UNITED STATES *v.* FARRAR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 732. Argued April 28, 1930.—Decided May 26, 1930.

Section 6 of the National Prohibition Act, which provides that "no one shall . . . purchase . . . any liquor without first obtaining a permit from the commissioner so to do . . .," relates only to that class of persons who may lawfully be authorized to sell, purchase, or otherwise deal with intoxicating liquors for non-beverage purposes, but who proceed to do so without a permit, and does not impose any criminal liability upon the purchaser of liquor for beverage purposes. P. 631.

38 F. (2d) 515, affirmed.

APPEAL by the United States under the Criminal Appeals Act from a judgment of the Di...ict Court sustaining a motion to quash an indictment charging the purchase of intoxicating liquor in violation of the National Prohibition Act.

Assistant Attorney General Youngquist, with whom *Attorney General Mitchell* and *Mr. John J. Byrne* were on the brief, for the United States.

The question involved should be viewed in the light of the ultimate aim and purpose of the National Prohibition Act, which is to prevent the use of intoxicating liquor as a beverage. *Corneli* v. *Moore,* 257 U. S. 491; *Donnelley* v. *United States,* 276 U. S. 505; *Yudelson* v. *Andrews,* 25 F. (2d) 80. See also *Selzman* v. *United States*, 268 U. S. 466; *United States* v. *Dodson,* 268 Fed. 397; *Goldberg* v. *Yellowley,* 290 Fed. 389; *Schnitzler* v. *Yellowley,* 290 Fed. 849; *Fritzel* v. *United States,* 17 F. (2d) 965.

The failure to include the purchase of liquor in the enumeration of acts prohibited by § 3 does not establish

that Congress intended that the purchase of liquor should not be an offense.

There are many acts and omissions, some relating to transactions authorized under regulations and permits and some to transactions wholly prohibited, which, though not included in that enumeration, are unquestionably made offenses by the Act and punishable under § 29. Among them are the failure of investigating officers to report violations to the United States Attorneys (§ 2); the use or disposition of intoxicating liquor by manufacturers of denatured alcohol, medicinal or toilet preparations, flavoring extracts, etc., otherwise than as an ingredient of such articles (§ 4); the sale by any person of any of such articles for beverage purposes (§ 4); the prescribing of liquor by anyone not a physician holding a permit to do so, as well as the prescribing by such a physician of liquor otherwise than in good faith as a medicine (§ 7); the failure to keep a record of liquor manufactured, purchased for sale, sold, or transported (§ 10); the failure of the manufacturer of liquor to attach to each container thereof a prescribed label (§ 12); the advertising of where or from whom liquor may be obtained (§ 17); the maintenance of a " common nuisance " (§ 21), and the possession of property designed for the manufacture of liquor intended for illegal use (§ 25).

The purchase of liquor for a purpose not authorized by the Act is within the terms of the prohibition of § 6.

The provision of § 6 is manifestly broad enough to embrace all persons, and, therefore, to include the appellee. To confine its application to persons to whom permits may issue has the anomalous effect of making the purchase of liquor without a permit an offense under the statute if the liquor is purchased for lawful purposes, but not an offense if the liquor is purchased to be disposed of illegally. This would appear to run counter to the command of § 3 that " all the provisions of this Act shall be liberally construed

to the end that the use of intoxicating liquor as a beverage may be prevented." See *Bombinski* v. *State*, 183 Wis. 351.

There is no more reason for assuming that the failure to provide a special penalty for the purchase of liquor shows the intent of Congress not to make that act an offense than there is for assuming that the unauthorized transportation, importation, exportation and possession of liquor are not offenses because no special penalties are provided therefor. The only penalties specially imposed by Title II are those for maintaining a "common nuisance" (§ 21), and for the illegal manufacture and sale of liquor (§ 29). The penalties for all other violations of Title II are prescribed by the provision of § 29: "Any person . . . who . . . violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined," etc. See *Donnelley* v. *United States*, 276 U. S. 505. Manifestly, that provision is not confined to violations by permittees.

There are, however, considerations tending to show that the purchase of liquor, except as authorized by the National Prohibition Act, is not an offense under that Act. See *Lott* v. *United States*, 205 Fed. 28.

A prohibition against the purchase of liquor for beverage purposes was intentionally omitted from the Eighteenth Amendment. Cong. Rec., Vol. 55, Part 6, p. 5647 *et seq.* This does not necessarily mean that such a purchase is not made unlawful by the National Prohibition Act. Many acts not mentioned in the Amendment, including the possession of intoxicating liquor, the maintenance of a common nuisance, and the advertising of liquor, are made offenses by that Act.

Dealing with the permissive features of the Prohibition Act, see S. Rep. No. 151, p. 20, 66th Cong., 1st Sess.; H. Rep. No. 91, p. 2, 66th Cong., 1st Sess.

When discussing the origin of the bill on the floor of the House, Mr. Volstead, chairman of the Judiciary Committee, observed: "The bill was largely modeled on the Ohio law. . . . Every State, I believe, that has a prohibition law has the essential features of this bill, including Iowa, Orégon, Kansas, North Dakota, South Dakota, Minnesota, Nebraska, Idaho, Alaska, Washington, and I might mention a number of others." Cong. Rec., Vol. 58, Part 3, p. 2512.

An examination of these prohibition laws shows that only in Nebraska was the purchase of beverage liquor an offense. See further Cong. Rec., Vol. 58, Part 3, p. 2802.

Section 32, Title II, of the National Prohibition Act provides that "It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser." This apparently was intended to apply only to charges of sale and to obviate the necessity of naming the person to whom the sale was made. It can not have application to other offenses, such as possession, transportation, etc., nor of course can it have application to a charge of purchase if purchase is a crime.

From the passage of the National Prohibition Act down to the time of this indictment, a period of approximately ten years, the National Prohibition Act was construed by the administrative departments charged with its enforcement as not making the purchase of liquor an offense. The reports fail to disclose any other case in which such a charge was brought.

In the following cases courts have said *obiter* that the purchase of liquor is not an offense. *Singer* v. *United States,* 278 Fed. 415; *Vannata* v. *United States,* 289 Fed. 424; *United States* v. *Kerper,* 29 F. (2d) 744; *Norris* v. *United States,* 34 F. (2d) 839.

In *United States* v. *Katz,* 271 U. S. 354, this Court held that § 10 is one of a group of sections, including

§ 6, which apply only to those dealing in liquor for purposes authorized by the Act. The application of § 6 was not directly involved.

Mr. William H. Lewis, with whom *Mr. James A. Cresswell* was on the brief, for appellee.

The buyer of liquor was not guilty of an offence under the National Prohibition Act, and § 6 relates solely to permittees. *United States* v. *Katz,* 271 U. S. 362, and footnote; s. c., 5 F. (2d) 528.

If Congress had intended to prohibit the straight purchase of beverage liquor, we should expect to find the word "purchase" inserted in the first paragraph of § 3. There is no possibility that the word was there omitted by inadvertence, since the section is a short one, and "purchase" in regard to nonbeverage liquors is inserted in the next paragraph. Congress mentioned "purchase" in §§ 4, 6, 10, 11 and 13, and in every case the purchaser is referred to in connection with a permit.

A glance at § 29, dealing with punishments, is illuminating. The first paragraph obviously deals with violations of the law by others than permittees. It is noted that the word "purchase" does not appear in this clause. The Government finding no penalty for the alleged offense of purchasing liquor either in the first or second clause, relies upon the third; "or violates any of the provisions of this title, for which offense a special penalty is not prescribed." It might be pertinent to ask, What "provision of this title" has the purchaser violated for which a penalty is not prescribed?

If we return to § 6, the purchaser there is a purchaser with a permit, and a special penalty is provided for the violations of the terms of the permit in the second clause of § 29. The fact that the word "purchase" does not appear either in §§ 3 or 29 is clear and convincing evidence that Congress never intended to make the purchaser an offender.

There is no inconsistency or contradiction in the contention that Congress intended to punish purchasers who are required to have a permit, and not those who are not required to have a permit. The former class owes a legal duty to the Government for the privilege it holds; the latter owes no duty to the Government and runs the risk of prosecution for other offences. As the learned Judge in the court below put it: "There are strong reasons why permittees should be penalized for the abuse of the privileges granted them."

This Court is asked to write the word "purchase" into the first paragraph of § 3, or strike out the words "without a permit" in § 6. It must do one or the other to make the purchaser an offender. To borrow a phrase used by the late Mr. Justice Sanford in *Everard Breweries* v. *Day,* 265 U. S. 543, this would be "to pass the line which circumscribes the judicial department and to tread upon legislative ground."

United States. v. *Katz,* 271 U. S. 354, is decidedly analogous to the case at bar.

It is not admitted that there is any ambiguity here, but if there is, the character of the statute determines the construction, and a criminal statute is strictly construed, and the Court will so construe the statute as to carry out the intention of the legislature.

The records of Congress show that there was a proposal to insert the word "purchase" into the Eighteenth Amendment, and it was rejected by a vote of 62 to 4, 30 not voting. Cong. Rec., 65th Cong., 1st Sess., Vol. 55, Part 6, p. 5645.

It is to be presumed that Congress intended to keep within the scope of its constitutional authority, and not to go outside. *United States* v. *Standard Brewery,* 251 U. S. 220.

This Court may take judicial notice of Senate Bill 1827, introduced by the same Senator Sheppard, proponent of

the joint resolution which became the Eighteenth Amendment, September 30, 1929,—the Bill entitled "A Bill Amending the National Prohibition Act so as to Prohibit the Purchase of Intoxicating Liquors as a Beverage."

It has been uniformly held by prosecuting officers and the public at large for more than ten years, that the purchase of liquor was not an offence under the National Prohibition Act.

If the meaning of a statute is open to doubt, the contemporaneous construction placed upon it when it became operative, and acquiesced in by the executive, the legislature, and the courts, or those charged with its enforcement, is highly persuasive of what the law is.

As pointed out by the opinion of the court below, there are *dicta* from at least three circuits—*Beecher* v. *United States,* 5 F. (2d) 45; *Norris* v. *United States,* 34 F. (2d) 839; *Dickinson* v. *United States,* 18 F. (2d) 887—to the effect that a sale is not punishable under the National Prohibition Act.

Every textwriter upon the National Prohibition law for the last ten years has held that a purchaser is not guilty of any offence under it. McFadden on Prohibition, p. 294, § 267; Blakemore on Prohibition, p. 151; Thorpe, National and State Prohibition, p. 196; Nelson, Federal Liquor Laws, p. 326, § 1022; Wayne B. Wheeler, Federal & State Laws Relating to Intoxicating Liquor, 3d ed., p. 69.

Administrative necessity or supposed public policy cannot add to an Act of Congress and make conduct criminal which the law leaves untouched. *Sarlls* v. *United States,* 152 U. S. 570; *United States* v. *Standard Brewery,* 251 U. S. 210.

It is fundamental that a penal law must inform the potential criminal that the act he is about to do is punishable as a crime. *United States* v. *Wilterberger,* 5 Wheat. 96; *United States* v. *Reese,* 92 U. S. 214; *Ex parte Webb,* 225 U. S. 663.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

By indictment returned in the federal district court for Massachusetts, the defendant (appellee) was charged with unlawfully and knowingly having purchased intoxicating liquor fit for use for beverage purposes, in violation of the National Prohibition Act. The district court sustained a motion to quash the indictment on the ground that the ordinary purchaser of intoxicating liquor does not come within the purview of the act. 38 F. (2d) 515. The government appealed under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246; U. S. C., Title 18, § 682, and § 238 of the Judicial Code, as amended by the act of February 13, 1925, c. 229, 43 Stat. 936, 938; U. S. C., Title 28, § 345.

Section 3 of the Prohibition Act, c. 85, 41 Stat. 305, 308, makes it unlawful for any person to "manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act . . ."; but provides that "Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold . . . but only as herein provided, and the commissioner may, upon application, issue permits therefor: . . . ."

Section 6 of the act, 41 Stat. 310, provides: "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided . . . ." Following this language, the section regulates with much detail the issue, character, and duration of the permit, and the application therefor, which application, among other things, must set forth "the qualification of the applicant and the purpose for which the liquor is to be used." The form of the permit and application, and the

facts to be set forth therein are to be prescribed by the Commissioner of Internal Revenue, who is to require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and provisions of the act. A large part of the act, including § 6, is devoted to the subject of the authorized manufacture, sale, transportation, and use of intoxicating liquor for nonbeverage purposes; while § 3 plainly deals with the prohibited traffic in such liquors for beverage purposes.

The government relies upon the literal terms of § 6, that "No one shall . . . purchase . . . any liquor without first obtaining a permit from the commissioner so to do . . ."; but, at the same time, frankly concedes that the application of this language to the present case is not free from doubt. The contrary view is that these words, considered in connection with the other provisions of § 6 and correlated sections, relate only to that class of persons who lawfully may be authorized to sell, purchase, or otherwise deal with intoxicating liquors for nonbeverage purposes, and who proceed to do so without a permit. That this defendant does not belong to that class, and could not, under any circumstances, have obtained a permit to make a purchase of the character here made, is not in dispute. The question thus presented is very nearly the same as that decided in *United States* v. *Katz,* 271 U. S. 354; and in principle is concluded by that case.

There, the defendants were charged with conspiring to sell intoxicating liquors without making a permanent record of the sale, in violation of § 10 of the act. The indictments were quashed in the district court on the ground that § 10, which required a permanent record to be made of sales, applied only to persons authorized to sell alcoholic liquor, and that the indictment failed to allege that either of the defendants held a permit or was otherwise author-

ized to sell. This court, in affirming the judgment, said (pp. 361–362):

"Of the thirty-nine sections in Title II of the Act, which deals with national prohibition, more than half, including the seven sections which precede § 10, contain provisions authorizing or regulating the manufacture, sale, transportation or use of intoxicating liquor for nonbeverage purposes. These provisions, read together, clearly indicate a statutory plan or scheme to regulate the disposition of alcoholic liquor not prohibited by the Eighteenth Amendment, in such manner as to minimize the danger of its diversion from authorized or permitted uses to beverage purposes. These provisions plainly relate to those persons who are authorized to sell, transport, use or possess intoxicating liquors under the Eighteenth Amendment and the provision of § 3 of the Act, already quoted." *

And it was held (p. 363) that "the words 'no person' in § 10 refer to persons authorized under other provisions of the act to carry on traffic in alcoholic liquors," not to the ordinary violator of a provision prohibiting transactions in respect of liquors for beverage purposes.

It is not necessary to repeat the citation of authorities or the pertinent canons of statutory construction set forth in the opinion to support this conclusion. We are unable to find any logical ground for holding that the words "no person" in § 10 are used in the restricted sense thus stated, but that identical words in § 6, which forms a part of the same general plan for controlling the authorized traffic in intoxicating liquors, may be given an unlimited application. Obviously the National Prohibition Act deals with the liquor traffic from two different points of view. In the case of beverage liquors, except for sacramental and medicinal purposes, the traffic is prohibited

* This refers to the portion of § 3 relating to the manufacture, etc., of liquor for nonbeverage purposes and wine for sacramental purposes.

absolutely and unconditionally; in the case of nonbeverage liquors, it is permitted but carefully regulated. The prohibitions in § 3 are with respect to the former; while those in § 6 are with respect to the latter. In the former the sale, but not the purchase, is prohibited; in the latter both are prohibited.

Since long before the adoption of the Eighteenth Amendment it has been held with practical unanimity that, in the absence of an express statutory provision to the contrary, the purchaser of intoxicating liquor, the sale of which was prohibited, was guilty of no offense. And statutes to the contrary have been the rare exception. Probably it was thought more important to preserve the complete freedom of the purchaser to testify against the seller than to punish him for making the purchase. See *Lott* v. *United States*, 205 Fed. 28. However that may be, it is fair to assume that Congress, when it came to pass the Prohibition Act, knew this history and, acting in the light of it, deliberately and designedly omitted to impose upon the purchaser of liquor for beverage purposes any criminal liability. If aid were needed to support this view of the matter, it would be found in the fact, conceded by the government's brief, that during the entire life of the National Prohibition Act, a period of ten years, the executive departments charged with the administration and enforcement of the act have uniformly construed it as not including the purchaser in a case like the present; no prosecution until the present one has ever been undertaken upon a different theory; and Congress, of course well aware of this construction and practice, has significantly left the law in its original form. It follows that, since the indictment charges no offense under § 6, it was properly quashed.

Judgment affirmed.