much of the fiery invective and blood-curdling epithet hurled at men who equally with their accusers are American freemen, impressed with the absolute necessity for maintaining sacred, the guaranties of life, liberty and property, and who are probably not more in love with corruption and greed, or more disposed to crush the humble and worthy, then the average of their fellow-citizens.

The saving grace of American humor which delights in the contemplation of grotesque exaggeration has often saved us from domestic turbulence, which the turgid exuberance of denunciatory language might have otherwise excited, against lawfully-constituted authority; and it may be that same useful trait will prevent the success of the present agitators against the Federal courts.

But whatever fate betide the Federal Judiciary I hope that it may always be said of them, as a whole, by the impartial observer of their conduct, that they have not lacked in the two essentials of judicial moral character, a sincere desire to reach right conclusions and firmness to enforce them.

THE DECISIONS IN PENNSYLVANIA ON THE STATUTES OF 1887 AND 1891 REGULATING THE LIQUOR TRAFFIC.

Discussion of the liquor laws from a legal, political and moral standpoint, has created such public agitation over the subject and made it of so much importance, that a general report of the workings of all systems throughout the country is near at hand. Anticipating such a report, it may be assumed that a thorough knowledge of the existing laws of any state will not be without advantage to one who wishes to become an intelligent reader of the question; nor will interest in such laws be confined to the limits of that state alone. Discovery of the weakness in a law, and proper remedial legislation for the same, can only be obtained by a comparison with other systems, their interpretation, workings and effect.

The extent and value of the business legalized by the

Acts of Assembly approved May 13, 1887 (known as the Retail Act); of May 24, 1887, and June 9, 1891 (known as the Wholesale Acts), and the moral issues involved in the efforts to restrain their operation, have developed certain contentions over their interpretation, which it is the purpose of this article to set forth. There has been no attempt made to give an exhaustive review of the liquor laws, but only to summarize all those cases that have been considered important enough to be taken to the Supreme Court of the state, and on which the Acts themselves are somewhat doubtful. For this purpose the cases form themselves naturally under three heads: 1. Petition; 2. Sale, and 3. Transfer.

PETITION.

Since the passage of the Acts of 1887, the Quarter Sessions courts have had jurisdiction of the license cases in their respective counties, and those courts alone can grant or refuse the privilege of selling liquor: (*Com.* v. *Sweitzer*, 129–644.) But a majority of the court is all that is necessary to validate the grant, though the president dissent: (*Branch's License*, 164–427.)

No person has any property in the right to become a liquor dealer, so that no one can compel the grant of a license even in the absence of any allegation that he is an improper person to be so favored. The grant or refusal is discretionary with the court. But this discretion is a legal one to be exercised wisely and not arbitrarily. The judge who grants or refuses all licenses without proper cause is not exercising a judicial discretion, but an arbitrary power. Therefore the court could not refuse to act upon an application, but it could act and refuse to grant the prayer of the petitioner; and a mandamus would not lie to force its assent, though the applicant has complied with all the requirements and is qualified to conduct the business: (*Raudenbusch's Pet.*, 120–328; *Ostertag's Pet.*, 144–426.)

If a hearing is had, and the proceedings are conducted in a proper and legal manner, that is all that can be demanded: (*Petition of Michael Collarn*, 134–551; *King's Application*,

1 Mon. 145.) And the applicant can be denied even a hearing, if he refuses to appear and testify at the request of the court: (*Wheelin's Pet.*, 134–557.) Further, the reasons for refusal form no part of the record, and will not be reviewed on appeal under the Act of May 9, 1889, it being but a substitute for a common law certiorari: (*Pet. of Henry Berg*, 139–354; *Rules of Practice*, 125–xxi.; 131–xxi.)

The objects of the Retail Act of May 13, 1887, P. L. 108, and the Wholesale Act of May 24, 1887, P. L. 194, were essentially different. The former was to restrain the sale of liquors, but the latter was a revenue act. Formerly, therefore, the same reasoning did not apply to the cases of wholesale applications throughout the state as to those for retail petitions; and there was not the same discretion allowed the quarter sessions in the former as in the latter: (*Pollard's Pet.*, 127-507.)

The reasons for this former distinction will be apparent from a review of the decisions.

Section 11 of the Act of May 24, 1887: "Licenses shall be granted in such manner as is provided by existing laws" —refers to the "existing laws" in regard to wholesale and not retail licenses as granted under the Act of May 13th (*Pollard's Pet., supra.*) At that time and up to the passage of the Act of June 9, 1891, it was always a question of what were the "existing laws" as to wholesale licenses in a given locality. The Act of 1856, the foundation of our license system, committed the granting and refusal of licenses to the quarter sessions of the proper county, except Philadelphia and Allegheny. From that time on, Philadelphia and Allegheny had a license system peculiar to them. In the rest of the state, however, the power to grant licenses has been continued in the quarter sessions by the Acts of 1858, 1867 and supplements: (*Ostertag's Pet. supra; Knarr's Pet.*, 127-554; *Pet. of W. C. McNulty*, 142-475.) In the absence of local laws, these acts governed as the "existing laws," and by them wholesale and retail licenses were placed on the same footing as far as the discretionary power of the court came in question: (*Nordstrom's Pet.*, 127-542.) The result was that

outside of Philadelphia and Allegheny counties the same discretionary power existed in both wholesale and retail cases. These were the existing laws referred to in the Act of May 24, 1887. But in these two excepted counties the wholesale petitioner demanded as a matter of right the grant of his privilege, if he was a citizen of the United States, of temperate habits and good moral character: (*Prospect Brewing Company's Pet.*, 127-523; *Pollard's Pet. supra.*) As can readily be seen, there was considerable unfairness in the operation of this law. The wholesale dealer of Montgomery county, though as fully qualified as his neighbor in Philadelphia, could only pray for his privilege, while the other demanded his. There was still another deficiency that needed a remedy. Under the Act of May 24th, the dealer could sell by the quart. As Mr. Chief Justice Paxson said: "It seems a perversion of terms to call a person who sells by the quart a wholesale dealer. It is practically a retail traffic, and of the worst character." And in the same opinion the court recommends the whole subject to the attention of the legislature: (*Nordstrom's Pet. supra.*)

At the next meeting of that body, the request of the Supreme Court was complied with; and the two defects above referred to remedied to some extent by the passage of the Act of June 9, 1891. This act prohibited the disposal by wholesalers of spirituous or vinous liquors in less quantities than one quart, and brewed or malt liquors in less quantities than twelve pint bottles (Act of June 9, 1891, P. L. 258). It also made a change in the discretionary power of the court. The quarter sessions can now refuse a wholesale license, when it is not necessary for the accommodation of the public, or the applicants are not fit persons. The refusal is not to be an arbitrary one, but based on an opinion "formed after due regard has been given to the number and character of the petitioners for and against such application:" (*Johnson's License*, 156-322). The rules which govern the court in the grant or refusal of wholesale licenses under the Act of 1891 are tersely summed up by Mr. Justice DEAN in *Gross' License* (161-345):

"I. The discretion must be exercised in a lawful manner.

"The applicant has a right to be heard and so have the objec-
"tors. A decree without a hearing or opportunity for hearing
"at a time fixed by rule or standing order as the law directs,
"would be manifestly illegal and on certiorari would be set
"aside.

"II. If the court has in lawful manner performed the duty
"imposed upon it, it is not our business to inquire whether it
"has made a mistake in its conclusions of fact. Whether the
"same facts induce in our minds the same belief as in that of
"the court below, as to the character of the applicant and
"other material averments is wholly immaterial; it is the dis-
"cretion of the Court of Quarter Sessions, not ours, that the
"law requires.

"III. A decree made arbitrarily or in violation of law, it is
"our plain duty to set aside. For example, if a judge should
"refuse a license because in his opinion the law authorizing
"licenses is a bad law, or if he should grant all licenses because
"he believed the law wrong as tending to confer a privilege on
"a special few, in either case there would be no exercise of
"judicial discretion; both would be the mere despotic asser-
"tion of arbitrary will by one in power; that sort of lawless-
"ness which is least excusable and excites most indignation.

"IV. If the record shows that the decree was had after
"hearing at a time fixed by rule or standing order, the pre-
"sumption is that the decree is judicial and not arbitrary, and
"this presumption is not rebutted by an argument from the
"evidence that the court ought to have reached a different
"conclusion.

"The court need not set out the legal reasons for its action.
"It is only bound to save them."

Where the court acknowledged in its decree that there were no reasons for refusal, and, if it had been a wholesale license that was sought, they would have felt bound to grant it, a procedendo was awarded on the ground that it was not the exercise of a legal discretion: (*Kelminski's License*, 164-231). Since the Act of 1891 an arbitrary refusal to grant a wholesale license is on the same footing as a refusal to grant a retail license; and now no warrant of law exists for distinction

in this particular between the two kinds of privileges, it being removed by that act. The discretion of the court is the same in both cases: (*Kelminski's License, supra.*)

But a refusal based on the non-necessity for more than two wholesale houses in the same place was upheld, as the discretionary power of the court had been properly used: (*Mead's License*, 161-375). That the place was not located in a city or town, but in a township; that it was not necessary; that the former licensees of the place violated the liquor laws; and that a legitimate business was not conducted there formed good reasons for refusal in one of our latest cases: (*Johnson's License*, 165-315). But the simple assertion that the place was "unnecessary for the accommodation of the public" gives no ground for refusal: (*Gemas' License*, 36 W. N. 367.)

Although not expressly decided, it may be safely said that the Act of 1891, being general in its terms, applies to Philadelphia and Allegheny counties, and dealers in those places can now no longer demand their licenses as was done in the Prospect Brewing Company's Petition and Pollards License, but like the petitioners of other counties, they must appeal to the grace of the court.

Notwithstanding these acts, it must be understood that there are counties in this Commonwealth in which no licenses may be granted. A general law does not repeal a local statute by implication. So that neither the Act of May 13, which expressly protects local laws; or May 24th, which is silent on the subject, both being general, would apply to counties governed by special prohibitory statutes. Potter county, which still maintains its prohibition system, is an example of this: (*Murdock's Pet.*, 149-341.)

SALES.

The first defence made to an obnoxious law is usually the contention that it is unconstitutional, and the Brook's High License Law formed no exception to this general rule. Its constitutionality was attacked on the ground. (1) It offends against Par. 3, Art. III of the State Constitution, which

declares: "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title." (2) It is special legislation, because it makes certain liquor laws applicable to one county and not to another by permitting the special prohibitory laws of some sections to stand.

In answer to the first argument, the Supreme Court said: "There is not a single section or clause of any section, that is not clearly germane to the subject expressed in its title." And to the second: "Nor is it special legislation for the reason stated. The object of the proviso (protecting special prohibitory laws) was not to designate other districts in which no license to sell intoxicating liquors shall be granted; but to avoid any doubt as to the intention of the legislature to leave intact special prohibitory laws enacted prior to the adoption of the present constitution." In other words, not to legislate specially for those different counties, but, to the contrary, not to legislate at all: (*Com.* v. *Sellers*, 130-32.)

Nor does it take away a vested right by changing the law under which the licensee has previously held, for he takes subject to subsequent legislation, and this applies with the same force to the Act of 1891. So that where a license was still in effect under the Act of 1887, the dealer was bound to conform in his sales to the Act of 1891, which changed his status for the worse: (*Com.* v. *Donahue*, 149-104; *Com.* v. *Sellers*, 130-32.)

The question of what are vinous, spirituous, malt or brewed liquors within the meaning of the act is not one of law but of fact, and as such to be decided by a jury and not by the court. If there is no evidence of whether the liquor is either vinous, spirituous, malt or brewed, the court must direct a verdict for the accused. But, if there is a scintilla of evidence on the subject, none but the jury can decide it. So cider, though not usually containing any of these qualities, might under some circumstances that would appear from the evidence be brought within the classes named: (*Com* v. *Reyburg*, 122-299.)

It is not only the sale of liquors that is obnoxious, but the

"furnishing" as well, when it is delivered on election day and Sunday, or to a minor or one of "known intemperate habits." (Sect. 17 Act., 1887). This provision applies not only to dealers, but to all persons. Whether the "furnishing" be by gift, sale or otherise is immaterial. It is a misdemeanor to the same extent. To these excepted classes no one can lawfully give or sell: (*Altenburg* v. *Com.*, 126-602.)

But the Act of 1887 does not attempt to control the private habits or domestic usage, therefore, the citizen can use on his own table or in his own house what beverages best please him. It is only when the conduct of the individual is such that the public morals or public peace are affected by it, that it becomes a matter of public concern and is subject to the examination and control of the criminal courts. Under this rule no man in Pennsylvania has a right to treat one who is visibly intoxicated: (*Altenburg* v. *Com.*); but he can treat on Sunday, and that, too, away from his home: (*Com.* v. *Heckler*, xxxvi. W. N. C. 363. Candidates on election day cannot furnish beer free to voters, nor can persons forbidden to sell on Sunday give away liquor with the same result. But, if for reasons of health or habit, one chooses to supply his own table with his own liquor for use by himself, his family, or his guests on Sunday, no law of the Commonwealth prevents him: (*Com.* v. *Carey*, 151-368). So that where detectives in order to discover train-wreckers entertained suspects by furnishing them liquor at their house on Sunday, no conviction followed. But where a farmer gave free of charge to persons visibly intoxicated, he was convicted; and a druggist met the same fate who sold twice on the same prescription: (*Com.* v. *Prickett*, 132-371.)

It is a general rule that ignorance of fact excuses where the act if done knowingly, would be *malum in se*. But where a statute commands that an act be done or omitted, which in the absence of such statute, might have been done or omitted without culpability, ignorance of fact or the state of things contemplated by the statute does not excuse. Where the saloon-keeper is ignorant of the age of his customer, he cannot set this up as a defence.

By the Act of 1854 the sale had to be *wilful*, but by succeeding legislation (Acts of 1867, 1875 and 1887) the sale need only be *unlawful*, the word wilful being omitted. So it is the act of selling and not the state of mind that stamps the act as a misdemeanor and at which the law is directed. Any other construction would practically nullify the act: (*In re Carlson's License*, 127-330). Though it is well nigh impossible for a bartender or saloon-keeper to know the age of one who may call for a drink, he is liable to have his license taken away from him, if he sell to a person the day before he is twenty-one years of age. And that too, though the minor misrepresents his age. But the dealer is not entirely without protection. By the Act of May 10, 1881, P. L. 12, minors representing themselves of age to obtain liquor are punished by fine and imprisonment; and the same punishment is dealt out to those who represent the minors to be of age.

Ignorantia legis non excusat. Everyone is bound to know the law. By this maxim the agent of a licensee acting innocently can be convicted. He is bound to know the limits of his principal's authority, and if he takes but one step beyond it, he is liable to indictment under the act. He must be careful to sell only where the licensee can do so with impunity: (*Stewart* v. *Com.*, 117-378; *Zinner* v. *Com.* 22 W. N. 97; *Com.* v. *Sweitzer*, *supra*).

A brewer's license does not entitle him to sell in two different places in the county: (*Zinner* v. *Com.*). But a brewer who has taken out a license can manufacture and sell his liquor at any one point in the county. He need not sell it where he manufactures, but if he sells away from where he manufactures, he cannot sell where it is made. In other words he cannot have two established places to sell the article. Otherwise he could have as many agencies as there are places in the county: (*Zinner* v. *Com.*).

It is the contract to sell a chattel and not payment or delivery which passes the property, and this rule is recognized throughout the United States. Whether the title to personal property passes by a sale depends upon the intent of the parties. Such intent may be expressly declared or may be

inferred from circumstances: (*Com.* v. *Hess*, 148-98). Therefore, where orders are sent for liquor C. O. D. by the purchaser of one county to the seller of another, and delivery is made by the agent of the seller in the county of the purchaser, this is a sale in the county of the seller and lawful. The carrier or agent in such a case is agent for the purchaser and delivery to the carrier in the county of the seller is delivery to the purchaser, and the sale or contract is complete in the place of delivery to carrier. It is only the performance of the contract and not the contract itself that is in question on the collection or non-collection from or delivery or non-delivery to the purchaser: (*Com.* v. *Fleming*, 130-138). The sale is complete before performance is thought of. But where the agent took orders outside of the county of his principal, and delivered them in the same place, the county of the purchaser, this was held an illegal sale. A dealer can sell to any person in the state, provided the sales are made at his place of business. But he cannot peddle his beer in counties not covered by his license: (*Com.* v. *Holstine*, 132-357). The purchaser need not call at the business place of the licensee, but such sales may be made in the ordinary course of business. So where orders are received by mail in the county of the wholesale dealer and the liquor is delivered by his wagons or by common carriers in the county of the purchaser, the sale is a proper one: (*Com.* v. *Hess*, 148-98).[1] Nor would payment by check sent through the mail or to the driver, who delivered as above, constitute a sale in the place of delivery, and no conviction could follow in such a case for sale outside the county: (*Com.* v. *Kleinmann*, 148-112).[2]

Selling liquors to persons of "known intemperate habits" comes within the same rule as selling to minors, *i. e.*, ignorance of fact or want of evil intent are not material. "Known intem-

[1] *Com.* v. *Brauninger*, 148–111.

[2] The rule deduced from these decisions would appear to be, that where the order is received marks the place of sale if the goods are set aside, or charged on the books of the seller, or any other act indicates the meeting of the two minds in a contract; while the place of delivery or payment, being simply the means of performance of a contract already made, is not material.

perate habits" means reputation in the neighborhood for intemperance, and not the actual knowledge of the saloon-keeper. A man who conceals his habits does not come within this class. His habits must be known not only to his family, but to his friends, neighbors, and the community at large in which he lives. He need not be known to every one, but only generally. It is that kind of a reputation he might have for honesty and integrity: (*Com.* v. *Zelt*, 138-615; *Com.* v. *Silverman*, 138-642).

Before the passage of the Wilson Bill, which allowed the states to make their own liquor regulations, even where it interfered with interstate commerce, there were frequent attempts to evade the law by shipping the liquor from another state and selling it in the original packages, thus bringing it within the ruling of *Leisy* v. *Hardin* (135 U. S. 100.) But the Supreme Court decided that the stopping of sales on Sunday, and to minors, and the intemperate habits was not on the same footing as the case referred to, and is not an interference with the traffic of the states within the meaning of that decision: (*Com.* v. *Zelt*, 138-615: *Com.* v. *Silverman*, 138-642.)

The law cannot be nullified by the formation of a so-called social club, which is run as a cover for the sale of liquor without license, but the steward of such club can be dealt with in the same manner as the bartender of an unlicensed saloon: (*Com.* v. *Tierney*, 148-552). Nor can a *bona fide* social club sell to persons, not members, on Sunday, and they are bound to know who are members of their organization: (*Com.* v. *Loesch*, 153-502.) What rights belong to the members of a *bona fide* club as among themselves has never been considered by our Supreme Court.

A criminal indictment and the forfeiture of license are not the only punishments meted out to the unfortunate liquor dealer who seeks to evade the license law. Outside of these sanctions which the public demands through its criminal courts, the tavern-keeper is liable in a private action of trespass in our common pleas to a person damaged by an unlawful sale.

With a system of punishment like that which sustains the law of 1887, and the strictness with which it has been construed by our Supreme Court, it is difficult to see why it should not be effectual to meet the purposes of its passage, if enforced by a proper administration.

TRANSFERS.

A licensee's privilege is personal and is not assignable, nor does it go to the personal representatives in case of death. For this reason a license cannot be transferred unless expressly authorized by the Act of Assembly and in the mode therein prescribed. The Act of 1887 is silent on the question of transfers, and they are still governed by the Act of April 20, 1858, Sect. 7, P. L. 366. The act provides that, "if the party licensed shall die, remove or cease to keep such house, his, her or their license, may be tranferred by authority granting the same on compliance with the requisitions of the law, etc." The requisitions of the law under this act permit a certain discretion to the authority granting or refusing licenses, and this discretion is now vested in the courts. This discretion, like that in the grants of licenses, depends upon the law and not the individual opinion of any of the judges; but if legally exercised is not reviewable in the Supreme Court: (*Blumenthal's Pet.*, 125-412.)

But a licensee can assign his interest in the license granted to him. Or to express it more correctly, he can consent to the transfer of it to his assignee, who succeeds him in the occupancy of the place. This assignment is subject to the approval of the Court of Quarter Sessions. There is nothing unlawful in this consent, as it is essential to the transfer. For this reason a judgment note given to secure a loan to carry on the liquor business, and an agreement to transfer the license on default in payment, is a legal transaction and not void as against public policy: (*Brewing Co.* v. *Booth*, 162-100.)

The right to transfer licenses from one person to another is purely statutory, and there is nothing in the law that permits the transfer from one place to another. Therefore, the quar-