

PROTECTION OF DRY AREAS

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So much public attention has been given the legalization of alcoholic beverages in the United States many persons fail to realize that one sixth of the nation still lives in territory which is legally "dry" and that only 15 states are entirely "wet."¹ More than academic interest attaches, therefore, to the problems involved in the protection of dry areas in the other 33 states.

Enforcement of sumptuary legislation has long been recognized as one of the most difficult tasks of government, so it was scarcely to be expected that the states could create a complete solution to the problems involved in regulating the sale and consumption of intoxicating beverages immediately following adoption of the Twenty-first Amendment. Not the least among the legal and administrative difficulties which arose were those involving dry areas. In many instances the problems which had marked the national prohibition period were intensified by the fact that large supplies of legal liquor became available within a few miles of most dry sections of the country. Consideration of the efforts made to protect dry localities demands recognition that there are two distinct types of such areas—the prohibition states of Kansas, Mississippi and Oklahoma, and the thousands of cities, towns, counties, and precincts which are dry by local option.²

Kansas, Oklahoma, and Mississippi, with an aggregate population of six and a quarter million persons and an area of nearly 200,000 square miles, are veritable islands in a sea of liquor.³ Despite their common boundary, Kansas is still bordered

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¹ States without dry territory within their borders include Arizona, California, Delaware, Idaho, Indiana, Iowa, Louisiana, Michigan, Missouri, Montana, Nevada, South Carolina, North Dakota, Utah, and Wyoming.

² Legality of local option elections has been upheld on the ground that delegation by the legislature of the power to determine certain facts upon which the action of the law depends, as in local option, is not a delegation of the power to legislate. *Johnston v. Bramlett*, 193 Ark. 71, 97 S. W. (2d) 631 (1936).

³ N. Y. Times, Nov. 5, 1936, p. 14, col. 5. Oklahoma in 1936 defeated repeal of state prohibition by a 3-1 vote. Division of wet-dry sentiment in Kansas and Mississippi is more difficult to determine. None of the three states participated in the vote on ratification of the 21st Amendment, but their congressmen were overwhelmingly against the repeal resolution.

The *Literary Digest's* Prohibition Poll in 1932, although accused of exaggerating wet sentiment, still

by three wet states and Oklahoma by five. Four wet states line the borders of Mississippi. What these dry states are doing to protect themselves, the parts played by neighboring states, and the role of the Federal Government as a protector of dry sentiment are deserving of consideration.

A population double that of the three dry states is contained in localized dry areas scattered through 30 states. The device of local option, which played such a prominent role in the rise of the prohibition movement prior to 1919, was written into the liquor control statutes of 35 states as a compromise with dry sentiment.⁴ Such a compromise apparently was quite necessary in some states, for more than half of the population of Georgia, North Carolina, Tennessee, and Texas lives in areas which are dry by local option, and more than 25 percent of the residents of Alabama, Kentucky, Maine, and Vermont also live in prohibition territory.⁵ Sentiment against traffic in intoxicating beverages appears to be concentrated largely in the South, and is weakest in the far West. As was the case before national prohibition, local option elections indicate that prohibition sentiment is stronger in rural than urban areas, and in small cities rather than large ones.⁶

Prohibitionists are admittedly hopeful that local option provisions can be utilized to promote the repeal of the Twenty-first Amendment, but thus far tendencies in this direction have been quite mixed. On the one hand, at least one state transferred from the dry to the wet column each year between 1933 and 1939, but, on the other, dries appear to be winning more local option elections than the wets.⁷ Local dry

showed a vote for national prohibition of 50.2% in Kansas, 45.4% in Oklahoma, and 44% in Mississippi. In only four other states did the dry vote exceed 40% of the total. 113 *LIT. DIG.* 11 (June 25, 1932).

⁴ No localities have voted dry under the local option laws of Delaware, Louisiana, Michigan, Missouri, and Montana, according to latest available reports.

⁵ *DISTILLED SPIRITS INSTITUTE, THE LOCAL OPTION FALLACY* (1938) 16. Tennessee did not adopt its liquor control statute until 1939, but by May 18, 1940, only 13 counties, containing one third of the state's population, had voted to legalize the sale of intoxicating beverages.

⁶ *ALA. ALCOHOLIC BEV. CONTROL BD. ANN. REP.* (1937), 7. In Alabama, for instance, the 25 counties which had voted to legalize liquor represented 39.3% of the counties of the state, but included 51% of Alabama's population.

KY. DEP'T. REV., ALCOHOLIC BEVERAGE STATISTICS (1938) 4. As of Dec. 31, 1938, Kentucky's 41 dry counties included 34.2% of the counties, but their combined population was only 24% of the total for the state.

⁷ *DISTILLED SPIRITS INSTITUTE, ANN. REP.* (1939) 11, 71. A compilation of 5,140 local option elections resulting in a change of status between Repeal and December 31, 1939, indicated prohibitionists had won in 2,898 elections, while the forces of Repeal had been successful on 2,242 occasions. More than 2,800 of these elections were held in Pennsylvania, Illinois, Ohio, and Maine, the dries winning in 1,826 tests and the wets in 1,025. Of 1,136 local option elections held in 22 states in 1939, 770 resulted in no change of status, 301 wet communities voted to become dry, and 65 dry areas were added to the wet column.

⁵ *PROCEEDINGS, NAT. CONF. STATE LIQUOR ADM'RS* (1938) 11. Data obtained from 41 states indicated that dry territory had increased since Repeal in 14 states, decreased in 9, and shown no change in 18.

N. Y. Times, Jan. 21, 1940, p. 14, col. 1. Official balloting in 1933-34 indicated 70% of the voters were wet, but the American Institute of Public Opinion (Gallup Poll) tests on the question whether Americans would vote dry if national prohibition came up again have revealed the following division:

	Percentage dry	Percentage wet
December, 1936	33	67
February, 1938	34	66
December, 1938	36	64
January, 1940	34	66

sentiment, however, has shown nowhere near the strength that it demonstrated in the last few years prior to adoption of the Eighteenth Amendment—the state of New York, for instance, having only 50 dry towns at the close of 1939, as against 602 towns and 18 cities in the prohibition column in December, 1918.⁸

The facts that most of the areas which are dry under local option are, individually, small in territory, that they are reasonably divided in wet-dry sentiment, and that they are almost always located within a few miles of localities in which liquor can be sold legally, form the basis for perplexing problems of administration and enforcement in these days of frequent intercommunication and widespread use of automobiles. It should not be forgotten that at the time the Eighteenth Amendment was submitted to the people it was argued that the minority of wet states was able to nullify state prohibition by shipping liquor into the dry areas.⁹ How potentially greater is such a danger now that the dry states are outnumbered 15 to one by states in which the sale of distilled spirits is legal?

The Twenty-first Amendment clearly recognizes the right of individual states to regulate and even prohibit traffic in intoxicating beverages,¹⁰ and it would appear that those which chose to remain dry might reasonably expect protection against the solicitation of sales, the prohibition of illegal transportation of liquor, freedom from any action which might appear to give a federal cloak of legality to acts illegal under state law, and adequate law enforcement at the state and local level.

Advertising

Publications advertising or soliciting orders for intoxicating liquor were banned from the mails if directed to any place in which it was, by state law, unlawful to advertise or solicit orders for intoxicating liquors, under terms of the Reed “bone-dry” Amendment of 1917.¹¹ The Twenty-first Amendment did not affect this Reed measure, and during the ratification period there was some confusion among liquor advertisers and publishers. Attorney General Cummings ruled that the responsibility for barring liquor advertisements from the mail moving into dry territory rested primarily on the Postmaster General, asserting that if “alleged violations of the Reed amendment are reported to the Department of Justice by the Postmaster General, the Department will give appropriate attention to such cases.”¹² The Post Office Department announced that it would enforce the law forbidding the circulation of

⁸ N. Y. Times, Nov. 19, 1939, p. 22, col. 4.

⁹ U. S. BUREAU OF PROHIBITION, STATE COOPERATION IN THE ENFORCEMENT OF NATIONAL PROHIBITION LAWS (1930) 2.

¹⁰ Sec. 2 provides: “The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited.”

¹¹ 39 STAT. 1069 (1917) amending Webb-Kenyon Act, 37 STAT. 699 (1913).

¹² Ruling of October 26, 1933. The Attorney General had previously stated that “some of the newspaper people have rather overstepped the limit” in printing liquor advertisements, especially those soliciting immediate orders, but he added that neither the publishers nor the advertisers had anything to fear if there was no intent to violate the law. N. Y. Times, Oct. 20, 1933, p. 10, col. 2; Oct. 27, 1933, p. 9, col. 3.

liquor advertisements in dry states, although it had not done so pending the decision of the Department of Justice.¹³

As a precautionary measure some liquor advertisements carried a "when and if" clause—publications being accepted for mailing which contained liquor ads specifically stating that beverages would be delivered only "when and if" Repeal was adopted.¹⁴ The Post Office Department overlooked its regulation that every edition of any publication must be exactly the same in form and content,¹⁵ and publishers were allowed to mail editions bearing liquor advertisements to wet states and the same edition with the advertisements removed and the pages left blank or filled with other copy to dry states!¹⁶ *Time*, beginning January 15, 1934, and for several months, carried liquor advertisements which included the statement: "This advertisement is not intended to offer alcoholic beverages for sale or delivery in any state wherein the sale or use thereof is unlawful."

The Liquor Enforcement Act of 1936¹⁷ repealed the Reed amendment, thus returning to the states that much more of the problem of liquor control. Most of the states which had set up liquor systems had included provisions concerning advertising by various media: publication, billboard, and radio, to meet this situation. The dry states—Mississippi and Oklahoma—prohibit advertising and solicitation of orders by publication.¹⁸

Radio advertising of distilled spirits has been used very little.¹⁹ The states are practically without power to deal effectively with such advertising,²⁰ and the federal law does not provide much regulation. The Federal Radio Commission, however, called the attention of broadcasters and advertisers to the fact that the "Radio Act of 1927 provides that stations are licensed only when their operation will serve public interest, convenience and necessity," and asked their intelligent cooperation insofar as liquor advertising is concerned.²¹

Repeated recommendations of the Federal Alcohol Administration and petitions of citizens to Congress finally resulted in the introduction of a bill to amend the Communications Act of 1934 by prohibiting the advertising of alcoholic beverages over the radio.²² The Senate Committee on Interstate Commerce submitted a majority report²³ which pointed out that the spirit and purpose of the Twenty-first Amend-

¹³ N. Y. Times, Oct. 30, 1933, p. 19, col. 6. A list of the states affected by the Reed amendment is carried in Post Office Dep't, Liquor Bulletin No. 3, Dec. 1, 1933, p. 1.

¹⁴ Howe, *Liquor Can Be Advertised Now*, 165 PRINTERS' INK 17-20 (October 12, 1933).

¹⁵ N. Y. Times, Dec. 6, 1933, p. 22, col. 5.

¹⁶ Vane and Hubbard, *Liquor—the Problem Child*, 22 ADVERTISING AND SELLING 19-20 (Nov. 23, 1933).

¹⁷ 49 STAT. 1930 (1936), 27 U. S. C. §§221 *et seq.* (Supp. V, 1939).

¹⁸ MISS. CODE (1930) c. 38, §2025; OKLA. STAT. (1931) c. 16, §2618.

¹⁹ 166 PRINTERS' INK 12 (Feb. 8, 1934). Station WOR at Newark, N. J., on a program advertising a gin, made the preliminary statement: "Those listening in from dry states may now tune out this station, for the next program is not intended to offer alcoholic beverages for sale or delivery in any state or community wherein the advertising, sale or use thereof is unlawful."

²⁰ North Carolina prohibits the advertising of liquor on radio programs originating in the state.

²¹ N. Y. Times, Feb. 3, 1934, p. 1, col. 6.

²² S. 517, 76th Cong., 1st Sess. (1939).

²³ SEN. REP. No. 338, 76th Cong., 1st Sess. (1939).

ment was to restore to the states the primary power of policing the liquor traffic as they saw fit, and that it was contrary to the purpose of the Amendment that Congress should permit the federally controlled medium of the radio—for which it was directly responsible—to be utilized for an advertising campaign to promote the sale of liquor.

Transportation

As early as 1890, the Federal Government provided by the Wilson "original package" Act that all intoxicating liquors transported into any state became subject to the laws of that state upon arrival.²⁴ Previously the courts had held that a state could not forbid any common carrier from bringing intoxicating liquors into the state,²⁵ and that any importer had the right to sell in the original package, notwithstanding a state law to the contrary.²⁶ The Webb-Kenyon Act²⁷ in 1913 further divested liquor of an interstate character and enlarged the scope of the Wilson Act by making receipt and possession of intoxicating liquor as illegal as its transportation into a dry state.²⁸

Prior to adoption of the Eighteenth Amendment and the National Prohibition Act,²⁹ the President was given "war" powers to prohibit alcoholic beverages in or near military camps,³⁰ to establish such dry zones as he deemed advisable about coal mines, munition factories and shipbuilding plants,³¹ and to prescribe limitations on the use of food and fruit materials in the production of malt and vinous liquors, without, however, authorizing the licensing of the manufacture of liquors in any state or civil subdivision where such was prohibited.³²

In the consideration of this aspect of the problem greatest immediate importance attaches, of course, to the ratification of the Twenty-first Amendment on December 5, 1933, carrying as it did in Section 2 its prohibition of the transportation or importation of intoxicating liquors into any state for delivery or use therein in violation of the laws of the state.

The Liquor Taxing Act of 1934³³ provided, among other things, that whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for sacramental, scientific, medicinal, or mechanical purposes, into any state the laws of which prohibit the manufacture or sale therein of intoxicating beverages, shall be fined or imprisoned or both. The Liquor Law Repeal and Enforcement Act of 1935,³⁴ while repealing Titles I and II of the National Prohibition Act and all laws amendatory or supplementary to the act, restated in Section 202(b)

²⁴ 26 STAT. 313 (1890), 27 U. S. C. §121 (1934).

²⁵ *Bowman v. Chicago & N. W. Ry.*, 125 U. S. 465 (1888).

²⁶ *Leisy v. Hardin*, 135 U. S. 100 (1890).

²⁷ 37 STAT. 699 (1913), 27 U. S. C. §122 (1934).

²⁸ *Adams Exp. Co. v. Commonwealth*, 160 Ky. 66, 169 S. W. 603 (1914), held that Webb-Kenyon Act did not apply to liquor shipped for personal use of consignee where such shipments are not prohibited by state law.

²⁹ 41 STAT. 305 (1919).

³⁰ 40 STAT. 82 (1917).

³¹ 40 STAT. 958 (1918).

³² 40 STAT. 282 (1917).

³³ 48 STAT. 313 (1934), amending 39 STAT. 1069 (1917) as amended.

³⁴ 49 STAT. 872 (1935), 27 U. S. C. §§151 *et seq.* (Supp. V, 1939).

the prohibition against transporting liquors into a state in violation of the laws of such state.³⁵

Also enacted in 1935 was the Federal Alcoholic Administration Act.³⁶ In order to regulate intoxicating beverages, protect revenue, and enforce postal laws,³⁷ Section 3 of this measure provided it would be unlawful to engage in the sale or shipping of intoxicating liquors except pursuant to a basic permit issued by the F. A. A. Certain character qualifications are required of permittees (§4(a).2) and the basic permit is conditioned upon compliance with the Twenty-first Amendment and laws relating to its enforcement (§4(d)).

A further effort to control liquor transportation was embodied in the Liquor Enforcement Act of 1936³⁸ which provided a misdemeanor penalty for anyone transporting intoxicating liquors of more than 4 percent alcohol by volume (excepting for sacramental, scientific, mechanical, or medicinal uses) into a state in violation of its laws. The definition of intoxicating liquors contained in the laws of such state was to be applied.

The difficulty is, however, that "the producer or distributor who holds a Federal permit is precluded from transporting liquor across state lines for unlawful uses, but there is no federal law which prevents him from dealing with bootleggers from outside the state who come to his place of business, pay him cash for his merchandise, and carry it across state lines. This is so, even though the distributor may be fully aware of the intention of the purchaser to introduce the liquor into a particular state for unlawful distribution."³⁹ Rectifiers and wholesalers are required to keep records of sales⁴⁰ but falsification of these records makes it even more difficult to stem the illegal traffic. The Federal Alcohol Administration⁴¹ reports that eight wet-state wholesalers sold approximately a million gallons of distilled spirits to Mississippi bootleggers from January to November, 1939.

Most of the states encourage exportation of liquor by making it tax-free, and thereby may be said to contribute to the bootlegger problem. A lack of regulations concerning out-of-state buyers is conducive to buying in one state for resale in another, particularly when liquors are exported free.⁴² Transshipment of liquor in

³⁵ 49 STAT. 877 (1935), 27 U. S. C. §122 (Supp. V, 1939).

³⁶ 49 STAT. 977 (1935), 27 U. S. C. §§201 *et seq.* (Supp. V, 1939).

³⁷ 35 STAT. 1131 (1909), 18 U. S. C. §340 (1934), had made intoxicating liquors nonmailable.

³⁸ 49 STAT. 1928 (1936), 27 U. S. C. §§221 *et seq.* (Supp. V, 1939).

³⁹ F. A. A. ADMR., ANN. REP. (1938-1939), 22.

⁴⁰ 19 STAT. 248 (1877), 20 STAT. 329 (1879), 26 U. S. C. §1208 (1934).

⁴¹ *Supra* note 39, at 33.

⁴² DISTILLED SPIRITS INSTITUTE, STATE LIQUOR CONTROL LAWS AND REGULATIONS RELATING TO DISTILLED SPIRITS (1939). Of 45 wet states, 19 specify exports as tax free, 9 list no tax, 11 make no provision concerning exports. Florida provides for an inspection fee of one half cent per half pint, Louisiana levies an inspection fee of 30 cents per case, and the Texas inspection fee amounts to 25 cents per package. Georgia charges a fee of 15 cents per gallon or 45 cents per case and a warehouse charge of 10 cents per case. Missouri allows exports to be tax free if shipped via common carrier and in Pennsylvania exemption is granted shipper upon petition showing that no tax is payable upon spirits shipped from any state which is in substantial competition with Pennsylvania.

Kansas is via established ports of entry and exit;⁴³ interstate shipment of liquor into Oklahoma and Mississippi is unlawful.⁴⁴

The only way to prevent importation, though, is to apprehend liquor runners in the act, which involves guarding several hundred miles of border in each of the dry states. In Kansas, for instance, most of the roads leading from Nebraska are extremely dusty and bootleggers operating under cover of both darkness and dust and using several different license plates have created a difficult enforcement problem.⁴⁵ Almost three years elapsed between adoption by Congress of the Liquor Enforcement Act of 1936⁴⁶ and the passage of legislation in Kansas and Oklahoma meeting the requirements of the federal law. Since the 1939 Kansas legislature adopted an act prohibiting the importation of intoxicating liquor except by special permit covering medicinal, mechanical, and similar purposes⁴⁷ approximately 50 cases have been filed in federal district courts and guilty pleas obtained in each instance.⁴⁸ The volume of illegal liquor still obtainable in dry states, however, indicates that liquor running still continues.

Occupational Tax

Considerable misunderstanding has arisen as a result of the federal occupation tax on liquor rectifiers, wholesalers, and retailers, the charge being frequently made that the Federal Government is licensing bootleggers in dry areas. Levied since 1875, this occupational tax, for instance, requires retail dealers in distilled spirits to pay \$25 a year.⁴⁹ The tax stamps or receipts for the special tax are sold by the Federal Government without investigation of the applicant, and without regard to whether or not the persons are licensed to engage in the liquor traffic by the state within which they engage in business.⁵⁰ During the fiscal year 1938-39, 1,228 retail

⁴³ KANS. GEN. STAT. (1935) art. 21, §2185. *Haumschilt v. State*, 142 Tenn. 520, 221 S. W. 196 (1920), held that transportation across a state can be forbidden only if use at destination is illegal; *Williams v. Commonwealth*, 169 Va. 857, 192 S. E. 795 (1937), held that the 21st Amendment does not authorize a state to regulate the shipment of intoxicating liquors transported through the state.

⁴⁴ MISS. CODE (1930) c. 38, §2003; OKLA. STAT. (Harlow's Supp. 1936) §2618. Under *Webb-Kenyon Act*, states may prohibit such shipments: *Clark Distilling Co. v. Western Maryland Ry.*, 242 U. S. 311 (1917); similar holding in *M. K. & T. Ry. v. Danciger*, 248 F. 36 (C. C. A. 8th, 1918); however, the individual is not prevented from bringing liquors lawfully purchased in another state for his own use, provided such liquors are brought in personally by the purchaser: *Crossland v. State*, 74 Okla. 58, 176 P. 944 (1918); and *Baldrige v. State*, 80 Okla. 85, 194 P. 217 (1920).

⁴⁵ Kansas Legislative Council, Research Dep't, Memorandum on Liquor Enforcement, Aug. 7, 1940.

⁴⁶ *Supra* note 38.

⁴⁷ GEN. STAT. (1939 Supp.) c. 21, art. 21. ⁴⁸ *Supra* note 45.

⁴⁹ 18 STAT. 311 (1875) as amended by 20 STAT. 333 (1879), 48 STAT. 967 (1934), INT. REV. CODE §3250(b)(1) (1939).

⁵⁰ Also interesting in this regard was the special annual excise of \$1,000 levied under 40 STAT. 1128 (1919), 42 STAT. 296 (1921), 43 STAT. 327 (1924), 44 STAT. 95 (1926), on every person engaged in the liquor traffic in any state or in any place therein, in which carrying on such business was prohibited by local or municipal law. Payment of this tax, as in the case of the special \$25 tax, was not to be held to exempt any person from any penalty or punishment provided by the laws of the state, nor was it to authorize the commencement or continuance of such business contrary to the laws of such state, or in places prohibited by local or municipal law. *Wainer v. U. S.*, 299 U. S. 92 (1936): the United States does not license the liquor business but merely lays an excise upon the doing of the business, whether lawful or unlawfully conducted. *Chapman v. Boynton*, 4 F. Supp. 43 (D. Kans. 1933), held that the internal revenue retail liquor license does not permit licensee to violate state laws. *Cleveland v. Davis*, 9

liquor dealers obtained such receipts in Kansas, 1,426 paid the special tax in Mississippi, and 1,851 in Oklahoma.⁵¹ In Iowa, state-operated liquor stores are the only legal retail liquor establishments, but during 1938-39, 2,049 retail liquor dealers purchased special-tax stamps to engage in the sale of distilled spirits.

In certain of the wet states the possession of a federal tax stamp by a person who does not hold a state license covering the same activity is *prima facie* evidence of violation of the state law.⁵² In dry counties of Florida and Kentucky, possession of a federal liquor tax stamp is *prima facie* evidence of the violation of the state law.⁵³

The attitude of the Federal Government, reflected in decisions of the Treasury Department⁵⁴ and opinions of the Supreme Court,⁵⁵ is that the statutory provisions with regard to the occupational tax on liquor traffic are applicable in both wet and dry states; that collectors of internal revenue have no discretion in the issuing of the stamps; that the tax imposed is in no sense a license to conduct a business in contravention of local prohibition laws; that the requirement of publishing the lists of special taxpayers to make such information available to local prosecutors and the admissibility of such evidence in the prosecution of local violators are conducive to enforcement of local prohibition laws.⁵⁶ The occupational tax stamp is not a license or permit but merely a receipt evidencing the payment of the federal tax on the occupation of selling liquor—a tax which Congress is required by Article I, Sec. 8, Clause 1 of the United States Constitution to make uniform throughout the Union if it is to be levied at all.⁵⁷

Local Enforcement

Despite all that the Federal Government can do, of course, the on-the-ground protection of dry areas must come from state and local enforcement officers. That each state has a right to establish its own system of liquor control, without regard to the action of other states, has been recognized by the United States Supreme

F. Supp. 337 (S. D. Ala. 1934), held that where the retail liquor dealer in a dry state had paid his license tax, imposition of the special \$1,000 excise would be a penalty which equity would enjoin. U. S. Treas. Reg. 3911, July 30, 1926. The special excise tax was ruled to be a penalty, but this position was reversed on repeal when collectors were instructed to treat the item as a special tax. In *U. S. v. Constantine*, 296 U. S. 287 (1935) and *U. S. v. Kesterson*, 296 U. S. 299 (1935), the Supreme Court decided this special excise tax was a penalty. The Revenue Act of 1935, 49 STAT. 1026, provided that it did not apply after June 30, 1935.

⁵¹ U. S. BUR. INT. REV. ANN. REP. (1938-1939), Table 32.

⁵² Idaho Laws 1939, c. 222, §909; Tenn. Acts 1939, c. 49, §14 (3); Wis. Stat. 1937, c. 176.05 (3a).

⁵³ Fla. Laws 1937, c. 18016, §9; Ky. Acts 1934, c. 146, art. 8, §6.

⁵⁴ TD-1484 (Bur. Int. Rev.) Apr. 21, 1909, held that special tax stamps are merely receipts for the tax and carry no privileges except immunity from prosecution for nonpayment of the tax; TD-1826, Jan. 7, 1913, held, with reference to the issue of special tax stamps to liquor dealers in prohibition territory, that the Bureau of Internal Revenue was without authority to refuse to issue the special tax stamps in cases where the conditions prescribed by federal laws were satisfied; see also U. S. Bur. of Int. Rev., 12 CUM. BULL. 461-5, 498-99, 500-2 (1933); 13 *id.* 427-33 (1934); 14 *id.* 403-7 (1935).

⁵⁵ See cases cited *supra* note 50.

⁵⁶ *Willingham v. U. S.*, 208 Fed. 137 (C. C. A. 5th, 1913), "the United States is not concerned with the enforcement of local laws regulating or prohibiting the sale of liquor."

⁵⁷ W. S. Alexander, F. A. A. Adm'r, letter of Nov. 22, 1937.

Court.⁵⁸ Under the Eighteenth Amendment the state and federal governments could act jointly in enforcing prohibition laws since both had concurrent police jurisdiction. The Twenty-first Amendment, however, extends affirmative federal protection to the states only to a limited extent, and in no event do federal officials have authority over the intrastate sale and distribution of intoxicating beverages.

Federal officials can and do assist state enforcement officers by making available information which to them indicates the possible violation of a state law,⁵⁹ but even here the ultimate action depends on state and local authorities. Appraising the effectiveness of enforcement efforts of state and local police is a difficult task, and one quite beyond the scope of this brief discussion, but the frequency of complaints with respect to conditions in specific localities indicates that the problems connected with bootlegging still demand solution.

Interstate Relations

Individual states, in establishing rules and regulations to control liquor traffic, usually considered only intrastate problems, apparently unmindful that serious difficulties might arise if their licensees contributed to violations of the laws of other states with respect to out-of-state sales and transportation across state lines.⁶⁰ As late as 1937 the National Conference of State Liquor Administrators' Committee on Cooperation—State and Federal—reported that:⁶¹

“Other than furnishing each other information, working together along the borders, and, where administrators have authority to promulgate rules and regulations with some force behind them, adopting such rules as would tend to better regulate the traffic between such states, there is not much that can be done toward cooperation between states as each state has its own individual problems and must handle them in their own way. Cooperation between state and federal governments is far more conducive of results than cooperation between states.”

Less pessimistic was the stand taken at the second annual Eastern Regional Conference on Liquor Control in New York City, November 18, 1938. It was there resolved that:⁶²

“In order to aid states in the enforcement of their laws, the statutes or regulations issued under the statutes of each state should require licensees to respect the laws of adjoining states in order to prevent bootlegging into dry, monopoly or license states. To this end, state laws and regulations controlling out-of-state shipments should prohibit any licensee

⁵⁸ State Board of Equalization of Cal. v. Young's Market Co., 299 U. S. 59 (1936); Mahoney v. Jos. Triner Corp., 304 U. S. 401 (1938); Indianapolis Brewing Co. v. Liquor Control Comm. of Mich., 21 F. Supp. 969 (E. D. Mich., 1938); Finch & Co. v. McKittrick, 305 U. S. 256 (1939); Ziffrin, Inc. v. Reeves, 308 U. S. 132 (1939).

⁵⁹ W. S. Alexander, F. A. A. Adm'r, on Aug. 15, 1939, furnished Attorney General Parker of Kansas data by letter relative to 146 Kansans who had purchased liquor from Illinois distributors in such quantities as to make it appear they were engaged in retailing distilled spirits. On May 7, 1938, Mr. Alexander furnished Governor Huxman of Kansas a list of Kansans who had been making large purchases from Kentucky distributors, to mention typical instances.

⁶⁰ 6 PROCEEDINGS, NAT. CONF. STATE LIQUOR ADM'RS (1939) 28.

⁶¹ 4 *id.* 55.

⁶² COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES (1939) 299.

from transporting or importing any intoxicating liquor or from delivering such liquor for the transportation or importation into any state in violation of the laws thereof."

A similar recommendation was included in the Report of the Committee on Liquor Control of the National Conference on Interstate Trade Barriers held in Chicago in April, 1939.⁶³

Representative of recent regulations designed to require respect for the laws of adjoining states are those of Indiana concerning non-resident customers.⁶⁴ No wholesale licensee may sell spirits to any out-of-state customer unless such customer has the legal right to buy such spirits at the place of his residence in accordance with the laws there prevailing. Nor shall any wholesale licensee sell to any out-of-state customer if such licensee has reason to believe that such customer intends to resell such spirits in any other state in contravention of the laws of that state, regardless of whether or not such customer has the legal right to buy such spirits at his place of residence. An out-of-state customer must exhibit proof of his right to purchase alcoholic beverages according to the laws of his own state and make out an affidavit that such beverages are not to be sold in any state, the statutes of which make unlawful the manufacture or sale of alcoholic beverages.

At the Midwest Conference on Liquor Transportation Problems, held at Chicago in March, 1940, Illinois, from which large quantities of liquor had been shipped illegally into other states, agreed to adopt a regulation (No. 31) effective April 1, similar to that of Indiana. A recommendation that all states consider the adoption of similar legislation or regulations was made at the Interstate Conference on Liquor Control held at Buffalo in January, 1940.⁶⁵

Local Option

Legalization of the sale of intoxicating beverages in 45 states did not mean that dry sentiment had disappeared. As a matter of practical politics, local option was a compromise with the dries, but local option provisions also were supported on the ground that laws defining the conditions of liquor sale should be strict or liberal in harmony with the customs, habits, and widely accepted modes of personal conduct in each locality, in order to be regarded as just and reasonable and thus gain the support of the preponderant majority of the people.⁶⁶

Basically, a local option election enables a decision on the question as to whether there shall be *sale* of alcoholic beverages within the area. Even in wet areas it is recognized as being in the public interest to forbid the sale of liquor within a certain distance of a school, playground, or church—the distance ranging as high as three miles in some instances.⁶⁷ Extending this principle to permit residents of any given

⁶³ *Id.* 291.

⁶⁴ Reg. 1, §10, June 21, 1938.

⁶⁵ Ind. Comm. Interstate Cooperation, *Recent Developments in Liquor Control* (Bull. No. 5, Mar. 12, 1940), 11.

⁶⁶ Committee on Liquor Control Legislation, *Principles Governing Liquor Control Legislation*, 23 NAT. MUN. REV. 49 (Supp. Jan. 1934).

⁶⁷ Cal. Stat. 1933, c. 826, 1023: Liquor may not be sold within three miles of the University Farm at Davis.

locality to prohibit the sale of liquor, or to allow it, according to their wishes, would appear to be an entirely legitimate phase of government activity. Nor should the enforcement problem in dry areas prove extraordinarily difficult, so long as there are legal sources of liquor for those who desire it, at not too great a distance. It is when local option goes beyond the question of sale and seeks to prevent transportation and possession that the more difficult problems of protection arise.

If experience in attempting to control the use of intoxicating beverages has shown one thing it is the virtual impossibility of preventing those who desire to drink from acquiring liquor, by one means or another.⁶⁸ Some states have recognized this problem and specifically allow possession for personal consumption in dry areas.⁶⁹ Even this, however, is not without its difficulties, of course, as is indicated by the fact that the Georgia Commissioner of Revenue has asked for elimination of the "one quart" law in favor of a measure authorizing seizure of stamped liquor in any quantity in a dry county.⁷⁰ In Alabama, bone-dry prohibition returned to 43 counties when the state Court of Appeals ruled that liquor purchased in a wet county could not legally be owned in dry territory. Previously, alcoholic beverages sold in wet counties had been considered as legal property anywhere in the state, under an advisory opinion of the Attorney General.⁷¹ Tennessee, latest of the states to adopt a liquor control law, doing so over the objection of the Governor, has made it possible for dry counties to forbid possession of liquor.⁷²

In most state liquor laws the question of possession in dry territory is not mentioned, but local option is specifically restricted to limitation on the sale of alcoholic beverages. To make it possible to fit sales restrictions fairly exactly to the desires of the citizenry some states, notably Maine, Massachusetts, New Jersey, New York, Ohio, Oregon, and Texas, allow the voters to express a preference on several types of questions rather than the simple proposition "Shall the sale of liquor be legalized?"⁷³

With liquor interests arrayed on one side and militant prohibitionists on the other, local option might easily make the problem of intoxicating beverage control a

⁶⁸ N. C. COMM. TO STUDY THE CONTROL OF ALCOHOLIC BEVERAGES, REPORT (1937) 12. Some indication of this is seen from data showing that between January 1 and August 14, 1936, the North Carolina state highway patrol arrested more persons for drunken driving, in proportion to population, in two "dry" counties than anywhere else in the state. The ten counties with the highest arrest ratios included six "dry" ones, two "wet" counties, and two counties containing "wet" townships.

⁶⁹ Ga. Laws, 1st Spec. Sess. 1937, act 297, §4, provided that "the manufacture, possession, distribution and sale" of alcoholic beverages would be legalized in any county voting to tax and control liquor, but if the majority of the voters opposed legalizing liquor the "manufacture, distribution, and sale" would be forbidden—possession being significantly omitted. §23-B made possession of not more than one quart of properly stamped liquor legal anywhere in the state.

Del. Laws 1917, c. 10, as amended by Laws 1933, cc. 12 and 17, provides that while it is illegal to receive from a carrier or possess liquor for sale in any area dry by local option "nothing in this section shall be construed to apply to individuals who may bring into any section of the state of Delaware where the sale of liquor is prohibited . . . upon their person or as their personal baggage, and for their private use, such spirituous liquors not for sale or barter."

⁷⁰ *Report on the Operation of the Liquor Law as of January 1, 1939*, p. 10.

⁷¹ N. Y. Times, Jan. 13, 1938, p. 16, col. 1.

⁷² Tenn. Public Acts 1939, c. 49, §16.

⁷³ N. Y. Laws 1939, c. 426. Voters in each city or township can indicate whether they desire to allow or forbid sale of all alcoholic beverages, or liquor, or wine, by the drink, or by the package, or by hotel keepers only, or even in summer hotels only.

political football, with harmful economic and social results. One phase of "protection" in local option areas, therefore, is covered by legal provisions limiting the frequency of such elections, and requiring that a certain percentage of the voters must sign the petition for an election. All but five of the states which permit local option elections have stipulated that they may be held only at specified intervals—five states fixing the minimum interval at one year, 12 at two years, four at three years, and seven at four years.⁷⁴ Washington authorizes a vote at each general election, but New York limits local option elections to once every three general elections. New England states, concerned with keeping the local situation in tune with the popular temper, provide for automatic submission of the liquor question to the vote.⁷⁵ In a large number of local option areas public opinion is quite stable, but voting strength is almost evenly divided in other sections, and reversals of earlier votes are not uncommon.⁷⁶ All but six of the 35 states permitting local option allow governmental units smaller than counties to conduct elections. A large number of such elections are held in areas which are small in size, in population, or in both.⁷⁷

Dry territory tends to mass in certain sections of Alabama, Texas, and a few other states, so that wet areas are somewhat less readily accessible, but in most states the wet and dry localities are quite thoroughly mixed. The interlocking of wet and dry areas, coupled with the fact that the dry islands are often small in size, makes almost impossible the application of such protective devices as were discussed with respect to the dry states of Kansas, Mississippi, and Oklahoma, even though an interstate problem is created when wet territory in one state touches a locality which is dry under local option provisions of an adjoining state.⁷⁸ The state can cooperate by not issuing licenses in dry cities and counties and can utilize its inspection and enforcement staff, but the burden of enforcing prohibition conditions following a "dry" election must of necessity fall on local police.

⁷⁴ CULVER AND THOMAS, STATE LIQUOR CONTROL ADMINISTRATION: A STATUTORY ANALYSIS (1940) 54-63.

⁷⁵ Annual town meetings in Vermont, the regular biennial elections in Massachusetts and New Hampshire, and the biennial election for senators and representatives in Maine.

⁷⁶ TEX. LIQUOR CONTROL BD., ANN. REP. (1937) 29; *id.* (1938) 30. Citizens of Howard County, Texas, voted 1,029 to 1,147 on December 10, 1937, to prohibit the sale of alcoholic beverages, only to change their minds on March 11, 1938, and legalize sale of beverages containing not more than 14 percent alcohol by a vote of 2,558 to 1,863, and to take still another stand 10 months later by voting to legalize the sale of all alcoholic beverages by the slim majority of 848 to 779.

⁷⁷ DISTILLED SPIRITS INSTITUTE, ANN. REP. (1939) 71. Between the repeal of Prohibition and December 31, 1939, 239 wet-dry elections were held in precincts of the city of Chicago, 160 resulting in prohibitionist victories and 79 in wet victories. TEX. LIQ. CONTROL BD., ANN. REP. (1937) 28-32. Fewer than 200 votes were cast in each of 17 local option elections held in Texas in 1937.

⁷⁸ N. C. COMM. REP., *supra* note 68 at 11: "We think it is immediately apparent that conditions beyond which North Carolina has no control have greatly affected conditions in the so-called prohibition counties. After the repeal of the federal prohibition act, Virginia, bordering on North Carolina for 312 miles, and South Carolina, bordering on North Carolina for 324 miles, both legalized the sale of liquor. If North Carolina had no liquor stores, South Carolina and Virginia would provide, or have already provided such stores within 50 miles of approximately two thirds of the population of North Carolina. During 1935 Virginia sold approximately 2,100,000 gallons of liquor, and during the past 12-months period South Carolina has sold approximately 1,400,000 gallons. Unquestionably a part of this crossed the state boundary lines for consumption in prohibition counties."

It follows, therefore, that the ultimate key to the protection of dry localities is a reasonableness on the part of those who make and interpret the liquor control laws. If there were no demand for intoxicating beverages in a particular area, local option would be unnecessary. Adoption of a dry law by local option merely means that a majority of the voting residents are interested in preventing traffic in liquor. The best protection that a dry locality can be given, until the day arrives when temperance education has become far more effective than it has been to date, appears to be a law which forbids the sale of liquor, but does not tell any man he cannot bring a bottle of whiskey in from the outside and consume it in his home if he wishes.

Local option is, in theory at least, a reciprocal device, designed not to promote the cause of prohibition exclusively, but to enable adaptation of liquor control laws to the wishes of the residents of a particular locality—whether they be wet or dry—and recognition of this will, in the long run, prove of assistance in protecting those areas which are really dry. It is a bit difficult, for instance, to justify the reasoning which forbids a city or town from holding an election on the sale of liquor if the parish in which it is located has voted dry, but which holds such city or town is not bound by a parish-wide local option election which favored the sale of liquor, and can hold a local option election of its own.⁷⁹ Recognition of the proper place and use of local option must, of necessity, precede effective protection of those localities which vote in favor of prohibition.

Everything considered, of course, the problem of protecting the interests of the dry areas in the United States is only one phase of the difficulties involved in present-day attempts to handle the liquor question. What has been said here, for instance, with respect to interstate relations and such activities as the attempts to eliminate illegal transportation of intoxicating beverages applies with as much force to the monopoly and private license states as to those states which still prohibit liquor. Complete protection of dry areas perhaps must await that apparently far-off day when the consumption of liquor will cease to be a social or political problem.

⁷⁹ LA., REP. AND OPINIONS OF THE ATT'Y GEN. (1934-1936), (opinion to R. S. Williams, Nov. 16, 1934) 589, (opinion to N. L. Hower, Nov. 28, 1934) 587.