pinto's* case. The concurring opinion of White, J., who had spoken for the court in the *Pinto* case, discloses a ground on which the two decisions may be reconciled. He points out that, since under the opinion of Railey, C. the unlawful manufacture of corn whiskey and the unlawful manufacture of any other kind of whiskey would constitute a felony under Section 21, there was, in the case then before the court, only a variance in the manner of the commission of the crime between the information and the evidence. As this variance was not a material one in the instant case, and the question was now raised after verdict, it was cured by the Statute of Jeofails. While White J. does not discuss his opinion in the *Pinto* case it is clear that the point there was more than one of variance and that it was an error and inaccuracy in instruction.

Nevertheless, one is forced to ask if this distinction is not in reality one of formal logic rather than of substance. If the variance between 'corn whiskey' alleged in an information and 'rye whiskey', let us say, established in the proof is not material, why would an error in instructions, which at most might cause the jury to confuse corn whiskey with some other kind of whiskey and find defendant guilty when he manufactured some species of whiskey other than that made from corn, be material? We are inclined to the belief that the actual holdings in the *Pinto* and *Wright* cases are inconsistent and that the latter case overruled the former.

In May 1926, the *Brown* case, having been retried to a jury who found the defendant guilty a second time, came back to the Supreme Court.[30] This time the conviction was affirmed. The greater part of the opinion is taken up with a discussion of the admissibility of certain evidence. Concerning the question here under discussion, the court stated:

> "We think the evidence was sufficient to support the verdict. The witness testified that he bought the pint of moonshine whiskey from the defendant, and paid him $1.50 for it; that it looked, smelled, and tasted like moonshine; and that it was moonshine whiskey; and that it made him drunk. This was sufficient to warrant the jury in finding that it was moonshine and was intoxicating. *State v. Pigg* (Mo. Supp. 278 S. W. 1030, 8).
>
> "Judge White said in his opinion:
>
> "Legally 'moonshine' in a context, like the language of the information, has as definite significance as the term 'whiskey'. It means liquor manufactured illegally'. *State v. Brown*, 304 Mo. 78, 262 S. W. 710".

The learned Commissioner here quoted from Judge Railey's opinion in the *Wright*[31] case the remarks about the statute prohibiting all forms of manufacture of whiskey

30. (1926) 285 S. W. 995.
31. Supra, Note 29.

whether the whiskey involved was "corn whiskey", "rye whiskey", or whiskey made from some other material. He then goes on to state that this ruling under Section 21 clearly applied to Section 20. In point of fact, the information in the case before the court seems to have been drawn under Section 21 and not Section 20, but this does not seriously affect the reasoning of the court's opinion. It stands as a clear affirmance of its position in the *Wright* case.

State v. Black[31a] seems expressly to overrule the decision in the Pinto case, in so far as the latter relates to the necessity of proving the sale of 'corn whiskey' rather than any other kind of 'moonshine' under an information charging 'corn whiskey'. The information in the *Black* case alleged that defendant sold one Dan Denver Ball a half pint of "hootch, moonshine, and corn whiskey". In instruction numbered one, the trial court, after requiring the jury to find that the defendant sold "a quantity of hootch, moonshine, and corn whiskey", proceeded to define these terms by saying that they *meant* illegally manufactured whiskey. To this instruction exception was taken for the reason, among others, that it permitted the jury to convict defendant even tho they should find that he sold some kind of illegally manufactured whiskey not made from corn. The Supreme Court, however, in an opinion by Judge Higbee, concurred in by the entire division, held that the instruction was good and affirmed the defendant's conviction. The *Wright* case and the second opinion in the *Brown* case were cited with approval, and the *Pinto* case was not mentioned. The question was identical with that upon which the conviction of Pinto had been reversed, and the case came up in exactly the same way.

In *State v. Vesper*[32] the information charged that the defendant had feloniously made and distilled "hootch, moonshine, and corn whiskey". It was proved that he had made an intoxicating liquor by redistilling some rubbing alcohol. Rubbing alcohol seems to be a kind of denatured alcohol. By this is meant that it is ethyl alcohol into which certain non-potable or poisonous substances have been placed in order that it may not be used for beverage purposes. As a matter of fact, many different prime materials are used for the commercial production of ethyl alcohol, and it was of course impossible to say that the original rubbing alcohol had in it any ingredient produced from corn. Defendant contended that he should have been indicted under Section 5 and not under Section 21. Section 4 of the act punishes the redistilling of denatured alcohol. The court held that, altho a prosecution might have been brought under Section 4, the same acts constituted a violation of Section 21 as well. The conviction was upheld. Judge Blair in delivering the opinion of the court said, "an intoxicating liquor illegally distilled for beverage purposes is hootch, moonshine, or corn whiskey."

In *State v. Bryant*[33], the evidence showed that defendant had made a distilled intoxicating liquor out of sugar, shorts, and yeast. It was not in evidence what kind of "shorts" were meant; that is whether they were made from corn meal or other grain. Yet the court without hesitation upheld a conviction for manufacture of "hootch, moonshine, and corn whiskey".

State v. Clark[34] was decided by the Springfield Court of Appeals, the opinion being written by Judge Bradley. The charge was under the first section of the Act of 1921. The proof showed transportation of "moonshine whiskey". The court however held that moonshine whiskey was only a kind of intoxicating liquor, and hence, while if the state chose to do so the person guilty of transporting it could be prosecuted

31a. (1927) 289 S. W. 804.
32. (1927) 289 S. W. 862.
33. (1927) 289 S. W. 938.
34. (1927) 289 S. W. 963.

for a felony, yet at the election of the state he could be prosecuted for a misdemeanor.

State v. Martin[35] held that where a defendant is charged with selling "moonshine corn whiskey" it is sufficient if the court in his instructions defines "corn whiskey", since corn whiskey as used in the statute is only a kind of moonshine, and the descriptive word "moonshine", as used as an adjective qualifying "corn whiskey," is redundant.

The latest case we have been able to find is that of *State v. Cook*.[36] Error was assigned on failure of the trial court in his instructions to define "hootch, moonshine and corn whiskey". The evidence was to the effect that defendant had sold a liquor which witnesses described variously as "moonshine" and "corn whiskey". No attempt was made by the trial court to define these terms at all. The conviction was sustained, the court speaking thru Judge Walker saying that these terms had a meaning well known to everyone and a definition of them was unnecessary. The learned Judge added that the court had frequently held that the terms, hootch, moonshine, and corn whiskey referred to "spiritous liquor, illegally distilled or manufactured." To this definition may be added that spiritous liquors in common parlance mean distilled liquors as distinguished from those which are merely the product of fermentation or brewing.

We are now in a position to sum up the law as it exists today. We shall attempt to answer the questions set out at the beginning of our discussion. It seems clear that the word "or" must be understood between the word "moonshine" and the words "corn whiskey" used in the statute.[37] The words are not to be understood as synonymous, but the terms hootch and moonshine are to be taken as general terms designating a large class or genus of intoxicating liquors of which corn whiskey is but a single species. The statute makes it a felony to sell any kind of moonshine. This felony may be committed in several ways by the sale of the various kinds of moonshine, and among the others of corn whiskey.[38] It seems that at least after verdict, a variance between the allegation of a sale or transportation or manufacture of one kind of moonshine, e. g., of corn whiskey, and the proof of the sale of some other kind of moonshine, will not be a fatal one.[39]

We have left however the question of just what liquors are included within the scope of the term moonshine. Let us examine in detail the status of each of the three general classes of alcoholic intoxicating liquors enumerated above. No case has been before the court in which a fermented liquor or brewed liquor, such as wine, cider, or beer e. g., as distinguished from a distilled liquor, has been involved. There is, therefore, certainly no authority for including such liquors in the class of moonshine. On the other hand, while there is no positive authority for excluding them, the language of the courts in almost all of the cases is to the effect that moonshine must be a distilled liquor.[40] Such a decision accords with common practice among the prosecutors and law enforcement officers generally. It also accords with common sense as we shall see later.

The authorities are clear that to be classed as moonshine, distilled liquor must have been illegally made.[41] This excludes the so called "bonded" whiskey or whiskey

35. (1927) 292 S. W. 39.
36. 3 S. W. (2nd) 365.
37. *State v. Combs*, supra Note 21.
38. *State v. Pinto*. supra Note 27.
39. *State v. Wright*, supra note 20.
40. *State v. Black*, supra note 31a.
41. *State v. Sedlaeck*, *State v. Chareth*, supra note 16, *State v. Tuten*, *Weller v. State*, supra note 17, *State v. Brown*, supra note 18, *State v. Wright*, supra note 29, *State v. Pinto*, supra, note 27, *State v. Vesper*, supra, note 31, *State v. Cook* supra, note 36.

legally made in government inspected distilleries and illegally diverted to prohibited uses, and also legally manufactured foreign whiskey and distilled liquors which have been unlawfully imported into the United States.

On the other hand, the decisions are expressly to the effect that distilled spirits not made from corn, and in fact not made from any grain at all, are nevertheless, if illegally manufactured, moonshine.[42] Seemingly all illegally distilled spirits are included in the prohibited class without regard to the prime materials used in their production.[43]

In all sciences, too broad generalizations are dangerous. This is particularly true in the field of jurisprudence. Yet it may not be wholly amiss to attempt to formulate a general definition upon the basis of our inductive study of the cases—a general rule which, like all rules of law, will be merely a short-hand formula descriptive of past observed phenomena, upon the basis of which we can with a fair degree of accuracy predict future phenomena in the same limited field. That definition may be stated as follows: Hootch or moonshine, as those terms are used in the prohibition act of 1923 are distilled intoxicating liquors which contain more than one half of one percent of ethyl alcohol by volume, and are potable and fit for beverage purposes, and which have been manufactured without a permit from the government of the United States and the government of the State, regardless of the materials used in their production.

III

Let us subject the rule thus formulated by inductive study of the cases to the test of pragmatic logic. Does it work? The pragmatic test suggested will be twofold. First, does the rule as stated give the statute such a meaning that this section when applied will tend to secure valuable social results? Does this construction of the act make it possible to enforce it as a matter of practical criminal law administration? To put the whole matter more concretely, does the classification of the offense of selling liquor which makes it a felony to sell illegally distilled liquor and only a misdemeanor to sell legally distilled liquor or brewed or fermented liquor (either legal or illegal), accord with a socially and economically sound public policy? Second, if this construction is established will it be practically possible under ordinary circumstances for a prosecuting attorney to prove that liquor sold is moonshine and thus secure a conviction of the defendant?

(a). There may be some doubt as to the wisdom of providing such drastic punishments as those included in Section 21. This doubt arises from the fact that juries are slow to convict when the punishment is too severe.[44] Yet the wisdom of

42. *State v. Vesper*, supra note 31; *State v. Bryant*, supra, note 33.

43. *State v. Cook*, supra note 36.

44. In the rural portions of Missouri and in the smaller cities there is a fairly high percentage of convictions in liquor cases as compared with all kinds of felonies. Felony liquor cases, 25.76%, all felonies 33%. In the cities of St. Louis and Kansas City however, the percentage of convictions in felony liquor cases is only 1.81%. However, a large number of liquor cases which start off as felony charges, are disposed of an pleas of guilty to included charges of misdemeanor. In St. Louis during the period covered by the Crime Survey, 145 out of 155 felony liquor cases were disposed of in this way. In Jackson County, 257 out of 306. (Missouri Crim. Survey, p. 302 *et sec*). The greater part of prohibition enforcement in the cities is left to the federal government, and under the federal code only the most important cases can be made felonies. It would seem therefore that experience in the cities shows that liquor cases cannot be disposed of as felonies, and that there is great reluctance on the part of juries to send persons charged with liquor violations to the penitentiary. In the experience of the writer, at Hannibal, a city of some 25,000 population, this has proven true. Juries who will acquit where a charge is brought under a felony section, will convict if the charge is under a misdemeanor section. Of course the case is different in purely rural counties.

punishing the seller of illegally distilled spirits more severely than the seller of "bonded" whiskey or of beer, wine or cider seems obvious. Aside from the fact that the consumption of illegally distilled liquor is more likely to produce drunkenness[45] than that of beer or wine or even lawfully made whiskey, and therefore involves a greater social evil, there are other reasons of even greater weight. It is perhaps necessary to punish the person occasionally who sells or makes, or gives away, or even possesses liquor of any kind. Unless the law is made in general terms prohibiting absolutely the use of all kinds of liquors, the difficulty of enforcing it would be many times greater than it is today. The man therefore who makes beer is a law violator, and hence a punishment for his act must be provided. We must examine, however, into the nature of punishment in such cases.

Punishment of crimes is of two kinds. It is assessed as a sort of peno-correctional treatment for the true criminal, and it is a necessary sanction attached to police regulations assessed against violators of those regulations who are not real criminals at all in most instances. Life in any organized society involves for each member thereof a certain sacrifice of his own individual wants and desires to the general social good. The ordinary normal individual learns to live in society with a minimum of friction by placing his desires, at any rate his lesser and temporary ones, in subjugation to the rules of conduct laid down by the group. Some individuals, however, fail to develop this social mindedness. When their own wants are in conflict with the interest of others, or with the general good, or with the rules laid down by the group, they follow their own desires exclusively. Such egocentric personalities are natural criminals.[46] When their egocentric and anti-social activity reaches a certain point, it becomes necessary for society to restrain their liberty and either treat them in such a manner that they will be reformed and made to develop socially desirable behavior habits, or, if reformation be impossible permanently, segregate them from the remainder of the community.[47] This process of peno-correctional treatment or complete segregation of offenders is punishment as applied in the ordinary felony case to true criminals. Society also finds it necessary—and increasingly necessary under the complex social and economic conditions of life in the modern community[48] to adopt many detailed rules of conduct which are often violated by persons who are normally socially minded. An illustration will serve to clarify this statement. In most cities there are highly complex traffic codes. While these laws are habitually violated by professional criminals, they are also commonly violated by persons who would shun even the thought of such crimes as murder, rape, robbery, or arson. Yet the violator of such police regulations, whether criminal or leading citizen of the community, must be punished. Only in this way will the regulation be made effective, and on the effectiveness of such rules depends to a very large degree the safety and happiness of each member in our increasingly complex society. It is clear, however, that punishment in this sense is a very different thing from punishment in the first sense mentioned. It proceeds from different causes, deals with a different sort of situation, and has a different purpose.

Now without regard to one's views of the general subject of prohibition, he must admit that there are many persons who make home brew beer, wine, cider, and other fermented and brewed liquors, who are not in any sense professional criminals as

45. Fisher, Op. Cit., note 14.
46. Brasol, *Elements of Crime*, (1927) Chapt. II.
47. Glueck, *Principles of a Rational Penal Code*, (1928), 41 Harvard Law Review, 453.
48. See the writer's discussion of this newer type of criminal law in Ely, Probable Cause in Connection with Applications for Search Warrants, (1928) 13 St. Louis Law Review. 101.

we have defined that term in this discussion. It also is clear that many persons who are not true criminals are often guilty of giving away bonded whiskey. On the other hand, the ordinary bootlegger customarily deals in illegally manufactured distilled liquor. Now the bootlegger is a professional criminal. His very business is a defiant violation of the expressed will of organized society, and the experience of the writer is that in most instances the same individuals and groups who are engaged in bootlegging are also connected with stealing, forging, the unlawful traffic in narcotic drugs, and other forms of anti-social activity.[49] It thus seems clear that, in a very large number of cases, punishment assessed for the manufacture, possession, and giving away of non-distilled bonded whiskey is punishment of the second kind, above mentioned. Punishment for making, selling, giving away, and transporting of illegally made distilled liquor, however, is usually punishment of the first variety—i. e. peno-correctional treatment, aimed at the true criminal.

Under an ideal scientific system of criminal procedure, in which the kind of punishment or treatment meted out to each offender would be determined by a body of experts, or a single expert, or even by the trial judge, no statutory distinction between the various kinds of offenses in this regard should be made. The judge or expert would be possessed of all of the facts of the defendant's life history, together with a complete medical and psychological report concerning his physical condition and behavior patterns and complexes. With this in mind he could and would fit the treatment to the needs of the patient.[50] But we do not have such a system. Punishment is fixed by a jury.[51] This jury is never composed of experts. It is usually composed of persons having no experience in such matter whatever, and no knowledge of the fundamentals of criminal science. Sometimes the jurors are themselves of a low order of intelligence.[52] This untrained, inexperienced body of laymen is asked, without the aid of any knowledge of the defendant's life story, his psychological and physical condition, or any of the other pertinent facts, to say what punishment the defendant shall undergo.

In the light of these facts, no other course is open than that followed by our legislature in most instances of establishing minute classes and gradations of offenses, and trying to affix to each class and grade a punishment which will come somewhere near meeting the needs of a majority of the persons who commit it.[53] If this method is applied to liquor offenses, we shall see that, in the case of the maker of home brew or the person who gives away a drink of bonded whiskey, only such punishment

49. This point was clearly stated in the address by Mr. Lashley of the Missouri Association for Criminal Justice in his address before the American Bar Association, 1928 meeting (not yet published).

50. Glueck *Op. Cit.*, note 47 supra; Cooley, *Probation and Delinquency*, (1927) Chapt. 16; see also Healy, *The Individual Delinquent*, (1924).

51. Altho the Missouri Association for Criminal Justice has criticized the present method of assessment of punishment there seems no immediate likelihood of a change in the law in this regard.

52. It should be born in mind that, as a class, lawyers, doctors, school teachers, and ministers are excluded from jury service; and that in general as a matter of practice heads of large businesses are also excused, as are engineers whose position in the running of factories and industrial enterprises makes their absence from work detrimental to social interests. These restrictions have taken off the jury lists a very large part of the educated portion of the community.

53. This method has been followed in the gradation of different degrees of murder, robbery, larceny, burglary, forgery and many other crimes. It has recently been applied on a much more scientific basis in the proposed Italian Criminal Code drafted by Sr. Ferri. Ferri, *Relatione sul Progetto Preliminare de Codice Penale Italiano.* (1921).

is ordinarily needed as will make such person realize that he has violated the will of society, and will lead in the future to a regard for the law, by persons who are not by nature criminal. But in the case of the person who makes, or sells moonshine as we have defined it, generally such punishment must be meted out as will enable the penal departments of the state to treat and, if possible, reform a true criminal of fixed anti-social habits of behavior and egocentric propensities. Hence the punishment of the one class of offense may well be that accorded misdemeanors while that given in the latter type of case may well be a felony punishment.

Of course such a system is arbitrary and unscientific.[54] Some serious offenders will be punished only for a misdemeanor and some persons who are mere occasional law violators will be convicted of felonies. But this is a defect necessarily inherent in a system of criminal procedure which empowers the jury to fix punishments and makes necessary the establishment of a scale of punishments by the legislature primarily based on the fact of the offense and not on the personality of the offender.

(b) As a second test of the practical workability of the proposed definition, we ask if it is such as will permit experts to state positively after an analysis of liquor submitted to them that it is moonshine. It is obvious that if a definition is so framed that it is impossible with the aid of chemical examination of a given substance to tell whether it falls within or without the definition, prosecution under the act would be impossible and it would be made meaningless. Applying this test then to the definition proposed we have two major questions of analytical chemistry involved: (1). Is it possible to distinguish brewed and fermented liquors from distilled liquors? (2). Is it possible to distinguish illegally distilled liquors from legally distilled liquors?

Distinguishing between brewed and fermented liquors on the one hand and distilled liquors on the other is ordinarily an easy matter. The quantitative determination of the amount of ethyl alcohol alone is ordinarily sufficient.[54a] But where the supposed whiskey has been diluted or particularly strong wines are involved, this test is not determinative of the question. Here however sugars and many other organic compounds are found in the wines and beers which are not present in whiskey, and the whiskey will always contain traces of fusil oil and certain organic acids.

A more difficult operation is involved in the differentiation of illegally made distilled liquor from liquor legally distilled. However, the former is almost always found to contain comparatively large amounts of fusil oil, while comparatively small amounts of this substance are to be found in bonded whiskey.[55] In addition the aldehydes in large quantities are found invariably in illegal whiskey whether it be made from corn, rye, fruit, or potatoes.[56] In the process of distillation these impurities pass off at either a higher or a lower temperature than the boiling point of ethyl alcohol and hence are found in the first and last protions of the liquors distilled. In a bonded distillery these first and last portions of each "cooking" are

54. Glueck, *Op. Cit.* note 47 supra.

54a. The difference in alcoholic contents mentioned between fermented or brewed liquors on the one hand and whiskey for distilled liquors on the other can not be detected by the use of a hydrameter since the presence of sugars in the fermented and brewed liquors prevents this test from being accurate and in fact usually prevents it from being used at all. The alcoholic percentages in these cases must be determined by a process of distillation and for great accuracy the analysis should be gravametric.

55. Note 13 supra.

56. The amounts of these compounds to be found in bonded whiskeys of various kinds are set out in Woodman, *Op. Cit* note 13 supra. It would be of great value for those connected with the enforcement of state prohibition if careful research were made to determine the amounts of these substances usually found in "moonshine".

discarded and only that portion which is largely free from impurities is used.[57] In addition the whiskey thus obtained is aged for long periods of time in charred barrels. This process serves to further purify it.[58] The presence of these impurities in large quantities is therefore positively determinative that the liquor has been illegally manufactured, i. e., that it is moonshine in accordance with the proposed definition.

IV.

It has recently been suggested that moonshine can only be applied to "whiskey"; that whiskey has always been understood as referring to liquor made from grains as distinguished from liquor made from fruit or other substances; and that therefore moonshine must always be made from grains. In support of this theory it is argued that liquor made from fruit never contains fusil oil; that fusil oil is the poisonous substance which produces the so called "hootch" poisoning; and that the reason for making the selling of moonshine a felony was to stop the sale of this dangerous substance.[59]

The term whiskey was before prohibition variously used in different parts of the country and in different foreign countries. But at any rate, to base an argument upon its meaning at that time is to go back to the old fallacious logic of concepts. Science today realizes that terms are only mathematical symbols.[60] They are like the figures of arithmetic or the letters of algebra. So long as, in a single discussion, we invariably use the terms in one sense, and so long as it is plain at the outset what particular physical facts the terms are going to represent in our discussion, it makes very little difference if we have departed from the meaning usually assigned to the terms.

The argument based on the absence of fusil oil sounds at first more convincing. As a matter of fact, however, it is not the fusil oil which makes liquor poisonous.[61] At most the fusil oil has a tendency to nauseate and nothing more. Some authorities state that hootch poisoning is nothing more than alcohol poisoning. But in any event the aldehydes present in illegally distilled liquor, whether produced from corn or fruit or any other prime material, are highly poisonous.[62]

Finally the great trouble with this theory is that it does not fit the decisions of the courts. The *Vesper* case e. g.[63] cannot be explained on this ground. Here rubbing alcohol which might have been made originally from fruit, grain, potatoes, rice or any number of different things, and about whose manufacture we actually know nothing

57. This process is known as fractional distillation. But even where it is not used by a careful controlling of temperature and other conditions, the whiskey is kept relatively pure, and unduly large amounts of the "secondary" constitutents are prevented from getting into it.

58. This process serves to remove pyrol alcohol which is said to give "raw" whiskey its unpleasant taste.

59. This argument was made by counsel for the defendant in the recent case of *State v. Harris* (Circuit Court of Marion County, May Term 1928, now pending on appeal to the Supreme Court.)

60. See note 9 supra

61. It is the fusil oil which gives flavor to whiskey. This substance, when taken in only small amount, as in bonded whiskey, produces no known toxic effect. In large amounts it will produce nausea.

62. The symptoms of so called "hootch poisoning" are those ordinarily found after the aldehydes have been taken: at least the writer has been so informed by friends in the medical profession.

63. Note 31 supra.

as far as the evidence in the case goes, was distilled, and a potable liquor produced. The court without hesitation held it to be moonshine.

It is submitted that the suggested definition of moonshine as a distilled liquor which has been made without lawful authority from the Federal and State governments, is clearly consistent with all of the Missouri cases except those which the court itself has plainly overruled; and that it embodies a wise social policy and is practically workable. It is believed that an attempt to elaborate the definition further would only lead to difficulties, and that the statement of Judge Walker in the last case, *State v. Cook*, should be taken as the final crystallization of the law.

Ben Ely, Jr.*

Hannibal, Mo.

*Mr. Ely is a member of the Hannibal Missouri, Bar, and a graduate of the School of Law of the University of Missouri, class of 1922.