

STPREME COURT UP- HOLDS DRY LAW

First Attack Against Constitutional-
ity of Nebraska's Prohibition
Law Fails

The supreme court of the state of Nebraska, in an opinion written by Chief Justice Morrissey, handed recently, from which Justices Sedwick and Cornish dissented, upheld the "possession of liquor" clause of the state prohibition law.

The attack upon it was made in the appeal of Paul B. Fritch, an Omaha druggist, who was arrested the day after prohibition went into effect last May, charged with having whiskey in his possession in his store. He was convicted on the theory that the only place a man may have intoxicants is in his dwelling house and that a druggist cannot lawfully possess, under the prohibitory law, any liquors save ethyl alcohol and alcohol so treated as to be unfit for beverage purposes.

The majority opinion says that the state having adopted prohibition, it was left to the legislature to devise a plan to successfully put that policy into operation. It says it is idle to forbid the traffic and yet to fail to provide an adequate method of enforcing the prohibition. It was, therefore, proper for the legislature to recognize the difficulties of enforcement and the enactment complained of is a proper and reasonable exercise of legislative power.

Justice Sedwick, who wrote the dissenting opinion in which Justice Cornish concurred, holds that the purpose of the amendment was to do away with the saloon and drunkenness, and that under the holding of the majority that only alcohol can be used for medicinal purposes practically prohibits the use of all liquors for that purpose. He says that the construction given is a forced one of a statute intended to abolish the open saloon and prevent drunkenness and crime, and the whole legislation is thrown into confusion and the real purpose of the people largely thwarted.

"In a prosecution under chapter 187, laws of 1917, for having possession of intoxicating liquor, the information need not negative the exceptions under its possession may be lawful, but these are available in defense.

"Under chapter 187, laws of 1917, the sale of intoxicating liquors is absolutely prohibited within this state, except as they may be sold under permit issued by the governor to those bringing themselves within the terms of the act.

"Section 11, chapter 187, laws of 1917, bears a reasonable relation to the peace and order of the state and to the enforcement of the law designed to prohibit traffic in intoxicating liquors and is, therefore, a constitutional enactment."

After discussing the first point, a technical one relating to the form of

the information the court says: "Keeping in mind the purpose of the constitutional prohibition against the liquor traffic, we may well assume that it was the intention of the legislature to absolutely prohibit the traffic in whiskey and to limit the traffic in intoxicating liquors even for medicinal purposes to pure ethyl alcohol and alcohol treated according to some formula permitted by the United States commissioner of internal revenue so as to render it unfit to use as a beverage, with suitable provision to enable church societies to procure, keep and use wine for sacramental purposes. Where the words 'intoxicating liquors' are used they appear to be employed so as to include wine for sacramental purposes as well as pure ethyl alcohol and alcohol treated according to some formula permitted by the United States commissioner of internal revenue as a beverage, but it cannot be said that it was ever contemplated that whiskey might be sold under any pretense whatsoever.

"It is further argued that the statute is beyond the legislative power and violates the constitution; that the state may not legislate against the possession of intoxicating liquor where it is not shown that the liquor is kept for unlawful purposes; that it is an unwarranted interference with property rights and is not within the reasonable exercise of the police power. This contention is not without respectable authority to support it, but there is also respectable authority for a contrary holding.

"Intoxicating liquor is universally regarded as a proper subject of application of the police power. Its power to create evil, prejudicial to the highest social order and the welfare of the community, is now universally admitted, and the power of the state to prohibit its manufacture or sale is no longer open to question. The general purpose of all of our laws on the subject is to promote temperance and prevent drunkenness, and this purpose has found expression in our organic law.

Task for Legislators
"The state having adopted a constitutional amendment forbidding the traffic in liquor, it was left to the legislature to devise a plan to successfully put that policy into operation. In forbidding the keeping of intoxicating liquors at any other place than a private dwelling house, the lawmakers were not attempting to make class distinctions and, inasmuch as no person is forbidden by the law to own or occupy a private dwelling house, it did not do so. We have only to consider whether this limitation upon the possession of liquor, even when not held for an unlawful purpose, is a reasonable one. It is idle to forbid the traffic in intoxicants and yet fail to provide an adequate method of enforcing the prohibition. It is common knowledge that officers of the law find it difficult to enforce prohibitory measures. If parties are free to keep quantities of intoxicating liquor in rooms, offices and buildings other than private dwelling houses, the work of the police officers is that much more difficult.

"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 prohibition the scope of which is regarded as essential, in the legislative judgment to accomplish a purpose within the admitted power of the government. With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the indictment has no substantial relation to a proper purpose it cannot be said that the limit of legislative power has been transcended, following the decision of the supreme court of the United States in *Purity Extract Tonic company vs. Lynch*.

"It was proper for the legislature to beset the administration of the new prohibitory law, and the enactment complained of is a proper and reasonable exercise of legislative power. The judgment is affirmed."

The dissenting opinion says in part:

"Under this decision, if physicians can get any liquors for medicinal purposes at all, it can only be from druggists with permits, and then only denatured or ethyl alcohol. There seems to be many other similar violations of the statute in this decision. It seems clear that the purpose of the constitutional amendment and of the statute was to do away with the saloon and drunkenness, and to that end to prohibit the manufacture and sale of any intoxicating liquor to be used as a beverage, and not to prevent the manufacture and sale of intoxicating liquors for medicinal, scientific, mechanical or sacramental purposes only.

"The details of this lengthy statute are for the purpose of making sure of that result. How unfortunate it is that the statute is so construed as to hamper and embarrass the enforcement of the will of the people of the state so plainly expressed in their amendment to the constitution and in subsequent legislation.

"If it was intended that all these formalities related only to the sale of ethyl alcohol, why not say so at once? Before selling or keeping ethyl alcohol, as herein provided, he shall secure a permit, etc. But the permit is to sell, not one particular liquor. It is intoxicating liquors generally.

"To provide, therefore, that only alcohol shall be used for medicinal purposes practically prohibits the use of all liquor for such purposes."

The liquors found in Fitch's possession were seized on May 2, the day after the prohibitory law took effect. The dissenting opinion holds that such possession was lawful up to the date of May 1. It points out that he promptly applied for a permit, but under the terms of the statute could not obtain one until after the lapse of twenty days. In the meantime he had made no sales.

"His violation of law consists in not having disposed of it before the act took effect," declares Judge Sedwick. "As a retail druggist he was not authorized to sell at wholesale, so that there was nothing left for him to do but to destroy the goods before the law took effect. Such legislation would be of the nature of an ex post facto law, and under such construction the statute itself destroyed defendant's property, and violates both sections 3 and 16 of the bill of rights.

"It is inconceivable that the people of this state, either by their votes upon the adoption of the constitutional amendment or thru the action of the legislature, intended such a result."

Discussing the language of the proviso in the law which allows liquor for beverage use to be kept only in private dwellings, the dissenting opinion finds that this was the essential element of the druggist's offense, and yet it was not pleaded in the complaint. The failure so to specify is held to be clearly insufficient. It concludes as follows:

"By the forced construction now given, to a statute which was intended to abolish the open saloon and prevent drunkenness and crime, the whole legislation is thrown into confusion and the real purpose of the people largely thwarted."

As Section 11 Reads

Possession of liquor. — Any person may purchase and keep in his possession ethyl alcohol treated as required by this act so as to be unfit for use as a beverage. It shall be unlawful for any person to have, possess or permit any intoxicating liquor to be in, upon or about any room, office, building or in any other place except in such person's private dwelling house, and except when and where and in the manner especially authorized as herein otherwise provided. And no person shall keep or possess intoxicating liquor in his private dwelling house in an amount more than is, reasonably sufficient for his personal use and needs; provided, however, that in any action brought under the provisions of this act, or based upon complaint of any violation thereof, or in any civil action growing out of any such actions, the possession, in and of itself, of any intoxicating liquor in a private dwelling house by the person against whom the violation of the act is charged, shall constitute prima facie evidence that such liquor was kept by such person with the purpose of unlawful sale, use or disposition in violation of the law.

NOTICE FOR PUBLICATION

Department of the Interior
U. S. Land Office at Alliance, Nebraska, April 4, 1918.
Notice is hereby given that F. Worth Jones, of Auxiliary Remount Depot, Camp Funston, Kansas, who, on October 10th, 1914, made homestead entry, serial, No. 016,981, for west half of section 14, township 21 north, range 47 west of 6th P. Meridian, has filed notice of intention to

make final three-year proof, to establish claim to the land above described, before Captain Howard C. Gale, detachment commander at Camp Funston, Kansas, on the 13th day of May 1918, and the testimony of the witnesses will be taken before the register and receiver of the United States land office, Alliance, Nebraska, on May 13th, 1918.

Claimant names as witnesses: Roy Coats, of Broadwater, Nebr.

Perry Beagle, of Alliance, Nebr.
Joseph Coval, of Alliance, Nebr.
Henry Sageboller, of Alliance, Nebraska.

T. J. O'KEEFE,
8850-894-1-19 Register.

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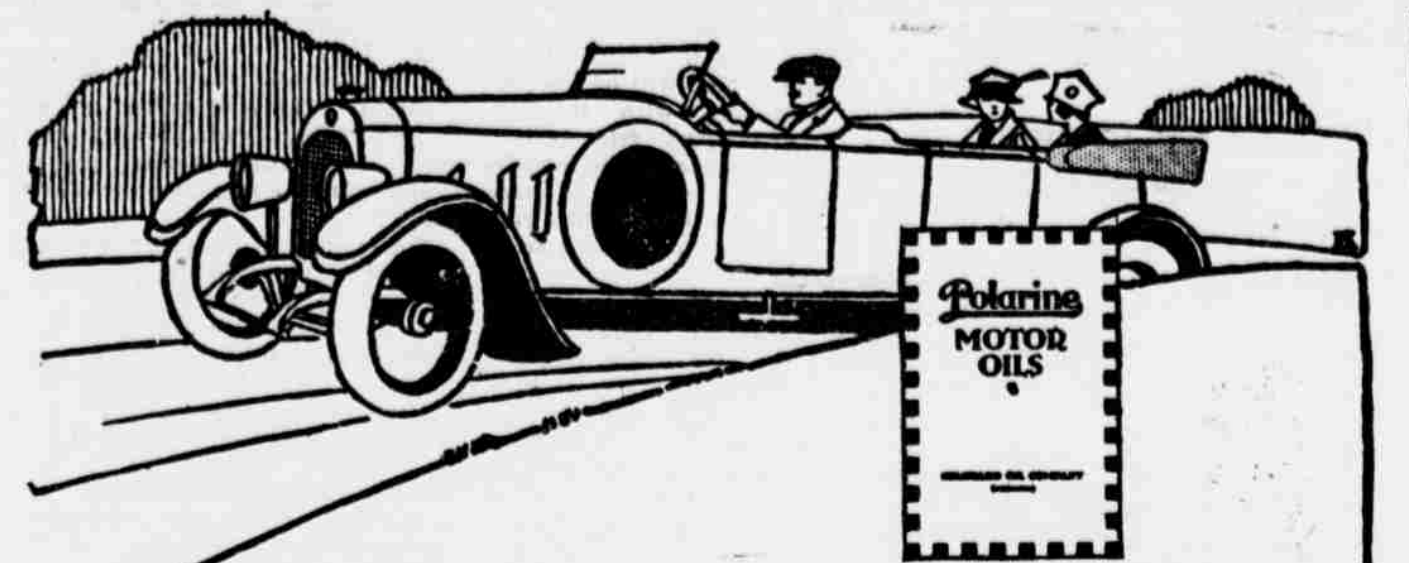
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