

# THE LIQUOR QUESTION. RULINGS OF JUDGE MCKEAN

TERRITORY OF UTAH,  
THIRD DISTRICT COURT.

The People, &c.,  
vs.  
Mansfield, Atchison,  
Steel, Pape, Arskeg,  
Hannek, Alder and  
Capit.

Habeas  
Corpus.  
June 12th,  
1873.

The defendants applied to the City Council of Salt Lake City, for license to sell spirituous and fermented liquors, and tendered a fee of \$50 per quarter year therefor. Under an ordinance, \$450 per quarter was demanded. This, the defendants refused to pay, and proceeded to sell liquor without license. For this they have been arrested, on warrants issued by a Justice of the Peace. They apply to this court to be discharged on *habeas corpus*, on the alleged ground that the ordinance in question is void.

O. F. Strickland and J. R. McBride for the petitioners, E. S. Hoge for the people.

MCKEAN, C. J. The City Council have authority "To license, tax, regulate, suppress or prohibit billiard tables, ten pin alleys." &c. See City Charter, Sec. 22.

Also "To grant and issue licenses, and direct the manner of issuing and registering thereof, and the fees to be paid therefor." See City Charter, Sec. 41.

Also—"To license, tax and regulate merchants and retailers, auctioneers, distillers, brewers, brokers, pawnbrokers, and money changers, and to impose duties upon the sale of goods at auction." See City Charter, Sec. 42.

Also—"To license, regulate or restrain the manufacturers, sellers or vendors of spirituous and fermented liquors, tavern keepers, dram or tipping shop keepers," &c. See City Charter, Sec. 24.

The power to license and the power to tax are different powers. The latter is not given in Sec. 24 of the City Charter.

The City Council also have power "To make and execute ordinances for the peace, good order, regulation, convenience and cleanliness of the city, and for the health, safety and happiness of the inhabitants thereof." See City Charter, Sec. 70.

This provision does not enlarge the particular powers specifically conferred by the other sections already cited. See Dillon's Municipal Corporations, Sec. 250.

A tax, unlike a license, must be enforced by the collector. See City Charter Sec. 67.

The courts cannot dictate to Congress, nor to the Legislature what laws, nor to the City Council, what ordinances, they shall enact; but the courts, when the questions arise, must pass upon the constitutionality of the laws, and the reasonableness of the ordinances that have been enacted by those bodies. See Dillon's Municipal Corporations, Secs. 261 and 262.

The Legislature fixed no sum for license. Is the amount prescribed by the ordinance unreasonable? Have the City Council converted or perverted the license system into a system of taxation? "Concerning useful trades and employments a distinction is to be observed between the power to license and the power to tax. In such cases the license cannot be used as a mode of taxation, with a view to revenue, but a reasonable fee for the license and the labor attending its issue may be charged." See "Dillon's M. Corp., sec. 291.

But the traffic in intoxicating liquors to be used as beverages, although in Utah, as in most of the States and Territories, a lawful business, is nevertheless regarded here and everywhere as a business liable to many abuses, and experience shows that it is fraught with great evils to society. I am of opinion that a board of excise may rightfully charge more for a liquor license than barely a fee for the license, and the labor attending its issue. So trifling a charge would in the numerous, almost innumerable, applications for licenses, and tend greatly to extend the business. While the license granted is permissive, it may be partially restrictive in its operation. I think that sections 24 and 41 of the City Charter will bear this construction; and I deem it right upon general principles. If I rightly understand them, (as cited by Dillon) the supreme courts of Wisconsin and Iowa have substantially

held this doctrine. See Dillon's Municipal Corporations, Sec 292, note 2. But, whether those courts have so held or not, I repeat, that the doctrine seems to me to be right upon principle, and to be a just construction of the City Charter. Let me not be misunderstood. The City Council cannot arbitrarily and capriciously demand and enforce any sum of money that they may please for a license, however exorbitant. The ordinance fixing the charge for a license must be reasonable, or the courts will declare it to be void. The principles applicable to the license system must be rigidly adhered to if licenses are granted, and neither taxation nor prohibition can be resorted to under the forms of a license. Very different principles are involved in licensing, taxing and prohibiting, and neither of the last two can be carried out under the forms of the first.

While it does not belong to courts to dictate in advance to legislative bodies, yet the circumstances of this case make it proper to say, that I deem the sum of \$50 per quarter, or \$200 per year, a smaller sum than the City Council is bound to accept for a liquor license. The restrictive principle, upon which they may act, even under the license system, will justify them in charging more than that.

The charter granted by the Legislature to the city is silent as to the sum that may be charged for a liquor license. Is the sum of \$450 per quarter, or \$1,800 per year, an unreasonable charge? Does it pervert the license system into a system of taxation? Or does it become prohibitory in its character, while it preserves the forms of the license system?

Under a charter similar to that of Salt Lake City, in the particulars under consideration, a corporation was held to be competent to enact an ordinance demanding \$500 as the fee for a retail license. This would seem to have been the fee for a year. See Dillon's Municipal Corporations, Section 299, Note 3.

The town council of Cahaba, Alabama, under a charter resembling ours, passed an ordinance charging \$1,000 for a liquor license. The Supreme court of that State, in *ex parte Burnett*, 30 Alabama 469, held the ordinance to be prohibitory in its nature, and void. The court, in that case add, "The question in this case is not relieved of its embarrassment by the fact that, notwithstanding the price, one retailer has submitted to the terms of the ordinance, and has driven a prosperous business. The ordinance still remains in its nature prohibitory."

These cases are cited, not as necessarily controlling here, but because they throw some light on the question under consideration. In construing the ordinances of a particular city, the charter and the circumstances of such city must be kept steadily in view. The ordinances of one city may not suit another. See Dillon's Municipal Corporations, sec. 261.

The views of legislative bodies, of city councils, and of courts elsewhere throughout the States and Territories may enable us the better to answer the question, whether the ordinance under consideration is or is not reasonable? The court is not aware of any city in the Republic where \$1,800 per year is charged for a liquor licence. There are some cities where the liquor traffic is prohibited, but it is believed that there are none where such a fee is deemed at all compatible with the licence system. To exact such a fee is an attempt to blend taxation, prohibition and license into one system. It cannot be done. The ordinance under consideration is not authorized by the charter, is unreasonable, and therefore void.

The petitioners must be discharged.

TERRITORY OF UTAH,  
THIRD DISTRICT COURT.

Lawrence, Mann, Lannan, Hale and Blachtol, plaintiffs.  
vs.  
Salt Lake City, Wells, Mayor, &c., and Clinton, Justice of the Peace, defendants.

MCKEAN, C. J.—This is a bill in Equity. The plaintiffs are engaged in the sale of spirituous and fermented liquors in Salt Lake city. Prosecutions have been commenced against some and are threatened against others of them, for alleged violations of the city ordinance exacting the payment of \$450 per quarter year for license to sell such liquors. The ordinance provides for criminal prosecutions, and for fine and imprisonment of those who

shall be convicted. The plaintiffs allege that they offered to pay \$50 per quarter year for license, which was refused; that the demand for \$450 is illegal and the ordinance void. They pray for the writ of injunction to restrain the defendants from further prosecuting them under said ordinance.

The defendants demur to the bill on the grounds—1st: That the bill is not signed by counsel. This point is well taken. See Rule 24, S. C. Equity Rules; Story's Eq. Pl., Sec. 48; Mitford's Pl., 48; Daniel's Ch. Pl., 306; 3 McLean, 104; 5 Cranch, 637; 2 Edwards, 190; 519-520. But the Court while sustaining the demurrer in this particular has discretionary authority to permit the bill to be amended.

The defendants demur—2ndly: That the plaintiffs have not stated such a case as entitle them to any relief in equity.

The prosecutions provided for by the ordinance in question, for the alleged offences of the plaintiffs, are criminal prosecutions. No authorities were cited on the argument, and I am not aware of any that authorize a court to restrain criminal prosecutions by injunction. In *Burnett vs. Craig*, 30 Alabama, 139, the Supreme Court of Alabama say, "We have not been able to find any principle or adjudged case which justifies an injunction to stay a prosecution, either criminal or quasi criminal; or to restrain a trespass to the person or personal property. We think such a precedent would be an alarming stretch of equity jurisdiction." Although a court of equity cannot interfere to stay criminal proceedings, yet if a person be maliciously prosecuted he has his remedy at law, or would have were just laws enacted here. If such laws do not exist the courts cannot be held responsible therefor.

The petition for injunction must be denied.

PROVO CITY, June 5, 1873.  
Editor Deseret News:  
Feeling desirous, in this fast age of improvements, that our city should not pass unnoticed, I will endeavor to let your readers know something of what is going on here. On the 28th of last month was the anniversary of the laying of the corner stone of what is now known as the Timpanagos Woolen Factory. The main building being 145 feet by 65 feet, three stories and basement of rock, and one story frame, with Mansard roof; and has some 6,000 lights of glass. The first floor contains 25 small or narrow looms and 12 broad looms, with warping, beaming, and other machinery to prepare the yarn for the looms, all set up with machinery and belting attached and in working order. The looms are "Jenks" improved three and four shuttle, capable of weaving pattern work, checks, plaids, doeskins, jeans, satinets, tweeds, blankets, shawls and such other goods of various patterns and descriptions, also capable of weaving about 1,800 yards of cloth per day of ten hours.

The second floor contains three latest improved self acting woolen mules, running 720 spindles each and capable of spinning 1,300 pounds of yarn per day, also one hand mule, 360 spindles, capable of spinning 200 pounds of yarn per day, all set up with machinery and belts attached and in working order.

The third floor contains five sets of cards, three cards in each set, all clothed and in working order, and four sets of cards, three cards in each set, now being clothed and put in running order, but all set up in their places. These machines when in full running order will consume or work up 1800 pounds of wool per day.

The fourth floor contains two renovators and two wool pickers, set up and in running order, also proper apparatus for carrying the wool onto this floor, and the rooms are so arranged that the wool and yarn are conveyed to their several departments on the most economical plan.

All the machinery in this building will be driven by a "Leffel" patent turbine wheel, 35 inches, under a head of 20 feet, and will drive from 60 to 70 horse power.

There is one adobie building, 72 x 33 feet, two storeys and basement, with upwards of 800 lights of glass. On the first floor and basement there are set up and in running order, four fulling machines, two

wash boxes, two narrow gigs, one broad gig, one broad and one narrow shearing machine, all of which is driven by one of Leffel's 26 1/2 inch turbine wheels, under 20 feet head, capable of driving 35 horse power.

One frame building, 65 x 35 feet, is used for washing wool and the dye house. The machinery consists of one patent wool washer, capable of washing 1600 to 1800 pounds of wool per day, and one hydro-extractor, with engine attached, for throwing the water out of the wool or cloth. The machinery is now set up and in running order, as also are the vats and tubs.

In another adobie building, 134 x 33 feet, two stories and basement with upwards of 1000 lights of glass, the south part is used for receiving, assorting and preparing the wool, etc.; the north end is set off for the boiler house, machine and carpenter shop, and wherein a "Supplie's" patent tubular boiler is set up and ready for use, the smoke being carried off by a stack built of brick, 95 feet high, 10 1/2 feet at the base and 7 feet at the top. The boiler is a fifty horse boiler, and calculated to heat water for the use of the dyeing and washing departments, also for the finishing department, and to furnish steam to heat up all the buildings, through pipes that are now placed around the walls. Water is conveyed in iron pipes under ground from the main race.

On the same ground is one grist mill (frame), 40 x 23 feet, in full and successful operation, driven by a "Leffel's" 22 inch turbine wheel, under 20 feet head. All of the above power is driven by water conveyed from Provo river through a large canal built expressly.

Wool is being received daily in sacks and in good condition, of which there is now on hand some 8,000 or 10,000 pounds.

The washing, carding, spinning, and weaving machinery will be in full operation on Monday next, with the expectation of continuing.

These buildings have been erected on the co-operative plan—each and every citizen of the county, who desired so to do, having been solicited to expend their labor and means in this very laudable enterprise, through which the material for the buildings, such as rock, lime, sand, lumber and the labor in the erection, were procured and performed without the aid of much money. President Young furnished nearly all the machinery, which is of the best and latest improved patterns.

Samuel Liddiard had charge of the rock and adobie work. William Ridd, of your city, superintended the carpenter work in the erection of the buildings, and Thomas Allman of this city, since, and Geo. Halliday, of Pleasant Grove, the plastering. Andrew H. Scott had the immediate charge of the construction and labor. F. X. Loughery has had charge of arranging and putting in position all the machinery, gearing and everything pertaining to the working of the machinery, the whole under the general superintendence of Prest. A. O. Smoot, who has been indefatigable in his exertions for the welfare and success of the enterprise.

In consequence of the late spring, our crops are rather late, but the rains have somewhat revived our farmers during the last few days. Provo River is beginning to show itself, and should the present warm weather continue for a few days, we expect to have some high water, but do not expect it to last.

Everything is quiet, business looking up, and Zion progressing.  
L. JOHN NUTTALL.

## EASTERN NOTES.

John H. Surratt is engaged in writing a history of his life and his connection with the assassination plot.

"Died a fighting Bill Jones," was the verdict of a coroner's jury over an Indian Territory man.

The black flint found near Fort Bridger, Wyoming Territory, is identical, according to Dr. Leidy, with that of the English chalk.

The State of Georgia has some twenty condemned criminals, all of whom are expected to hang before the 4th of July next.

At a recent "old folks" dance at Morrisville, Vt., the best musician in the orchestra was said to be Dwight Marsh, eighty years old, who played upon a violin two hundred and fifty-two years old.

The New York Legislature having at length adjourned, only the Massachusetts Legislature remains in session, of the 31 which started in together at the beginning of the year.

"Galvanizing a dirty scandal" is the way the New York Times, to which the Beecher-Tilton-Bowen covenant was sent for publication, alludes to the reopening of the matter. And every new touch makes it dirtier, and the only way to satisfy either church or laymen is to clean the whole matter up.—*Cincinnati Times.*

A lady who was passing along Chapel street, New Haven, wore a handsome gold chain, which attracted the attention of a dashing cut-purse. Armed with a sharp instrument, he made a stroke at the glittering chain, but a movement of the lady just at that moment caused him to fall of his object. The knife, however, struck the lady's dress and cut it from shoulder to shoulder.

## PIOCHE NOTES.

From the Record to June 8—  
Parrots should not be taught vulgarity and profanity; but it is necessary to keep them out of Pioche if it is desired to educate them as Christians.

Potatoes from Utah are peddled out on the streets at three cents a pound—just the freight rate from Lehi here. The market is overstocked with potatoes.

Joseph Millet, the pioneer gardener of Spring Valley, is now supplying Pioche with early vegetables of all kinds—radishes, onions, lettuce, etc.

A party of prospectors have started out to the southward, with Indian guides. We do not know their exact destination. Probably they have gone in search of the Colorado quicksilver mines.

A Swiss cultivator named Burilla has quite an extensive vineyard in St. Joseph, in the southeastern part of this county. His grape crop has been injured some by frost, but he expects a fair yield, and will put up considerable wine the present season.

The barley crop is being harvested in the Muddy valley, and the yield is good. Wheat and corn are looking well, and the former will be ready for the reaper as soon as the barley crops are secured. Messrs. Logan, Patterson and Jennings are each harvesting extensive crops.

We some weeks ago reported that an Indian had been brutally maltreated by a white man, in Spring Valley, stating at the time that we were ignorant of the cause of the white man's conduct in the matter. We now learn that the white man was the aggressor, and that the savage has not yet recovered from his injuries.

A Mr. Oulds, a hard-working and industrious teamster, fell from his wood wagon when bringing in a load of wood, receiving dangerous injuries. He was unconscious when found, and has been irrational ever since. He is a man advanced in years, and has a family depending upon him for support.

Mr. A. Leman, of Snake Valley, his ranch being about a hundred miles north of Pioche, is extensively engaged in fruit raising, and will this summer be able to exhibit the first apples and peaches produced in Southeastern Nevada. The young fruit on some of his trees is maturing splendidly. These bearing trees are three years old. He intends to greatly extend his orchard the coming fall, being satisfied that fruit culture in this country can be made a success. Mr. L. also has some fine strawberry beds, and the berries are now ripening.

Few are aware that here in this county, where we have snow storms in the latter part of May, cotton can be successfully cultivated. Such is the fact; at this very time within 125 miles of Pioche, in the south-eastern part of the county, a fifteen-acre field of cotton is growing splendidly and promising a heavy yield. It is the property of a Mr. Patterson, whose rancho or plantation, is in the Muddy Valley, about midway between St. Joseph and St. Thomas. It is one of the upland varieties, and seems to be maturing satisfactorily. It is believed it will be ready for picking some time early in August. There is a cotton manufactory at St. George, in Utah, and thither the crop will be taken to be worked up. What a country! Cotton and oranges within two days' ride to the south of us, and almost perennial snows the same distance to the north.

Mr. Davidson, and others, who have lately returned from a trip through the Muddy valley, inform us that the Piutes down that way besiege every passing white man, and, with lank and forlorn countenances, demand to know where their Agent is. At St. Thomas Mr. Davidson saw a boy of half-finished bucks and squaws cutting away the most putrid portion of their flabby and stinking salt pork, by order of the sub-Agent, with the hope that they could temporarily stay hunger with the better portions of it. They are very much dissatisfied, saying they cannot eat pork, and have never received an ounce of flour or anything else in the eating line, though an abundance had been promised them by Mr. Ingalls. The Piutes are reported to be very tractable and obliging to prospectors traversing their country. Their Christian guardians are severely denounced for their cupidity in withholding or stealing the annuities due them from the General Government.

The Sevich Indians inhabit that part of the Colorado valley which lies between the mouth of the Rio Virgin and the Big Canyon—a region of country believed to be rich in minerals, but which has been but very little prospected. The Seviches use a bright red paint, and trade it to neighboring tribes, which is believed to be genuine protosulphide of mercury, or cinnabar. Believing the Piutes had just received their annuities, the Seviches recently visited their camps on the Muddy with large quantities of it, intending to "swap" it for some of the gim-cracks they supposed the Piutes would be possessed of. Some prospectors who happened along at the time examined the natural paint, and pronounced it identical with the vermilion found in the New Almaden quicksilver mine in California. The early Spaniards were led to that famous mine by Indians, who had long used the cinnabar to paint their faces and robes, it being to them a source of great wealth, as the Columbia Indians, and all the intervening tribes, were wont to come down and traffic for it. The Seviches, it seems, are using their deposits to like advantage, as the Piutes and Mohaves report that their ancestors, as far back as their traditions reach, have obtained their paint of the Seviches. Quicksilver mines on the Colorado, if as extensive as those of California and Spain, would be a source of immense wealth to individuals and to the country. Hundreds of thousands of dollars are sent out of Nevada annually for quicksilver. The Seviches might be induced, if approached in the right way, to disclose the locality of their cinnabar deposits.