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New Jersey Court of Errors and Appeals

WEST JERSEY AND SEASHORE RAILROAD COMPANY,
Prosecutor-Respodent.
vs.
CITY OF MILLVILLE,
Defendant in Certiorari
Appellant.

ON CERTIORARI
ON APPEAL FROM
SUPREME COURT

STATE OF THE CASE

WALTER H. BACON,
Attorney for Prosecutor-Respondent.

LOUIS H. MILLER,
Attorney for Defendant on Certiorari, Appellant.

November Term, 1917

Supreme Court of New Jersey

WEST JERSEY AND SEASHORE RAILROAD COMPANY, *Prosecutor,* vs. CITY OF MILLVILLE, *Respondent.*	ON CERTIORARI	10

STATE OF THE CASE

WRIT
(Returnable May 31, 1917)

NEW JERSEY, *ss.* THE STATE OF NEW JERSEY TO THE CITY OF MILLVILLE, GREETING:—

[SEAL] We being willing, for certain reasons appearing by affidavit filed at the time of the allowance hereof, to be certified of a certain ordinance passed by the Board of Commissioners of the City of Millville, on the sixteenth day of February, nineteen hundred and seventeen, and which has become operative in said City as the result of a referendum election held in said City on the eighth day of May, nineteen hundred and seventeen, entitled, "An ordinance for the suppression of the unlawful sale of alcoholic liquors in the City

of Millville", and of all proceedings taken by said Commissioners resulting in the passage of said ordinance and its adoption by the voters of said City of Millville,

WE COMMAND YOU, that the aforesaid ordinance so passed and adopted as aforesaid, with all things touching and concerning the same, as fully and entirely as before you they remain, to our Justices of our Supreme Court of Judicature at Trenton, on the thirty-first day of May, nineteen hundred and seventeen, you certify and send, together with this writ, that therein may be done what of right and according to law should be done.

WITNESS, WILLIAM S. GUMMERE, Esq., Chief Justice of our Supreme Court this Twelfth day of May, nineteen hundred and seventeen.

WM. C. GEBHARDT,
Clerk.

WALTER H. BACON,
Attorney.

I allow this writ. Let it be sealed.

Dated May 11, 1917.

CHAS. C. BLACK,
J. S. C.

RETURN

The Ordinance and proceedings within mentioned with all things touching and concerning the same, as fully and entirely as before it they remain, to the Justices of the Supreme Court of Judicature at Trenton, the City of Millville doth certify and send, as within it is commanded.

IN WITNESS WHEREOF the said City has caused its corporate seal to be hereto affixed and these presents to be signed by its Mayor and attested by its Clerk this twenty-second day of May, nineteen hundred and seventeen.

CITY OF MILLVILLE, By
Thomas Whitaker, Mayor.

[Seal of City of Millville)

Attest:
JOHN S. HORTON, *Clerk.*

CITY OF MILLVILLE

ORDINANCE NO. 154

AN ORDINANCE FOR THE SUPPRESSION OF THE UNLAWFUL SALE OF ALCOHOLIC LIQUORS IN THE CITY OF MILLVILLE.

THE BOARD OF COMMISSIONERS OF THE CITY OF MILLVILLE DO ORDAIN:

1. Every person who shall in the City of Millville directly or indirectly keep or maintain by himself or by associating with others, or who shall in any manner aid, assist or abet, in keeping or maintaining any club house, lodge room, boat house, or other place in which alcoholic liquor is received or kept for the purpose of gift, barter or sale, or for the distribution or division among the members of

any club, lodge or other association by any means whatsoever or who shall maintain in any club house, lodge room, boat house or other place in said City what is known as the "locker system", or other system or device for evading the provisions of this ordinance, and every person who shall use, barter, sell or assist or abet in bartering, selling or distributing any alcoholic liquors or received or kept, shall be deemed guilty of a violation of this ordinance.

2. In all cases the members, shareholders, or partners, associates or employees in any club, lodge or association mentioned in Section One of this ordinance shall be competent witnesses to prove any violation of this ordinance, or of any fact tending thereto, but the testimony given by such person shall in no case be used against him in any action or proceeding brought for violation of this or any other ordinance of the City.

3. All houses, lodge rooms, boat houses, buildings, club rooms and places of every description in the City of Millville where alcoholic liquors are or hereafter shall be sold, vended or furnished contrary to law (including those in which clubs, lodges or other associations sell, barter, exchange, give, keep, store, deposit or distribute or dispense alcoholic liquors to their members, associates, guests or others by any devise whatever, as forbidden in Section One) shall be held, deemed and taken and hereby are declared to be common and public nuisances. Any person who shall maintain, or shall aid or abet, or knowingly be associated with others or in any manner assist in maintaining such common and public nuisances shall be guilty of a violation of this ordinance.

4. Any person who knowingly permits any building owned or leased by him or her or under his or her control or any part thereof, to be used in maintaining a common and public nuisance hereinbefore declared and described in Section Three of this ordinance shall be deemed guilty of assisting in maintaining such nuisance.

5. It shall be unlawful for any railroad or other common carrier or express company to deliver in the City of Millville any package of alcoholic liquor (a) consigned to any club, lodge or other association; (b) consigned to any expressman or other person for or on account of any club, lodge or other association; or (c) consigned to any expressman or other person where there are marks or lettering, numerals or other device on any said package indicating that the same shall be delivered to any club house, lodge room, boat house or like place in said City, or to a member of any club, lodge or association at any club house, boat house, lodge room or like place in said City.

6. No railroad or other common carrier or any express company shall deliver in the City of Millville to any expressman nor to any other person whomsoever except to the consignee actually named in the bill of lading, any package of alcoholic liquor, except on a written order of the consignee to be filed with the receipt for such package.

7. It shall be unlawful for any expressman or other person to take into his possession any package of alcoholic liquor consigned to him as agent, or in his care for another, and make delivery of any such package in this City.

8. It shall be unlawful for any expressman, whether owner or driver, messenger, porter, hackman, hack driver, jitney owner, jitney driver, person or corporation, to act directly or indirectly, in the City of Millville, as agent for any brewing house, distillery, liquor dealer, or other person, for the sale or delivery in the City of Millville of alcoholic liquors, or for the procuring of orders for alcoholic liquors or to engage directly or indirectly in any manner in the sale of alcoholic liquors,, nor shal lany expressman or other person whomsover act in this City as agent for any brewery, wholesale or retail liquor dealer or other vender of alcoholic liquor for the purpose of delivering to any purchaser any package of alcoholic liquor, or in collecting, recovering, gathering, shipping, re-shipping or transporting

or shipping back to, or for or on account of any such brewer or wholesale or retail liquor dealer or other vender of alcoholic liquors any crates, or empty beer or other bottles, jugs, demijohns or other vessels which have been used as containers of alcoholic liquors.

9. The agents, clerks and employees of any railroad or other common carrier, or of any express company, and the drivers and other employees of any expressman or express company who shall aid, abet or assist in any violation of this ordinance, shall be deemed equally guilty with their employer or principles of such violation and punishable by like fine or imprisonment or both.

10. Hereafter all public porters, hackmen, expressmen, omnibus drivers, stage drivers, and drivers of any other carriage and means of transportation of passengers, baggage, merchandise and goods and chattels of every kind, and the owners and drivers of vehicles and means of transportation including jitneys, shall be licensed by the City Clerk, and it shall be unlawful for any public porter, hackman, omnibus driver, stage drive or driver of any other carriage and means of transportation of passengers, baggage, merchandise and goods and chattels of every kind, or the owners and drivers of vehicles and means of transportation, to carry on any said employment in this City without such license first had and obtained. The annual fee for each such person shall be One Dollar and for each such vehicle shall be One Dollar. All licenses shall run for one year commencing on the first day of the month after this ordinance becomes effective. The license number of each person shall be displayed by a proper metal tag or badge, to be worn by the licensee on cap, vest or coat, and the license number on each vehicle shall be affixed to the same in some conspicuous position. If any such licensee shall be convicted of violating any of the provisions contained in this ordinance, in addition to the other punishment hereinafter provided, his license or licenses, both for

himself and his vehicles shall be revoked by the magistrate, nor shall any such license so revoked be renewed without order of the Board of Commissioners. Nothing in this Section contained shall be construed to require any street railway company to take out any additional license.

11. Nothing in this ordinance contained shall restrain any license physician from prescribing or pharmacy or regularly established hospital from dispensing alcoholic liquors pursuant to the provisions of the State laws; provided, that no prescription for alcoholic liquors shall be re-filled by any druggist or pharmacist, unless especially directed by writing on such prescription, and then the same shall not be re-filled after the expiration of thirty days from its date. The date of each such prescription and the name of the patient for whom the same is given shall be plainly written on the prescription. This ordinance shall not be construed to prohibit any common carrier or other person from delivering to any druggist, pharmacist or regularly established hospital any alcoholic liquors.

12. The bills of lading and other documents of any railway, street railway or other transportation company or common carrier in this City shall be open to the inspection of the Board of Commissioners or any of them and the police officers of this City.

13. A separate record, alphabetically arranged, shall be kept by every railway or other common carrier, or express company, at their offices in this City, of all consignments of alcoholic liquors received in this City by them and the names of the shipper and consignee and the quantity of each shipment; which record shall be open to inspection by said Commissioners or any of them and the police officers of this City.

14. Wherever the term "alcoholic liquor" is used in this ordinance it shall be deemed to include whiskey, brandy, gin, rum, wine, ale, porter, beer, cordials, hard or fermented cider, alcoholic bitters, ethyl alcohol, all malt liquors

and all other brewed, fermented or distilled liquors or ardent spirits.

15. Nothing in this ordinance contained shall be construed to inhibit traffic in alcoholic liquors by or with any club, lodge or association which, or person who, shall have been duly licensed to sell alcoholic liquors in this City.

16. If any of the preceding Sections or provisions of this ordinance shall for any reason be adjudged invalid and void, such determination and finding shall not be held nor construed to affect nor impair the validity of any other sections or provisions hereof.

17. Any person or persons, other than a corporation, convicted of violating any of the provisions of this ordinance shall be imprisoned in the county jail for a term not exceeding ten days or be fined not exceeding One Hundred Dollars, or both, and upon conviction as aforesaid a corporation shall be liable to a like fine, and the magistrate before whom such offence or offences may be cognizable shall have discretion in imposing such penalty or penalties, but not to exceed the maximum penalty herein prescribed. Upon a second or further conviction for violation of any of the provisions of this ordinance, the maximum penalty of One Hundred Dollars and (except in cases of a corporation) ten days' imprisonment in the county jail shall be imposed by the magistrate.

18. This ordinance shall not be construed to repeal or affect the provisions of Ordinance Number Twenty-four (24) and the supplements thereto and amendments thereof, nor any other ordinance heretofore enacted; but shall be deemed an additional ordinance or by-law of the City. This ordinance shall take effect immediately upon its publication as provided by law.

The foregoing Ordinance, known as Ordinance No. 154, was adopted by the Board of Commissioners of the City of Millville, February 16th, 1917, and signed by Thomas Whitaker, Mayor, and Roland B. Corson, Lewis E. Kurtz, Walter S. Kates and W. Fred Ware, Commissioners; and before ten days from the time of final passage of said Ordinance, a petition signed by electors of the city equal in number to at least fifteen per centum of the entire vote cast at the then last preceding general municipal election protesting against the passage of such Ordinance, having been presented to the Board of Commissioners, the same was thereupon suspended from going into operation, and the Board of Commissioners did on March 2nd, 1917, reconsider such Ordinance and decline to repeal the same and the Board of Commissioners did submit the said Ordinance, as is provided by sub-section B of Section 16 of the Commission Government Act, to the vote of the electors of the city, at the general municipal election held May 8th, 1917, at which election a majority of the qualified electors voting on the same did vote in favor thereof and thereupon such Ordinance did go into effect and become operative.

All of which is certified this ninth day of May, nineteen hundred and seventeen.

JOHN S. HORTON,
Clerk of the City of Millville.

EXTRACTS FROM THE MINUTES OF THE BOARD OF COMMISSIONERS OF THE CITY OF MILLVILLE, NEW JERSEY.

Millville, N. J.
February 9th, 1917.

The Board of Commissioners met in regular session with Mayor Whitaker presiding. Members present, Whitaker, Corson, Kurtz, Kates, Ware.

Ordinance No. 154 for the suppression of the unlawful sale of liquors in the City of Millville was introduced, read in full by the Clerk and laid over for one week.

Millville, N. J.
February 16, 1917.

The Board of Commissioners met in regular session with Mayor Whitaker presiding. Members present, Whitaker, Corson, Kurtz, Kates, Ware.

Ordinance No. 154 providing for the suppression of the unlawful sale of liquors in the City of Millville, was finally adopted by the following vote: Yeas: Corson, Kurtz, Kates, Ware, Whitaker. The adoption of this ordinance was followed by applause from a large delegation of citizens. Rev. J. H. Boal, Rev. A. C. Oliver and Wesley Howell made short addresses commending the Board and the Solicitor for the action taken.

Millville, N. J.
March 2nd, 1917.

The Board of Commissioners met in regular session with Mayor Whitaker presiding. Members present, Whitaker, Corson, Kurtz, Kates, Ware.

The Clerk reported the filing of a petition on Monday, February 26th, asking for a referendum vote on Ordinance No. 154, and filed a formal certificate known as a "certificate of filing and sufficiency." On motion of Mr. Ware this certificate was ordered received and filed by the following vote: Yeas: Corson, Kurtz, Kates, Ware, Whitaker. The Clerk also informed the Board that petitions signed by 31 electors who were signers of the former petition and asked that their names be not counted, had been filed on Tuesday evening, March 1st.

Resolution Number 193 providing for the reconsideration forthwith of Ordinance No. 154 was adopted by the following vote: Yeas: Corson, Kurtz, Kates, Ware, Whitaker.

Mayor Whitaker asked City Solicitor Miller's opinion about the counter petition of 31 electors reported by the Clerk. Mr. Miller gave an opinion that these were not legally effective because the petition had become operative before same were filed.

Resolution No. 194 providing for the nonrepeal of Ordinance No. 154 and further providing for the submission to the voters the question of the adoption or rejection of said ordinance at the general election to be held in this city on the 2nd Tuesday of May, next, was adopted by the following vote: Yeas: Corson, Kurtz, Kates, Ware, Whitaker.

Millville, N. J.
April 5th, 1917.

The Board of Commissioners met in regular session with Mayor Whitaker presiding. Members present, Whitaker, Corson, Kurtz and Ware. Absent, Kates.

The meeting was held on this date under the provisions of Resolution No. 19 governing dates for meetings when regular meetings fall on a legal holiday.

Resolution No. 198 designating the day the District Boards of Registry and Election shall meet for the purpose of registering for the next municipal election of Commissioners was adopted by the following vote: Yeas: Corson, Kurtz, Ware, Whitaker.

PETITION

Under section seventeen, as amended, of an act of the Legislature of the State of New Jersey, entitled "An act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities governed by boards of commissioners or improvement commissions in this State," approved April twenty-fifth, one thousand nine hundred and eleven, as amended by Chapter 366 of the laws of 1912, approved April second,

one thousand nine hundred and twelve, amending the title and the body thereof, we, the undersigned, electors of the City of Millville, New Jersey, hereby petition the Board of Commissioners of the City of Millville, in the State of New Jersey, protesting against the passage of an ordinance entitled, "An ordinance for the suppression of the unlawful sale of liquors in the City of Millville," numbered 154, to the end that the same may be reconsidered and repealed, by said board, or be submitted to the vote of the electors of said city in such manner as is provided by law.

(Here follow signatures of electors as enumerated in the certificate of filing and sufficiently attached to said petition certified to on March 2nd, 1917, by John S. Horton, City Clerk.)

CITY OF MILLVILLE

In the Matter of the Petition Protesting Against the Enactment of Ordinance Number One Hundred and Fifty-four.	Certificate of Filing and of Sufficiency.

To the Board of Commissioners of the City of Millville:

I, John S. Horton, Clerk of the City of Millville, do hereby certify and make statement:

1. That the foregoing annexed petition was presented to and filed with me on the twenty-sixth day of February, nineteen hundred and seventeen.

2. That I have examined said petition to see if it conforms with the requirements of Section seventeen of

the act entitled, "An Act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities governed by boards of commissioners or improvement commissioners in this State," and the acts supplemental thereto and amendatory thereof. (P. L. 1911, p. 462, &c.).

3. That said petition is signed by electors of the City equal in number to at least fifteen per centum of the entire vote cast at the last preceding general municipal election, to wit, the election held in said City on November 7th, 1916.

The entire vote cast at said last general municipal election, to wit, the general election held in said City on November 7th, 1916, is twenty-six hundred and eighty-five (2685) and the entire vote cast at the last general municipal election at which the Board of Commissioners was elected, held on the twenty-second day of May, 1913, was twenty-three hundred and ninety-two (2392).

RESOLUTION NUMBER 193

WHEREAS, Ordinance Number One Hundred and Fifty-four of this City was passed by the Board of Commissioners on the sixteenth day of February, nineteen hundred and seventeen, and, not being an ordinace that was required by the general laws of the State or by the provisions of the Walsh Act to take effect immediately upon its passage, and the same was not an ordinance for the immediate preservation of the public peace, health or safety, containing a statement of its urgency; and, therefore, said ordinance did not go into effect before ten days from the date of its final passage; and

WHEREAS, during said ten days a petition signed by electors of the City equal in number to at least fifteen per centum of the entire vote cast at the last preceding general municipal election, protesting against the passage

of such ordinance, was presented to the Board of Commissioners, so that said ordinance has been suspended from going into operation; wherefore it is the duty of the Board of Commissioners to reconsider such ordinance to the end that the said ordinance be entirely repealed or be submitted to the vote of the electors of the City as required by law: therefore,

RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MILLVILLE:

That this Board do, forthwith, proceed to reconsider said ordinance for the purposes aforesaid.

Adopted March 2nd, 1917.

Thomas Whitaker, Mayor.
Roland B. Corson,
Lewis E. Kurtz,
Walter Kates,
W. Fred Ware,
Commissioners.

ATTEST:
John S. Horton, Clerk.

Millville, N. J., March 1st, 1917.

Mr. J. S. Horton,
Clerk of the City of Millville.

Sir:—

We, the undersigned, having signed a petition for a referendum vote on Ordinance No. 154, have further considered, and now we are not in favor of a referendum vote on Ordinance No. 154, and desire to have our names erased from the petition.

(Here follow the names of thirty-one electors)

RESOLUTION NUMBER 194.

WHEREAS, Ordinance Number One Hundred and Fifty-four of this City, entitled "An Ordinance for the

suppression of the unlawful sale of alcoholic liquors in the City of Millville," pursuant to the provisions of Resolution Number 193 is now before this Board for reconsideration, for the reasons recited in said last named Resolution; and

WHEREAS, this Board is of the opinion that said ordinance makes proper and necessary provisions for the suppression of the unlawful sale of alcoholic liquors in this City; and therefore said ordinance ought not be repealed; and

WHEREAS, under the provisions of the statute, if said ordinance be not repealed by this Board, it is the duty of this Board to submit said ordinance to the vote of the electors of the City, either at a general election, or at a special election to be called for that purpose, unless a general municipal election is fixed within ninety days hereafter; and

WHEREAS, a general municipal election is fixed within ninety days hereafter, Now, Therefore,—

RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MILLVILLE:

1. That it is the sense of this Board that said ordinance ought not be repealed, and this Board hereby does decline and refuse to repeal the same.

2. That this Board submit said ordinance, and the question of the adoption or rejection of said ordinance hereby is submitted, to the vote of the electors of the City at the general election to be held in this City on the second Tuesday of May, next; and said ordinance shall not, as provided by law, go into effect or become operative unless a majority of the qualified electors voting on the same shall vote in favor thereof.

3. The City Clerk shall cause such ordinance to be published once in at least one of the newspapers published in said City, such publication to be not more than twenty

nor less than five days before the submission of such ordinance to be voted on.

Adopted March 2nd, 1917.

Thomas Whitaker, Mayor.
Roland B. Corson,
Lewis E. Kurtz,
Walter Kates,
W. Fred Ware,
Commissioners.

ATTEST:
John S. Horton, Clerk.

RESOLUTION NUMBER 198.

A RESOLUTION DESIGNATING THE DAY THE DISTRICT BOARDS OF REGISTRY AND ELECTION SHALL MEET IN THIS MUNICIPALITY FOR THE PURPOSE OF REGISTERING FOR THE NEXT MUNICIPAL ELECTION OF COMMISSIONERS THE NAMES OF ALL LEGAL VOTERS RESIDENTS OF THE ELECTION DISTRICTS FOR WHICH THEY ARE APPOINTED, PURSUANT TO THE PROVISIONS OF CHAPTER 263 OF THE LAWS OF 1917, APPROVED MARCH 31st, 1917.

RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MILLVILLE:

1. The district boards of registry and elections in all districts of this City shall meet on Tuesday, April 24th, 1917, (being a time not more than twenty or less than ten days preceding the next municipal election of commissioners) at seven o'clock in the forenoon and continuing in session until nine o'clock in the evening for the purpose of registering the names of all legal voters of the election district for which they are appointed, this Resolution being adopted pursuant to the directions contained in Chapter 263 of the Laws of 1917, aforesaid; Provided, that it shall not be necessary for any voter to register who is already

properly registered to vote at the next preceding general election under any other act.

2. The City Clerk shall forthwith give notice in conformity with the provisions of law of such meeting, and to that end the notice of election now being published shall be modified and corrected by the Clerk to conform to the requirements of said statute of 1917 and the terms of this Resolution. The Clerk is further directed to give notice by an addenda at the foot of the election notice or otherwise that the boards of registry and elections of this City will not meet on Tuesday, April 10th, 1917, for the purpose of registering legal voters as heretofore advertised, and a similar notice shall be posted by the City Clerk at the polling places and other public places in the City of Millville, to the end that the electors of the City may not be unduly inconvenienced by the aforesaid change in the election law.

Adopted April 5th, 1917.

Thomas Whitaker, Mayor.
Roland B. Corson,
Lewis E. Kurtz,
.....
W. Fred Ware,
Commissioners.

ATTEST:
John S. Horton, Clerk.

Note:

Attached to the return and forming part thereof, are various proofs of publication of Ordinance No. 154 of said City both before and after submission to the voters and proofs of publication of registry and election notices.

Also copies of election returns showing that at a special election held in said City on May 8, 1917, the total number of Ballots cast was 2765

Ballots rejected 18

Ballots cast for adoption of Ordinance No. 154 1440

Ballots cast against the adoption of Ordinance No. 154, 992

Following these returns is a statement made by John S. Horton, Clerk of the City of Millville, as follows:—

A statement of the determination of the Clerk of the City of Millville, relative to an election held in the City of Millville, Cumberland County, New Jersey, on the eighth day of May, in the year of our Lord One thousand nine hundred and seventeen, for the election of five commissioners of said city and for the submission of the ordinance known as Ordinance Number One Hundred Fifty-four to the electors of said city.

I, John S. Horton, Clerk of the City of Millville, having canvassed the returns of said election in the manner provided by the statute (Chapter 275, Laws of 1917) do determine that, at the said election, Thomas Whitaker, Walter S. Kates, Wilbert J. Simmerman, Lewis E. Kurtz and Samuel D. Bennett were duly elected commissioners of the City of Millville; and that a majority of the qualified electors of said city voting on the same did vote in favor of the aforesaid Ordinance Number One Hundred Fifty-four.

JOHN S. HORTON,
Clerk of the City of Millville.

I do hereby certify that the foregoing is a true, full and correct statement of my determination of the result of said election.

In witness whereof I have hereunto set my hand this ninth day of May in the year of our Lord one thousand nine hundred and seventeen.

JOHN S. HORTON,
Clerk of the City of Millville.

REASONS
(Filed May 31, 1917)

NEW JERSEY SUPREME COURT

WEST JERSEY AND SEASHORE RAILROAD COMPANY,
Prosecutor,
vs.
CITY OF MILLVILLE,
Respondent.

ON CERTIORARI
REASONS

The said prosecutor, by Walter H. Bacon, its attorney, comes and prays that the ordinance known as Ordinance No. 154, entitled "An ordinance for the suppression of the unlawful sale of alcoholic liquors in the City of Millville," adopted by the Board of Commissioners of the City of Millville, February 16, 1917, and submitted to the vote of the electors of said City at an election held May 8, 1917, at which election a majority of the persons who voted thereon did vote in favor thereof, whereby it is claimed that said ordinance did go into effect and become operative, may be set aside, reversed and for nothing holden for the following reasons:—

I

As to the prosecutor, said ordinance requires the violation of sundry provisions of an act of the Congress of the United States entitled "An act to regulate commerce", approved February 4, 1887, as amended, and is, therefore, ultra vires and void.

II

As to the prosecutor, said ordinance requires the violation of sundry provisions of an act of the Legislature of the State of New Jersey, entitled "An act concerning public utilities, to create a Board of Public Utility Commissioners

and to prescribe its duties and powers", approved April 21, 1911, and the supplements thereto, and is, therefore, ultra vires and void.

III

Section 5 of the ordinance aforesaid, requires prosecutor and its agents and employees, to discriminate against certain associations and persons in the handling of interstate and intrastate traffic, and to discriminate against a particular traffic to a specified municipality in a state not governed by a law prohibiting the sale of intoxicating liquors, and is therefore, illegal and void.

IV

Said ordinance requires the prosecutor to violate its contracts with shippers, and with connecting carriers engaged in interstate commerce and is, therefore, illegal and void.

V

Said ordinance requires prosecutor to violate that portion of Section 15 of said "Act to Regulate Commerce", as amended, which makes it unlawful for an agent or employee of a carrier to give information to any person other than the consignor or consignee concerning property delivered to such carrier for interstate transportation, and is, therefore, ultra vires, illegal and void.

VI

Because said ordinance attempts to regulate commerce between the several states.

VII

Because said ordinance attempts to regulate commerce in New Jersey.

VIII

Because said ordinance operates unreasonably and oppressively against the prosecutor.

IX

Because the rights and liabilities of the parties to an interstate railway shipment depend upon Federal legislation, the bill of lading and common law rules as accepted and applied in Federal tribunals, and a municipal ordinance in conflict therewith is, therefore, ultra vires, null and void.

X

The said ordinance imposes a direct burden upon interstate commerce, contrary to Article I Section 8 of the Constitution of the United States and is, therefore, illegal and void.

XI

The City of Millville is without power to punish prosecutor for delivering in that City, to the consignee thereof, intoxicating liquors transported by prosecutor in interstate commerce.

XII

The Board of Commissioners of said City is without power or authority to require a railway carrier to keep a separate record of consignments of alcoholic liquors received by it and the names of the shipper and consignee and quantity of each shipment, or to require that such record shall be open to the inspection of the said Commissioners and any of them, and the police officers of said City.

XIII

The Board of Commissioners of said City is without power or authority to ordain that the bills of lading and other documents of a railway carrier shall be open to the inspection of the Board of Commissioners and any of them and the police officers of said City.

XIV

The Board of Commissioners of said City is without power or authority to ordain that it shall be unlawful for

any railroad carrier to deliver in the City of Millville any package of alcoholic liquor consigned to any club, lodge or other association or to any expressman or other person for or on account of any club, lodge or other association or to any expressman or other person where there are marks or lettering, numerals or other device on any said package indicating that the same shall be delivered to any club house, lodge room, boat house or like place in said City, or to a member of any club, lodge or association at any club house, boat house, lodge room or like place in said City.

XV

Said ordinance is in divers other respects ultra vires, illegal and void.

WALTER H. BACON,
Attorney of Prosecutor.

Service of a copy of the within Reasons is hereby acknowledged.

May 29, 1917.

LOUIS H. MILLER,
Attorney for Respondent.

NEW JERSEY SUPREME COURT

WEST JERSEY AND SEASHORE RAILROAD COMPANY, *Prosecutor,* vs. CITY OF MILLVILLE, *Respondent,*	ON CERTIORARI STIPULATION

(Filed May 31, 1917)

It is stipulated and agreed by and between the attorneys for the respective parties to the above-entitled cause, that the following facts be admitted as though duly proved in said cause.

1. Prosecutor is a railroad corporation organized under the laws of the State of New Jersey.

2. The West Jersey and Seashore Railroad Company owns and operates a line of railroad extending from the City of Camden, in the County of Camden, to the City of Cape May, in the County of Cape May, within the State of New Jersey, which line of railroad passes through said City of Millville, and said Railroad Company carries freight and express matter to said City of Millville from other points in the State of New Jersey, and, also, through connections with other carriers by water and rail, carries such freight and express matter into the City of Millville, from various other States in the United States, its colonies and dependencies, and from foreign countries.

3. In the conduct of its business aforesaid, said Railroad Company uses the uniform bill of lading in common with the principal railroad corporations operating in the United States.

4. A copy of the said uniform bill of lading, so used as aforesaid, is hereto attached and made a part of this stipulation.

Dated May 29, 1917.

WALTER H. BACON,
Attorney of Prosecutor.
LOUIS H. MILLER,
Attorney for Respondent.

F. D. 2529 525 C 9 22 1916

WEST JERSEY & SEASHORE RAILROAD COMPANY

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE

Shippers No.....
Agents No. .....

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from .....
to ..... is in
Cents per 100 Lbs.

IF ... Times 1st	IF 1st Class	IF 2d Class	IF Rule 25	IF 3d Class	IF Rule 26	IF Rule 28	IF 4th Class	IF 5th Class	IF 6th Class	If Special per.....	If Special per.....

RECEIVED,
subject as above stated, at .....

Date 191

From .....
Via .....

(Mail Address—Not for purposes of Delivery)

Consigned to .....
Destination ..... State of..... County of.....
Route ..... Car Initial..... Car No.....

No. Packages	Description of Articles and Special Marks	Weight (Subject to Correction)	Rate and Authority	Freight Charges		Advances		Prepaid	

..... Shipper. ..... Agent.
Per ..... Per .....

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

CONDITIONS

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or

damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor, after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable despatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid.

Except in cases where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, claims must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Suits for recovery of claims for loss, damage or delay shall be instituted only within two years after delivery of the property, or, in case of failure to make delivery, then within two years after a reasonable time for delivery has elapsed.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding,

and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigations, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the provisions of the tariff, which shall be treated as incorporated into the conditions of this bill of lading.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

NEW JERSEY SUPREME COURT

WEST JERSEY AND SEASHORE RAILROAD COMPANY,
Prosecutor,
vs.
CITY OF MILLVILLE,
Respondent.

ON CERTIORARI

ORDER

The Court having inspected Ordinance No. 154 of the City of Millville, entitled "An Ordinance for the suppression of the unlawful sale of alcoholic ilquors in the City of Millville", returned with the certiorari in this cause, the reasons for setting the same aside in so far as the provisions thereof affect the prosecutor as a common carrier, and having heard the argument of Walter H. Bacon, of counsel for prosecutor, and of Louis H. Miller, of counsel for the respondent, and considering the same, and being of the opinion that the provisions of said ordinance which attempt to prevent the delivery of intoxicating liquors in the City of Millville by prosecutor as a common carrier, and which require the prosecutor to keep books and records in a specified manner and to open the same to inspection by the City Commissioners and others, are ultra vires, illegal and void.

It is, on the thirteenth day of June, nineteen hundred and seventeen, Ordered that the said ordinance, in the particulars above recited, and especially section numbered 5, 12 and 13 thereof in so far as they affect or attempt to affect the said West Jersey and Seashore Railroad Company,

as a common carrier, be and the same hereby is set aside, made void and for nothing holden, with costs to be taxed.

Let this order be entered in the minutes.

Entered June 16, 1917, By the Court,
On motion of WM. S. GUMMERE, C. J.,
Walter H. Bacon, Attorney for Prosecutor.

A true copy,
WM. C. GEBHARDT, *Clerk*.

SUPREME COURT OF NEW JERSEY
Clerk's Office, Trenton

October 13, 1917.

Louis H. Miller, Esq.,
Millville, N. J.

Dear Sir:—

In the case of West Jersey & S. S. R. R. Co. vs. City of Millville, which case was tried at the June Term, 1917, there is no opinion filed by the Court.

Dictated V. M. Very truly yours,
WM. C. GEBHARDT,
Clerk.

NEW JERSEY SUPREME COURT

WEST JERSEY AND SEASHORE RAILROAD COMPANY,

Prosecutor,

vs.

CITY OF MILLVILLE,

Respondent.

ON CERTIORARI
NOTICE OF APPEAL

To Walter H. Bacon, Esq., Attorney for Prosecutor.

Take notice that the City of Millville, Respondent, Defendant in Certiorari, appeals from the whole of the judgment rendered in this cause in the New Jersey Supreme Court on the thirteenth day of June, nineteen hundred and seventeen, on the following grounds:

1. The Supreme Court decided that the provisions of Ordinance Number 154 of the City of Millville entitled, "An Ordinance for the suppression of the unlawful sale of alcoholic liquors in the City of Millville," returned with the certiorari in this cause which attempts to prevent the delivery of intoxicating liquors in the City of Millville by prosecutor as a common carrier, and which requires the prosecutor to keep books and records in a specified manner and to open the same to inspection by the City Commissioners and others, are ultra vires, illegal and void; whereas such provisions of said ordinance are in fact legal, valid and within the power of the defendant in certiorari.

2. The Supreme Court decided that said Ordinance in the particulars above recited and especially sections numbered 5, 12 and 13 thereof in so far as they effect or attempt to effect the said West Jersey and Seashore Railroad Company as a common carrier are void; whereas said ordinance in said particulars and especially sections numbered 5, 12 and 13 thereof in so far as they effect or attempt to effect the said West Jersey and Seashore Railroad Company as a common carrier are valid and not ultra vires the defendant in certiorari.

3. The Supreme Court adjudged that the said Ordinance in the particulars above recited and especially sections 5, 12 and 13 thereof in so far as they effect or attempt to effect the West Jersey and Seashore Railroad Company as a common carrier be set aside, made void and for nothing holden; whereas the said Supreme Court should have adjudged that said ordinance in the respect referred to is valid and should have been affirmed.

4. The Board of Commissioners of the City of Millville had power to adopt said Ordinance; and the decision and judgment of the Supreme Court to the contrary was erroneous.

5. The Board of Commissioners of the City of Millville had power to enact Sections 5, 12 and 13 of said Ordinance; and the decision and judgment of the Supreme Court to the contrary was erroneous.

6. The Board of Commissioners of the City of Millville had power to enact all of the provisions of said Ordinance; and the decision and judgment of the Supreme Court to the contrary was erroneous.

7. The Ordinance is not unreasonable and oppressive as to Prosecutor; and the decision and judgment of the Supreme Court to the contrary was erroneous.

8. The Ordinance does not impair the obligation of Prosecutor's contract.

9. The Ordinance does not require the Prosecutor to violate any of the provisions of the interstate commerce act.

10. The Ordinance does not attempt to regulate interstate commerce, except as to certain traffic in intoxicating liquors, and traffic in such liquors contrary to the provisions of the Charter and constituent laws of the City and said Ordinance is not protected by the interstate commerce laws by reason of the acts of Congress known as the Wilson Act 26 Stat. at L 313; the Webb-Kenyon Law 37 Stat. at L. 699; and section 239 of the Penal Code 35 Stat. at L, 1136.

11. The Ordinance is not void because in conflict with any State law.

12. Said Ordinance does not require the violation of any of any provisions or of sundry provisions of an act of the Congress of the United States entitled "An act to regulate commerce," approved February 4, 1887, as amended,

13. Said Ordinance does not, as to Prosecutor, require the violation of sundry provisions or of any provisions of an act of the Legislature of the State of New Jersey, entitled "An act concerning public utilities, to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April 21, 1911, and the supplements thereto.

14. Section 5 of said Ordinance does not require Prosecutor and its agents and employees, to discriminate unlawfully against certain associations and persons in the handling of interstate or intrastate traffic or to discriminate unlawfully against a particular traffic to a specified municipality, and the provisions of said ordinance referred to in the judgment of the Supreme Court are applicable only to spirituous, vinous,

malted, fermented or other intoxicating liquor of any kind, intended by any person interested therein, to be received, possessed, sold or in any manner used, either in the original package or otherwise in violation of said Ordinance, to wit, a law of State, within the intent and meaning of the Webb-Kenyon Act, 37 Stat. at L, 699.

15. Said Ordinance does not require Prosecutor to violate section 15 of said act to regulate commerce.

Dated Millville, N. J., June 19th, 1917.

LOUIS H. MILLER,

Attorney of defendant in Certiorari, Respondent-Appellant

New Jersey Court of Errors and Appeals

WEST JERSEY AND SEASHORE RAILROAD COMPANY,
Prosecutor-Respondent

vs.

CITY OF MILLVILLE,
Defendant-Appellant.

ON CERTIORARI
ON APPEAL FROM
SUPREME COURT

BRIEF FOR PROSECUTOR-RESPONDENT.

The writ in this case brought before the Supreme Court for review an ordinance adopted by the City Commissioners of the City of Millville, New Jersey, entitled "An ordinance for the suppression of the unlawful sale of alcoholic liquors in the City of Millville."

The ordinance was adopted February 16, 1917, but by reason of a referendum election under the "Walsh Act", is not claimed to have become effective until May 9, 1917. This writ was allowed May 11, 1917.

The West Jersey and Seashore Railroad Company is a common carrier of freight and express, in both interstate

and intrastate commerce, its railroad passing through the City of Millville, and prosecuted the writ because specially affected by some of the provisions of the ordinance.

At the conclusion of the argument before the Supreme Court, the announcement was made, in substance, that the Court was of opinion that the provisions of the ordinance which attempt to prevent the delivery of intoxicating liquors in the City of Millville by said Railroad Company as a common carrier, and which require said Railroad Company to keep books and records in a specified manner and to open the same to inspection by the City Commissioners, are *ultra vires,* illegal and void.

June 13, 1917, an order was entered that the said ordinance, in the particulars above mentioned, and especially sections numbered 5, 12 and 13 thereof, in so far as they affect or attempt to affect said Railroad Company as a common carrier, be set aside.

From this order an appeal was afterwards taken.

Fifteen reasons were assigned in the Supreme Court in which the invalidity of the ordinance was indicated, but these reasons may be considered more conveniently in a discussion of the ordinance as a whole, and of some of its sections.

I

THE BOARD OF COMMISSIONERS OF THE CITY OF MILLVILLE WAS WITHOUT POWER TO ADOPT THE SAID ORDINANCE.

There is no "local option" law in force in New Jersey.

> "The liquor traffic is a special subject of legislative cognizance." *Salerno vs. City of Passaic,* 88 *N. J. L. at p.* 90.

While the charter of the City of Millville gives the common council power to license the sale of intoxicating liquors, there is nothing in the charter which gives the municipality power to prevent the delivery of intoxicating liquors in said City or to otherwise regulate the traffic in intoxicating liquors in said City.

The Commission Government act under which the City of Millville is now operating, does not confer such power.

> *Salerno vs. City of Passaic,* 88 *N. J. L.* 87.

In the absence of a statute expressly conferring the power, a municipal corporation has no authority to prohibit or regulate the traffic in intoxicating liquors.

> *City of Summit vs. Iarusso,* 87 *N. J. L.* 403.
> 23 *Cyc.* 67, 74, 161.
> *Sternweis vs. Stilsing,* 52 *N. J. L.* 517.
> *Rossell vs. Garon,* 50 *N. J. L.* 358
> *Schlachter vs Stokes,* 63 *N. J. L.* 138.

Perhaps Chapter 150 of the Laws of 1916 (*P. L. p.* 306) enlarged the powers of the Millville Commissioners, but certainly not to the extent of authorizing the passage

of an ordinance prohibiting a common carrier from delivering to the consignee intoxicating liquors, lawfully purchased in this State or transported in interstate commerce, particularly where such liquors are obviously intended, not for sale, but for personal use.

While the title of the ordinance indicates that its purpose is to suppress the "unlawful sale" of intoxicating liquors in Millville, the obvious intent was to prevent, if possible, the delivery of intoxicating liquors to individuals who are members of clubs.

In *Cortland vs. Larson, 273 Ill.* 602, 113 *N. E.* 51, *L. R. A.* 1917 *A* 314, defendant was convicted of violating an ordinance designed to prohibit the maintenance of club rooms.

It was held that,

> "Municipal authority to regulate, prohibit or license the selling of intoxicating liquor does not include power to forbid the maintaining of club-rooms where such liquor is kept for private use, or the use of liquor therein.
>
> Police power of a municipal corporation does not extend to forbidding the keeping of intoxicating liquor by members of clubs in their lockers for their individual use.
>
> Municipal authority to declare what shall be a nuisance, and prevent and remove the same, does not include power to declare the keeping of intoxicating liquor in the lockers of private clubs, for the individual use of members to be a nuisance."

II

THE BOARD OF COMMISSIONERS OF THE CITY OF MILLVILLE WAS WITHOUT POWER TO ENACT SECTIONS 5 AND 6 OF SAID ORDINANCE.

Prosecutor-Respondent is a railroad corporation organized under the laws of the State of New Jersey. It owns and operates a line of railroad extending from Camden to Cape May, passing through Millville. It carries freight and express to Millville in both interstate and intrastate commerce.

Prosecutor-Respondent uses the uniform bill of lading which is in common use by all the principal railroads of the Country.

Obviously, therefore, prosecutor-respondent is subject to the provisions of the Interstate Commerce Act and of the New Jersey Public Utilities Act.

Insofar, at least, as Ordinance No. 154 attempts to regulate commerce and to require prosecutor-respondent to violate the Acts of Congress and laws of New Jersey relative to common carriers, it is *ultra vires* and void.

Sec. 5 of the ordinance attempts to render unlawful the delivery in Millville by a common carrier, of any package of alcoholic liquor consigned to a designated class of associations and persons.

To comply with this section of the ordinance would render such carrier liable to an action for conversion of the property.

In *Rosenberger vs. Pacific Express Company*, 241 *U. S.* 48, *Law Ed. Vol.* 60 *p.* 880, a state law of Texas imposed a license tax of $5000. annually on each place of business of every Express Company where intoxicating liquors were delivered and the price collected on C. O. D. shipments. The Express Company theruepon discontinued at all its agencies in Texas all such business and as a result, sent back to Kansas City, Missouri, the packages of intoxicating liquor which it had receivel under C. O. D. shipments made to various places in Texas from Kansas City, by Rosenberger, the plaintiff, and tendered them to him. He refused to accept the offer and brought suit to recover the value of the merchandise, on the ground that the failure to carry out the shipments was a conversion.

The question in this case was determined in the light of the operation of the Commerce clause as affected by the power conferred upon the States by what is usually known as the Wilson Law (*Act of Aug.* 8, 1890, *Chap.* 728, 26 *Stat. at L.* 313. *Comp. Stat.* 1913, *Sec.* 8738), and wholly unaffected by Section 239 of the Penal Code enacted by Congress Mar. 4, 1909, (35 *Stat, at L.* 1136, *Chap.* 321, *Comp. Stat.* 1913, *Sec.* 10, 409) prohibiting the shipment of intoxicating liquors under C. O. D. contracts, and also without reference to the Act of Congress known as the Webb-Kenyon Law of Mar. 1, 1913 (*Chap.* 90, 37 *Stat. at L.* 699, *Comp. Stat.* 1913, *Sec.* 8739.)

Mr. Chief Justice White said,

> "Thus limited, as it is not controverted and indeed is indisputable that the provisions of the statute placed a direct burden on the shipments

with which it dealt, and in fact were prohibitive of such shipments, it follows that error was committed in holding that the statute was not repugnant to the Constitution of the United States in so far as it applied to interstate C. O. D. shipments, for the following reasons: (a) Because it is settled from the beginning, and too elementary to require anything but statement, that, speaking generally, the states are without power to directly burden interstate commerce, and that commodities moving in such commerce only become subject to the control of the states or to the power on their part to directly burden after the termination of the interstate movement; that is, after the arrival and delivery of the commodities and their sale in the original packages; and that this rule is as applicable to the movement of intoxicating liquors as to any other commodities. (b) Because the Wilson Act only modifies these controlling rules by causing interstate commerce shipments of intoxicating liquors to come under state control at an earlier date than they otherwise would; that is, after delivery, but before sale in the original packages. (c) Because the power in interstate commerce shipments to make C. O. D. agreements, that is, agreements on delivery of the commodities shipped to collect and remit the price, is incidental to the right to make such shipments, and the commodities when so shipped do not come under the authority of the State to which the commodities are shipped under such agreements until arrival and delivery, and therefore any attempt on the part of the state to directly burden or prohibit such contracts, or prevent the fulfilment of the same, necessarily comes within the general rule and is repugnant to the Constitution of the United States."

In *Rossi vs Pennsylvania*, 238 *U. S.* 62, *Law Ed. Vol.* 59, *p.* 1201, Mr. Justice Pitney said,

> "The Federal question presented is whether, under the act of Congress approved August 8, 1890, Chap. 728 (26 *Stat. at L.* 313, *Comp. Stat.* 1913, *Sec.* 8738) known as the Wilson Act, the state of Pennsylvania may punish plaintiff in error for delivering in that state liquors transported in interstate commerce, under the circumstances stated. The case arose before the passage of the act of March 1, 1913, Chap. 90 (37 *Stat. at L.* 699, *Comp. Stat.* 1913, *Sec.* 8739), known as the Webb-Kenyon Act, and the effect of this legislation is therefore not now involved.
>
> As has been recently pointed out in *Kirmeyer vs. Kansas*, 236 *U. S.* 568, 572 *ante* 419, 35 *Sup. Ct. Rep.* 419, the transportation of intoxicating liquor, as of other merchandise, from state to state, is interstate commerce, and state legislation which penalizes it or directly interferes with it, otherwise than as permitted by an act of Congress, is in conflict with the commerce clause of the Federal Constitution; and while Congress, in the Wilson Act, declared in substance that liquors transported into any state, or remaining therein for use, consumption, etc., shall, upon arrival in such state, be subject to the operation and effect of its laws enacted in the exercise of the police power, to the same extent and in the same manner as though the liquors had been produced in such state, and shall not be exempt therefrom by reason of being introduced in original packages, this does not subject liquors transported in interstate commerce to state regulation until after their arrival at destination and delivery to consignee or purchaser." (Citing authorities.)

It will be observed that in each of these cases the Supreme Court of the United States held that any attempt on

the part of the state to prevent delivery of intoxicating liquors, transported in interstate commerce, is illegal.

As stated, these decisions were without regard to the effect of the Webb-Kenyon Act.

In *Adams Express Company vs. Kentucky,* 238 *U. S.* 190, (1914) it was held that the Webb-Kenyon Act was not intended to divest intoxicating liquors of their interstate character in all cases but only in "certain cases" and it was held that,

> "Shipments into a state of intoxicating liquors which, because intended solely for the personal use of the consignees, were not to be used in violation of the laws of the state as construed by its highest court, were not subjected to the operation of a law of such state forbidding carriers to bring intoxicating liquors into, or deliver them in, any dry territory, by the provisions of the Webb-Kenyon Act of March 1, 1913, prohibiting the interstate shipment or transportation of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of the state into which the liquor is transported."

Speaking for the Court, Mr. Justice Day said,

> "Extraneous words omitted, this statute reads: 'The shipment or transportation * * of * * * intoxicating liquor * * * from one state * * * into any other state * * * which * * * intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state * * * is hereby prohibited'. It would be difficult to frame language more plainly indicating the purpose of Congress

not to prohibit all interstate shipment or transportation of liquor into so-called dry territory, and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the state into which it is thus shipped or transported. Such shipments are prohibited only when such person interested intends that they shall be possessed, sold, or used in violation of any law of the state wherein they are received. Thus far and no farther has Congress seen fit to extend the prohibitions of the act in relation to interstate shipments. Except as affected by the Wilson act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon act, which prohibits the transportation of liquors into the state, to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution."

See also,

Sturgeon vs. State of Arizona, 17 *Ariz.* 513, 154 *Pac.* 1050, *L. R. A.* 1917 *B* 1230.

Chicago, B. & Q. R. Co. vs. Giles, 235 *Fed. Rep.* 804.

In *Clark Distilling Co. vs. Western Maryland RR. Co.* (*decided Jan.* 8, 1917) *U. S. Adv. Ops.* 1916, *p.* 180, the Webb-Kenyon Act was held constitutional. This act divests intoxicating liquors of their interstate character when shipped from one State, Territory or District of the United States into any other State, Territory or District of the United States and intended to be

"received, possessed, sold, or in any manner used, either in the original package or otherwise, in

violation of any law of such State, Territory or District of the United States."

(*Fed. Stat. Ann.* 1914 *Supp. p.* 208).

The Court held that,

"A State may, consistently with the due process of law clause of U. S. Const. 14th. Amend. forbid all shipments of intoxicating liquor, whether intended for personal use or otherwise.."

There being no law of New Jersey which forbids shipments of intoxicating liquors, it follows that the Webb-Kenyon Act does not apply, and that, under the authority of the cases above cited, the ordinance in question is void, at least, in so far as it applies to interstate shipments.

The opinion of Mr. Chief Justice White in the Distilling Company case reviews the antecedent "legislative and judicial progenitors" of the Webb-Kenyon Act, and leaves no room for doubt that only a state law, not a municipal ordinance, can operate to make the act applicable.

Citation of further authorities seems unnecessary in support of the proposition that a municipal ordinance which conflicts with the actual exercise of powers of Congress over commerce, must give way before supremacy of national authority, and that ,as liquor purchased in another state and shipped to the purchaser in this state is not contraband, it is protected as an article of interstate commerce until it is delivered to the purchaser or consignee.

Sections 5 and 6 of the ordinance under review attempt to prohibit prosecutor-respondent from making delivery to the consignee of liquor in its possession as a common

carrier. The duty of the carrier under the Federal and State laws, and under its contract with the consignor, requires such delivery to be made, hence, the municipal ordinance must fall.

As to the duty of a common carrier to receive and transport property, see *Corpus Juris Vol.* 10, *p.* 65, *et. seq.*

III

THE SAID BOARD OF COMMISSIONERS OF THE CITY OF MILLVILLE WAS WITHOUT POWER TO ORDAIN OR ENACT SECTIONS 12 AND 13 OF SAID ORDIANCE.

These sections read as follows:—

> "Sec. 12. The bills of lading and other documents of any railway, street railway or other transportation company or common carrier in this City shall be open to the inspection of the Board of Commissioners or any of them and the police officers of this City."
>
> "Sec. 13. A separate record alphabetically arranged shall be kept by every railway or other common carrier or express company, at their offices in this City, of all consignments of alcoholic liquors received in this City by them, and the names of the shipper and consignee and the quantity of each shipment; which record shall be open to inspection by said Commissioners or any of them and the police officers of this City."

A portion of Section 15 of the Interstate Commerce Act, as amended, reads as follows:—

> "It shall be unlawful for any common carrier subject to the provisions of this Act, or any officer, agent, or employee of such common carrier,

or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used; *Provided,* That nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the Government of the United States, or of any State or Territory in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers."

"Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than One Thousand Dollars."

The shipment of intoxicating liquors into New Jersey is not yet a "crime", nor is it yet a "crime" to violate an ordinance of the City of Millville.

For the carrier to obey this ordinance, would be to subject it to indictment and on conviction to a fine of $1000. in the Federal Court.

The legal rule applicable is stated by Mr. Justice Garrison in *Hudson & Manhattan RR. Co. vs. Hoboken,* 75 *N. J. L.* 302, as follows:—

> "Municipal control, which is one of regulation merely, is itself a delegated power, and hence is, *pro tanto,* revoked or limited by the direct exercise of the legislative function in the premises."

Hence, even if we assume that under its charter provisions Millville might have had the power to regulate the liquor traffic in some respects, such power is revoked, in so far as it attempts the exercise of jurisdiction over a carrier, by the action of the legislature in passing the Public Utilities Act, and by the Act of Congress.

See *Phillipsburg vs. Public Utility Board,* 85 *N. J. L.* 141.

The jurisdiction of the Public Utilities Board is over steam railroads as well as other named utilities. *P. L.* 1911, *p.* 376, *Sec.* 15.

The system of bookkeeping is placed under the general control of the Board by Section 16 (d) page 379, subject to the Interstate Commerce Commission's regulation of the subject as provided in Section 20 of the Interstate Commerce Act, as amended June 29, 1906, February 25, 1909, and June 18, 1910.

IV

THE ORDINANCE OPERATES UNREASONABLY AND OPPRESSIVELY AGAINST THE PROSECUTOR-RESPONDENT.

Both the Interstate Commerce Act and the Public Utilities Act, forbid a carrier to subject any particular person or corporation or locality or any particular description of traffic to any prejudice or disadvantage in any respect whatever. Violations are punishable by heavy fines.

The ordinance under review not only requires violation of these statutory enactments, but makes it encumbent upon the carrier to determine, at its peril, who are the persons against whom it is to discriminate.

Interstate shipments come to prosecutor-respondent under the uniform bill of lading. The obligation of the carrier is fixed, not by State law or municipal regulation, but by the Act of Congress.

> *Olivit Bros. vs. Pennsylvania RR. Co.* 96 *Atl. Rep.* 582.

> "The rights and liabilities of the parties to an interstate railway shipment depend upon Federal legislation, the bill of lading, and common law rules as accepted and applied in Federal tribunals."
>
> *Cincinnati, etc., Ry. Co., vs. Rankin,* 241 *U. S.* 319, *Law Ed. Vol.* 60, *p.* 1022.

Carriers are bound to receive and transport all freight tendered. This is the rule of law established by the

Courts, and re-affirmed in the Hepburn Act and the Utilities Act. The same duty rests upon the connecting and terminal carrier as upon the initial carrier.

See *Corpus Juris, Vol.* 10, *p.* 66.

In *Carr vs. Penna. RR. Co.,* 88 *N. J. L.* 235, this Court held that,

> "Any lawful holder of a bill of lading issued by the initial carrier pursuant to the Carmack amendment (section 20 of the Interstate Commerce act, as amended June 29th, 1906, 34 *U. S. Stat. at L. pp.* 593, 595, *Sec.* 7), upon receiving property for interstate transportation, may maintain an action for any loss, damage or injury to such property caused by any connecting carrier to whom the goods are delivered. *Adams Express Co. vs. Croninger,* 226 *U. S.* 491."

It is lawful to purchase intoxicating liquors in every County and in almost every City of this State. That being true, no municipality is yet empowered to pass an ordinance prohibiting a common carrier from transporting and delivering to the purchaser living in such municipality the commodity so purchased, for his personal use.

For the reasons assigned in the state of the case, all of which are urged, it is respectfully submitted that the judgment of the Supreme Court should be affirmed.

November Term, 1917.

WALTER H. BACON,

Attorney and of Counsel for West Jersey and Seashore Railroad Company.

NEW JERSEY COURT OF ERRORS AND APPEALS

WEST JERSEY AND SEASHORE RAILROAD COMPANY, *Prosecutor-Respondent* VS. CITY OF MILLVILLE, *Defendant in Certiorari* *Appellant*	ON CERTIORARI

BRIEF OF APPELLANT, CITY OF MILLVILLE

The writ herein brought before the Supreme Court for review a certain ordinance of the city of Millville, known as Ordinance 154, of which the following is a copy:

CITY OF MILLVILLE
ORDINANCE NO. 154

An Ordinance for the Suppression of the Unlawful Sale of Alcoholic Liquors in the City of Millville.

The Board of Commissioners of the City of Millville do Ordain:

1. Every person who shall in the City of Miilvllle directly or indirectly keep or maintain by himself or by associating with others, or who shall in any manner aid, assist or abet, in keeping or maintaining any club house, lodge room, boat house, or other place in which alcoholic liquor

is received or kept for the purpose of gift, barter or sale, or for the distribution or division among the members of any club, lodge or other association by any means whatsoever or who shall maintain in any club house, lodge room, boat house or other place in said City what is known as the "locker system", or other system or device for evading the provisions of this ordinance, and every person who shall use, barter, sell or assist or abet in bartering, selling or distributing any alcoholic liquors or received or kept, shall be deemed guilty of a violation of this ordinance.

2. In all cases the members, shareholders, or partners, associates or employees in any club, lodge or association mentioned in Section One of this ordinance shall be competent witnesses to prove any violation of this ordinance, or of any fact tending thereto, but the testimony given by such person shall in no case be used against him in any action or proceeding brought for violation of this or any other ordinance of the City.

3. All houses, lodge rooms, boat houses, buildings, club rooms and places of every description in the City of Millville where alcoholic liquors are or hereafter shall be sold, vended or furnished contrary to law (including those in which clubs, lodges or other associations sell, barter, exchange, give, keep, store, deposit or distribute or dispense alcoholic liquors to their members, associates, guests or others by any devise whatever, as forbidden in Section One) shall be held, deemed and taken and hereby are declared to be common and public nuisances. Any person who shall maintain, or shall aid or abet, or knowingly be associated with others or in any manner assist in maintaining such common and public nuisances shall be guilty of a violation of this ordinance.

4. Any person who knowingly permits any building owned or leased by him or her or under his or her control or any part thereof, to be used in maintaining a common

and public nuisance hereinbefore declared and described in Section Three of this ordinance shall be deemed guilty of assisting in maintaining such nuisance.

5. It shall be unlawful for any railroad or other common carrier or express company to deliver in the City of Millville any package of alcoholis liquor (a) consigned to any club, lodge or other association; (b) consigned to any expressman or other person for or on account of any club, lodge or other association; or (c) consigned to any expressman or other person where there are marks or lettering, numerals or other device on any said package indicating that the same shall be delivered to any club house, lodge room, boat house or like place in said City, or to a member of any club, lodge or association at any club house, boat house, lodge room or like place in said City.

6. No railroad or other common carrier or any express company shall deliver in the City of Millville to any expressman nor to any other person whomsoever except to the consignee actually named in the bill of lading, any package of alcoholic liquor, except on a written order of the consignee to be filed with the receipt for such package.

7. It shall be unlawful for any expressman or other person to take into his possession any package of alcoholic liquor consigned to him as agent, or in his care for another, and make delivery of any such package in this City.

8. It shall be unlawful for any expressman, whether owner or driver, messenger, porter, hackman, hack driver, jitney owner, jitney driver, person or corporation, to act directly or indirectly, in the City of Millville, as agent for any brewing house, distillery, liquor dealer, or other person, for the sale or delivery in the City of Millville of alcoholic liquors, or for the procuring of orders for alcoholic liquors or to engage directly or indirectly in any manner in the sale of alcoholic liquors, nor shall any expressman or other person whomsoever act in this City as agent for any brewery, wholesale or retail liquor dealer or other vender of

alcoholic liquor for the purpose of delivering to any purchaser any package of alcoholic liquor, or in collecting, recovering, gathering shipping, re-shipping or transporting or shipping back to, or for or on account of any such brewer or wholesale or retail liquor dealer or other vender of alcoholic liquors any crates, or empty beer or other bottles, jugs, demijohns or other vessels which have been used as containers of alcoholic liquors.

9. The agents, clerks and employees of any railroad or other common carrier, or of any express company, and the drivers and other employees of any expressman or express company who shall aid, abet or assist in any violation of this ordinance shall be deemed equally guilty with their employer or principles of such violation and punishable by like fine or imprisonment or both.

10. Hereafter all public porters, hackmen, expressmen, omnibus drivers, stage drivers and drivers of any other carriage and means of transportation of passengers, baggage, merchandise and goods and chattels of every kind, and the owners and drivers of vehicles and means of transportation including jitneys, shall be licensed by the City Clerk, and it shall be unlawful for any public porter, hackman, omnibus driver, stage driver or driver of any other carriage and means of transportation of passengers, baggage, merchandise and goods and chattels of every kind, or the owners and drivers of vehicles and means of transportation, to carry on any said employment in this City without such license first had and obtained. The annual fee for each such person shall be One Dollar and for each such vehicle shall be One Dollar. All licenses shall run for one year commencing on the first day of the month after this ordinance becomes effective. The license number of each person shall be displayed by a proper metal tag or badge, to be worn by the licensee on cap, vest or coat, and the license number on each vehicle shall be affixed to the same in some conspicuous position. If any such licensee shall

be convicted of violating any of the provisions contained in this ordinance, in addition to the other punishment hereinafter provided, his license or licenses, both for himself and his vehicles shall be revoked by the magistrate, nor shall any such license so revoked be renewed without order of the Board of Commissioners. Nothing in this Section contained shall be construed to require any street railway company to take out any additional license.

11. Nothing in this ordinance contained shall restrain any licensed physician from prescribing or pharmacy or regularly established hospital from dispensing alcoholic liquors pursuant to the provisions of the State laws; provided, that no prescription for alcoholic liquors shall be re-filled by any druggist or pharmacist, unless especially directed by writing on such prescription, and then the same shall not be re-filled after the expiration of thirty days from its date. The date of each such prescription and the name of the patient for whom the same is given shall be plainly written on the prescription. This ordinance shall not be construed to prohibit any common carrier or other person from delivering to any druggist, pharmacist or regularly established hospital any alcoholic liquors.

12. The bills of lading and other documents of any railway, street railway or other transportation company or common carrier in this City shall be open to the inspection of the Board of Commissioners or any of them and the police officers of this City.

13. A separate record, alphabetically arranged, shall be kept by every railway or other common carrier, or express company, at their offices in this City, of all consignments of alcoholic-liquors received in this City by them and the names of the shipper and consignee and the quantity of each shipment; which record shall be open to inspection by said Commissioners or any of them and the police officers of this City.

14. Wherever the term "alcoholic liquor" is used in this ordinance it shall be deemed to include whiskey, brandy, gin, rum, wine, ale, porter, beer, cordials, hard or fermented cider, alcoholic bitters, ethyl alcohol, all malt liquors and all other brewed, fermented or distilled liquors or ardent spirits.

15. Nothing in this ordinance contained shall be construed to inhibit traffic in alcoholic liquors by or with any club, lodge or association which, or person who, shall have been duly licensed to sell alcoholic liquors in this City.

16. If any of the preceding Sections or provisions of this ordinance shall for any reason be adjudged invalid and void, such determination and finding shall not be held nor construed to affect nor impair the validity of any other sections or provisions hereof.

17. Any person or persons, other than a corporation, convicted of violating any of the provisions of this ordinance shall be imprisoned in the county jail for a term not exceeding ten days or be fined not exceeding One Hundred Dollars, or both, and upon conviction as aforesaid a corporation shall be liable to a like fine, and the magistrate before whom such offense or offences may be cognizable shall have discretion in imposing such penalty or penalties, but not to exceed the maximum penalty herein prescribed. Upon a second or further conviction for violation of any of the provisions of this ordinance, the maximum penalty of One Hundred Dollars and (except in cases of a corporation) ten days' imprisonment in the county jail shall be imposed by the magistrate.

18. This ordinance shall not be construed to repeal or affect the provisions of Ordinance Number Twenty-four (24) and the supplements thereto and amendments thereof, nor any other ordinance heretofore enacted; but shall be deemed an additional ordinance or by-law of the City.

This ordinance shall take effect immediately upon its publication as provided by law.

—

The foregoing Ordinance, known as Ordinance Number 154, was adopted by the Board of Commissioners of the City of Millville, February 16th, 1917, and signed by Thomas Whitaker, Mayor, and Roland B. Corson, Lewis E. Kurtz, Walter S. Kates and W. Fred Ware, Commissioners; and before ten days from the time of final passage of said Ordinance, a petition signed by electors of the city equal in number to at least fifteen per centum of the entire vote cast at the then last preceding general municipal election protesting against the passage of such Ordinance, having been presented to the Board of Commissioners, the same was thereupon suspended from going into operation, and the Board of Commissioners did on March 2nd, 1917, reconsider such Ordinance and decline to repeal the same and the Board of Commissioners did submit the said Ordinance, as is provided by sub-section B of Section 16 of the Commission Government Act, to the vote of the electors of the city, at the general municipal election held May 8th, 1917, at which election a maiorty of the qualified electors voting on the same did vote in favor thereof and thereupon such Ordinance did go into effect and become operative.

All of which is certified this ninth day of May, nineteen hundred and seventeen.

John S. Horton,
Clerk of the City of Millville.

5-10-1t

The Supreme Court filed no opinion in the Court below, but a rule was entered of which the following is a copy:

NEW JERSEY SUPREME COURT

WEST JERSEY AND SEASHORE RAILROAD COMPANY, *Prosecutor,* vs. CITY OF MILLVILLE, *Respondent.*	ON CERTIORARI ORDER

The court having inspected Ordinance No. 154 of the City of Millville, entitled "An Ordinance for the suppression of the unlawful sale of alcoholic liquors in the City of Millville," returned with the certiorari in this cause, the reasons for setting the same aside in so far as the provisions thereof affect the prosecutor as a common carrier, and having heard the argument of Walter H. Bacon, of counsel for prosecutor, and of Louis H. Miller, of counsel for the respondent, and considering the same, and being of the opinion that the provisions of said ordinance which attempt to prevent the delivery of intoxicating liquors in the City of Millville by prosecutor as a common carrier, and which require the prosecutor to keep books and records in a specified manner and to open the same to inspection by the City Commissioners and others, are ultra vires, illegal and void.

It is, on the thirteenth day of June, nineteen hundred and seventeen, Ordered that the said Ordinance, in the particulars above recited, and especially sections numbered 5, 12 and 13 thereof in so far as they affect or attempt to affect the said West Jersey and Seashore Railroad Company, as a common carrier, be and the same hereby is set

aside, made void and for nothing holden, with costs to be taxed.

Let this order be entered in the minutes.

Entered June 16, 1917,
on motion of
WALTER H. BACON,
Attorney for Prosecutor.

By the court,
WM. S. GUMMERE, C. J.

The validity of the ordinance was attacked in the Supreme Court upon certain grounds all of which are involved in considering the following

POINTS

1. Was the city of Millville authorized by legislative enactments to adopt Ordinance 154?

2. If the legislature has attempted to grant the power by legislative enactments, is such enactment in contravention of any of the provisions of the State Constitution?

3. Is the ordinance invalid as to the prosecutor, because (a) it impairs the obligations of prosecutor's contract; or (b) it requires the prosecutor to violate some of the provisions of the Inter-State Commerce Act; or (c) it attempts to regulate Inter-State Commerce:

I.

THE CITY OF MILLVILLE WAS AUTHORIZED BY LEGISLATIVE ENACTMENTS TO ADOPT ORDINANCE 154.

The Court in such a proceeding will take judicial notice of the charter and constituent acts under which the city of Millville claims its powers.

The charter of the city of Millville is found in P. L. 1866, Chapter 116, &c. By Sections 17 and 18 of the charter the following powers are granted and regulations established:

17. And be it enacted, That the said mayor and common council, or a majority thereof, in council convened, shall have sole, only and exclusive right and power of granting license, under the common seal of said city, to all and every innkeeper and retailer of spirituous liquors, residing in said city, in like manner and on the same conditions as may now be done by the courts of common pleas of this state, except only that they may grant such license for any term not exceeding one year, as they may deem best; and they shall also have the sole, only and exclusive right and power of licensing such and so many keepers of oyster houses and cellars and places for the sale of fermented liquors within said city, upon such terms and conditions, and subject to such regulations, as they may deem most conducive to the public good thereof, and the amount of license fees levied and assessed shall be paid to the treasurer for the use of the city.

Not only has the State conferred upon the governing body of the City of Millville exclusive right and power of licensing and regulating the sale of intoxicating liquors in the City of Millville, but by distinct Legislative enactment contained in the City Charter it is made unlawful for any person or persons to sell within the corporate limits of the City of Millville any spirituous liquors in less quantities than five gallons, without first having obtained license therefor. It is also provided by the City Charter that the governing body may enact such restrictions and penalties as they deem necessary in relation thereto. These provisions are contained in Section 18 of the City Charter, which reads as follows:

18. And be it enacted, that it shall not be lawful for any person or persons to sell, within

> the corporate limits of the city of Millville, any spirituous liquors, in quantities less than five gallons without first having obtained a license therefor from the mayor and common council, or majority thereof in council convened, of said city, in whom shall be vested the exclusive right and power of granting such licenses, and who may enact such restrictions and penalties as they deem necessary in relation thereto.
>
> (*Charter of City of Millville, P. L.* 1866, *p.* 123, *Secs.* 17-18.)

In connection with the broad powers contained in Sections 17 and 18 of the City Charter it appears that the City Government has been granted further and ample power to adopt all reasonable ordinances for the prevention of the unlawful sale of intoxicants in the City of Millville.

It must be conceded that clubs, boat houses and all places where persons congregate and there maintain by lockers or otherwise a system of storing intoxicating liquors, where the same may be, and presumably will be, drunk on the premises, without restraint or license, are likely *to disturb the peace and good order of the community.* They are quite sure to be places where habitual drunkeness is permitted. By Section 10 of the Charter of the City of Millville the governing body is given authority to enact ordinances *for the more effectual suppression of vice and immorality.*

Of course the words "Vice and immorality" as used in our statutes have acquired a particular meaning because of our ancient statute known as the Vice and Immorality Act. Among other things inhibited by this statute is drunkeness (4 *C. S.* 5715, *Sec.* 7).

When by Section 10 of the City Charter the City was granted authority to pass ordinances for the suppression

of *vice and immorality* it became the duty of the City to enact ordinances *for the more effectual suppression of drunkeness* in the City of Millville. And it cannot be denied that the maintenance of clubs and other places where persons congregate to drink intoxicating liquors, in secret, and without restraint of any kind does, in truth, tend to the fostering and encouragement of tippling houses where drunkeness is bound to be prevalent. The City of Millville contends that the clause of the City Charter which confers upon the governing body the power and authority to enact ordinances for the suppression of vice and immorality is a sufficient legislative grant for the enactment of Ordinance Number 154, for that Ordinance does directly and in an effectual and necessary way, provide for the suppression of the vice of drunkeness.

There are also other clauses in Section 10 of the City Charter which broaden the powers of the governing body with respect to the enactment of this ordinance. There is a clause granting power to enact ordinances

> For preserving peace and good order; for suppressing and restraining disorderly * * * * houses; * * * and such other by-laws and ordinances for the peace, good order and prosperity of said city, as they may deem expedient, not repugnant to the constitution and laws of this state, or of the United States.

By another clause of Section 10 of the City Charter ordinances may be enacted for

> Preventing or restraining * * * * disturbances, or disorderly assemblages, in any street, alley, house or place in the said city.

It will thus be seen, that in connection with the specific grant of authority contained in Section 17 and 18 of the Charter touching the suppression of disorderly houses

and the illicit sale of liquor, the usual general clauses granting power to the governing body to enact ordinances for the preservation of peace and good order are contained in the Charter of the City of Millville. But in addition to these specific grants of power contained in the Charter, the Legislature has conferred on the City of Millville, by a more general law, authority to enact the ordinance in question.

In nineteen hundred and thirteen the city of Millville adopted the commission government act (*P. L.* 1911, 462). By Section 8 of this act as amended (*P. L.* 1912, *p.* 650), certain general police powers are conferred upon the city; and by Chapter 150 of the Laws of 1916 (*P. L.* 1916, *p.* 306), specific authority was conferred upon commission-governed cities of the state with relation to the enactment of ordinances relating to intoxicating liquors. This Statute of 1916 reads as follows:

Chapter 150

A supplement to an act entitled "An act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities governed by boards of commissioners or improvement commissioners in this state," approved April twenty-fifth, one thousand nine hundred and eleven, the title to which act was amended to read as above set forth by an act approved April second, one thousand nine hundred and twelve, giving to cities adopting the said act power to pass ordinances regulating the sale of spirituous, vinous, malt and brewed liquors.

Be it enacted by the senate and general assembly of the state of New Jersey.

1. Whenever the provisions of the act to which this act is supplemental have been adopted

by any city, either prior or subsequent to the passage of this act, such cities shall be and are hereby vested with power and authority to enact and enforce by imposition of reasonable fines or imprisonment, or both, all ordinances necessary for the protection of life, health and property *and for the enforcement of all laws of the state regulating the sale of spirituous, vinous, malt and brewed liquors; to declare and prevent and summarily to abate nuisances, whether caused by the sale of spirituous, vinous, malt, intoxicating and brewed liquors, or otherwise;* to preserve and enforce the good government and general welfare, order and security of such city, and shall have all power necessary for its government not in conflict with the laws applicable to all cities of this state or the provisions of the constitution.

2. This act shall take effect immediatley.

Approved March 17, 1916.

(*P. L.* 1916, *Chap.* 150, *p.* 306.)

It therefore appears that complete authority has been conferred by the legislature upon the city of Millville to enact the said ordinance so far the legislature itself may have power to delegate such authority to the city of Millville.

II.

IF THE LEGISLATURE HAS ATTEMPTED TO GRANT THE POWER BY LEGISLATIVE ENACTMENTS, IS SUCH ENACTMENT IN CONTRAVENTION OF ANY OF THE PROVISIONS OF THE STATE CONSTITUTION?

It cannot be contended that those matters inhibited by the ordinance and by Section 18 of the city charter may only be punishable by indictment. Mr. Justice Garrison in

Riley vs. Trenton, 22 Vr. 498, stated that this was settled in the case, *Paul vs. Gloucester County* (*21 Vr.* 595, 600).

As long ago as 1874 the following rule was declared in *Howe vs. Plainfield* (*8 Vr.* 145-151):

> "The unlawful retailing of intoxicating drinks or the keeping of tippling houses, are not included in the category of criminal offences, the punishment of which cannot, constitutionally, be delegated by the legislature to a municipality, as offences cognizable by it under the powers of police."
>
> (*8 Vr.* 145-151: *Howe vs. Plainfield.*)

It is a matter of comon knowledge that these clubs and secret places where persons congregate and maintain what is known as the locker system or some similar system where liquor may be stored for sale or for the purpose of being drunk on the premises, are mere tippling houses, places where the members drink spirituous liquors or strong drinks habitually to excess. Whether or not such places are tippling houses within the meaning of the common law is a question which this court may, perhaps, now decide. There are various definitions of tippling houses given by the authorities (see "Words and Phrases"); but whether or not the clubs and places affected by Ordinance 154 are tippling houses as defined by the common law, they are unquestionably places where drunkeness is likely to be prevalent; and drunkeness is a vice the suppression of which is imposed as a duty upon the governing body of the city by the terms of its charter. The courts of some of the States seem to have gone quite far afield in an attempt to limit the meaning of the words "Tippling" and "Tippling Houses." But Blackstone plainly implies that tippling itself was merely the drinking of liquor to excess, and the inference is that a tippling house was a place where such practices occurred

or were permitted. In 4 Black. Comm. * p. 64 the following principles are declared:

> X. Drunkenesss is also punished, by statute 4 Jac. c. 5, with the forfeiture of 5s, or the sitting six hours in the stocks; by which time the statute presumes the offender will have regained his senses, and not be liable to do mischief to his neighbors. There are many wholesome statutes by way of prevention, chiefly passed in the same reign of king james I., which regulate the licensing of alehouses; *and punish persons found tippling therein;* or the master of such houses permitting them. 4 Black. Comm. *64, Sec. X.

In *Paul vs. Gloucester County,* 21 Vr. at page 595, the Court of Errors held:

> "The legislature has a right to grant to municipal corporations the power to regulate and prohibit the sale of liquors";

and at page 600, Mr. Justice Van Sickle, speaking for the Court of Errors, said:

> "The validity of this law (the Local Option Law of 1888) may be rested securely upon the right of the legislature to delegate the powers of the local government to political subdivision of the state."

The capacity to grant such legislative powers commonly called police powers to municipal corporations must be admitted, as this question seems to be at rest.

For the foregoing reasons the City of Millville respectfully maintains that legislative authority for the adoption of the ordinance in question is complete.

III.

IS THE ORDINANCE INVALID AS TO THE PROSECUTOR, BECAUSE (a) IT IMPAIRS THE OBLIGATION OF THE PROSECUTOR'S CONTRACTS; OR (b) IT REQUIRES THE PROSECUTOR TO VIOLATE SOME OF THE PROVISIONS OF THE INTERSTATE COMMERCE ACT; OR (c) IT ATTEMPTS TO REGULATE INTERSTATE COMMERCE?

It is respectfully submitted that the ordinance is not invalid for any of these reasons.

(a) The ordinance does not impair the obligations of the prosecutor's contract in any legal sense. But it may here be observed that, when the prosecutor raises this point, it does by necessary inference, concede the point that Ordinance No. 154 *is a law of the state* within the meaning of the United States Constitution forbidding a state from enacting any laws that impair the obligations of a contract. And therefore by making this point the prosecutor concedes that the ordinance in question is a law of the state of New Jersey, a question of some importance hereinafter discussed.

But the point now raised is not sound.

The bill of lading printed with the case distinctly provides that the railroad company issuing it, the initial carrier, is only the agent for the secondary railroad; and the latter has not right in law to continue, either itself or by its agent the intial carrier, in the making of further contracts now denounced as unlawful by positive law. A new contract must be made, as was done by the railroads against whom the mandamus was prayed in *U. S. vs. Oregon—Washington R. & N. Co.*, 210 *Fed.* at p. 379. In that case the opinion of the Court recites that:

> "In obedience to and in conformity with the act of Congress and the laws of Idaho, *the de-*

fendant companies have promulgated a rule to the effect that shipments of intoxicating liquor from points outside of the state of Idaho to *points within a prohiibtion unit of such state shall be governed by the same rules as purely intrastate shipments,* and therefore refused to receive the shipment in question."

So the bill of lading ought to be amended; but if it be not, then two things must be said: First, the parties to a contract cannot appeal to its provisions for protection from the terms of a subsequently enacted law otherwise valid. For the contract loses its force, and becomes void and of no effect because illegal.

The power of the legislature to subserve the general welfare of the people by all needful and proper regulations, in the interests of health and safety, is inherent in the sovereignty of the state, and cannot be bartered away or impaired by contract, public or private. *Boston Beer Co. vs. Massachusetts,* 97 U. S. 25, 24 L. Ed. 989, and other cases cited in 11 U. S. C. S. (1916) p. 13610, pl. 76.

In view of the act of August 8th, 1890, providing that liquors imported into the state shall immediately become subject to its police laws, even while in the original package of importation, the South Carolina Act of Dec. 24th, 1892, was held not to contravene Art. 1, par. 10, cl. 1, of the Constitution of the United States, forbidding a state to enact any law impairing the obligation of contracts. *Cantini vs. Tillman,* 11 *U. S. C. S.* 13611, 54 *Fed.* 969.

Rights and privileges arising from contracts with the state are subject to the regulations for the protection of the public health, morals and safety in the same sense as are rights arising from other contracts. *Pittsburg C. C. & L. Ry. Co. vs. Chappell* (Ind 1914), 106 N. E. 403, cited in note 11 *U. S. C. S.* 13611.

Secondly, it should be noted that the carefully drawn bill of lading contains a clause protecting the prosecutor.

> "Sec. 1. The carrier or party in possession of any of the property described shall be liable for any loss or damage thereto except as hereinafter provided. * * * Except in case of negligence of the carrier * * * the carrier shall not be liable for loss, damage or delay occurring while the property is stopped and held in transit * * * resulting from a *vice* in the property. Bill of Lading Sec. 1."

(b) The ordinance does not require the prosecutor to violate any of the provisions of the Interstate Commerce Act.

Section 15 of the interstate commerce law (11 *U. S. C. S. at p.* 9201) does contain a proviso forbidding the common carrier from disclosing any information concerning the nature, kind, quantity, destination or routing of any property tendered or delivered to the carrier, but there is this proviso:

> *Provided,* that nothing in this act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the government of the United States, or of any state or territory, in the exercise of his powers or to any officer or duly authorized person seeking such information for the prosecution of persons suspected of crime.

Nor do the requirements of the ordinance that the carrier keep a record of the liquor invalidate the ordinance.

> "The requirements of a state law that those transporting liquors into the state keep a record of the same and file statements thereof with the

clerk of the Circuit Court is not invalid as imposing a direct burden on interstate commerce, regardless whether it is within the Webb-Kenyon Act. *American Ex. Co. vs. Beer* (*Miss* 1914), 65 *So.* 575; *Southern Ex. Co. vs. Longinotti, Id.* 583; *same vs. Miller, Id.* 652; *State vs. Seaboard Am. Line* (*N. C.* 1915), 84 *S. E.* 283; *cited* 11 *U. S. C. S., p.* 9539."

IS THE ORDINANCE AFFECTED BY THE INTERSTATE COMMERCE LAWS?

By two distinct statutes, the Wilson Act of 1890 and the Webb-Kenyon Act of 1913, Congress has taken certain traffic in intoxicating liquor out of the protection of interstate commerce laws.

The Wilson Act is found in 11 U. S. C. S. at page 9530, Section 8738: 26 Stat. at l. 313, and is as follows:

> Chap. 728. An act to limit the effect of the regulations of commerce between the severals states and with foreign countries in certain cases.
>
> Be it enacted, &c., that all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or, storage therein, shall upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory and shall not be exempted therefrom by reason of being introduced therein in original packages or otherwise. Approved August 8, 1890.

The Webb-Kenyon Act is founded in 11 U. S. C. S. p. 9538; 37 State. L. p 699, and reads as follows:

> Chap. 90. An act divesting intoxicating liquors of their interstate character in certain cases.
>
> Be it enacted, &c., that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind, from one State, Territory or District of the United States, or place non contiguous to but subject to the jurisdiction thereof, into any State, Territory or District, of the United States or place non contiguous to but subject to the jurisdiction thereof, which said spirituous, vinuous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory or district of the United States, or place contiguous to but not subject to the jurisdiction thereof, is hereby prohibited. Passed March 1, 1913.

IS THE ORDINANCE A LAW OF NEW JERSEY UNDER THE WEBB-KENYON ACT?

If so, it being made unlawful for the persons thereto inhibited, to receive the liquor consigned to them in the manner pointed out by the ordinance, then the railroad cannot claim the protection of the interstate commerce laws. Hence it must first be found, if the ordinance shall be effective against the prosecutor, that the ordinance *is a law of the state of New Jersey;* for the liquor must be in transit "in violation of any law of such state, &c." If it be objected that the ordinance is not a law of the state of New Jersey because it is only a local law or by law effective

in the city of Millville, then it is answered that the authorities are adverse to that contention.

Said Mr. Justice Van Syckle in *Paul vs. Gloucester County*, 21 *Vr. p.* 600:

> "The distinction is suggested, that the by-laws and ordinances of local governments have not the force or effect of laws; that they must be reasonable, and are subject to be set aside on certiorari by the courts.
>
> To this I cannot assent. The rule in this respect, is correctly and accurately stated by Mr. Justice Depue, in this way: 'A grant of power to a municipal corporation to legislate by ordinance on enumerated subjects connected with its municipal affairs, is in addition to the power of making by-laws, which is incidental to the creating of a corporation.' *State, Taintor vs. Morristown,* 4 *Vroom,* 57. "The Court will inquire into the reasonableness of ordinances passed by a municipal body under legislative authority, when the powers granted are expressed in terms which are general and indefinite. *But when the legislature has defined the delegated powers* and prescribed with precision, the penalties that may be imposed, an ordinance within the delegated limit cannot be set aside as unreasonable." *Hayes vs. Cape May,* 21 *Vroom,* 55.

Although the proposition that the legislature of a state is alone competent to make laws is true, yet it is also settled that it is competent for the legislature to delegate to municipal corporations the power to make laws and ordinances, with appropriate sanction, which, when authorized, have the force, in favor of the municipality and against persons bound thereby, *of laws passed by the legislature of the state.*. 1 *Dill. Mun. Corp. par.* 299 (245).

From these principles it must be taken that Ordinance 154 is a law of the state of New Jersey of local application. The enactment of such an ordinance is a matter of pure local option; for, the commission government act is applicable to all municipalities of New Jersey which choose to adopt the same. The commission government act may be adopted by any municipality if the people so elect; and having been adopted, all of the municipal corporations exercising the delegated functions may, by the processes of commission government, either through the governing body or by the initiative feature of the statute, adopt such an ordinance. In a true sense Ordinance 154 is a local option law. It is not insisted, however, that this point is necessary to sustain the city's case; but it is set forth to the end that the cases presently to be cited may have a more direct application. A local option law, as commonly understood, is one intended to be effective only in limited districts. In like manner an ordinance of the city adopted with the legislature's sanction has precisely the same force and effect. In other words, it is a matter of indifference whether the local law be brought about by local option as commonly understood, or by the medium of an ordinance. Surely there can be no distinction between the local option law, so called, and the city ordinance for they are both laws of the state, authorized by legislative enactment, limited in their operation to local territory.

It has been held by the Courts, upon direct rulings on the question, that a municipal ordinance is a state law. In *Citizens' St. R. Co. vs. City R. Co.*, 56 Fed. at p. 748, the Court said:

> "It is contended by counsel for the defendant that, conceding that the grant of rights, privileges and immunities to the complainant by the city constitutes a contract falling within the above constitutional guaranty, ***still it is not impaired by***

a law of the state, and therefore that no federal question is presented. * * * The authority exercised by the city in granting to the defendant the rights, privileges or easement to lay, maintain and operate a street railway upon and along the public streets *is that of the state itself*.. 56 Fed, pp. 748, &c., cases cited."

The provisions of the Webb-Kenyon Law were held applicable to local option territory by the Supreme Court in *State vs. Grier,* 88 *Atl.* 579; 27 *Del.* (4 *Boyce*) at page 364. In that case the Court said:

"We think the person to whom the liquor is given for transportation and delivery is interested therein within the meaning of the federal law, and that if he intends when he receives, or has in his possession, the liquor, to carry it from a point in one state *to local option territory in another state,* into which the carrying is unlawful, the transaction is not protected by the commerce clause of the federal constitution *it being a violation of the law of the state* into which the liquor is carried. And so it may be said that if such person carries or delivers the liquor *into local option territory* where such carrying or delivery is unlawful, *it is used by him in violation of the law of the state within the meaning of the federal statute."* (Webb-Kenyon Law.)

In the Idaho case, *U. S. &c., vs. Oregon—Washington R. & N. Co.,* 210 Fed. 378, the Federal Court denied an application for a mandamus on the ground that the Webb-Kenyon Act was held to apply to local option territory within a state.

In *State vs. Van Winkle,* 91 Atl. 385; 27 Del. (4 Boyce) 578, Syl. 12, p. 580; text 626, the Supreme Court

of Delaware followed the same principle which had been laid down in the Grier case cited, but discharged the defendant Van Winkle on a technical ground. In the Clark distillery case decided by the United States Supreme Court, Mr. Justice White expressed the opinion that Van Winckle was guilty; and therefore it seems that the United States Supreme Court has, by a direct ruling, affirmed the principles that the Webb-Kenyon Law is applicable to local option territory.

Finally, the United States Supreme Court has held that the Webb-Kenyon Law must be read in the light thrown upon it by the Wilson Act of 1890. Said Mr. Justice White in *Clark Distilling Co. vs. Western Maryland R. Co.*, 37 Sup. Ct. Rep. at p. 184:

> "Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this Court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means of subterfuge and indirection to set such laws at naught."

The opinion in the Clark case is appended to this brief for convenient reference.

None of the reasons assigned against the validity of the ordinance being good, the legality of the ordinance should be affirmed. But if any section attacked be found illegal, yet the rest of the ordinance should stand, as provided in Section 16 of the ordinance itself.

Respectfully submitted,

LOUIS H. MILLER,

Of Counsel With City of Millville, Appellant.

Dated ~~June~~ Oct. 1st, 1917.

SUPREME COURT OF THE UNITED STATES

Nos. 75 and 76.—October Term, 1916.

The James Clark Distilling Company,
Appellant,

75 vs.

The Western Maryland Railway Company and The State of West Virginia

The James Clark Distilling Company,
Appellant,

76 vs.

The American Express Company and The State of West Virginia

Appeals from the District Court of the United States for the District of Maryland
(January 8, 1917.)

Mr. Chief Justice White delivered the opinion of the Court.

To refer to the principal state law relating to these suits, to the pleadings and the decision of the Court below will make the issues in these cases clear and point directly to the elements required to be considered in deciding them.

West Virginia in February, 1913, enacted a prohibition law to go into effect on July 1st of the following year. Code 1913, c. 32A. Putting out of view the right of druggists under stringent regulations provided by the statute to sell for medicinal purposes and the right otherwise to sell wine for sacramental and alcohol for scientific and manufacturing purposes, the law forbade "the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale" intoxicating liquors, and the intoxicants embraced were comprehensively defined. The

statute contained many restrictions concerning hotels, restaurants, clubs and so-called associations where liquor was kept and served either as a result of membership or by gift or otherwise, which were evidently intended to prevent the frustration of the prohibitions against the keeping of intoxicants for sale and purchase by subterfuge in the guise of the exercise of an individual right. There was no express prohibition against the individual right to use intoxicants and none implied unless that result arose (a) from the prohibition in universal terms of all sales and purchases of liquor within the state, (b) from the clause providing that every delivery made in the state by a common or other carrier of the prohibited intoxicants should be considered as a consummation of a sale made in the state at the point of delivery, and (c) from the prohibitions which the statute contained against solicitations made to induce purchases of liquor and against the publication in the state of all circulars, advertisements, price lists, etc., which might tend to stimulate purchases of liquor.

Under this statute and in reliance upon the provisions of the Act of Congress known as the Webb-Kenyon Law (Act of Congress of March 1, 1913, 37 Stat. 699), the state of West Virginia in one of its courts sued the Western Maryland Railroad Company and the Adams Express Company to enjoin them from carrying from Maryland into West Virginia liquor in violation of law. In substance it was charged that very many shipments had been taken by the carriers contrary to the law both as to solicitations and as to the use for which the liquor was intended. Preliminary injunctions were issued restraining the carrying of liquor into the state subject to many conditions as to investigation, etc., etc. With these injunctions in force, these suits were commenced by the Clark Distilling Company to compel the carriers to take a shipment of liquor which it was asserted was ordered for personal use and deliver it in West Virginia, on the ground that the Act of

Congress to Regulate Commerce imposed the duty to receive and carry and that besides the West Virginia prohibition law when rightly construed did not forbid it. The carriers, not challenging the asserted meaning of the West Virginia law, set up the injunctions and averred that to receive and carry the liquor would violate their provisions and therefore there was no duty under the United States law to do so. West Virginia intervened in the suits, relying upon the state law and the injunctions which had been issued. At the trial it was shown that the plaintiff Distilling Company had systematically solicited purchases and constantly shipped liquor from Maryland into West Virginia in violation of the prohibition law. The Court held that the West Virginia law did not prohibit personal use, and did not forbid shipments for such use and that as there was no state prohibition, the Webb-Kenyon Law had no application, and that as the solicitations forbidden by the state statute were solicitations to do that which was forbidden, that consideration was irrelevant. The construction of the statute made by the state court was held not authoritatively binding, as that court was not one of last resort, and the right to practically modify the injunctions was declared to exist because West Virginia by making herself a party to the suits had submitted herself to the jurisdiction of the court. All questions concerning the power of the State of West Virginia to pass the prohibition law if it meant otherwise, and of the right of Congress to adopt the Webb-Kenyon Act under a like hypothesis, were reserved. 219 Fed. Rep. 333. Before the decrees entered became final the Circuit Court of Appeals for the Fourth Circuit in a case pending before it (*West Virginia vs. Adams Express Company,* 219 Fed. Rep. 794), decided directly to the contrary. It held that the law of West Virginia did prohibit shipments for personal use; that it did forbid solicitations therefore for such purchases; that by operation of the Webb-Kenyon Act there was no longer a

right to ship liquor into the state in violation of its laws; and that both the state law and the Webb-Kenyon Act were constitutional. Controlled by such decision, the trial Court recalled its opinion, heard a re-argument, and, although not changing its view, accepted and gave effect to the conclusions reached by the Circuit Court of Appeals because they were deemed to be authoritative, and the cases were brought directly here, because of the constitutional questions, to review such action.

The issues to be decided may be embraced in four propositions which we proceed separately to consider.

1. *The correct meaning of the West Virginia law as to the subjects in dispute.*

The difference as to the meaning of the statute in the court below was whether or not the West Virginia law prohibited the receipt of liquor for personal use; and if it did, whether or not the prohibitions of the law equally applied to shipments from outside and to those originating in the state. But the possibility of dispute over these subjects no longer exists because after the decision below and since the cases were first argued (for they have been here argued twice), the state of West Virginia amended the statute so as to leave no room for doubt that it does forbid all shipments, whether for personal use or otherwise, and whether from within or without the state. The pertinent provisions of the amendments are placed in the margin.*

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*"Sec. 7. It shall be unlawful for any person to keep or have, for personal use or otherwise, or to use, or permit another to have, keep, or use, intoxicating liquors at any restaurant, store, office building, club, place where soft drinks are sold (except a drug store may have and sell alcohol and wine as provided by sections four and twenty-four), fruit stand, news stand, room, or place where bowling alleys, billiard or pool tables are maintained, livery stable, boat house, public building, park, road, street or alley. It

As the relief sought is the permanent right to ship in the future, the meaning of the statute now, that is, as amended, is the test by which we must consider the questions requiring solution. Indeed, this is frankly admitted by the parties since it is unequivocally declared that the question is the operation and effect of the statute as amended and its constitutionality. We therefore come to the second question, which is:

2. *The power of the state to enact the prohibition law consistently with the due process clause of the Fourteenth Amendment and the exclusive power of Congress to regulate commerce among the several states.*

That government can, consistently with the due process clause, forbid the manufacture and sale of liquor and regulate its traffic, is not open to controversy; and that

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shall also be unlawful for any person to give or furnish to another intoxicating liquors except as otherwise hereinafter provided in this section. Any one violating this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less that one hundred dollars, nor more than five hundred dollars, and be imprisoned in the county jail not less than two or more than six months; provided, however, that nothing contained in this section shall prevent one, in his home, from having and there giving to another intoxicating liquors when such having or giving is in no way a shift, scheme or device to evade the provisions of this act; but the word 'home' as used herein, shall not be construed to be one's club, place of common resort, or room of a transcient guest in a hotel or boarding house. And, provided, further, that no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in sections four and twenty-four; and, pro-

there goes along with this power full police authority to make it effective, is also not open. Whether the general authority includes the right to forbid individual use, we need not consider, since clearly there would be power, as an incident to the right to forbid manufacture and sale, to restrict the means by which intoxicants for personal use could be obtained, even if such use was permitted. This being true, there can be doubt that the West Virginia prohibition law did not offend against the due process clause of the Fourteenth Amendment.

But that it was a direct burden upon interstate commerce and conflicted with the power of Congress to regulate commerce among the several states, and therefore could not be used to prevent interstate shipments from Maryland into West Virginia, has been not open to question since the decision in *Leisy vs. Hardin,* 135 U. S. 100. And this

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vided, further, however, that in case of search and seizure, the finding of any liquors shall be prima facie evidence that the same are being kept and stored for unlawful purposes."

"Sec. 34. It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage. Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months; provided, however, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in sections four and twenty-four."

brings us to consider whether the Webb-Kenyon Law has so regulated interstate commerce as to give the state the power to do what it did in enacting the prohibition law and cause its provisions to be applicable, to shipments of intoxicants in interstate commerce, thus saving that law from repugnancy to the Constitution of the United States, which is the third proposition for consideration.

3. *Assuming the constitutionality of the Webb-Kenyon Act, what is its true meaning and its operation upon the prohibitions contained in the West Virginia law?*

Omitting words irrelevant to the subject now under consideration, the title and text of the Webb-Kenyon Act are as follows:

> "An Act divesting intoxicating liquors of their interstate character in certain cases.
>
> " * * * That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, * * * into any other state, territory, or district of the United States, * * * which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States * * * is hereby prohibited."

As the state law forbade the shipment into or transportation of liquor in the state whether from inside or out, and all receipt and possession of liquor so transported without regard to the use to which the liquor was to be put, and as the Webb-Kenyon Act prohibited the transportation in interstate commerce of all liquor "intended to be received,

possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such state," there would seem to be no room for doubt that the prohibitions of the state law were made applicable by the Webb-Kenyon Law. If that law was valid, therefore, the state law was not repugnant to the commerce clause. It is insisted that this view gives too wide an effect to the Webb-Kenyon Law since that act was only intended to include state prohibitions in so far as they forbade the shipment, receipts and possession of liquor for a forbidden use, and hence as individual use was not forbidden by the state law, the shipment, receipt and possession for such use was not embraced by the Webb-Kenyon Act and the state law, so far as it was outside of that Act, was repugnant to the commerce clause. This is sought to be supported by the historical environments of the Webb-Kenyon Act as evidenced by the debates on its passage and by a decision of this court, as well as decisions of state courts (which are in the margin*) which, it is insisted, have so construted that act.

Assuming, for the sake of argument only, that the debates may be resorted to for the purpose of showing environment, we are of opinion they clearly establish a result directly contrary to that which they are cited to maintain. Undoubtedly they show that it was insisted the Act was not intended to interfere with personal use, as of course it was not, since its only purpose was to give effect to state prohibitions, not to compel the states to prohibit personal use. Indeed, the meaning which it is sought to affix to the Webb-Kenyon Act, if accepted, would cause that act to have

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*Van Winkle vs. State, 27 Delaware, 578; Adams Express Co. vs. Commonwealth, 154 Kentucky, 462; Adams Express Co. vs. Commonwealth, 160 Kentucky, 66; Palmer vs. Southern Express Co., 123 Tennessee, 116; Ex parte Peede, 170 S. W. (Texas Crim. App.) 749.

the effect of compelling the states to prohibit personal use, since if all the prohibitions of state laws against manufacture, sale, receipt and possession of intoxicants remained subject to the danger of indirect violation by permitting shipment, receipt and possession for personal use, it would follow that a necessary and immediate incentive was imposed upon the states by the Webb-Kenyon Act to enact a provision against personal use.

The antecedents of the Webb-Kenyon Act, that is, its legislative and judicial progenitors, leave no room for the contention made. To correct the great evil which was asserted to arise from the right to ship liquor into a state through the channels of interstate commerce and there receive and sell the same in the original package in violation of state prohibitions, was indisputably the purpose which led to the enactment of the Wilson Law (Act of Congress of August 8, 1890, 26 Stat. 313) forbidding the sale of liquor in a state in the original package even although brought in through interstate commerce when the existing or future state laws forbade sales of intoxicants. And this was recognized by the long line of decisions (a few of the leading cases are in the margin*) which upheld that law and pointed out that it permitted the state prohibitions to take away from interstate commerce shipments a right which they otherwise would have embraced, that is, the right to sell after receipt in the original package, any state law to the contrary notwithstanding. At the same time it was recognized, however, that as the right to receive liquor was not affected by the Wilson Act, such receipt and the possession following from it and the resulting right to use

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*In re Rahrer, 140 U. S. 545; Rhodes vs. Iowa, 170 U. S. 412; American Express Co. vs. Iowa, 196 U. S. 133; Pabst Brewing Co. vs. Crenshaw, 198 U. S. 17; Rosenberger vs. Pacific Express Co., 241 U. S. 48.

remained protected by the commerce clause even in a state where what is known as the dispensary system prevailed. *Vance vs. Vandercook,* 170 U. S. 438. Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of inter-state commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears since if that be not true the coming into being of the Act is wholly inexplicable.

The case in this court relied upon to establish the contrary (*Adams Express Company vs. Kentucky,* 238 U. S. 190) clearly does not do so. All that was decided in that case was that as the court of last resort of Kentucky into which liquor had been shipped had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited. The leading state case cited is *Van Winkle vs. State,* 27 Delaware, 578. It is true in that case the state law prohibited shipment to and receipt of intoxicants in local option territory, and if the Webb-Kenyon Law had been applied, there would have been no possible ground for claiming that the state prohibitions could be escaped because the liquor was shipped in interstate commerce. But the

shipment was held to be protected as interstate commerce despite the state prohibition because the Webb-Kenyon Law was not correctly applied, for the following reason: Coming to consider the text of that law, the Court said that as the Webb-Kenyon Act prohibited the shipment of intoxicants "only when liquor is intended to be used in violation of the law of the state," and as the liquor shipped was intended for personal use, which was not forbidden, therefore the shipment, although prohibited by the state law, was beyond the reach of the Webb-Kenyon Act. But we see no ground for following the ruling thus made since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that Act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.

The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that Act was within the power of Congress to adopt, there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution; and this brings us to the last question, which is:

4. *Did Congress have power to enact the Webb-Kenyon Law?*

We are not unmindful that opinions adverse to the power of Congress to enact the law were formed and expressed in other departments of the government. Opinion of the Attorney General, 30 Op. A. G. 88; Veto Message of the President, 49 Cong. Rec. 4291. We are additionally conscious, therefore, of the responsibility of determining these issues and of their serious character.

It is not in the slightest degree disputed that if Congress had prohibited the shipment of all intoxicants in the channels of interstate commerce and therefore had prevented all movement between the several states, such action would have been lawful because within the power to regulate which the Constitution conferred. *Lottery Case,* 188 U. S. 321; *Hoke vs. United States,* 227 U. S. 308. The issue, therefore, is not one of an absence of authority to accomplish in substance a more extended result than that brought about by the Webb-Kenyon Law, but of a want of power to reach the result accomplished because of the method resorted to for that purpose. This is certain since the sole claim is that the Act was not within the power given to Congress to regulate because it submitted liquors to the control of the states by subjecting interstate commerce in such liquors to present and future state prohibitions, and hence in the nature of things was wanting in uniformity. Let us test the contentions by reason and authority.

The power conferred is to regulate, and the very terms of the grant would seem to repel the contention that only prohibition of movement in interstate commerce was embraced. And the cogency of this is manifest since if the doctrine were applied to those manifold and important subjects of interstate commerce as to which Congress from the beginning has regulated, not prohibited, the existence of government under the Constitution would be no longer possible.

The argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply. In fact the contention previously made that the

prohibitions of the state law were not applicable to the extent that they were broader than the Webb-Kenyon Act is in direct conflict with the proposition as to delegation now made.

So far as uniformity is concerned, there is no question that the Act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the states,—so that the question really is a complaint as to the want of uniform existence of things to which the Act applies and not to an absence of uniformity in the Act itself. But aside from this it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it, that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States. In view of the conceded power on the part of Congress to prohibit the movement of intoxicants in interstate commerce, we cannot admit that because it did not exert its authority to the full limit, but simply regulated to the extent of permitting the prohibitions in one state to prevent the use of interstate commerce to ship liquor from another state, Congress exceeded its authority to regulate. We can see, therefore, no force in the argument relied upon tested from the point of view of reason, and we come to the question of authority.

It is settled, says the argument, that interstate commerce is divided into two great classes, one embracing subjects which do not exact uniformity and which, although subject to the regulation of Congress, are in the absence of such regulation subject to the control of the several states (*Cooley vs. Port Wardens of Philadelphia,* 12 How. 299), and the other embracing subjects which do require uniformity and which in the absence of regulation by Congress remain free from all state control (*Leisy vs. Hardin,* 135 U. S. 100). As to the first, it is said, Congress may, when regulating, to the extent it deems wise to do so permit state

legislation enacted or to be enacted to govern, because to do so would only be to do that which would exist if nothing had been done by Congress. As to the second class, the argument is. that in adopting regulations Congress is wholly without power to provide for the application of state power to any degree whatever, because in the absence of the exertion by Congress of power to regulate, the subject-matter would have been free from state control, and because, besides. the recognition of state power under such circumstances would be to bring about a want of uniformity. But granting the accuracy of the two classifications which the proposition states, the limitation upon the power of Congress to regulate which is deduced from the classifications finds no support in the authority relied upon to sustain it. Let us see if this is not the case by examining the authority relied upon. What is that authority? The ruling in *Leisy vs. Hardin, supra.* But that case, instead of supporting the contention, plainly refutes it for the following reason: Although *Leisy vs. Hardin* declared in express terms that the movement of intoxicants in interstate commerce belonged to that class which was free from all interference by state control in the absence of regulation by Congress, it was at the same time in the most explicit terms declared that the power of Congress to regulate interstate commerce in intoxicants embraced the right to subject such movement to state prohibitions and that the freedom of intoxicants to move in interstate commerce and the protection over it from state control arose only from the absence of congressional regulation and would endure only until Congress had otherwise provided. Thus in that case in pointing out that the movement of intoxicants in interstate commerce was under the control of Congress despite the wide scope of the police authority of the state over the subject, it was said (p. 108): "Yet a subject-matter which has been confided exclusively to Congress by the Constitution is not within the juridiction of the police

power of the state, unless placed there by congressional action." Again, referring to the uniform operation of interstate commerce regulations it was said (p. 109): "Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled." Further the Court said (p. 119): "The conclusion follows that, as the grant of the power to regulate commerce among the states, so far as one system is required, is exclusive, the states cannot exercise that power without the assent of Congress, * * *." Again after pointing out that the question of the prohibition of manufacture and sale of particular articles was a matter of state concern, it was said (p. 123): "But notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action." And finally, after pointing out that the states had no power to interfere with the movement of goods in interstate commerce before they had been commingled with the property of the state, it was said that this limitation obtained "in the absence of congressional permission" to the state (p. 124).

Thus it follows that although we accept the classification of interstate commerce in intoxicants made in *Leisy vs. Hardin,* we could not accept the contention which is now based upon that classification without in effect overruling that case, or what is equivalent thereto, refusing to give effect to the doctrine of that case announced in terms

so certain that there is no room for controversy or contention concerning them. But we would be required to go further than this, since it would result that we would have to shut our eyes to the construction put upon the ruling in *Leisy vs. Hardin* by Congress in legislating when it adopted the Wilson Act and also to practically overrule the line of decisions which we have already referred to sustaining and enforcing that Act. Let us see if this is not certain. As we have already pointed out, the very regulation made by Congress in enacting the Wilson Law to minimize the evil resulting from violating prohibitions of state law by sending liquor through interstate commerce into a state and selling it in violation of such law was to divest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from state authority which otherwise would have obtained. And that Congress had the right to enact this legislation making existing and future state prohibitions applicable, was the express result of the decided cases to which we have referred, beginning with *In re Rahrer, supra.* As the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon Law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity, a result which, as we have previously said, would reverse *Leisy vs. Hardin* and overthrow the many adjudications of this court sustaining the Wilson Act.

These considerations dispose of the contention, but we do not stop with stating them but recur again to the reason of things for the purpose of pointing out the fundamental error upon which the contention rests. It is this: the mistaken assumption that the accidental considerations which cause a subject on the one hand to come under state

control in the absence of congressional regulation, and other subjects on the contrary to be free from state control until Congress has acted, are the essential criteria by which to test the question of the power of Congress to regulate and the mode in which the exertion of that power may be manifested. The two things are widely different, since the right to regulate and its scope and the mode of exertion must depend upon the power possessed by Congress over the subject regulated. Following the unerring path pointed out by that great principle we can see no reason for saying that although Congress in view of the nature and character of intoxicants had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power. Or, in other words, stating the necessary result of the argument from a concrete consideration of the particular subject here involved, that because Congress in adopting a regulation had considered the nature and character of our dual system of government, state and nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce co-operation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution. And it is well again to point out that this abnormal result to which the argument leads concerns a subject as to which both state and nation in their respective spheres of authority possessed the supremest authority before the action of

Congress which is complained of, and hence the argument virtually comes to the assertion that in some undisclosed way by the exertion of congressional authority, power possessed has evaporated.

It is only necessary to point out that the considerations which we have stated dispose of all contentions that the Webb-Kenyon Act is repugnant to the due process clause of the Fifth Amendment, since what we have said concerning that clause in the Fourteenth Amendment as applied to state power is decisive.

Before concluding we come to consider what we deem to be arguments of inconvenience which are relied upon, that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which after all dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guarantees such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not,

consistently with the guarantees of the Constitution, embrace.

Affirmed.

Mr. Justice McReynolds concurs in the result.

Mr. Justice Holmes and Mr. Justice Van Devanter dissent.

A true copy.

Test:

Clerk Supreme Court, U. S.