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The States Did Not Fail in Liquor Control

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NOTES

THE STATES DID NOT FAIL IN LIQUOR CONTROL

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The twenty-first amendment has been submitted to the states and adopted. It repeals the eighteenth amendment and retains federal control over interstate shipment. The amendment provides:

"Section 1. The 18th article of amendment to the Constitution of the United States is hereby repealed.

"Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution, within seven years from the date of the submission thereof, to the States by the Congress."

One of the principal objections to this amendment was that it would return us to a situation which existed in this country from the adoption of the Constitution to the passage of the eighteenth amendment. The most serious indictment against the system of control that existed at that time was directed at the inability of the "dry" states to prohibit shipments of liquor from neighboring states. In fact this was the outstanding argument in favor of national control. We may freely admit that if saloons are harmful such injury is confined to those in the state where the saloon is located. So far then as the saloon is concerned it can be abolished by any state that so desires. But on the question of interstate shipment we are faced with a different proposition. By shipping liquor from one state to another it was impossible for a state to prohibit the sale and possession of intoxicating liquor within its boundaries. The states were unable to cope with this situation, hence, national control.

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Now that we have returned liquor control to the states it is important that we look into the history of this question from the standpoint of constitutional law. Were the states unable to prohibit interstate shipments? Were the charges against the states justified? If we did encounter unsurmountable obstacles then, will we be facing the same obstacles now that the twenty-first amendment is adopted.

I propose to show—

1. That we never had free state control until 1913.
2. That the states were hampered until that date by federal interference.
3. That we never had any federal cooperation until 1917 and then for a period of only twenty-two months.
4. That the twenty-first amendment establishes a plan of cooperative federal and state regulation.

To adequately understand the situation that existed prior to the enactment of the eighteenth amendment it is necessary that we go back to the case of *Brown* v. *Maryland*.[1] The question involved in that case was whether or not the state of Maryland had the power to require a license for the privilege of selling goods by wholesale which had been shipped into the state. The license fee did not apply to Maryland manufactured goods. Brown was indicted for importing goods from a foreign country and selling them without license. Mr. Chief Justice Marshall in writing the opinion of the Court holding the Maryland law unconstitutional said the federal government would protect such goods until they became mingled with the mass of property in the state, and that the goods did not become so mingled as long as they remained in the original package. The Chief Justice went on, by dictum, to say that the same rule would apply to goods shipped from a sister state. This statement was dictum because the case involved only foreign commerce. This case established what was later known as the "original package doctrine". The dictum purported to extend the doctrine to interstate commerce.

In 1886, fifty-nine years after the decision of *Brown* v. *Maryland*, Iowa passed a law prohibiting the shipment of in-

[1] 12 Wheat. 419, 6 L. Ed. 678 (1827).

toxicating liquor into the state to any consignee other than one who had a license to sell such liquor. Bowman Brothers, an Iowa partnership which had no license to sell such, bought 5,000 barrels of beer from a Chicago concern and ordered it to be shipped to Iowa. The Chicago & Northwestern Railway Company refused to carry the beer on the ground that it violated the Iowa Statute. The purchaser then applied to the federal court for an injunction to compel the railroad company to carry the shipment. The injunction was denied in the lower court but the United States Supreme Court in *Bowman* v. *Chicago & Northwestern Railway Company*,[2] held that it must be granted. The court held that the Iowa law was in conflict with interstate commerce clause of the federal constitution.

Thus, the Supreme Court of the United States held that Iowa must submit to the shipment of beer to a consignee who was not allowed to sell it. This made it impossible for Iowa to enforce its laws. The state could revoke a seller's license because he disregarded the state law, but he could still have beer or liquor shipped to him from another state. This decision could not be justified on the ground that this beer was for private consumption. The petitioner here was a partnership and, furthermore, the consumption of 5,000 barrels of beer would be a rather ambitious undertaking. The license law of the state was gone in so far as receiving liquor was concerned.

But could not the state still punish one who sold this beverage in violations of its laws? Iowa tried this and passed a statute giving the officers power to seize any intoxicating liquor which was being held contrary to the state law. The constitutionality of this seizure law came before the court in *Leisy* v. *Hardin*.[3] Mr. Leisy had heard of this "original package doctrine" established in *Brown* v. *Maryland*. With this knowledge he gave birth to a bright idea. He had a large order of beer shipped from Illinois in quarter barrels, eighth barrels, and sealed cases. He held this just as shipped from Illinois and sold it in the same case in which it was shipped. The Supreme Court of the United States held that this could be done. The court held that Congress had the power to regulate interstate commerce; that the power to regulate included

[2] 125 U. S. 465, 8 Sup. Ct. 689, 31 L. Ed. 700 (1888).
[3] 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128 (1890).

the power to protect, and that the power to ship an article from a sister state included the power to sell it after it arrived. Mr. Chief Justice Fuller writing the opinion of the court spoke in very broad language. He said "under our decision in *Bowman* v. *Chicago & Northwestern Railway Company,* supra, they had the right to import this beer into that state, and in view of what we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer". This was very strong language and must have been discouraging to the state which was trying to enforce its laws. The court, therefore, took the position that the plaintiff could sell beer if he sold it in the "original package". This left the state with very little control over the sale of liquor. This was done over the protest of the state. It was not a question of the state lacking "power" to act but of lacking "authority" to act. The federal government had commanded the state to keep "hands off interstate commerce."

In both these cases there were dissenting opinions. Both met with strong popular disapproval. The result was the passage of the Wilson Act[4] in 1890. This act provided that liquors shipped from one state to another became subject to the laws of the latter state upon arrival. This act gave back to the state part of its control but still did not prohibit shipment of liquor into its territory. This law gave rise to a large mail order and express business. A person who could not purchase liquor in his state could order it in small lots (usually by the gallon) and have it shipped to him by express. The states immediately voiced a protest to this business. The state of Kentucky passed a statute prohibiting the sale of liquor to known habitual inebriates. A gentleman falling in this class, and not being able to purchase liquor in his home town, ordered two packages—one from New Albany, Indiana, and one from Nashville, Tennessee. The Commonwealth of Kentucky imposed a fine on the Adams Express Company for

[4] 26 Stat. at L. 313 (1890).

carrying the liquor in violation of this statute. The case was taken to the United States Supreme Court and the verdict was set aside in *Adams Express Co.* v. *Kentucky*.[5] The court held that the State of Kentucky could not prevent such interstate shipments. Naturally after this the C. O. D. business of foreign liquor dealers grew by leaps and bounds. The states then tried to enact laws prohibiting the shipment of liquor into dry territories. But the constitutionality of them was denied.

Congress tried, to correct this difficulty by the *Webb-Kenyon Act*[6] in 1913. This bill prohibited the shipment of liquor into a state to be received, possessed or sold, either in the original package or otherwise in violation of the state law. This law gave to the state the power that it should have had all the time. By its interpretation the state could prohibit the shipment of liquor into its boundaries.

The weakness of the *Webb-Kenyon Act* lay in the fact that Congress did not provide it with any enforcement provisions. The federal government had the power to punish these violators had it so desired. This it did not elect to do until 1917 when the *Reed Amendment*[7] became a law. This statute provided penalties for purchasing or causing liquor to be shipped into dry territory and also prohibited advertising liquor in such territories by use of the United States mail and attached a penalty for violation of the law.

Briefly then the history of liquor control methods prior to the eighteenth amendment may be summarized as follows:
1. Prior to 1890 for a period of about a hundred years the state had no power or control over liquor shipped in interstate commerce. The state had no authority to exclude liquor from its borders. After it came in it could be sold freely so long as the sale was made in the original package.
2. In 1890 Congress passed the *Wilson Act* which made liquor subject to state control as soon as it arrived in the state. This law as construed denied the state authority to prohibit shipment of liquor from another state. This statute was responsible for a large C. O. D. and mail order business.

[5] 214 U. S. 218, 29 Sup. Ct. 633, 53 L. Ed. 972 (1909).
[6] 37 Stat. at L. 699 (1913).
[7] 39 Stat. at L. 1058 at p. 1069 (1917).

3. Congress tried by the *Webb-Kenyon Act* of 1913 to curb this transportation by prohibiting the shipment of liquor into dry territory. This law was of little effect because Congress failed to attach any penalty for its violation. By this time a large C. O. D. business had been built up. It was hard for the state to combat it because in the first place the shipper was always out of the jurisdiction of the state, making it difficult for the state to proceed against him, and in the second place the carrier could always plead ignorance of the contents of the package it was carrying.

4. In 1917 the federal government did what it should have done more than a hundred years before. It stepped in to prevent interstate shipments of liquor into dry territory, and to punish violators.

This brief summary shows clearly that it was not a lack of ability on the part of the state in keeping liquor out, but the real difficulty was a refusal of the federal government to let the state act. If a state desired to bar liquor it was unable to do so because of the federal constitution. During all this time—until 1913—the proponents of national prohibition were pointing to the interstate shipment problem as one with which the state could not cope. They were pointing to the C. O. D. business and saying that if one wanted liquor all one had to do was "order it". The system of state control was being bombarded with all this avalanche of criticism when the plain truth is that this type of business was being forced on the states over their protest, by the federal government.

After March 3, 1917 the system was put into operation that should have been in use all the time. By virtue of the Reed Amendment enacted on that day the federal government assumed control of the interstate business and left to the state the control of the local business. This placed each government where it belonged, and where it could work most effectively. Had this been done seventy-five years prior to the time that it was done the eighteenth amendment would never have been proposed or ratified. The tragedy is that it was not done earlier. The stage was set for proposing the eighteenth amendment even before the Reed Amendment was enacted. The eighteenth amendment was certified by the Secretary of

State on January 29, 1919, only twenty-two months after the *Reed Amendment* was passed by Congress.

The twenty-first amendment is simply re-establishing the system that was in effect for this twenty-two months to which I have referred. It is at least very unfortunate that we did not give this system a trial. From the standpoint of political science and law enforcement it was an ideal system. Each government will be working in the sphere in which it is best adapted. A spirit of cooperation will replace the spirit of jealousy and antagonism.

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