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IS LICENSE . . . . CONSTITUTIONAL?

A SECOND BRIEF

By ELI F. RITTER

BEFORE THE SUPREME COURT OF INDIANA

FUNK & WAGNALLS COMPANY

LONDON NEW YORK TORONTO

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Is license constitutional

MARY E. HAGGART
and
SARAH C. RATHWELL
vs.
JOHN H. STEHLIN
and
GEORGE HEIDT.

No. 16,142.
Supreme Court
of
Indiana.

BRIEF ON PETITION FOR RE-HEARING.

THE appellants in support of the petition for rehearing in the above entitled cause submit the following brief:

DECIDES WHAT IS NOT AT ISSUE.

The following language was used in appellants' original brief in this cause in the very outset of the argument, as appears on page 12: "If the Act of the Legislature contained no other provisions than such as assume control, regulation, and restriction upon the sale of intoxicating liquors, I should readily concede its validity. It is not the control over this subject and business to which I offer objections. My objections are made to the license, the authority, and the sanction given by the Act to the person, the place, and the conduct of the saloon business." I quote

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also from the brief on page 33. "I will go no further in the effort to establish the dangerous and disastrous character of the saloon business. Let it be borne in mind that I am now only discussing the saloon business. I am not lecturing on temperance, total abstinence, the moderate use of intoxicating liquors, nor the manufacture of the same as an industry. I am talking about the saloon business solely; the place where intoxicating liquors are sold and drunk, where persons are invited to meet and drink, the place and business authorized and sanctioned by law." The right of the Legislature to regulate and control and to license the sale of intoxicating liquors was specifically and distinctly conceded in my original brief in this case and in my oral argument before the Court. That question was in no way put at issue in this case, yet, with all due respect for the opinion of this Court as rendered in this case, I urge that the Court has decided very clearly and very conclusively and very satisfactory that particular question. The citations in the opinion of the Court in its support apply and support the opinion on the question decided, and the Court is correct when it says upon that question that, "There is absolutely no diversity of opinion. There is, therefore, no room for doubt. No question as to our duty, for we are bound by the law as it exists." All of this I now concede fully

and freely, as was conceded at all times in the argument of this cause. As I stated in the oral argument, every State in the Union where there exists a prohibitory Statute has, nevertheless, some provision by Statute for the sale, with regulations and restrictions, of intoxicating liquors. The opinion of the Court is solely upon that question, but that question was not at issue. I submit in all candor to the intelligence of this Court upon a careful re-examination of my original brief and argument and the record, whether I am not right in this presentation. I should not seriously object to the decision, correctly made and supported as it has been, though upon a question not at issue, if the Court has gone a step further and decided the question that was at issue.

THE QUESTION AT ISSUE.

After what I am satisfied the Court will see upon second thought was a careful effort on my part in the original brief and former argument to state what was not at issue and what I was not intending in any way to put at issue, the Court will find I did proceed to state with a fair degree of clearness what was at issue and the ground of constitutional objection to the Legislative Act.

I am unable to give any better expression to this question at issue than is given in my

original brief on page 12, as follows: "My objections are made to the license, the authority, and the sanction given by the Act, to the person, the place, and the conduct of the saloon business." I quote further from page 33 of the same brief: "I am talking about the saloon business solely; the place where intoxicating liquors are sold and drunk, where persons are invited to meet and drink, the place and the business authorized and sanctioned by law." This question that is at issue is not passed on in the opinion rendered by the Court. The opinion of this Court lays down the proposition involved in the case at the very beginning as follows: "The assault upon the Statute comes from a quarter different from that whence all assaults have come in the past; for it comes from citizens and property-owners who are not engaged in the traffic, not from those whom the law requires to take out a license and against whom penalties are denounced for a failure to pay the fee prescribed, and to obtain the license which is required of all who engage in the business of dram-selling. The position of the appellants is a moral one. There is no instance in the books where such a position has been assumed." The opinion says, "The assault upon the Statute comes from a quarter different from that whence all assaults have come in the past." I admit that the citizens of this State have submitted

hitherto to all the devastating and ruinous work of the saloons and saloon system ; to all its tyranny and heartless oppression ; have looked and prayed that the Government and her Legislatures and her Courts would some time bring relief. This "assault" is led by two women, by the side of whose home a saloon has been established, with its blasting influences over the rental and intrinsic value of the home and making the home unbearable. They have appealed to the Court, not expecting the Court to assume the attitude of repelling an "assault" with drawn sword, but to grant relief and protection to the home and citizens. The opinion further says: "The position of the appellants is a moral one. There is no instance in the books where such a position has been assumed." There is certainly more in the position of appellants than is thus stated in the opinion of the Court. The appellants in the institution of this action sought damages for injury to their property and the disturbance to their enjoyment of the premises, and sought relief by injunction, also, from the further continuance of the same.

There is no controversy in this case, no denial in the issues, and can be none under the issues, as to the actual damage already sustained, and the further damage to be sustained, by these appellants on account of the saloon which has been licensed and located

beside their home. This feature of the case presents a question of actual damage and injury to the property, and is in no sense a question of morals. But there is also a question of morals involved, in that the institution licensed is licensed immorality. So far as it applies to this case I concur in the expression in the opinion that "there is no instance in the books where such a position has been assumed." It is true that the position assumed and the issue tendered in this case is a new one, and presented to this Court for the first time the question has been presented to any Court, but I do not understand the expression of the Court in this case when it says, "We are asked to overthrow a principle of law which has prevailed not merely for years but for centuries." What principle of law does the Court refer to? I insist that the Court is mistaken in the opinion in the principle of law involved. The opinion following the foregoing quotation proceeds upon a theory that the principle of law involved is: whether the Legislature of a State may license, regulate, and restrict the liquor-traffic. That is not the principle nor question involved. The question is presented as to what the Legislature may authorize to be licensed. The Legislature may provide a system for licensing school-teachers and doctors and the sale of liquor. The Legislature might provide for the licensing, regulating,

and restricting other vocations, business, and professions. I concede that there is a wide field and great scope which are exclusively the province of the Legislature for license systems, with which the Courts can have no power to interfere. But the Legislature may not license everything. Its power is limited by the Constitution. When it exceeds its power, the Courts can interfere and are bound to when a question is presented. The Constitution of Indiana presents the moral question in Article 8, Section 1, as it appears in the Revised Statues of 1881, as follows: "Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government, it shall be the duty of the General Assembly to encourage by all suitable means, moral, intellectual, scientific, and agricultural improvements, and to provide by law for a general and uniform system of common schools, wherein tuition shall be without charge and equally open to all."

If this Section of the Constitution presents any question at all, any subject at all, to the Legislative department of the State government; if this Section of the Constitution commands or lays any duty at all upon the Legislature, the question, the subject, and the duty presented to the Legislature, is public morality.

This Section of the Constitution makes

this subject distinct and specific just as much so as intelligence, science, agriculture, and common schools, which are each specific subjects in this Section. This Section of the Constitution makes morality a specific subject for legislative action just as much as if it were the only subject named.

If the Legislature were to pass an Act which was against education, or an Act against public intelligence, or an Act against the interests of agriculture, such an Act would be void, and it would be the duty and province of the Courts to declare it so. If the Act in fact worked an injury that was ruinous to the subject contemplated, the Courts must pass on the effect and result of the Act, sustain or declare it void in accordance with the effect and result it in fact has, however laudable might be the intention of the Legislature in the passage of the Act.

In Mugler *vs.* Kansas, 123d U. S., 205, the Supreme Court of the United States says: "The Courts are not bound by mere forms nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry, whether the Legislature has transcended the limits of its authority. If, therefore, a Statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial rela-

tion to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge and thereby give effect to the Constitution."

The Court in the opinion in this case says: "The theory of the Legislature upon this subject is, that the business is one which requires restraint because it is harmful to society." Then the Statute purports to have been enacted to protect public morals, public health, and public safety. "In such case," says the U. S. Supreme Court, "the Courts are under a solemn duty to look at the substance of things." This is the plain duty of the Court concerning legislation upon the specific subject of morality as presented in this Section of the Constitution. Many things the Legislature may do, but there are a great many things the Legislature may not do. There are many things the Legislature may license and on the other side many things it may not license.

If the Legislature, as it might do, were to establish a license system for slaughter-houses with regulations and restrictions and without any exception as to locality, it would not be insisted, I take it, that under such general license law a slaughter-house might be established on the main street in the heart of Indianapolis. If the Legislature were to provide, as it might, a license system for rolling-mills, and boiler and iron foundries, and without

any exceptions as to locality, it would not be claimed that under such general license system, a company might establish a rolling-mill, and another a boiler and iron foundry beside the slaughter-house on the main street and in the heart of our city.

The Legislature might provide a system for licensing pest-hospitals with regulations and restrictions, and without any exceptions as to locality, but it would not be contended by the legal profession, I take it, that a man might establish a pest-house on the main street and in the heart of the city of Indianapolis. These propositions are thoroughly supported by the authorities cited in my original brief in this case. On the principle of law recognized and established, I inquire, how can a saloon be established in the neighborhood described in the complaint in this case, and referred to in the original brief herein, and be maintained and protected? The appellants have not asked in this case and do not now ask in this case to overthrow any principle of law which has prevailed for centuries nor for one day in any Christian or civilized government. But, on the other hand, the appellants do urge the Court to recognize and apply the principles of law to this case that are applied and have been applied in the high Courts of the various States, and even by the Supreme Court of the United States, in the protection of private and public

rights of property and individuals as well as the peace and good order of the community and the enjoyment and protection of the homes.

The Legislature cannot license gambling, nor prize-fighting, nor cock-fighting, nor duelling, nor prostitution, because these things are injurious to public morals and public peace, and are immoral in themselves. The Legislature cannot provide a system for licensing any phase of immorality because of the constitutional provision to which I have called attention. While the Legislature, I concede, may by a constitutional Act license, regulate, and restrict the sale of liquor, it could not, in connection with the sale of liquors, license gambling or any other immoral thing. It is no more necessary, and I appeal to the Court for careful consideration of the proposition I present when I say, it is no more necessary to license a saloon in connection with licensing, regulating, and restricting the sale of liquor, than it is to connect gambling and other vices with the same. There is just as much actual necessity and less danger to the community, for persons to meet together for the purpose of gaming, as for drinking intoxicating liquors. The proposition that the authority to license, regulate, and restrict the sale of liquor carries with it the authority to license a saloon, cannot be maintained. The proposition that the

Legislature may license, regulate, and restrict the sale of liquor as is settled by the Courts, is based upon the theory that in so providing, the evil effects and consequences growing out of the use of intoxicating liquors shall by such legislation be prevented, mitigated, or reduced to the lowest possible degree. Any legislation that accomplishes these purposes is within the scope of the constitutional provision. Any legislation upon this subject which aggravates and multiplies the evils and disastrous effects growing out of the use and abuse of intoxicating liquors is in violation of the Constitution. The question whether the purpose of the Constitution which requires that the Legislature shall, by the best means, provide for morality, is being carried out by an Act of the Legislature, is a question addressed to the Courts, comes within its duty, and from which there is no escaping the responsibility. This question is not left solely to the Legislature nor is the duty and responsibility in the premises more with the Legislature than with the Courts.

It will not do for Courts to refer litigants, whose rights of property and person have been invaded and who are suffering from the same at the hands of a merciless foe to the whole human race, to the Legislature for the relief and protection against unconstitutional legislation. It is the province and duty of the Court to inquire into the effects and results

of legislation for the purpose of determining whether the purpose and objects of the Constitution are being promoted or defeated by legislation. It is a well-settled proposition that all laws must be construed in the interest of public health and public morals. No contract between individuals, nor where the State is a party, can be binding, where the consideration involved, or the subject-matter, is immoral or injurious to public morals.

The Supreme Court of Indiana held in 1879 in the case of Kellum *vs.* The State, 66th Indiana, 588, that the provision for a lottery in the charter to the Vincennes University was in the nature of a contract and might be the subject of a contract with the State of Indiana, and was binding. But afterwards with more light and the growth of general intelligence and public conscience aiding the Court, in 1883, in the case of the State *vs.* Woodward, 89th Indiana, 110, the Court held that a lottery could not be the subject of a contract, because it was immoral and annulled the charter to that extent.

No individual nor the State of Indiana can be bound by a contract for an immoral consideration nor an immoral purpose. This is the settled law in Indiana. I repeat here a quotation, made in my original brief, from the Supreme Court of the United States that has been often reiterated by that Court: "No Legislature can bargain away

the public health or the public morals. The people themselves cannot do it, much less their servants. Government is organized with a view to their preservation and cannot divest itself of the power to provide for them."

The Constitution of Indiana is careful to say: "It shall be the duty of the General Assembly to encourage by all suitable means, moral, intellectual, scientific, and agricultural improvements," etc. The Constitution makes it the duty of the Legislature to encourage by all suitable means *moral improvement.* It will not do to say that a saloon license law was in operation at the time when our present Constitution was adopted and had been long prior thereto in Indiana, and that because the Constitution is silent upon that subject, it thereby shall be construed to sanction the continuance of such legislation. Massachusetts, Rhode Island, and New Hampshire had license laws at the time of the adoption of their State Constitutions that were in force in 1845 and 1846. Their respective Constitutions were silent on the subject of the sale of intoxicating liquors. After the adoption of their respective Constitutions, the respective Legislatures of those States passed what were substantially prohibitory laws. The question was raised in each of these States that these Statutes were in conflict with the Constitution of the State, also in violation of the

provisions of the Constitution of the United States. These questions were passed upon by the Supreme Courts of these States, and also by the Supreme Court of the United States, in Thurlow *vs.* Commonwealth of Massachusetts, 5th Howard, 504, in which it is held that such legislation is valid, notwithstanding the silence of the Constitution. The same question on the same kind of a case came before the Supreme Court of the United States from Iowa (where the Constitution of the State of Iowa was silent upon the subject of licensing and regulating the liquor-traffic) yet the Legislature passed a prohibitory law and the Supreme Court held that the Act was valid, notwithstanding the silence of the Constitution upon that subject.

5 How. (Mass.) 504

But I insist that the Constitution of Indiana is not silent upon the question I am now presenting to this Court. It does specifically command legislation in the interests and for the promotion of public morals, and does thereby prohibit any legislation that would be against the interests of public morals. It is not the purpose of a State Constitution to specify the form nor method of legislation. It only lays down principles. If statutory laws existing when a constitutional provision goes into effect cannot be harmonized with the Constitution when it takes effect, then the Statute is annulled by the constitutional provi-

sion. I concede that a statutory law providing a license system for saloons existed at the time when our present State Constitution took effect in 1851. The Constitution in the light of that Statute made it the duty of the Legislature to promote by all suitable means public morality. In the light of public intelligence and judicial knowledge of Courts and the common conscience there are more reasons for saying that the present Constitution contemplated prohibiting a saloon license system by these provisions, than for saying it meant to leave such a system to stand forever. The constitutional provision contemplates the growing demands of public morality. That these demands whatever and whenever arising shall be met. No man of intelligence and candor can reconcile the constitutional requirement placed upon the Legislature to promote public morals with the maintenance of the saloon license Act of the Legislature. Every intelligent man knows, and the Court cannot avoid the judicial knowledge, that the Act of the Legislature providing for a saloon license system is against the interests of public morals. The Constitution and this Act with the history and results of such legislation cannot be reconciled. *No process of reasoning can harmonize the two. No evasion, no quibbling, and no dicta can satisfy common intelligence and common conscience upon this question.* Do the

results and effects of this Act tend to accomplish the promotion of public morals as required by the Constitution, or do they defeat and destroy public morals? *These are the questions presented to this Court.* I bring this Act of the Legislature before this Court for these two inquiries. These are not questions for the Legislature alone. This Court is not bound by the Act of the Legislature, unless it is in harmony with the Constitution, and this Court is bound by the Constitution to declare an Act void unless it is in harmony with the Constitution. It is far more serious in the consequences that follow for the Court to hesitate or fail in the discharge of a duty placed upon it, than it would be for the Legislature because of the superior intelligence and greater opportunity on the part of the Court for consideration of the question involved. I hold up the Constitution of Indiana and this saloon license Act of the Indiana Legislature side by side before this Court. Here is the constitutional provision: "Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government, it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement, and to provide by law for a general and uniform system of common schools, wherein tuition shall be without charge and equally open to

all." Here is the first Section of the Act (sufficient to present the point). "It shall be unlawful for any person, directly or indirectly, to sell, barter, or give away, for any purpose of gain, any spirituous, vinous, or malt liquor, in a less quantity than a quart at a time, without first procuring, from the Board of Commissioners of the County in which such liquor is to be sold, a license as hereinafter provided; nor shall any person, without having first procured such license, sell or barter any intoxicating liquor to be drunk, or suffer to be drunk, in his house, outhouse, yard, garden, or the appurtenances thereto belonging."

In the language of the Supreme Court of the United States: "Courts are not bound by mere forms nor are they to be misled by mere pretenses, they are at liberty, *indeed, are under a solemn duty to look at the substance of things whenever they enter upon the inquiries, whether the Legislature has transcended the limits of its authority.*" If therefore a Statute purporting to have been enacted and to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the Court to so adjudge and thereby give effect to the Constitution. I call attention, as I have a right to do, to the history and results of such legislation as this.

Such legislation has a character and reputation, the most notorious of any other legislation in the history of this nation.

At this point I refer again to my original brief, not only on this particular point but on all the citations and points cited in it. But I quote a few expressions from different higher sources of information which are more fully set out in the original brief: The Indianapolis *Daily Journal:* "The open saloon is a universal public enemy." The Indianapolis *News:* "The saloon is a vicious, dangerous plague-spot on our Christian civilization and must be rooted out. There is not room for it and liberty to live; one or the other must go." The Bishop's Address: "It cannot be licensed without sin." The Supreme Court of the United States: "By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram-shop where intoxicating liquors in small quantities to be drunk at the time are sold indiscriminately to all parties applying." The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained in these retail liquor saloons, than to any other source. This language of the Supreme Court of the United States, brings the saloon clearly within the definition of a common law nuisance, and classed under wrongs

malum in se. I quote from Wood's Law of Nuisance, Section 24: "The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness, and promotive of evil manners, and anything that produces such results finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance." . . . "If it comes within the rules that have been established by the Courts, and such have been dictated by the highest wisdom and soundest public policy, and is productive of the ill results that characterize these wrongs, it is a public nuisance, and will be punished as such." If the authority and protection given by this Act were withdrawn from the saloons in Indiana, not one of them could stand against an arraignment as a nuisance.

Does the Constitution mean anything? Does it mean what it says when it uses the word moral? *Does it mean moral or does it mean something else?* I take it that the Constitution means what it says, when it uses the word moral, it means moral. When the Constitution says the Legislature shall provide by all suitable means for the promotion of morality, the framers of the Constitution knew what they were talking about, meant what they said, and expected of the Legislature what the provision in the Constitution requires.

Does an inquiry into the question whether an act of the Legislature is in harmony with the Constitution mean anything? Does such an inquiry mean a whitewashing process? Does it mean the looking into a question with one eye shut, or does it mean that the inquiry shall go to the bottom, beyond the form into the substance, to the actual common-sense view and consideration of grave facts?

As a matter throwing some light upon this question, of the importance given and contemplated by the Constitution to the subject of morals, I call attention to Article 9, Section 1, of the first and only Constitution of Indiana prior to the present Constitution. In the Constitution of 1816, in the Article and Section to which I call attention, provision is made for the promotion of several special objects, among which were "intelligence," "science," "agriculture," "commerce," "art," "manufacture," and "natural history," and concludes in this language, "and to countenance and encourage all principles of humanity, honesty, industry, and morality." That this Section of the old Constitution with every provision in it was carefully considered in the adoption of Article 8, Section 1, of our present Constitution is very clear, for the Article referred to in our present Constitution begins by quoting the exact language contained in the beginning of the Article referred to in the old Constitution. The Article in the new is

much briefer than the one in the old Constitution, leaving out entirely more than half of the language and subjects embraced in the Section of the old Constitution. In the Section in the old Constitution the word morality is the last word in the Section, and is among the things in the Section that the Legislature was to "countenance and encourage." Things evidently considered of minor importance, and, the least of all, was morality. In the Section in our new Constitution, to which I have called attention, among the special subjects to be promoted by all suitable means, morals is the first named.

The constitutional command to provide for public morals is not a mere incident in this Section of our present Constitution as it was in the former. Among the special subjects in our present Constitution that the Legislature is commanded to provide for, morals is given an especial prominence. This was no accident, as is clearly shown by considering the old Constitution and the new together, which is required under the rules of construction in the question I am presenting. It is clear, in the light of the history and comparison between the old Constitution and the present, that the framers of our present Constitution intended deliberately, with full comprehension of the language they used and idea expressed, to give the most important position and greatest prominence in the order

of subjects to be promoted by the Legislature, to the subjects of public morals, thus placing this subject ahead of public intelligence, science, agriculture, education, public schools, and any other subject. Acting under the command and authority of the Section of our present Constitution relied upon in this case, the Legislature of Indiana has established, promoted, and maintained a State University, Agricultural College, special schools, and a public school system, and wonderful things have been accomplished thereby for the welfare of the citizens of our State. But, in total disregard of the most important specific subject in this Constitution provision, the Legislature has established, maintained, and permitted to be developed to a most alarming extent, a saloon license system, which has been more disastrous to public morals than any other evil known among men. It is a very doubtful question whether heretofore and to-day the six thousand saloons licensed by provision of our Legislature, have not done and are not to-day doing more harm and injury to the public morals, health, and peace of the citizens in the State of Indiana, than all the State educational institutions are doing good. 6000.

I submit the inquiry to the judicial knowledge of this Court based upon the history, common knowledge, and general concurrence of Christian and civilized sentiment, whether

it is not true that the six thousand saloons in Indiana, licensed, authorized, and sanctioned by the legislative Act complained of, are not doing as much harm to the public morals in Indiana as all the educational institutions supported by the State, are doing good? I put the good done by the educational institutions supported by the State of Indiana down beside the evil done by the six thousand saloons licensed by Act of the Legislature in Indiana, and ask that, upon the showing made, a balance be struck. In my original brief I made the statement, and supported it, that Courts took judicial knowledge of the civilized and Christian sentiment of the country, and regard such sentiments whenever they have application to a question before the Court; that such sentiments become a part of judicial knowledge and enter into the decision of questions. (I need not repeat the lengthy array, showing numerous expressions from the highest sources of credibility upon the question as to the character and effect of saloons as institutions, not only one saloon but all saloons. There are no exceptions as to the moral effect of saloons. There may be degrees however.

Without repeating, I refer again to all these expressions concerning the saloon and ask, *are these things so? Are these statements true? Are these institutions what they are said to be? Are these institutions doing what they are said to be*

doing? I do not believe a candid and intelligent man can be found who would controvert what is said against the saloon. Let it be borne in mind that I am not now talking about the right of the Legislature to regulate and restrict and license the sale of intoxicating liquor. I am conceding all that in the broadest and fullest sense, but I am talking about the saloons, the institutions, the places, not necessarily connected with the licensing, regulating, and restricting of the sale of liquor. I ask, are these institutions which are provided for in the licensed saloon system, in their character and effect and results of their work, what the Court knows them to be and what the Christian and civilized sentiment and the people declare them to be? This being so, the Act of the Legislature that licenses these institutions cannot be in harmony or reconciled with, nor claim the protection of the Constitution of the State of Indiana. Instead of licensing a saloon, in connection with the licensing the sale of intoxicating liquors; instead of conferring the authority to open a place where persons are invited to assemble wherein intoxicating liquors may be sold and drunk; that is the very thing that ought not to be licensed in connection with such sale.

The Legislature can provide for licensing the sale of intoxicating liquors without providing for licensing the saloon. It could

license the sale without licensing the saloon. Among the regulations and restrictions connected with the sale of intoxicating liquors there ought to be a provision against every saloon feature. The business of selling intoxicating liquors is a hazardous business to the public in any form, because of the nature of the thing sold.

In the opinion in this case this Court says: "The theory of the Legislature upon this subject is, that the business is one which requires restraint, because it is harmful to society." The Supreme Court of the United States in the case of Crowley *vs.* Christensen says: "As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or may be permitted under such conditions as will limit to the utmost its evils." This declaration of the Supreme Court of the United States concerning the sale of intoxicating liquors, that it "*may be permitted under such conditions as will limit to the utmost its evils*" is exactly the position I want to be understood as taking in this case. The Legislature may license, regulate, and restrict the sale of intoxicating liquors under the conditions defined by the Supreme Court, and the Legislature may not do it otherwise. Especially is this true under our Constitution in Indiana.

There is a large discretion, I concede also, given to the Legislature in devising the

means and in exercising its judgment as to the best means for licensing, regulating, and restricting the business, and limiting the evils connected therewith. But, however wide may be the discretion, and whatever latitude may be left to the judgment of the Legislature upon this subject, it is the duty of the Court to inquire into the action of the Legislature upon the subject, *into the substance of it*, into the effect and results of it, *to determine, in fact, whether* the legislation does accomplish or defeat the end sought by the Constitution. Whatever may be the subject acted upon by the Legislature in the passage of a civil or criminal Act, if the effect and result of its action is to defeat the promotion of public morals, it is the duty of the Supreme Court to declare it void when the question is presented.

When the Legislature, acting upon the subject of the sale of intoxicating liquors, as it might legally do, provided for the license, regulation, and restriction of the same, as it might legally do, goes beyond and transcends the limits of its authority, and provides for licensing saloons in connection with such sales, with the light of the history of such legislation before it, with all the disastrous consequences and results following such legislation, it is the duty of the Court, when called upon by proper proceedings, to interpose for the protection of the Constitution.

There is no necessity for the Legislature connecting the saloon and the sale of liquor. They are not necessarily parts of the same thing. They are not necessarily branches of the same business. The saloon is exactly and distinctly the business that ought not to be connected with the sale of intoxicating liquors. The saloon multiplies and aggravates the evils naturally growing out of the sale of intoxicating liquors instead of limiting and lessening them.

In the opinion in this case, this Court says: "The position of the appellants is a moral one. There is no instance in the books where such a position has been assumed. I can name one other instance in the books where exactly this moral position was assumed. I take it that the instance to which I shall refer is one of considerable importance and entitled to very serious consideration. The instance appears in the Constitution of the State of Indiana in Article 8, Section 1, where the Legislature is commanded to provide by all suitable means for the promotion of morality. I do not deem it necessary to present to this Court many books on this subject, as this one book is binding upon us all in this forum. In the Baltimore Potomac R. R. Co. *vs.* 5th Baptist Church, etc., 108th U. S. Supreme Court, page 739, a case very much like this case, where the R. R. Company, upon a license from the Legislature for

certain privileges, established its engine-house and repair-shops beside a Church, thereby disturbing the occupants and worship of the Church, and injured the value and enjoyment of their property, was enjoined from maintaining the same, upon the grounds that it was a nuisance, notwithstanding their license. Speaking upon the rights of property and its enjoyment in that case the Supreme Court said: "The great principle of common law which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred." It is sometimes said that there are no common law rights left to citizens of this country. This is a serious mistake. The case from which I have just quoted was decided in 1882, in which a licensed institution was enjoined and a common law right maintained as against a Statute. I quote from this last decision of the highest Court in this nation, also, for the purpose of showing that Christian morality and *common law morality, common sense morality, and morality* are all the same thing. *In other words, that morality is morality,* in legal contemplation, whether it is applied to Christian people, good citizenship, the sale of liquor, or saloons. I do, therefore, assume a moral position. Though it may be a position never assumed before in the presence of this Court, yet I venture to stand on

it with both feet and face the Court, armed only with the law of God, which is the law of the land, and the fundamental law of the State of Indiana. I find precedence for this position in these two books. It is stated in one of these books that "one shall chase a thousand and two put ten thousand to flight." I am here to test the question whether two women fighting for their "altars and their fires" and their home, may not put to flight six thousand saloon-keepers and drive out of their fortifications that they have been enabled to build under the protection and guardianship of this devilish license system in Indiana.

I beg the Court not to overlook the damage feature involved in this question to the appellants, caused by the establishment of a saloon beside their home, on account of which this suit is brought. The Court states another feature of the case when it says the appellants assume a moral position. The moral position assumed by the appellants is because the institution, claiming the protection of the law, that is set down beside their home, is an immoral and ruinous institution. It is true in part that the appellants' position assumed is a moral one; it is just as true that the appellees' position assumed is an immoral one, and the question is presented to the Court, whether morality or immorality shall prevail. The appellees are admitting all that

is alleged in the complaint against the institution and the business, and the location and effect of the saloon which they maintain to the injury of the appellants, but assert their license as a sole, yet a complete, defense in this action. Is the institution and the business carried on by these appellees a moral or an immoral business in all candor? Apply to this business any test considered in any way under the light of moral contemplation, either as to the form or substance of this business. If it is moral, then their defense is complete. If it is immoral, it can be no defense at all. If this were the only saloon in Indiana, located as it is, I dare say there would be little difficulty in suppressing it, but as it is a part of a great system we are compelled to attack the system. My opposing counsel will not deny the proposition that if the Legislature of Indiana were to pass an Act attempting to make gambling contracts legal, that such an Act would be void, on the ground of immorality. If the Legislature were to pass an Act attempting to make the wages of immorality a legal claim collectible by suit at law, such an Act would be void on the ground of immorality. If the Legislature cannot make immorality the subject of contract nor legal liability, how can the Legislature license and thereby protect immorality? It would make no difference of principle if the institution estab-

lished in the place of this saloon were a gambling-house or a house of ill-fame licensed by an Act of the Legislature, it is only the question of an immoral business.

Let it be borne in mind, I am not asking this Court to overthrow any principle that has been long settled. It has never been settled that a saloon is a moral institution on principle, on theory, or in fact. It is as thoroughly settled, as that lying is wrong, that the saloon business is an immoral business, not the business of one saloon, but the business of every saloon. This is settled and conclusive in the minds of all men, and in the knowledge of all Courts of any respectability. This is a fact settled on principle, because of the nature of the business itself. *This principle, this universal conclusion, this sound proposition, this unanswerable fact,* I present to the Court and then claim that the principle involved is that such an immoral business cannot stand; I am asking the Court to sustain, not to overthrow, a principle of the most vital importance.

In some of the decisions of this Court and elsewhere, speaking of the license, it is said that the license is a permit, sometimes that it is a tax, sometimes that it is regulation and restriction. All this looks to me like an effort to weaken the strength of an offensive term, to shorten, sugar-coat, and break the effect of the term license. Why not say that

license is license? This is a fact. Why try to explain it or soften terms? In the opinion in this case there is much said about the purposes of the license law, being to regulate and restrict the sale of intoxicating liquors. Nothing at all is said about the offensive character of the thing licensed. Why not say that the license law licenses saloons, and that the term saloon means saloon with all the term implies? When we have used terms that are thoroughly understood by all the people, by all the Courts, terms that are not ambiguous, that are full of meaning and thoroughly comprehended, the use of such terms facilitate and make clear legal propositions and legal arguments. Therefore, when I speak of this license law, I mean this saloon license law. When I speak of license, I mean license. When I speak of saloons, I mean saloons.

PUBLIC POLICY.

The opinion in this case quotes from the case in 5th Wallace, 462: "The Court can know nothing of public policy except from the Constitution and the laws." I accept that statement of a legal proposition as absolutely correct. I want to present the proposition contained in that statement as it applies to this case. That proposition implies that the Court *must look to both the Legislation*

and the Constitution in determining a question of public policy. Such a question is not left to the Legislature alone. The Legislature is not the sole judge, and its action is not final on matters of public policy where a constitutional question arises. When the Constitution commands a given course of action upon a subject, that course of action upon that subject is absolutely binding upon the Legislature, and that course of action upon that subject is settled public policy. This is in accordance with the principle defined in the quotation from the Supreme Court of the United States used by this Court in its opinion in this case.

This Court is bound to look to the Constitution and see what is the policy upon a given subject, and by looking to the constitutional provision herein referred to, the Court will find the subject of morality presented in the Constitution and the policy demanded of the Legislature, is to provide by "suitable means" for the promotion of this subject. The Legislature, in the Act referred to, providing for the licensing of saloons, has adopted a policy directly in conflict with the policy laid down and commanded in the Constitution. The Constitution commands the promotion of morality. The legislative Act provides for the destruction of morality. I hold up this constitutional command and policy beside the legislative Act and results,

and say that the policy and results in the Act are in direct conflict with the policy and purposes in the Constitution. There can be no process of reasoning, no attempt at softening or modifying of terms, there is no way known to the process of intelligent and candid consideration of a question by which this constitutional policy and this legislative policy can be harmonized. It cannot be said that this saloon license system promotes morality. It can be and must be said that it promotes immorality. An immoral institution licensed by Act of the Legislature must be declared an outlaw and without protection, because the Constitution will not tolerate such a thing.

It is a matter fully within the judicial knowledge of this Court that the whole combined interests of the liquor-traffic stand as a unit in favor of maintaining and protecting this license system, not only in Indiana, but in every State in the Union, where they have such a system, and in States where they have not such a system, the same interests are a unit in the effort to secure such a system. It is within the judicial knowledge of this Court that the saloon-keepers in the State of Indiana have recently formed a State association with subordinate branches, the purpose of which is to maintain this saloon license system. It is within the judicial knowledge of this Court that under this saloon license system the saloon-keepers and liquor-dealers

have grown in numbers and prospered in wealth, and gained such influence in politics and otherwise, that they dominate the Legislature of Indiana, and dominate politics, and dominate politicians, and, in many instances, dominate the lower Courts, and defy the laws of the State, and announce that they cannot be enforced.

As a matter of public occurrence I call the attention of this Court to the editorial comments in certain newspapers which are devoted exclusively to the interests of the liquor-traffic and saloon business throughout the nation concerning the decision rendered in this case, in which the attention of the saloon-keepers and liquor-dealers in the nation, are called to the effect of the decision as favorable to that business, and use language of the highest commendation. Such papers as the Washington City *Sentinel; The Southwest*, of Cincinnati, Ohio; *The Champion*, of Chicago, Illinois; and *Mida's Criterion*. Especially I call attention to an editorial concerning the decision in this case in *The Champion* of Chicago, of date February 11, 1892. In that editorial is quoted and most highly approved an editorial from the *Criterion*, which is too long to quote here, but it concludes as follows: "Listen to the aphorisms laid down by the honorable Court:"

D.C. of Ind.

"These licenses give no authority. They are mere receipts for taxes."

"License is wholly within the discretion of the State Legislatures."

"License laws are prohibitory in their character."

"If it were not for legislative restriction by license, anyone might engage in the business of selling intoxicating liquors without limitation or restraint."

"The object of the law is to protect the community from the evils of intemperance."

A decision by this high and honorable Court, received with words of the highest commendation and praise by the organs representing the "universal public enemy," and the shouts that have gone up from the saloons in the nation, and from dens of immorality on the one side, and the expressions of regret from every civilized and Christian source on the other side, are matters of such serious concern as seem to me to require a careful reconsideration of the decision and the issues and questions involved.

Any policy of legislation thoroughly indorsed by this immoral business, this law-defying element, this powerful influence and combination; any policy sought to be maintained by this element and these combinations, and which affords the best conditions for the prosperity of this dangerous business, is supported upon a policy at war with the Constitution. All the religious bodies, all the organizations established upon benevo-

lent and humane principles, all the organizations formed for the promotion of morality and resistance of immorality, all men of high character and distinguished for good works in the line of Christianity, benevolence, and morality in Indiana, all that civilized and Christian sentiment referred to by the Supreme Court of the United States, are arrayed in antagonism to the policy represented in the Act of the Legislature presented to this Court. Assuming that morality means morality, and that immorality means immorality, the morality in the Constitution and the immorality in this Act represent the two sides of hostile forces.

NO SALOONS WITHOUT LICENSE.

In the opinion in this case the Court says: "The law in exacting a license fee does not grant a privilege that did not before exist, but, on the contrary, lays a special tax upon a pursuit, which, but for the Statute, might be followed without paying any special tax." This statement is quoted from Lutz *vs.* the City of Crawfordsville, 109th Indiana, 406. Then the Court proceeds further to say: "Many other cases in our own reports declare the same general doctrine." Whatever the Supreme Court of Indiana may have said heretofore concerning the privilege, to sell liquor granted in the license, the question of

the constitutionality of the law that licenses saloons has never been presented to this Court, nor to any other Court. The Supreme Court of Indiana has never spoken on that issue.

I deny that these cases, cited and quoted from in the opinion in this case, have any application to the issue now before the Court. When the Court says that the license Act "lays a special tax upon a pursuit, which, but for the Statute, might be followed without paying any special tax," I cannot accept that declaration of law as correct, if it is intended to be applied to the saloon business. I want to be understood as assuming and standing squarely on the proposition that the business of keeping a saloon could not be maintained without license for a saloon.

In the opinion in this case, referring to my use and application in my former brief and oral argument of the language of the Supreme Court of the United States, in the case of Crowley *vs.* Christensen, this Court says: "Counsel seizes upon a fragmentary expression in the opinion from which we have quoted, and isolating it from its associated words, affirm that it sustains the contention that the State has no power to regulate the liquor-traffic by providing that dealers shall take out a license." I respectfully ask the Court to reread my former brief and reconsider my oral argument. I am satisfied that

by so reading and so considering all that I have said the Court will see that it is wholly mistaken in my position, and my application of the language in that case. I can readily see on this misapprehension of my position how the Court could use the following language concerning my brief: "In affirming this, one of the plainest and most elementary principles of logic and of law is violated by counsel, for a clause or sentence is always to be considered in connection with the words with which it is associated." This language used by the Court concerning myself and my position is very strong. I take this occasion to plead not guilty, and to say that there is not one item of evidence in support of the charge. I did not seize upon any fragmentary expression. I did not isolate any expression from its connection. I did not make any such application of any such expressions, or of the decision in that case as is stated. I take pleasure in saying that I have a very high regard and respect for this Court and the members thereof, but I have also self-respect. The language in the opinion in this case is certainly hasty and does me an injustice. The purpose for which I used that decision, the applications I made of its language was: First, to show the judicial knowledge taken by the highest tribunal in the Government of the dangerous character and results of the saloon business; second, to

show the judicial knowledge taken by the Court of the civilized and Christian sentiment of the land; and, third, to establish the proposition that there is no inherent right in a citizen of any State, or of the United States, to sell by retail intoxicating liquors.

Nobody will controvert the first and second of these propositions, nor that they are thoroughly supported by that decision and highest authority. Let us see whether the same authority does not fully support the third proposition. I quote from that decision: "There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State, or of a citizen of the United States." This quotation is the whole of a sentence and contains the whole statement of a conclusion. It contains no argument. The sentence shows that it is no part of the process of reasoning, but that it is the final statement of a conclusion from the reasoning that has gone before. If the quotation states a conclusion of law (it speaks for itself in that respect), and I gave the whole statement and the language exactly as it appears in the statement, then I have committed no violence. There is no ambiguity in the language used in the quotation and the sense is complete. It requires no construction to ascertain the meaning. What does that Court mean? Do I understand this Court to mean by what it

says in the opinion in this case that by taking all the language of that decision of the United States Supreme Court, and each part of it, in connection with all the other parts, that the Supreme Court of the United States when it said, "there is no inherent right in a citizen of any State or of the United States to sell intoxicating liquors by retail," etc., it meant that *there is* an inherent right? The United States Supreme Court certainly meant to find, and meant to say, that there is or is not an inherent right, etc., and its language is, *there is* no inherent right. Does it mean what it says?

Certainly that high tribunal meant to decide something concerning the inherent right to sell intoxicating liquors by retail. I cannot here present and apply the rules of grammar and rhetoric, or the rules of judicial construction, but I call on this Court at its leisure to make an application of all these rules familiar to the common-school teachers, and school children, and the University professors, and the students, or the legal profession, to determine whether in any of these respects I have done violence to that decision of the Court. I am willing to be tested by the rules laid down in the books. It is nowhere in that decision intimated that there is an inherent right in any citizen of the United States or of any State to sell intoxicating liquors by retail. It is specifically and dis-

tinctly stated that there is no such inherent right.

A thing that a man has no inherent right to do, he violates the law if he does it, unless the right to do the particular thing which was not inherent has been created and conferred upon him.

Suppose we had no saloon license law in Indiana, and the appellees were conducting a saloon, as they are, and as presented in this case, would they be violators of the law? If so, what law? Section 289 of the Revised Statutes, 1881, of Indiana, reads: "Whatever is injurious to health or indecent or offensive to the senses or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action." Section 290: "Such action may be brought by a person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance." Section 291: "Where a proper case is made, a nuisance may be enjoined or abated and damages recovered therefor." I refer to the citations in the Statute following these Sections.

In McLaughlin *vs.* The State, 45th Ind., 338, it is held that a nuisance may be adjudged such in order to be abated either in a civil or criminal case. Section 2066, "makes any offensive business (and specifies many such) a

public nuisance." The Section is too long to quote in this brief, but it is a criminal Statute against the maintenance of any business that is injurious to health, comfort, or property of individuals, or the public. With these Statutes concerning nuisance and the general law on the subject as laid down in Wood on the Law of Nuisances, which are quoted in this and in my original brief, with the numerous decisions in our Courts, there cannot be a moment's doubt that this saloon could be abated, the appellees punished for maintaining it, and damages recovered, if it were not for the guardianship and protection given by the Act complained of in this case, in the way of a license, to this business.

The Statutes concerning nuisances are ample both in their civil and criminal provisions to give relief and protection to these appellants, if the appellees were left to their inherent rights. There is not only no inherent right to conduct the business complained of in this case, but there are numerous and ample provisions for suppressing the same, if it were not for the license saloon law. The declaration in the opinion of the Court in this case is that; "the law in exacting a license fee does not grant a privilege that did not before exist." The Supreme Court of the United States has distinctly said that no such privilege does exist in any individual citizen of the United States or of a

State, and the declaration of the Court in the opinion in this case is in direct antagonism to the declaration of the Supreme Court of the United States on this question. Further the opinion in this case says, "but, on the contrary, lays a special tax upon a pursuit which, but for the Statute, might be followed without paying any special tax." This expression also is in direct antagonism to the law as declared by the Supreme Court of the United States, for the declaration of this Court is that there is an inherent right outside of the Statute to pursue the business complained of in this case.

I ask the Court in all candor to test and apply the decision of the Supreme Court of the United States to the issue in this case and to the question now under consideration, and see whether I am not right, and whether my views are not in harmony with the decision of the Supreme Court of the United States, which is binding upon this Court. This Court has several times and especially in the Vincennes University case, overruled its own decision in order to harmonize with that Court of last resort. It would not be justice to the litigants in this case to compel them, as they must be unless full consideration shall be given to the question, to go to the Supreme Court of the United States. The license Act does in its effect, and by its terms, undertake to confer a right upon individuals

and upon the appellees in this case, to conduct and maintain a business that they could not maintain and conduct without the privilege so conferred. If there was no license Act, and the appellees undertook to pursue the business complained of in this case, they would be standing upon their inherent rights and would be in direct hostility to the Statutes concerning nuisances, and the decisions and declaration of the Supreme Court of the United States. That was exactly the position of Christensen in San Francisco, California, whose case was presented to the Supreme Court of the United States, and they held he had no such right. Christensen claimed that he had the inherent right, as a citizen of the State and of the United States, to sell intoxicating liquors by retail, and that that inherent right could not be taken away from him by Statute. The Supreme Court decided that he had no such right and that the Legislature of California could license, regulate, and restrict the liquor-traffic. The effect of that decision was that Christensen had no inherent right to sell intoxicating liquors, but that he might secure the right by virtue of the Act of the California Legislature. That he might not pursue the business if there were no Statute on the subject, and that he could secure the authority under the license Act to conduct that business, but the Supreme Court did not hold in that case that an Act licens-

ing *saloons* is valid, because that question was in no way before the Court. It was merely licensing the sale of intoxicating liquors that was presented. The Supreme Court took the occasion to say, while they recognized the power of the Legislature to pass a license Act, that such business may, "be permitted under such conditions as will limit to the utmost its evils." Under this declaration, a law that licenses a saloon in connection with the sale of intoxicating liquors, and thereby aggravates and multiplies the evils, as our Legislative Act complained of does, would be invalid. I do not think that this Court, upon a reconsideration of the issue involved here, and which is presented here for the first time that the issue has ever been before any Court, an issue based on the Constitution of Indiana, a question peculiar and distinct from any other that has been considered by the Courts, I say I do not believe that this Court will be willing to put of record a decision that any man might pursue the business of conducting a saloon in Indiana, without violating the law, if we had no license saloon Act. I cannot believe that this Court, upon reconsideration and reflection, will put of record a decision in the light of our Constitution which will declare that this demoralizing, disturbing, disastrous saloon business, licensed by the Legislature of Indiana, is a business in harmony with the provision of our Constitu-

tion, which requires the Legislature to promote morality by all suitable means.

I hereinbefore quoted from the Supreme Court of the United States in the case of Baltimore Potomac R. R. Co. *vs.* 5th Baptist Church, and repeat the quotation here: "The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred." This language was used in a case involving exactly the same principle involved in this case. It also defines what is meant in law by morality. Morality, as contemplated by common law, morality, as contemplated by Christianity, and morality, as contemplated by the Constitution of Indiana, is the same thing.

I am fully aware that to meet the demands of the saloon influences in this State and to accomodate the same, there is a modified meaning given to that term. It is softened and all the meaning taken out of it, and it is made to mean something else by politicians and officers and persons who have an eye single to selfish interests. This term, so full of meaning, is looked upon and considered as empty and meaningless by persons who have been subjugated by these demoralizing influences.

I call the attention of the Court to the fact that the question I am now presenting is a

new question, that it is based mainly upon the peculiar provisions of our State Constitution, and that this Court is now called upon to declare what the Constitution means, what are its demands, and whether its provisions are to be enforced against the most powerful and most dangerous combination that has ever been arrayed against this Government.

Probably the most important case, considering the circumstances and effects, ever decided in England, was the case of Somerset *vs.* Stewart, in King's Bench, decided June 22, 1771. (See Loftin's Reports, Easter Term, 1st case.) About fifty years before that date Lords Hardwick, Talbott, and York had held that African slaves might legally be held in England, and from that date to the date of the decision in that case, that had been accepted as the law. A native was captured on the coast of Africa and brought to Virginia and sold as a slave. His name afterwards became James Somerset, and Charles Stewart, of Virginia, became his owner. In 1770 the master took his slave as a servant to England, and while there the slave refused to obey or recognize his master's authority. He was seized, put in irons, and placed on board a ship to be sent to Jamaica and sold. Thomas Watkins, Elizabeth Cady, and John Marlowe, Quakers, who had been actively engaged in opposition to slavery, made affidavit that Somerset had been imprisoned with-

out authority Upon that a writ of habeas corpus was issued out of the Court of King's Bench, commanding the captain of the ship to produce the body of Somerset in Court. The captain in his answer to the writ set out the facts, and the question was presented for consideration of the Court. The argument of the question before the Court was lengthy, and participated in by numerous advocates, in which was made very prominent, that the growth of Christian and civilized sentiment and public intelligence was such, that the law of England could not then be declared to be what it had been declared and understood to be fifty years before. Sergeant Davy, speaking of the effects of Christian and humane sentiment on the law of England, said among other things: "For the air of England, I think, however, it has been gradually purifying ever since the reign of Elizabeth."

It was urged in argument on behalf of the master that the consequences of a decision in favor of the slave would be most disastrous. This consideration seems to have greatly impressed the Court, for the Court suggested a settlement; that the case would better not be pressed to a final determination; that the owner would better let the slave go than to jeopardize the tenure of all the slaves. It is apparent that the slave-holder and his legal advisers thought that the Court would not

dare to apply the actual principle of law involved in the case, because of the powerful influences arrayed against the slave, and the consequences that might follow. It was said, in argument, that fourteen to fifteen thousand slaves in England, and more than one hundred and sixty-six thousand negroes in Jamaica would be turned loose on England and fugitive blacks from all over the world would be seeking refuge on English soil. Lord Mansfield delivered the unanimous opinion of the Court. He said, in the language of that day, among other things: "The setting fourteen to fifteen thousand men at once free, loose by solemn opinion, is much disagreeable in the effect it threatens." . . . "If the parties will have judgment, *fiat justitia, ruat cœlum*, let justice be done, whatever be the consequences." . . . "Mr. Stewart may end the question by discharging or give freedom to the negro." . . . "But if the parties will have it decided, we must give our opinion." . . . "Compassion will not on the one hand, nor inconvenience on the other, be decided, but the law."

The slave was liberated. There had been no Act of Parliament, no decision of Court, upon this question intervening for fifty years, and, since the declaration of law, directly the opposite.

The Court in that case did not declare a new principle of law but made a different

application of an old principle of law. It reversed what had been declared to be and accepted as the law for more than fifty years, and did so, as the opinion clearly shows, because of the inhumanity, immorality, and injustice in the institution of slavery, of which the Court took judicial knowledge. That decision freed every slave then held in England. The dire consequences of such a decision, predicted in the argument, to commerce, domestic affairs, and social order, did not follow. The Christian civilization so adjusted the affairs that the effects of the decision came like a providential blessing to the whole people.

More than one hundred years have passed, yet England points to it with pride, and it has had more to do with stimulating and sustaining the steady progress of humane and Christian principles in legislation and in Courts than any decision ever rendered by any Court in these one hundred years.

At the December term, 1856, of the Supreme Court of the United States, in the case of Dred Scott *vs.* John F. A. Stanford, 19th Howard, was presented to the Supreme Court of the United States, a case very similiar in principle and spirit to the Somerset case in England. This last named case was fully presented to the Court and thoroughly argued, but the case came before the Court at a time when the question involved had become a

political question, political parties had taken their positions upon it and a desperate struggle was on concerning it. The question presented involved the rights of an individual, nothing less and nothing more, only so far as the effects of the decision might extend. No candid man will deny that the Court in that case was dominated and controlled by the demands of a political party and the powerful combination organized to maintain and protect a wicked institution. It was held in that case that, as slavery existed when the Constitution of the United States was adopted, that the instititution of slavery was thereby adopted. Just as I understand it to be claimed by the appellees' counsel in this case, that as a saloon license law existed when our present Constitution was adopted, that the saloon license system was thereby adopted forever. The rights of the individual had not a feather's weight in the consideration of that case by the Court. It was held, in substance, that the individual was without remedy and without rights and that the wicked institution with which he contended might extend its blasting influences over the free soil into every locality thereof. That decision was so shocking in its declaration of law, in the prejudice and weakness it exhibited, that it is designated as one of the dark chapters in the history of the nation. While the just, humane, and legal principles declared in the

Somerset case came, and remain, as a constant blessing to a great nation, the inhuman, unchristian, and false legal principles applied in the Dred Scott case, fanned to a blaze public controversy, weakened the confidence of the people in the Courts, and had a very large influence in causing the civil war which continued until the wicked institution was destroyed. The declaration of law, as laid down by the Supreme Court of the United States in the Dred Scott case was not the law. The court might have and ought to have declared the law.

I cite the last two cases and use them in this argument for all there is in them. I mean by these two citations to call attention to the weal and woe to the individual and the public that sometimes depend on the decision of the Court. It is the policy of the law in all civilized governments, and has been ever since Moses came down from the summit of the smoking mountain, to protect the rights of persons and property of individuals against the despoiler. The appellants in this case, who represent the highest type of womanhood, had sought a location in a community unsurpassed in any city or in any State in the Union, and had there established a home and became residents and citizens, and tax-bearers, and in all respects obedient to the law. They are in no way at fault. The Act upon which appellees rely for protection

in this case deprives appellants of even the privilege of remonstrating against the granting of license, because they are women. Appellees came into that quiet neighborhood, settled down beside that happy home, and established a saloon with its blasting influence, and claim to be protected by an Act of the Legislature of Indiana. This Act, if valid, has deprived these women of sacred rights, and has conferred upon these men privileges of the most dangerous and ruinous character. Are these women helpless or remediless? Are they to be turned away from the courts of justice in Indiana without relief, to suffer irreparable damage, and be compelled to abandon their home? Is this saloon-keeper, with the five thousand others in Indiana, engaged in like business, to be thus encouraged and protected to pursue this business, and fattened on ill-gotten gains?

It would not do to say that the question and this case are not properly presented to this Court. The whole of the case, all the material facts, and the legal propositions are now before this Court. There is no other way and no other process by which any more can be done than has been done in presenting this case. Let me concede that more powerful arguments might be made than has been made, and greater array of counsel and greater influences might be brought to bear than has been, but the case itself is its best

advocate. A decision can be rendered in this case in favor of the appellants based on sound principles, and if it can be, then there is every reason why such a decision shall be. It is not very difficult to find a way, nor to find legal principles to sustain a decision that protects the weak against the strong, the oppressed against the oppressor, the good against the bad, and the home against the saloon.

I feel compelled to apologize to the Court for very much of what may seem to be mere repetition in this brief. This has seemed to me excusable because of a great anxiety to present all of the phases of this case and the anxiety to be fully understood.

Wherefore appellants most respectfully ask a rehearing in this case.

ELI F. RITTER,
Attorney for Appellants.

See comments in the "Wine and Spirit Gazette" for Jan. 29. 1894. on Decision page 3.