

Liquor Wars and the Law

Decisions of the Kansas Supreme Court, 1861 to 1920

by *Kenneth J. Peak and Jason W. Peak*

Questions of policy are not questions for the courts.

— *Kansas Supreme Court*
Associate Justice David J. Brewer, 1881

Four things belong to a Judge:

To hear courteously,
To answer wisely,
To consider soberly, and
To decide impartially.

— *Socrates*

Although for many years prohibition succeeded in much of the state, common notions of Kansas as a “dry” state are contradicted by the facts. Abstemiousness and regard for the liquor laws were not shared by all of its inhabitants, many of whom were immigrants who contributed to the sopping wetness of the state. It has been said that early Kansas would be dry as long as voters could stumble to the polls. Indeed, during most of its early statehood, from 1861 to 1920, much of the state wallowed in widespread lawlessness and vice, and open saloons generally ran with public approbation. No issue divided Kansas longer and more fiercely than its attempts at pro-

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The authors extend their gratitude to Michael J. Brodhead, emeritus history professor, University of Nevada, Reno, who reviewed earlier drafts of this article, and the anonymous reviewers who imparted many thoughtful and insightful comments. Their efforts greatly assisted the final product.

Kansas History: A Journal of the Central Plains 28 (Summer 2006): 2 .





Customers, including a police officer (far right) at the Horseshoe Saloon in Junction City, 1906, pay little heed to liquor laws of the day.

hibition, and its history is reflective of the complex state personality.¹

Conversely, we cannot speak of one's dry persuasion and temperate lifestyle without also speaking of his religion, and certainly the religious life was strongly embedded in Kansas. In nineteenth-century Kansas, temperance came to be defined as "moderation in all things beneficial

1. Patrick O'Brien and Kenneth J. Peak, *Kansas Bootleggers* (Manhattan, Kans.: Sunflower University Press, 1991), 1, 3.

and abstinence from all things harmful." Alcohol, of course, was included in the latter camp. The strongest support for the temperance cause came from those persons in the evangelical tradition: Methodists, Baptists, Congregationalists, Presbyterians, Disciples of Christ, Scandinavian Lutherans, and Quakers.² For them, the purpose of one's time on earth was to gain eternal salvation.

2. Robert Smith Bader, *Prohibition in Kansas: A History* (Lawrence: University Press of Kansas, 1986), 9, 11.

In the early years following statehood some Kansas counties were legally if not actually dry, while many were legally wet, and, in fact, nearly drenched. In the early to mid-1870s Kansas had sixteen hundred federal permits to sell retail liquor, forty-six breweries, and two distilleries. Saloons became a recognizable part of urban and neighborhood life. In its most basic form, a saloon might consist of a plank resting atop two barrels in a tent. The local “watering hole” served as meeting hall and a place to receive mail or read a newspaper.³

Yet saloons, with their tobacco-stained floors and walls with paintings of female nudes that implied illicit sexuality, came to exhibit for many citizens the several shortcomings of humankind, representing “all things harmful.” Often the drunkard’s reputation as a wife beater, child abuser, and sodden, irresponsible nonprovider was not undeserved. It was primarily because of this latter problem—the suffering and violence that was directly attributable to alcoholic consumption—the temperance movement came into being.⁴

Although the temperance movement predated statehood, Kansas would stand at the forefront of this movement and have uninterrupted prohibition longer than any other state. However, this statement belies the truth: while Kansas historically enjoyed a reputation for being the Union’s driest state, that reputation was ill deserved.

The focus of this article is the role of the Kansas Supreme Court in the state’s lengthy wet versus dry conflict. This analysis begins with statehood in 1861 and ends with the advent of national Prohibition in 1920, with passage of the Eighteenth Amendment to the U.S. Constitution. Of particular emphasis is the Kansas Supreme Court’s role in shaping the state’s liquor laws and in their enforcement, from the fundamental task of defining what constituted intoxicating liquors to addressing far more complex legal issues. These were daunting tasks, as many wets sought to use a variety of loopholes and other means of evading prosecution under the law.

A territorial supreme court was created in Kansas by an act of Congress on May 30, 1854, as part of the first organized government in the territory. This court was composed of a chief justice and two justices, and its first session was held at the Shawnee Manual Labor School on July 30, 1855. When Kansas became a state on January 29, 1861, the

3. *Ibid.*, 22; Thomas R. Pegram, *Battling Demon Rum: The Struggle for a Dry America, 1800–1933* (Chicago: Ivan R. Dee, 1998), 103.

4. Nancy G. Garner, “‘A Prayerful Public Protest’: The Significance of Gender in the Kansas Woman’s Crusade of 1874,” *Kansas History: A Journal of the Central Plains* 20 (Winter 1997–1998): 214–29.

state’s constitution created a supreme court, consisting of one chief justice and two associate justices elected from the state at large for six-year terms. The three-justice supreme court was expanded by a constitutional amendment in 1900 to the current level of seven justices. This was due to the court’s ever increasing caseload, including questions relating to alcohol.⁵

Kansas entered the Union without a liquor law in place and during a period when the state’s population was burgeoning. Indeed, Kansas’s population increased threefold from 1860 to 1870, and tripled again during the 1870s. Temperance advocates were not pleased that the liquor problem was left unsolved by the new state constitution, especially with the influx of saloonkeepers, gamblers, and prostitutes.⁶

Although a state temperance society was organized in Kansas in April 1861, this group was quite ineffectual in its early years, and nearly a decade would pass before the temperance movement had any real cohesion. Many Kansans became adamantly opposed to liquor and its effects, and immediately galvanized their efforts to bring about a tougher dram shop law, being inspired by church revivals throughout the country and the advent of the Murphy movement.⁷ This crusade was led by Francis Murphy of Portland, Maine, a reformed drunkard who emphasized the power of Jesus Christ to change lives. Murphy was born in Wexford, Ireland, and migrated to the United States in 1852, at age sixteen. He was a brilliant temperance orator—as witnessed by a large crowd in August 1879 at a national temperance camp meeting at Bismarck Grove, near Lawrence, Kansas. Soon dries across Kansas and the nation were wearing the blue ribbon of Murphyism—the color taken from a biblical reference that bids the children of Israel to put a ribbon of blue in the borders of their garments to help them remember God’s message. By the time of Murphy’s death in Los Angeles in June 1907 at age seventy-one, it was estimated that he had spoken at twenty-five thousand temperance meetings.⁸

5. Constitution of the State of Kansas, Article 3, Section 2; Kansas Judicial Branch, “History of the Kansas Appellate Courts,” www.kscourts.org (accessed November 14, 2005).

6. Carol D. Clark and Roy L. Roberts, *People of Kansas: A Demographic and Sociological Study* (Topeka: Kansas State Planning Board, 1936), 31; Milton Tabor, “Kansas Reaches Fifty Year Mark in Prohibition,” *Topeka Daily Capital*, April 26, 1931.

7. Bader, *Prohibition in Kansas*, 25. The term “dram shop” refers to venues where alcohol is dispensed. A dram, in apothecaries’ weight, is equal to about one-eighth of an ounce. The term generally refers to a small drink of alcoholic liquor.

8. D. W. Wilder, *The Annals of Kansas, 1541–1885* (Topeka: Kansas Publishing Co., 1886), 785; BBC, *Beyond the Broadcast—Making History*, “Making History: The Blue Ribbon Army,” www.bbc.co.uk/education

Church revivals and temperance rallies, such as this 1878 camp meeting in Bismarck Grove near Lawrence (right), inspired many



Kansans to become adamantly opposed to liquor. Additionally, the Murphy movement, a crusade against alcohol led by Francis Murphy

(above), spread rapidly across the country and spurred thousands to take up God's message and avoid the evils of alcohol.



Several lesser temperance organizations appeared in Kansas in the 1870s as well, such as the Kansas State Union, later to become the Kansas State Temperance Union headquartered in Topeka. The Woman's Christian Temperance Union (WCTU) also came to Lawrence in 1879, with Frances Willard as national president (its motto: "For God, Home and Native Land"); the WCTU would later occupy a major role in Kansas's temperance affairs.⁹

It was within this atmosphere of temperance fervor that the Kansas Supreme Court made its first incursion into the state's liquor affairs in January 1875. In *Haug v. Gillett*, defendant H. W. Gillett was a wholesale liquor dealer in Leavenworth, where he was licensed by the city to sell liquor in any quantity except by the dram. William Haug, a Topekan, placed orders for liquors in Leavenworth with Gillett, who then shipped the liquor by rail to Haug. Gillett was arrested under Section 3

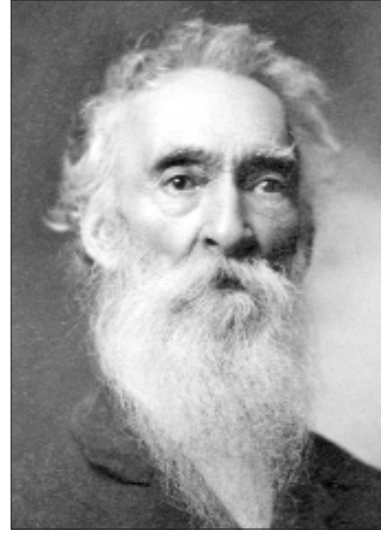
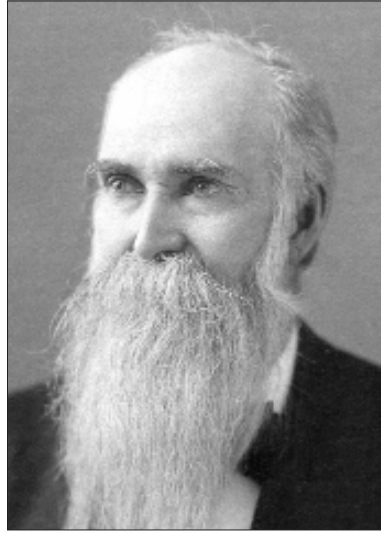
of the dram shop act, which forbade the sale of liquors by "any person without taking out and having a license as grocer, dram shopkeeper, or tavern keeper." (Gillett had no such license in Topeka.) The court held in favor of Gillett. A licensed liquor dealer could take orders in any part of the state, and was not required to obtain a license from the authorities of each city or county in which sales were made. The court reasoned that, while the state legislature "may suppress the liquor traffic altogether, or impose such restrictions as it deems wise," its enactments were to be construed "in the light of the general usages of society and business." Here, although the contract was made in Topeka, no title passed before the goods were selected and shipped in Leavenworth; therefore, it was in Leavenworth that the sale was completed, and there Gillett had a license.¹⁰

Associate Justice David J. Brewer, who would become a major figure in both the Kansas and U.S. court systems, authored the *Haug* opinion. Becoming an associate justice of the Kansas Supreme Court in January 1871, Brewer had already served in Leavenworth County as a prosecutor as well as judge of county criminal, probate, and district courts. In 1884 Brewer was appointed by President Chester Arthur to the U.S. Circuit Court for the Eighth Circuit, and by President Benjamin Harrison to the U.S. Supreme Court in December 1889, where he served until 1910. No justice

/beyond/factsheets/makhist/printable/makhist7_print6d.html (accessed January 15, 2006); Eva M. Murphy, "Woman's Christian Temperance Union," *Kansas Historical Collections, 1907-1908* 10 (1908): 40-41; *Girard Press*, July 4, 1907. According to Bader, *Prohibition in Kansas*, 34, the Murphy movement had actually begun sweeping across Kansas more than a year prior to Murphy's appearance at Bismarck Grove; by the summer of 1878, an estimated two hundred thousand Kansans—one-fourth of the state's population—were wearing the "bonny badge of blue."

9. Bader, *Prohibition in Kansas*, 129; L. B. Smith, "The Woman's Christian Temperance Union," in *Prohibition in Kansas, 1895-1901*, comp. T. E. Stephens (Topeka: Kansas Farmer Co., 1902), 87; Noble Prentis, *A History of Kansas* (Topeka: Caroline Prentis, 1909), 99.

10. *Haug v. Gillett*, 14 Kan 140, 142, 143 (1875).



(Far left) David J. Brewer became an associate justice of the Kansas Supreme Court in 1871. (Center) Daniel M. Valentine was elevated to the state supreme court in 1868. (Left) Samuel A. Kingman was elected chief justice of the Kansas Supreme Court in 1866 and served until his retirement in 1876.

had ever come to the high bench with a richer judicial background.¹¹

Brewer's opinion was joined by his two colleagues, Chief Justice Samuel A. Kingman and Associate Justice Daniel M. Valentine. Kingman was born in Massachusetts in June 1818. After being admitted to the Kentucky bar, he was county clerk and district attorney, served in the state legislature, and in 1858 he moved with his family to Kansas. Soon after opening a private law practice in Hiawatha, he was appointed by the legislature to adjust the territorial claims; he was elected chief justice of the Kansas Supreme Court in 1866 and served in that capacity until his retirement in 1876.¹²

Valentine was a commanding jurist in his own right; Brewer once described him as "one of the most painstaking

11. A diligent worker, Brewer wrote almost six hundred opinions during his twenty-one years on the federal bench, only one-tenth of these in dissent. His judicial philosophy was described as "moderate conservative." He often voted with the court's majority in striking down progressive laws restricting property rights, and his cases illustrated his strong commitment to protection of individual liberties as well as international peace. He was an outspoken opponent of imperialism and a leading supporter of missionary activity. See Kansas State Historical Society, "A Kansas Portrait," www.kshs.org/portraits/brewer_david.htm (accessed November 14, 2005); Michael J. Brodhead, *David J. Brewer: The Life of a Supreme Court Justice, 1837-1910* (Carbondale: Southern Illinois University Press, 1994), 23. For a general history of the U.S. court system, see David Neubauer, *America's Courts and the Criminal Justice System*, 8th ed. (Belmont, Calif.: Wadsworth, 2005), 57-58.

12. Kingman was appointed state librarian, and was also president of the State Judicial Association and the State Bar Association. He also was the first president of the Kansas State Historical Society, beginning in December 1875. He died at Topeka in September 1904; Kingman County was named in his honor. See Frank Wilson Blackmar, *Kansas: A Cyclopedia of State History* (Chicago: Standard Publishing Co., 1912), 2: 74-75; Samuel A. Kingman, "Reminiscences," *Kansas Historical Collections, 1901-1902* 7 (1902): 153-55, n. 153.

and thoughtful judges I know." Valentine, who came from Iowa, where he was county attorney for a brief time, was elected in 1861 a representative of the legislature from Franklin County, Kansas, and in 1862 as a state senator. In 1864 he was elected judge of the district court of the fourth judicial district, and in the general election held in 1868 he was elected to the Kansas Supreme Court, remaining on the supreme court bench for twenty-four years.¹³

These three jurists worked well together and certainly were prolific; by 1877 Brewer and Valentine each had written more than four hundred court decisions, two-thirds of the total number since statehood. With Kingman's resignation in 1876, Albert H. Horton, described as having "a clear, forceful, and logical mind and untiring industry," was appointed to serve as chief justice by Governor Thomas Osborn (who, according to at least one account, was himself a notorious drinker); Horton would serve on the state's highest court for eighteen years.¹⁴

13. Valentine retired in January 1893 to become senior member in the Topeka law firm of Valentine, Goddard and Valentine. See *United States Biographical Dictionary: Kansas Volume* (Chicago: S. Lewis and Co., 1879), 23. See also J. A. Smith and Arthur Fuller, *A Twentieth Century History and Biographical Record of Crawford County, Kansas, by Home Authors* (Chicago: Lewis Publishing Co., 1905), 175-88, <http://skyways.lib.ks.us/genweb/archives/crawford/history/1905/175.html> (accessed November 14, 2005).

14. Wilder, *The Annals of Kansas*, 711; Bader, *Prohibition in Kansas*, 29; William E. Connelly, *A Standard History of Kansas and Kansans* (Chicago: Lewis Publishing Co., 1918), 3: 1252; Edwin A. Austin, "The Supreme Court of the State of Kansas," *Kansas Historical Collections, 1913-1914* 13 (1914): 99. Horton had served for a brief time as city attorney in Atchison prior to being appointed district court judge for Atchison County. In 1869 President Ulysses S. Grant appointed him U.S. attorney for Kansas. He also served in the state legislature's lower house and as state senator.

This new triad of jurists—Horton, Brewer, and Valentine—also would author a number of significant decisions in Kansas’s fledgling years under the state’s new prohibitory law. Although the court was obligated to uphold the prohibitory amendment, the jurists were also—perhaps not unwittingly—engaged in social reform, policy-making, and activism, while greatly assisting the state’s temperance cause.

Two additional liquor-related cases were decided in the year following *Haug*. The first, *Salina v. Seitz*, was authored by Justice Valentine and involved druggists; it clarified and constricted the Kansas liquor law. In May 1874 Seitz, a Salina drugstore clerk who did not possess a license, sold a gallon of intoxicating liquor to a customer. The city convicted Seitz for selling liquor in violation of its ordinance. In a pioneering decision that afforded fundamental judicial process for the liquor cases to follow, the supreme court unanimously upheld the city’s liquor ordinance, held that the county district court did have jurisdiction to try the case, and determined that the defendant would have been culpable even if the liquor had been sold for medicinal purposes.¹⁵ The second case, also in 1876, *Moonlight v. Bond*, involved a candidate for sheriff in Leavenworth County, William Bond, who gave three men funds with which to purchase and distribute drinks and cigars to voters on election day so as to enhance his prospects. The court found in favor of Bond and held that it was not shown that any elector was paid or promised anything for doing anything wrong.¹⁶

The state legislature enacted a significant new drug store law in 1879 that eventually would propel the state’s supreme court into a new line of cases. County commissioners were authorized to grant licenses for the sale of intoxicating liquors for medicinal purposes. A petition had to first be presented to the commissioners and signed by a majority of the male residents of the township who were twenty-one years of age and over. Applicants were required to post a two-thousand-dollar bond and not sell any intoxicating liquors for other than medicinal purposes, and then only with a physician’s prescription. Drug store proprietors were required to keep a record of all liquor sales, including the number of the prescription, the name of the prescribing physician, the date of the sale, and the kind and quantity of

the liquor sold. Persons obtaining intoxicating liquors under false pretense could be fined from ten to one hundred dollars and sent to jail for up to thirty days.¹⁷

Litigation rapidly sprang from the drug store law during the January 1880 term of the court. The facts of the case are that Nathaniel Welsford, a resident of Peabody, a third-class city, wished to open a drug store (also known, interestingly, as a retail dram shop) there; he paid all required sureties and license costs, and obtained the required signatures of the city clerk and treasurer. However, Welsford met with refusal when he sought the signature of the Peabody mayor, Philip Weidlein, thus voiding the entire application. The supreme court commanded Weidlein to sign the application or show cause why he should not do so; the mayor told the court that the city council could not grant the license under the law because less than a majority of the city’s residents twenty-one years of age and older had signed the petition, that only 251 names were attached to it, and that 280 resident adults of the city had not signed the petition. Given these facts, judgment was entered for Mayor Weidlein.¹⁸

The development of a fervent temperance cause and statutory prohibition in Kansas were not overnight occurrences or sudden uprisings of the populace against the liquor traffickers. Rather, they were the result of sentient, measured feelings of a majority of the people, beginning after the Civil War and continuing to 1880. Temperance adherents—many of whom were Murphyites and who proudly wore the symbolic blue ribbon—suddenly dotted the Kansas landscape.

The Kansas senate passed a prohibition resolution by a vote of 37 to 0 on February 21, 1879. It was sent to the house, where it passed 88 to 31 on March 5, 1879. Senate Joint Resolution Number 3, which read in part, “The manufacture and sale of intoxicating liquors shall be forever prohibited in the State, except for medical, scientific, and mechanical purposes,” would be presented to the people of Kansas for acceptance or rejection. No state had ever written prohibition into its constitution (although the Maine Law of 1851 had banned the sale of liquor throughout the state); indeed, no state had ever voted on such a proposition.¹⁹

November 11, 1880, was the fateful election date, and the dries prevailed: the final vote was 92,302 in favor of the

15. 16 Kan 143 (1876).
16. *Ibid.* 351.

17. *Kansas Compiled Laws* (1879), 386–88.

18. *Welsford v. Weidlein*, 23 Kan 602 (1880).

19. Grant W. Harrington, “The Genesis of Prohibition,” *Kansas Historical Collections, 1919–1922* 15 (1922): 228–30; Wilder, *The Annals of Kansas*, 845.

amendment, and 84,304 against.²⁰ In the final analysis, counties tended to vote dry if they had a strong presence of evangelical churches, Old World ethnicity, and Republican politics; were composed of small to moderate-sized towns; and were geographically removed from the Missouri border (Missouri's much more lenient liquor laws, a constant source of the liquor flow into Kansas, was a longtime thorn in the side of the Sunflower State). This twenty-one-word amendment to the Kansas State Constitution would remain intact for sixty-eight years, until its repeal in 1948.²¹

After Kansas enacted its prohibitory amendment, wet forces immediately challenged its validity, in four separate appeals to the Kansas Supreme Court (known collectively as the *Prohibitory Amendment Cases*). Justice Brewer was given the task of writing the unanimous decision. Brewer acknowledged that to many people the amendment was "the crowning effort of a brave and earnest people to free itself from the curse of intoxication;" and to others, it represented "a radical change of policy, trespassing upon personal liberty and rights of property."²² The only two questions before the court, however, were whether the amendment had been properly submitted to the people, and whether proper provision was made for receiving, counting, and canvassing the votes. The court answered both questions in the affirmative, with Justice Brewer showing some frustration while engaging in some editorializing and scolding in rendering the court's decision:

The two important, vital elements in any constitutional amendment are the assent of two-thirds of the legislature, and a majority of the popular vote. In constitutional changes the popular voice is the *paramount* act. We may not ignore public history. Nearly two years elapsed between the time the proposition passed the legislature and the day of the popular vote. Pulpit, press, and platform were full of it. It was assumed on all sides that the question was before the people for decision. There was not even a suggestion of any such defect in the form of submission as would defeat the popular decision. If this objection had been raised prior to the election, the legislature could have been easily convened, and the defect remedied. After the contest was ended and the election over, the claim is for the first time made that . . . this was simply a stu-

pendous farce, meaning nothing, accomplishing nothing. This court has again and again recognized . . . that in elections the will of the majority controls, and mere irregularities or informalities in the conduct of an election are impotent to thwart the expressed will of such majority.²³

Soon another difficult challenge surfaced. Although Kansas would become legally dry on May 1, 1881, another law was needed to ensure its enforcement.²⁴ Governor John P. St. John signed what served as the prohibitory law's enforcement act on February 19, 1881. The agency responsible for liquor sales would be the drug stores, with permits issued by the probate judges of the counties at their discretion; applicants had to submit a petition signed by twelve male citizens certifying that they were of good moral character, and post a twenty-five-hundred-dollar bond. Druggists could sell liquor for medical purposes only, upon presentation of a physician's written prescription; the druggists were required to keep an accurate and complete record of all sales showing the purchasers' names and addresses, and to sell liquor only to persons presenting a sworn affidavit stating that the liquor purchased would not be used as a beverage. But despite these apparent safeguards, selling liquor "for medicinal purposes" quickly became the largest loophole in the law, with physicians prescribing intoxicating liquor for a wide range of illnesses.²⁵

All other places where liquor either was manufactured or sold in violation of the law would be deemed public nuisances, and offenses were punishable by a fine of one to five hundred dollars and thirty to eighty days in jail, and costs of one hundred dollars for each injunction granted against a defendant's property.²⁶ The primary responsibility for the law's enforcement fell to the county attorneys.

This enforcement law wrought much confusion, however, and the supreme court was quickly called upon to set-

23. *Ibid.*, 706, 710–12, 720.

24. Ruth Bordin, *Woman and Temperance: The Quest for Power and Liberty, 1873–1900* (Philadelphia: Temple University Press, 1981), 192.

25. *Kansas Compiled Laws* (1881), 386–88. The original law of 1881, which enacted the amendment, is called the Benson Law, or Act, after its principal author. The generous prescription of intoxicating liquors for medical reasons led newspapers such as the *Boston Transcript* around the country to chide, "Kansas physicians help the drouthy ones to get around the prohibitory law by prescribing liquor for all the ills that flesh is heir to. For a boil on the arm, one patient was ordered to take, in eleven days, ten pints of 'spiritus fermenti' and thirty bottles of beer . . . boils are very fashionable in Kansas." Quotation in *Girard Press*, February 2, 1882.

26. See *Kansas Laws* (1881), ch. 128, amended by *ibid.*, (1885), ch. 149; amended by *ibid.* (1887), ch. 165.

20. Wilder, *The Annals of Kansas*, 931–32.

21. Bader, *Prohibition in Kansas*, 60; Kevin Wendell Swain, "Liquor by the Book in Kansas: The Ghost of Temperance Past," *Washburn Law Journal* 322 (Spring 1996): 332. The amendment was repealed by a vote of 422,294 in favor, and 358,310 against repeal.

22. 24 Kan 700, 704, 706 (1881)

The court's greatest difficulty was in defining the term "intoxicating liquors." Some liquids containing alcohol might be used primarily for medicinal, scientific, toilet, or culinary purposes, while others, such as patent medicines, bitters, and tonics might be within the scope of the prohibitory law. About this perplexing situation, Justice Brewer wrote that to outlaw all substances containing alcohol would be unconstitutional.

the matters. In 1881 Brewer wrote the court's overall opinion, this time for eight cases in what were collectively termed the *Intoxicating Liquor Cases*.²⁷ First, Brewer upheld the constitutionality of empowering probate courts to issue liquor licenses to druggists (an appellant had argued that the jurisdiction of the probate court was set by the constitution and could not be expanded by the legislature, and thus the probate court had no power to issue liquor permits; therefore, it was argued, if the permit was worthless, then the statute allowing for such permits was also worthless, and anyone could sell liquor without limitation):

While the jurisdiction of the probate court is defined by the constitution . . . the legislature may cast upon the persons holding the office of probate judge other duties than those of the court over which he presides. Clearly the act gives the power to the probate judge rather than the probate court.

Second, the court found in favor of the legislature's restricting the sale of liquor to one class, the druggists:

[The legislature] may commit the sale of liquor to any particular class of persons which by reason of its special training and habits it may deem peculiarly fit for such duty. The law does not attempt to prescribe who may and who may not become druggists. It simply says that only druggists shall sell liquor. No law of this kind interferes with individual liberty in its true sense.²⁸

The court's greatest difficulty, however, was in defining the term "intoxicating liquors," since the law was vague and broad on that point. Brewer did not believe that the legislature intended such a sweeping prohibition, nor that it could prohibit the sale or use of any article containing alcohol. Essence of lemon, for example, might contain enough alcohol to produce intoxication, but it is no intoxi-



ating liquor. Bay rum, cologne, paregoric, tinctures generally, all contained alcohol, but were primarily for medicinal, scientific, toilet, or culinary purposes and were not intoxicants, while some "patent medicines, bitters, cordials, and tonics of the day" might be within the scope of the prohibitory law, as would whiskey, beer, gin, brandy, and other obviously intoxicating beverages and compounds of alcohol. Attempting to help further clarify this perplexing area of the prohibitory statute, Brewer added:

The courts will take judicial notice of the uses and character of these articles. You need not prove what bread is, or for what purpose it is used. No more need you in respect to whisky or gin on the one hand, or cologne on the other. If the compound or preparation be such that the distinctive character and effect of intoxicating liquor are gone, that its use as an intoxicating beverage is practically impossible by reason of the other ingredients, it is not within the statute. The mere presence of alcohol does not necessarily bring the article within the statute. On the other hand, if the intoxicating liquor remains as a distinctive force in the compound [which is] liable to be used as an intoxicating beverage, it is within the statute. Whether any particular compound . . . is then within or without the statute is a question of fact, to be established by the testimony and determined by a jury. The courts may not say as a matter of law that the presence of a certain percent of alcohol brings the compound within the prohibition. Of course, the larger the percent of al-

27. 25 Kan 751 (1881).

28. *Ibid.* 758-61.

cohol and the more potent the other ingredients, the more probably does it fall within or without the statute.²⁹

Additionally, and noting that he was only speaking for himself, Brewer wrote that to outlaw all substances containing alcohol would be unconstitutional. He felt that it was *not* within the legislature's power to proscribe articles that were not inherently dangerous to the public, and that such articles could only be abridged or changed "by the majority speaking through the legislature only when the public safety, the public health, or the public protection requires it." Clearly, Brewer was concerned about infringements of individual liberty through questionable exercises of police power. And, as was later opined by Brewer biographer Michael J. Brodhead, "The statement might be interpreted as the grumbling of a judge who enjoyed a glass of beer now and then."³⁰

Enforcement of the prohibitory law was made more difficult because sales of intoxicants made pharmacy operation a lucrative business; for most druggists the sale of liquor meant several hundred dollars a year in additional income. Concurrently, as mentioned above, many Kansans invented diseases for which liquor was an elixir. Liquor was claimed to "cure" a wide variety of ailments (for example, indigestion, malaria, debility, and diarrhea accounted for about 60 percent of the total number of diseases claimed in two Shawnee County drugstores in 1892 and 1893).³¹

Some would-be saloonists attempted to skirt the amendment by establishing "club rooms." While acknowledging that social clubs were different from saloons—the former were "places maintained for a company of persons who claim a right to resort thereto by reason of connection of membership"³²—the legislature felt that it could not allow these club owners to have unfettered ability to sell liquor. The 1881 statute read in part:

Every person who shall keep or maintain any club room in which any intoxicating liquor is received or kept for the purpose of use, gift, barter or sale as a beverage . . . shall be deemed guilty of a misdemeanor, fined not less than \$100 nor more than \$500,

and sentenced from 30 days to 6 months in the county jail.³³

The year 1883 was an active and significant one for supreme court liquor decisions. Among the cases included on its docket and for which decisions were rendered were *State v. Hunt* and *State v. Mugler*. In the former, the court held that where a druggist had a permit to sell intoxicating liquors, all of his clerks and agents could sell the same for him in his drug store without violating the law; such sales, however, had to be made in the drug store where the business was carried on.³⁴ In *Mugler*, defendant Peter Mugler had erected a brewery in 1877; then, in 1881 (after the prohibitory law's inception) he was convicted of possessing illegally manufactured liquor and maintaining a nuisance. The beer, however, had been manufactured *prior to* the effective date of the prohibitory law. Mugler argued that he had been deprived of his previously lawfully possessed property without due process, in violation of the Fourteenth Amendment, and that the legislature's passage of the prohibitory amendment was thus unconstitutional.³⁵ The supreme court upheld Mugler's conviction and the law's constitutionality. In a separate, concurring opinion, however, Justice Brewer agreed with the defendant's conviction for selling beer but expressed his doubts about the legislature's "power to prescribe what a citizen shall eat or drink." Brewer's most serious objection to the prohibitory law was that it had, by denying beer manufacturers the use they had intended for their property, taken away said property without due process of law—which, in his mind, was indeed a violation of the Fourteenth Amendment. Brewer felt that since Mugler had purchased beer manufacturing equipment for ten thousand dollars prior to the constitutional amendment, and with the equipment then becoming unsuitable for any other purpose after the law's passage, Mugler should receive due compensation.

The case eventually went to the U.S. Supreme Court. On December 5, 1887, Mugler's conviction and the Kansas prohibitory amendment were upheld. Justice John Harlan wrote in the Court's opinion that "If . . . a state deemed absolute prohibition to be necessary for the peace and security of society, the court could not override the will of the people. The state of Kansas had a right to prohibit the liquor

29. *Ibid.*, 765–68; see also Brodhead, *David J. Brewer*, 36–37.

30. 25 Kan 751, 765 (1881); Brodhead, *David J. Brewer*, 38.

31. Bader, *Prohibition in Kansas*, 84, 85.

32. *State v. Nield*, 4 Kan. App. 627 (1881)

33. *Kansas Laws* (1881), ch. 128; see also *Kansas General Statutes* (1901), 521–22.

34. *State v. Hunt*, 29 Kan 762 (1883).

35. *State v. Peter Mugler*, 29 Kan 252 (1883).

Attempts to skirt the prohibition law included the forming of clubs. Here, in the 1880s, members of the Germania Society in Salina seemingly ignore prohibition laws and prepare to drink a toast.



traffic.”³⁶ With both the United States and Kansas Supreme Courts upholding Mugler’s conviction, their ruling that the prohibitory law was constitutional, and that the saloonists who had erected their breweries prior to the law’s taking effect in 1881 had violated the law, all such joints across Kansas were legally (if not in reality) out of business.

Two other liquor cases of note were decided by the Kansas Supreme Court in 1883. Mary Borgman, finding her husband habitually drunk at Charles Jockers’s saloon in Hanover, notified Jockers that she did not want him to sell any more liquor to her husband because it rendered him incapable of transacting ordinary business and supporting his family (which included herself and seven children). Jockers failed to yield to her wishes, so Mrs. Borgman sued Jockers and was awarded a judgment of fourteen hundred dollars; he appealed. The supreme court upheld the judgment, saying that Borgman was morally and legally bound to supply his family with the necessities of life, that his constant intoxication prevented his doing so, and that Jockers’s disregard of the law and rights of the wife warranted damages.³⁷

In the other 1883 case a club was formed in Solomon that owned the liquor kept within, which was sold only to club members. Benjamin Nickerson, a club member, arranged for liquor to be sold to a person who was not a member. The court, with Brewer again authoring the opinion, unanimously held that a jury was justified in finding a club member guilty for effecting a sale to one who was not a member.³⁸ The earlier club room statute of 1881 applied only to those individuals who kept or maintained such a

premises, so this decision expanded the law’s control over club room members.

Then, in late 1883 and early 1884 the Kansas Supreme Court rendered two decisions concerning a municipality’s efforts to circumvent the prohibitory law. These decisions in subsequent years would become highly significant (particularly from 1907 to 1910, when many city councils quietly accepted “fines” from saloonists in return for allowing them to operate). In 1883 the court heard from Shawnee County Attorney A. H. Vance that for two years the City of Topeka had licensed and imposed taxes upon businesses selling intoxicating liquors. The court held that the city was exercising a corporate power not conferred upon it by law, and barred the city from its unlawful assumption of such power.³⁹ Topeka officials apparently attempted another means of circumventing the law, however, and in 1884 Vance again sought the court’s assistance. Vance informed the court that by mid-1883 the city was allowing more than thirty saloons to exist, from which the city realized twenty-two thousand dollars in revenue; and, while Topeka was not directly licensing saloons, an ordinance had been enacted stating that “Persons dealing in soda water, seltzer water, German mineral water, and other drinks, shall pay for each and every place where such drinks are sold \$600 per annum.” The court held that the sole purpose for pas-

36. *Mugler* is affirmed at 123 US 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887).

37. *Jockers v. Borgman*, 29 Kan 109 (1883).

38. *State v. Benjamin Nickerson*, 30 Kan 545 (1883).

39. *State ex. rel. Co. Atty. Shawnee Co. v. City of Topeka*, 30 Kan 653 (1883).

sage of the ordinance was to permit the saloons to remain in business and to derive revenues from them. The city was barred from continuing the practice.⁴⁰

In 1885 the court heard another scheme to evade the prohibitory law. Plaintiff B. A. Feineman was a wholesale liquor dealer in Kansas City, Missouri, who had sold and shipped liquors to one Frank Sachs, under contractual arrangement, in Kansas. Sachs had failed to pay for a shipment of liquor, and Feineman sued. The court held that citizens of another state who entered into an arrangement to furnish liquor, and thus enabled a Kansas citizen to violate state laws, were not entitled to any greater privilege than any other Kansas citizen. Feineman was therefore not entitled to the assistance of the Kansas courts in recovering the price of the liquors he sold. Feineman received no financial satisfaction.⁴¹

Two appeals to the supreme court in 1886 presented additional alcohol-related issues of note for the jurists. The first concerned the question of whether or not someone could be prosecuted who *leased* to another person a building that was being used as a saloon, and the second was whether or not probate judges had to provide reasons for denying applicants a liquor permit.

In the first case Atchison resident Frederick Koester leased a building to Heber Taylor, who then sublet the first floor to William Temme, who opened a saloon therein. After a temporary injunction was granted against Koester and Temme, thus closing the saloon, Temme leased the first floor to a man from St. Joseph, Missouri, who reopened a saloon in the room Temme formerly had occupied. Koester, who lived within a few blocks of the building and knew of the saloon's existence, was found in contempt of court (for violating the injunction against him) and fined; he appealed. The supreme court found no connection between Koester and Temme, or between Koester and others operating the saloon; nor was it shown that he had any personal control of the saloon. Therefore, even though Koester knew that the room was used as a saloon, might have taken steps to avoid the lease, and may have had a *moral* duty to take steps to avoid the lease and/or close the saloon, he had no such *legal* duty. The justices also reasoned that if Koester had *knowingly* rented his building as a saloon, it would have been a very different matter, but

Koester's conviction for contempt of court was overturned.⁴²

The second case involved Wellington druggist A. M. Stanley, who applied to the probate judge for a permit to sell intoxicating liquors. The judge, without providing any rationale, refused to issue the permit. The supreme court upheld the right of probate judges to act as such without giving reason, citing section 2, chapter 128, Laws of 1881, which stated that "Such probate judge is hereby authorized, *in his discretion*, to grant a druggists' permit."⁴³

In January 1890 the Kansas Supreme Court was compelled again to consider whether a particular substance was intoxicating. A Topeka restaurant sold "hard cider," consisting of 13.14 percent alcohol by weight. Four patrons who drank the cider claimed that they became intoxicated, and the restaurant's owner, Nick Schaefer, was convicted for selling an intoxicant. The court affirmed Schaefer's conviction, noting that hard cider was excessively fermented and intoxicating, and within the statute.⁴⁴

Despite all this legal activity, Kansas perhaps was wetter than ever during the 1890s. The southeast corner of the state, later widely known as the "Little Balkans," was only tenuously affiliated with the rest of the state and was especially problematic because of that region's bootlegging, temperance, and organized crime activities. The transient mining population of Cherokee and Crawford Counties in particular, the prevalence of drink and drunkenness therein—and an antipathy toward the law among this sizeable population of European immigrants—constituted a problem that would bedevil dries for decades.⁴⁵

Meanwhile, amid this wet backdrop, the supreme court was still rendering liquor enforcement decisions. One involved Wyandotte County business owner Rheinhardt Falk, whose place of business consisted of a cigar store in front and a saloon in the back. Two men, John and Fritz, made liquor sales in the back room, and Falk was convicted on two counts of selling intoxicating liquors. Falk argued that no evidence indicated that he actually sold any liquor himself or was even present when sales were made. The court upheld Falk's conviction, however, finding suffi-

40. *State ex rel. Vance v. City of Topeka*, 31 Kan 452 (1884).

41. *B. A. Feineman v. Frank Sachs*, 33 Kan 621 (1885). See also *Westheimer v. Nutt*, 34 Kan. 731 (1886); *Samuel Bowman Distilling Co. v. Nutt*, *ibid.* 724.

42. *Koester v. State*, 36 Kan 27 (1886).

43. *Stanley v. Monnet*, 34 Kan 708 (1886).

44. *State v. Schaefer*, 44 Kan 90 (1890).

45. O'Brien and Peak, *Kansas Bootleggers*, 1; Kenneth J. Peak and Patricia A. Peak, *Kansas Temperance: Much Ado About Booze, 1870–1920* (Manhattan, Kans.: Sunflower University Press, 2000), 6.

The period from 1897 to about 1910 was one in which Kansas saloons operated most openly and with the sanction of the officials whose duty it was to suppress them. Obviously, no attempt has been made to hide this shipment of "empties" stacked at the railroad depot in Dwight, 1911.



cient evidence that John and Fritz were his clerks or agents in selling the intoxicating liquors, and that the defendant knew of such sales, thus being as liable as if he had made the sales in person.⁴⁶

Another case demonstrated that some Kansans were still attempting to sell a variety of concoctions as nonintoxicating beverages. At trial in the Norton County District Court, a jury heard testimony from a number of witnesses that liquids called "rock and rye" and "hop ale" were intoxicating, although the joint's owner, George Moulton, had claimed he did not know they were intoxicants. The supreme court upheld the defendant's conviction of twelve counts of selling intoxicating liquors, believing that the evidence (statements from those persons who purchased and drank it) proved the liquids were intoxicating liquors.⁴⁷

The period from 1897 to 1910 was one in which Kansas saloons operated most openly and with the sanction of the officials whose duty it was to suppress them. In reality, judges may have been the most malefasant persons of all in the attempts to evade the law because they granted leniency to offenders, making convictions punishable by the mere payment of a fine.

By the early 1900s Kansas was still a cauldron of intemperate activity as well as a venue of hopefulness. The rejuvenation of the Woman's Christian Temperance Union and the Kansas State Temperance Union had raised people's expectations, but saloonism was becoming more brazen and open. The scene was set for "a mighty conflict."⁴⁸

Onto this scene came the "Kansas Cyclone," Carry A. Nation. At the age of fifty-five and while living with her attorney husband in Medicine Lodge, she along with other women in the WCTU began standing outside the illegal

druggist shops and singing. Nation quickly found her life's vocation, and in the spring of 1900 made her first foray out of town, traveling to Kiowa, about twenty miles from her home. There she smashed three joints with rocks and bricks, and in December 1900 she raided the bar of the swank Carey Hotel in Wichita. She then proceeded to engage in a long string of such "hatchetations," arrests, and short stints in jail. Nation and her followers terrorized saloonists across central Kansas and in Topeka.⁴⁹ Notwithstanding Nation's saloon smashing and her attendant publicity, however, the booze continued to flow in Kansas.

In February 1901 the Kansas temperance corps finally obtained some relief from a source other than Mrs. Nation: the state legislature. Being influenced by Nation's argument that saloons were in fact nuisances to be attenuated, a tougher law was enacted. Known as Hurrel's Nuisance Bill, this was one of the most stringent temperance laws ever passed, going beyond the *premises* and including the saloon *equipment*. Its principal section read:

All places where intoxicating liquors are manufactured, sold, bartered, or given away . . . or . . . kept for sale, barter, or delivery . . . and all intoxicating liquors, bottles, glasses, kegs, pumps, bars and other property kept in and used in maintaining such a place, are hereby declared to be common nuisances.⁵⁰

49. For an analysis of Nation's life, see Fran Grace, *Carry A. Nation: Retelling the Life* (Bloomington: Indiana University Press, 2001); Herbert Asbury, *Carry Nation* (New York: Alfred A. Knopf, 1929); Robert L. Taylor, *Vessel of Wrath: The Life and Times of Carry Nation* (New York: New American Library, 1966); Bader, *Prohibition in Kansas*; Andrew Sinclair, *Prohibition: The Era of Excess* (Boston: Little, Brown, 1962).

50. *Girard Press*, February 28, 1901.

46. *State v. Falk*, 51 Kan 298 (1893).

47. *State v. Moulton*, 52 Kan 69 (1893).

48. M. N. Butler, *The Kansas Klondike and the Leavenworth Inferno* (N.p.: M. N. Butler, 1899), 39.



Onto the scene of brazen and open saloonism came the “Kansas Cyclone” Carry A. Nation (below) who raided bars and smashed joints in an attempt to cripple the flow of liquor. This Enterprise saloon (left) exhibits the work of Mrs. Nation and her hatchet.



such as the one we are considering are illegal restrictions upon interstate commerce and in conflict with the constitution of the United States.”⁵¹ This setback basically meant that intoxicating liquors were to be regarded as legitimate articles of interstate commerce, and that the state could not legally impede the transportation of intoxicating liquors coming into the state from outside its borders.

Furthermore, the law provided for the issuance of search and seizure warrants against places where liquor was thought to be sold.

Three significant supreme court decisions were rendered in early 1902, the first two of which provided setbacks for prosecutors and drys. First, until *State v. Hickox* was decided in January 1902, traveling salesmen representing out-of-state wholesale liquor firms had been convicted for selling liquor in Kansas. A. L. Hickox represented the Kansas City, Missouri, wholesale liquor merchant Holzmark, and resided in Missouri. While doing business in Howard, Kansas, Hickox was arrested and convicted on two counts of violating the prohibitory liquor law. The Kansas Supreme Court observed that Hickox’s liquor orders were sent to Holzmark in Kansas City, that he did not deliver any liquor to the persons ordering same, nor did he possess the liquors at any time. The state argued that intoxicating liquor was not on footing with ordinary commodities; that, under the state’s police power, it had banned liquor by law; and that liquor should be taken out of the sphere of commerce in Kansas. According to the court, the issue posed was whether the state had authority to regulate interstate commerce in such a manner. Its finding: “The state is without power to legislate in respect to such commerce”; the court added that “State provisions

Also in January 1902 the court heard an appeal from John Cairns, an employee of the Wells–Fargo Express Company at Scranton. Cairns received a box, consigned C.O.D., containing whiskey. When a man arrived to take delivery of the box, Cairns collected monetary charges and released the box; as a result of this transaction, he was convicted of selling intoxicating liquors. The issue was whether Cairns acted as an agent of the express company or of the sender that unlawfully mailed the whiskey. The court held in Cairns’s favor, deciding that in such instances a “sale” as set forth under the prohibitory law did not occur.⁵²

Finally, in July 1902 in *State v. McManus*, defendant C. McManus was convicted for maintaining a nuisance. Prior to his trial, all of his saloon property—including liquors, glasses, bottles, kegs, pumps, bars—was destroyed. McManus argued that the property seized was not used in violation of any law, and that such property could not be destroyed without there first being a conviction. The court disagreed with McManus, saying that not only did the sa-

51. 64 Kan 651, 652, 661 (1902).

52. *State v. Cairns*, *ibid.* 782 (1902)

loon constitute a nuisance but all of the property did as well, and such property could be destroyed before trial.⁵³

The year 1903 commenced with a court decision that was intended to counter yet another attempt to evade the prohibitory law. Matt Peak was the local manager of the Kansas Utopia Association club at Everest, which was organized to keep intoxicating liquors on hand for the exclusive use of its members. Any person could join the association by paying two dollars, and a member could purchase any quantity of liquor by the drink, bottle, or otherwise. Peak was convicted of selling intoxicating liquors and maintaining a nuisance. He appealed on grounds that the liquor stock was the private property of the members, that he merely delivered to the membership liquor that was already theirs, and that his doing so did not violate the prohibitory law. Peak received no satisfaction from the supreme court, however, which determined that the "Association, stripped of its subterfuge and pretenses, was a whisky saloon, devicefully planned to evade the prohibitory law, so that it hardly deserves the attention of the court."⁵⁴

Another unique legal question arose at about the same time in Topeka, where five women in a prayer band went to a brick building and found a saloon operating and men playing cards, while a dozen men drank at the bar. One woman saw money pass from a customer to the bartender for beer. The police were summoned. The defendant in the case, Fritz Durein, was a prominent saloon proprietor/bartender at the Hall of Fame Saloon; he was convicted of selling liquor and maintaining a nuisance. He argued on appeal that because a dozen men were drinking in the joint, the witnesses would have been unable to identify who actually purchased the beer. The high court disagreed, however, saying his argument did not override the fact that sales were made.⁵⁵

The Kansas Supreme Court began 1905 with another noteworthy decision, this being an appeal from H. B. White, who had been convicted of maintaining a liquor nuisance. His place of business, a general store, had been searched and a large quantity of whiskey found. At trial White sought an acquittal by claiming that he kept the liquor for his own use. The supreme court agreed with the lower court that "it is not an offense for a person to keep in-

toxicating liquor for his own use," and one may lawfully keep liquor at his residence. Unfortunately for White, however, the justices found that the liquor was not kept in his dwelling but rather in his store, thus giving the appearance of intent to sell; his conviction was upheld.⁵⁶

Notwithstanding the above efforts at enforcing the prohibitory law, the period from 1907 to 1915 involved nearly every possible kind of illicit liquor activity. Temperate Kansans were disheartened with open-air liquor use, violence, and debauchery; joints so widespread that public officials who failed to pursue saloonists and imbibers frequently were ousted from office; payoffs (related closely to the lack of enforcement); and saloons springing up like sunflowers across Kansas, particularly in the Little Balkans.

In January 1907 Kansas Attorney General C. C. Coleman obtained an injunction from the supreme court ousting the City of Pittsburg from the exercise of certain powers, specifically the imposition and collection of a license tax on businesses selling and keeping intoxicating liquors. But Pittsburg city officials and citizens continued supporting their saloons. City officials had come to depend on saloons for their salaries and those of other city employees. Indeed, in 1910 these employees were paid from a fund created solely by the contributions of thirteen saloon owners in Pittsburg. The supreme court assessed fines for contempt of court against "all concerned in the carrying out of this arrangement," including the person collecting the funds (fined one thousand dollars), the saloonists (five hundred dollars each), and persons receiving their salaries from saloon keepers, including the police judge (one hundred dollars), police officers (fifty dollars each), and fire fighters (twenty-five dollars each).⁵⁷

Mid-1914 brought another supreme court decision against loophole-seeking wets who continued trying to invent and sell intoxicants outside the statute. Albert Miller and one other man, both druggists in Junction City, were convicted for maintaining common nuisances. They had manufactured and sold a concoction known as "Jamaica ginger" using a formula found in the *United States Pharmacopoeia*. Trial evidence indicated that Jamaica ginger commonly was used as a substitute for whiskey in Junction City. The defendants argued that it was not an intoxicant but rather a medicinal article used for relief of colic, diarrhea, and other disorders. The supreme court learned that Kentucky's highest court already had determined Jamaica

53. *State v. McManus*, *ibid.* 720 (1902).

54. *State v. Peak*, 66 Kan 701 (1903).

55. *State v. Durein*, 70 Kan 1 (1904).

56. *State v. White*, 71 Kan 356 (1905).

57. *State ex rel. Coleman v. City of Pittsburg*, 80 Kan 710, 714 (1909).



The defendant in one of many liquor cases that found its way to the high court was Fritz Durein, a prominent saloon proprietor and bartender in Topeka. Durein is pictured here, with a bottle and his dog, inside his Hall of Fame Saloon.

On appeal to the Kansas Supreme Court the railroad company challenged the constitutionality of the Mahin Act, insisting that the criminality of a carrier could not be based on the unknown intention of the consignee to use the liquor unlawfully. The court found the law to be constitutional and, with regard to the railroad's contention that it did not know the intended use of the liquor, Justice Judson S. West could not restrain his pen from leveling a blast at the railroad's insolence:

It [the evidence] was such as to convince any fair-minded person that a carrier who repeatedly delivers liquor in lots of from 10,000 to 30,000 pounds to known violators of the prohibitory law must be plethorically overstocked with ignorance not to know that such consignments are for other than the personal use of those receiving them.⁶⁰

In February 1917 an unexpected occurrence toughened many states' liquor laws when Congress banned interstate shipments of liquor into prohibition states (*State v. Hickox*, 1902). U.S. senator from Missouri James Reed attached an amendment to a post office appropriations bill that would ban interstate shipments of liquor into prohibition states, thus making all such states "bone dry" (and fomenting a serious move toward national Prohibition) even if their laws did not require it. The House passed the Reed amendment on February 21, 321 to 72; even without passing the Senate, momentum was established for the individual states to enact similar legislation. A Kansas version of the national bone-dry law was quickly passed by the legislature and signed by Governor Arthur Capper on February 23, 1917, who called it "the most drastic anti-liquor enactment written in this nation." Therefore, Kansas was completely dry—legally, if not literally. The law's principal features were prohibiting shipping liquor to any part of the state and making it a crime to possess liquor in any form.⁶¹

60. *State v. The Missouri Pacific Railway Company*, 96 Kan 609, 612 (1915).

61. William A. Brandenburg Jr., "A History of Liquor Prohibition in Crawford County, Kansas" (master's thesis, Kansas State Teachers College, 1931), 19; *Girard Press*, May 8, 1917.

ginger to be an intoxicant. The test, the Kansas court said, echoing Justice Brewer's decision of 1881, was that if the liquor be such that the distinctive character and effect of intoxicating liquor be absent, it was outside the statute, and vice-versa. The convictions were upheld.⁵⁸

An interesting legal battle also developed in mid-1915 between the Cherokee County prosecutor and the Missouri Pacific Railroad. The railroad had been convicted of twelve counts of knowingly delivering liquor to persons who intended to use it in violation of the prohibitory law. Commonly known as the Mahin Act, the 1913 statute read in part:

It shall be unlawful for any railroad company, express company, or other common carrier, or for any person, company, or corporation to carry any intoxicating liquor into this state or from one point to another within the state for the purpose of delivery, or to deliver the same to any person, company or corporation within the state except for lawful purposes.⁵⁹

58. *State v. Miller*, 92 Kan 994 (1914).

59. *Kansas Laws* (1913), ch. 248.

Fittingly, perhaps, given the disproportionately high amount of liquor law violations that had occurred in the state's southeast corner, it was a Crawford County resident's conviction for and challenge of the Kansas bone-dry law that would eventually wend its way to the state supreme court in its January 1919 term. John Macek was charged with feloniously permitting another person to have and to keep a quantity of intoxicating liquors on Macek's premises. Macek operated a boardinghouse and formerly had been convicted under the prohibitory law. He challenged the bone-dry law as unconstitutional. The court disagreed, holding the law to be a valid exercise of the state's police power. Justice John S. Dawson wrote:

The times change. Men change, and their opinions change; their notions of right and wrong change. Any legislature sincerely determined to suppress the sale of liquor and . . . the keeping of tippling nuisances, would be strongly persuaded to go the final step of forbidding the mere possession of intoxicants.⁶²

World War I afforded an opportunity to hasten national Prohibition by stressing the importance of devoting food production to the fighting forces and not to the saloon. Congress banned the use of foodstuffs in production of distilled liquor from September 1917 until the end of the war, thus dismantling the liquor industry. Breweries ceased production on December 1, causing twenty thousand brewery employees—six thousand of them in Milwaukee alone—to become unemployed.⁶³

On December 22, 1917, with the war raging and without fanfare, Congress approved the Prohibition amendment to the Constitution and sent it to the states for ratification, three-fourths (or thirty-six) of the states being necessary for ratification. On January 16, 1919, the Nebraska legislature became the thirty-sixth body to ratify the Eighteenth Amendment, and Prohibition became part of the Constitution, to take effect one year after the date of its final ratification. The United States became the first nation of the world to make such a provision a part of its basic law.⁶⁴

62. *State v. Macek*, 104 Kan 742, 745, 746 (1919). Case literature shows a discrepancy regarding the spelling of this name; both MacEk and Macek are given.

63. Pegram, *Battling Demon Rum*, 145–46; *Pittsburg Daily Headlight*, September 30, 1918.

64. *Girard Press*, January 17, 1917; Pegram, *Battling Demon Rum*, 148.

Congress then passed, and President Woodrow Wilson signed, the Wartime Prohibition Act, which banned all use of foodstuffs in the manufacture of spirits, wine, and beer as of July 1, 1919. This legislation was to be in effect until the end of the demobilization of troops, and by this measure national Prohibition commenced even before the Eighteenth Amendment was even ratified.

The role of dries in liquor-soaked Kansas, not only in the passage of the state's own prohibitory amendment but also in the onset of national Prohibition, is substantial and significant. Kansas's temperance zeal and organization had been coalescing and maneuvering into place for forty years prior to the arrival of national Prohibition. On the opposing side were thousands of people—both within the state as well as without—who, like many Americans, loved to indulge in drink and/or sought to profit from the sale of intoxicants, felt that state government should stay out of their personal affairs, and engaged in acts of circumvention toward this “noble experiment” called Prohibition.

The Kansas Supreme Court was inextricably caught in the middle of this legal, social, and political quagmire, contributing in large measure to this groundswell movement to clear the state's landscape of many saloons and jointists. The court was compelled to occupy an activist, policy making role (contrary to Justice Brewer's statement in 1881), even as a newly established institution that was compelled to uphold, mold, and preserve a widely unpopular and ignored prohibitory law—a law that was, like the court itself, new and untested.

History likely will little remember the justices who sought to interpret the Kansas prohibitory law's many facets and to constrain its many offenders. The competence and mettle of these early Kansas jurists is underscored by their tenure in office and the fact that the state's supreme court even sent one of its members (Justice Brewer) to the bench of the nation's highest court. As this article demonstrates, while jurists officially can make no laws and change no constitutions, a forum does exist within the courts in which they can and do express their individual opinions of laws or constitutional amendments. Furthermore, these cases lay bare the fact that judges at times agonize over their decisions, while being required to exercise their power in the most undemocratic of institutions with great restraint.

