Approved 3/14/83
Date

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Edward F. Reilly, Jr. at
Chairperson

11:00 a.m./~~p.m.~~ on March 7, 19 83 in room 254-E of the Capitol.

All members were present except: Senator Roitz and Senator Vidricksen, who were excused.

Committee staff present: Russell Mills, Legislative Research
Emalene Correll, Legislative Research
Fred Carman, Assistant Revisor of Statutes
June Windscheffel, Secretary to the Committee

Conferees appearing before the committee: General Thomas J. Kennedy, Alcoholic Beverage Control
Bill Strukel, Alcoholic Beverage Control
Tom Coleman, Alcoholic Beverage Control

SB250 - relating to trains being class B private clubs.

The Chairman introduced Director Kennedy, who distributed copies of a Memorandum to the committee, dated March 7, 1983, re: SB250. It is attached and a part of the record (Attachment #1). At the request of the committee the ABC contacted Senator Bogina and D. J. Roberts, the owner of the train, as well as the Federal Bureau of Alcohol, Tobacco and Firearms and the Nebraska Alcoholic Beverage Control.

The Memorandum deals with the purpose, perspective and comments and/or recommendations of SB250. Senator Pomeroy moved that the bill be amended as suggested by the ABC as shown on page 2 of the attached Memorandum from General Kennedy. 2d by Senator Morris. Motion carried.

Senator Gannon moved that SB250 be recommended favorably for passage as amended. 2d by Senator Winter. The motion carried. Senator Francisco asked that his "no" vote be recorded.

Director Kennedy then distributed copies of his Memorandum to the committee dated March 7, 1983, re: Modifying Club Licensing Act to allow temporary memberships for "Fund Raising" purposes. It is a part of the record. (Attachment #2) Also attached is a copy of the opinion, State of Kansas ex rel. Curt T. Schneider v. Thomas J. Kennedy (Attachment #3) concerning the "open saloon." Senator Winter moved to take out "fund raising" and the requirement showing a person's age, from the suggested amendment, and to prepare a bill to carry out the recommendation and introduce it for consideration by the committee. 2d by Senator Pomeroy. Motion carried.

A Memorandum from Director Kennedy was distributed to the committee concerning Temporary Memberships in Class B Clubs for Military Officers on TDY. It is dated March 7, 1983, and made a part of the record. (Attachment #4). Senator Winter made a motion that the committee authorize a bill to be introduced and referred back to the committee for consideration concerning Attachment #4, to have it apply to TDY military personnel. 2d by Senator Daniels. Motion carried.

Senator Pomeroy moved that the Minutes of February 24, 1983, be approved as corrected. 2d by Senator Meyers. Motion carried.

The meeting adjourned at 12:00 noon.

MEMORANDUM

Minutes of March 7, 1983
Attachment #1

TO: Honorable Edward F. Reilly, Jr.
Chairman, Senate Federal and State Affairs Committee

FROM: THOMAS J. KENNEDY, Director, ABC Division

RE: Senate Bill 250

DATE: March 7, 1983

PURPOSE

The purpose of this memorandum is to provide follow-up information about Senate Bill 250.

PERSPECTIVE

Per your request, we have contacted Senator Bogina and Mr. D.J. Roberts (913/236-5711) Merriam, Kansas, the owner of the train. We also contacted the Federal Bureau of Alcohol Tobacco and Firearms in Kansas City, Mo. and the Nebraska Alcoholic Beverage Control.

It would appear that Senate Bill 250, with a few amendments, could be a workable piece of legislation. According to Dave Bateman, BATF, a train similar to the one referred to in this bill, would be required to purchase the same type of federal license as do the airlines, that being a Federal Retail Liquor Dealer's Stamp at large. The IRS Form #11 is the application form used and the cost is $54.00 a year and is applicable for multi-state use.

The Nebraska Alcoholic Beverage Control spokesman stated they sell a railroad license to corporations for $100 plus a registration fee, plus an additional charge of $1 per car. This license is good from May 1 to April 30 and is not sold on a pro-rata basis. The holder of the Nebraska railroad license is the operator and authorized to allow consumption, selling and purchasing. Nebraska has no law which would prohibit the selling of Kansas liquor on railroad cars. No liquor tax is collected by Nebraska for sales which are made on railroad cars.

Mr. D.J. Roberts informed us that he would actually own all of the railroad cars and equipment. He will be leasing the engine and the engine crew from a railroad. At the present time, he is not sure where the train will be located, however, he could possibly enter into an agreement with the Rosedale Burlington Yard located at 36 Southwest Blvd., Kansas City, Kansas. Mr. Roberts also discussed the possibility of locating the train and equipment in Kansas City, Missouri.

SB 250
March 7, 1983

COMMENTS AND/OR RECOMMENDATIONS

1. Recommend that the train cars be located somewhere in the State of Kansas. The reason for this recommendation is that the train car premises would be available for inspection.

2. Recommend that Senate Bill 250 be amended to state that any and all alcoholic liquor taxes due the state be paid from the county in which the train cars are located. This will solve the 10% excise tax distribution problem.

For example, if the train is parked at the Rosedale Burlington yards in Kansas City, Kansas, Wyandotte County, would receive that portion of the 10% excise tax money which is returned to the city or county where the club is located.

3. Recommend that a provision be included in the bill that would authorize rules and regulations to be promulgated to take care of records and reports, collection and payment of taxes for this train or trains.

5. Recommend that the Director of Alcoholic Beverage Control be authorized to enter into a Memorandum of Record and Agreement with the licensee with respect to other provisions of the Kansas Club Licensing Act and related rules and regulations. For example, the state class "B" club license, the local license (county or city) as well as the Federal Retail Dealer's Stamp at large, should all be displayed prominently in the main club car.

That alcoholic liquors be purchased from a Kansas retail liquor dealer, who possesses the Federal Wholesaler's Basic Permit.

That ABC Agents have the right to make routine inspections.

That all employees engaged in selling, dispensing or serving alcoholic liquor will be registered with the Director.

That the temporary membership roster is available for inspection as well as liquor store receipts of purchases. These receipts must be kept on the premises with written authorization, receipts older than for the current month could be kept in Mr. Robert's main office, a place available to our inspectors.

That the club, like all other class "B" clubs be required to make monthly reports pertaining to liquor purchases, sales and excise tax payments, etc.

That the licensee submit a monthly list of all trips planned to include destination, time of departure, expected time of arrival and expected time of return.

COMMENT: Such a Memorandum of Record and Agreement of this nature, signed by the Director of ABC and the licensee, would bring these matters to the attention of the licensee thus avoiding misunderstandings, etc.

Respectfully submitted,

THOMAS J. KENNEDY, DIRECTOR
Alcoholic Beverage Control Division

TJK:cjk

Attachment # 2
Minutes of March 7, 1983

MEMORANDUM

TO: Honorable Edward F. Reilly, Jr.
Chairman, Senate Federal and State Affairs Committee

FROM: THOMAS J. KENNEDY, Director, ABC Division

RE: Modifying Club Licensing Act to allow temporary memberships for "Fund Raising" purposes.

DATE: March 7, 1983

PURPOSE

The purpose of this memorandum is to provide sample language for the modification of the Club Licensing Act to allow temporary memberships for "Fund Raising" purposes.

PERSPECTIVE

Political groups, fund raising organizations, conventioneers and others are constantly wanting to host public oriented activities where alcoholic liquors would be sold by the drink.

COMMENTS AND/OR RECOMMENDATIONS

While the constitutional prohibition against the "Open Saloon" must be kept in mind, we feel amendments to Kansas Statute Annotated 41-2601 would allow flexibility in this area.

Recommend that K.S.A. 41-2601 be amended to read:

"(c) Any class B club licensed under the provisions of this Act may establish rules where a guest at a bona fide private party held on the premises of the licensed club for the purpose of fund raising may file application for temporary membership in the club for the period of the private party, and such temporary membership shall not be subject to the waiting period or dues requirement of this section. A list consisting of the name, address, and age of each private party guest shall be submitted to the club management at least 3 days in advance of the function and only a person(s) whose name appears on this list may be authorized temporary membership status. Any club intending to issue temporary memberships as authorized under this section must notify the Alcoholic Beverage Control of the name of the fund raising organization, and the date and time of the function at least 7 days prior to the function.

Rules and regulations may be promulgated as necessary to control such functions and the Director of Alcoholic Beverage Control shall have broad discretionary authority to govern such activities."

This amendment will permit attendees of a bona fide private party held for the purpose of fund raising to have temporary membership in a class B private club, purchase tickets or make donations to the group, and purchase and consume alcoholic liquors in the club. A requirement for temporary membership status is that people attending must be identified on a roster to be furnished in advance of the date of the function with no one being granted temporary membership if their name is not on the roster.

Further recommend that subparagraphs (c), (d), (e) and (f) be relettered (d), (e), (f) and (g).

Respectfully submitted,

THOMAS J. KENNEDY, DIRECTOR
Alcoholic Beverage Control Division

TJK:cjk

Attachment #3
Minutes of March 7, 1983

No. 50,263

STATE OF KANSAS ex rel. Curt T. Schneider,
Attorney General,
Petitioner,

v.

THOMAS J. KENNEDY, Director,
Alcoholic Beverage Control,
Respondent,

THE KANSAS HOTEL AND MOTEL ASS'N, INC.,
Intervenor.

SYLLABUS BY THE COURT

1.

The 1978 Kansas legislature amended the Private Club Act, K.S.A. 41-2601 et seq., to authorize the issuance of liquor licenses for class B clubs which are licensed food service establishments as defined in K.S.A. 1977 Supp. 36-501, and permitted the sale of alcoholic liquor by the drink for consumption on the licensed premises, but only in the same room where food is sold and served with the sale and consumption of such alcoholic liquor, provided that not less than fifty per cent (50%) of the gross receipts in each calendar year are from the sale of food for consumption on the premises. Upon constitutional attack it is held the legislature has attempted to authorize the establishment of an "open saloon" in violation of article 15, section 10 of the Kansas constitution.

2.

Article 15, section 10 of the Kansas constitution provides: "The legislature may provide for the prohibition of intoxicating liquors

Atch. 3

in certain areas. Subject to the foregoing, the legislature may regulat license and tax the manufacture and sale of intoxicating liquors, and may regulate the possession and transportation of intoxicating liquors. The open saloon shall be and is hereby forever prohibited." Article 15, section 10 of the Kansas constitution does not authorize the legislature to define the term "open saloon."

3.

It is entirely within the power of the people who establish and adopt the constitution to make any of its provisions self-executing. Prohibitory provisions in a constitution are self-executing to the exten that anything done in violation of them is void.

4.

Absent specific authorization in the constitution giving the legislature authority to define constitutional provisions, it is the function and duty of the Supreme Court to define constitutional provisio

5.

It is the nature of the judicial process that the construction of a constitutional provision by the Supreme Court becomes equally as controlling upon the legislature of the state as the provisions of the constitution itself.

6.

Rules applied by the Supreme Court in determining the constitutionality of a statute are stated in the opinion.

7.

The term "open saloon" as used in article 15, section 10 of the Kansas constitution is construed to be any establishment open to the public, without discrimination, where alcoholic beverages are dispensed or sold and served for consumption on the premises.

8.

A food service establishment which is open to the public and dispensing or selling alcoholic beverages for consumption on the premises is an open saloon, and the comparative revenue derived from food or alcoholic liquor is immaterial.

9.

In an original action in quo warranto brought by the attorney general challenging the constitutional validity of 1978 legislative amendments to K.S.A. 41-2601 et seq., and K.S.A. 41-803, as authorizing the maintenance of an "open saloon" in violation of Article 15, Section 10 of the Kansas constitution, it is held: The petitioner's writ of quo warranto shall be granted and the respondent is prohibited from the issuance of any class B club licenses as designated in subsection (b)(3)(B) of L. 1978, ch. 186, § 3.

Original action in quo warranto. Opinion filed December 5, 1978. Judgment for petitioner.

John R. Martin, first deputy attorney general, argued the cause and Curt T. Schneider, attorney general, was with him on the brief for the petitioner.

Benjamin J. Neill, of department of revenue, argued the cause, ar Thomas J. Kennedy, director of alcoholic beverage control, and Alan F. Alderson, of department of revenue, were with him on the brief for the respondent.

Charles N. Henson, of Eidson, Lewis, Porter & Haynes, argued the cause and Richard E. Hayse, of the same firm, was with him on the brief for the intervenor.

Paul Arabia, of Wichita, was on the brief amici curiae, for The Portobello Club, Inc., and Down Home, Inc.

The opinion of the court was delivered by

SCHROEDER, C.J.: This is an original action in quo warranto brought by the attorney general challenging the authority of the Directo of the Alcoholic Beverage Control Board to issue licenses to class B clubs where liquor may be sold and served in conjunction with the sale and consumption of food.

The issue in this case is whether the 1978 legislative amendments to K.S.A. 41-2601 et seq., and K.S.A. 41-803, authorize the maintenanc of an "open saloon" in violation of article 15, section 10 of the Kansas constitution.

The 1978 Kansas legislature amended the Private Club Act, K.S.A. 41-2601 et seq., to authorize the issuance of liquor licenses for class B clubs which are licensed food service establishments as defined in K.S.A. 1977 Supp. 36-501. New section 11 of chapter 186, laws of 1978, provides:

> "(a) A club license for a class B club specified in subsection (b)(3)(B) of K.S.A. 1977 Supp. 41-2601 and amendments thereto shall allow the licensee to sell and offer for sale alcoholic liquor for consumption on the licensed premises, but only in the same room where food is sold and served with the sale and consumption of such alcoholic liquor.
>
> "(b) This section shall be part of and supplemental to K.S.A. 41-2601 to 41-2635, inclusive, and amendments thereto."

The legislature, by amending K.S.A. 41-2601, authorized a new type of class B restaurant-club and defined it as follows:

"(B) A premises which is a licensed food service establishment, as defined by K.S.A. 1977 Supp. 36-501 and amendments thereto, of which not less than fifty percent (50%) of the gross receipts in each calendar year are from the sale of food for consumption on the premises." L. 1978, ch. 186, § 3.

Furthermore, under the new law, class B restaurant-clubs are licensed without membership cards, membership lists, dues, waiting periods, carry-in bottle or liquor pool requirements.

The 1978 legislature also amended the statutory definition of "open saloon." K.S.A. 41-803 of the Liquor Control Act as amended now provides in pertinent part:

"(a) It shall be unlawful for any person to own, maintain, operate or conduct either directly or indirectly an open saloon.

"(b) As used in section 10 of article 15 of the constitution of the state of Kansas and this section, 'open saloon' means any place, public or private, where alcoholic liquor is sold or offered or kept for sale by the drink or in any quantity of less than two hundred (200) milliliters (6.8 fluid ounces) or sold or offered or kept for sale for consumption on the premises where sold, but does not include any class B club licensed in accordance with K.S.A. 41-2601 to 41-2634, inclusive, and amendments thereto." L. 1978, ch. 189, § 13.

Preliminary to our discussion of the merits of this action, the background of liquor regulation in Kansas should be studied. From the very outset of our state's history, the legality of alcoholic liquor has been a subject of debate, and the state constitution has been the forum for that debate.

At the Wyandotte Constitutional Convention in 1859, a prohibitory provision stating that "the Legislature shall have the power to regulate or prohibit the sale of alcoholic liquor except for mechanical and medicinal purposes" was proposed and subsequently withdrawn. The constitution was adopted without any reference to alcoholic liquor.

In 1880, however, the voters approved the original version of article 15, section 10 of the constitution which provided:

> "The manufacture and sale of intoxicating liquors shall be forever prohibited in this state, except for medical, scientific and mechanical purposes."

Thereafter the legislature defined those acts which constituted a manufacture and sale as well as described the substance which could be regarded as intoxicating liquor. It also defined what substances could not be sold for medical, scientific and mechanical purposes. See L. 188 ch. 128, §§ 2,10.

Suffice it to say under these laws so-called patent medicines enjoyed a steady increase in popularity. The problems which arose prompted the legislature to respond in 1909 and 1911 by amendments which removed the "medical, scientific and mechanical exception" and substituted a provision which allowed certain wholesale druggists to sell alcohol to registered pharmacists for medicinal purposes. See L. 1909, ch. 164, § 1; L. 1911, ch. 178, § 1. Our court upheld these new laws in numerous cases. Thus, the passage of the 18th amendment to the Constitution of the United States in 1919 prompted little change in an already "dry" Kansas.

In 1933, the 21st amendment to the Constitution, which repealed the 18th amendment, was passed. That same year a special session of the Kansas legislature agreed to submit to the voters of 1934 a proposed amendment to the Kansas constitution which provided:

> "The legislature may license and regulate the manufacture, sale, possession and transportation of all liquor having any alcoholic content, and may impose special taxes on all malt, vinous and spirituous liquors, and may provide for the prohibition of such liquors in certain areas." L. 1933, special session, ch. 128, § 1.

The provision contained no open saloon prohibition and was defeated.

Soon after, the Kansas legislature in 1937 directed that 3.2% beer was not an intoxicating liquor and authorized its sale by licensees throughout the state. This law is now codified as K.S.A. 41-2701 et seq. and has been consistently upheld by our court. See e.g. Johnson v. Reno County Comm'rs, 147 Kan. 211, 212, 75 P.2d 849 (1938); Linquist v. City of Lindsborg, 165 Kan. 212, 214-16, 193 P.2d 180 (1948).

In 1947, the legislature proposed the amendment of article 15, section 10 of the constitution to provide:

> "The legislature may provide for the prohibition of intoxicating liquors in certain areas. Subject to the foregoing, the legislature may regulate, license and tax the manufacture and sale of intoxicating liquors, and may regulate the possession and transportation of intoxicating liquors. The open saloon shall be and is hereby forever prohibited." L. 1947, ch. 248, § 1. (Emphasis added.)

Unlike the 1933 proposal, this amendment, which was approved by the voters of 1948 and remains the law in Kansas today, prohibits the open saloon.

Shortly thereafter in 1949, the legislature passed a comprehensive liquor control scheme known as the Kansas Liquor Control Act, now codified at K.S.A. 41-101 et seq. For purposes of this section the legislature defined "open saloon" in K.S.A. 41-803 as "any place, public or private, where alcoholic liquor is sold or offered for sale or kept for sale by the drink . . . or sold, offered for sale, or kept for sale for consumption on the premises where sold."

During the years that followed the enactment of the Kansas Liquor Control Act various private clubs were conceived to dispense alcoholic liquor. In State v. Larkin, 173 Kan. 112, 244 P.2d 686 (1952), our court overturned one such arrangement as a subterfuge of the Act.

The legislature subsequently responded to the severe law enforcement problem by enacting "The Private Club Act" of 1965. K.S.A. 41-2601 et seq. It provided that on and after July 31, 1965, the consumption of alcoholic liquor at any place other than that provided in the act "shall be deemed to be the consumption of alcoholic liquor in a place to which the general public has access." K.S.A. 41-2603. (Emphasis added.) Under the terms of that Act the Director of the Alcoholic Beverage Control can issue licenses to class A clubs (those which are not operated for profit) and class B clubs (those which are operated for profit). The consumption of alcoholic liquor on the premises of such clubs is deemed to be consumption in a place to which the general public has no access. The consumption of liquor by the drink is authorized by the Act (K.S.A. 41-2602) in four places which are defined: (1) Upon private property by those occupying the private property as owner or as the lessee of the owner and by their guests

where no charge is made by the owner or lessee for the alcoholic liquor served; (2) at a class A or class B club licensed by the Alcoholic Beverage Control Director; (3) in a lodging room of any hotel, motel or boarding house where the alcoholic liquor is consumed by the occupant or his guests, provided the occupant is not engaged in the sale of liquor; and (4) in a private dining room of a hotel, motel or restaurant rented for a special occasion for a private party, where there is no sale of the alcoholic liquor.

The Private Club Act of 1965 was upheld in Tri-State Hotel Co. v. Londerholm, 195 Kan. 748, 408 P.2d 877 (1965).

Then, in 1970 the people of Kansas were given the opportunity to amend article 15, section 10 of the constitution to exclude the open saloon prohibition. See L. 1970, ch. 189, § 1. The proposition was rejected on November 3, 1970, by a narrow margin of 346,423 votes against the amendment to 335,094 for it.

For an exhaustive article on the history of intoxicating liquor in Kansas, complete with authoritative citation, see Clark, Wyatt Earp and the Winelist: Is a Restaurant an "Open Saloon?", 47 J.B.A.K. 63 (1978).

While the liquor issue remained a topic of heated debate in subsequent years, no significant changes occurred in the law until 1978 when the legislature amended both the Private Club Act, K.S.A. 41-2601 et seq., and K.S.A. 41-803 to authorize the sale of liquor in conjunction with the serving of food by a licensed "food service establishment, as defined by K.S.A. 1977 Supp. 36-501 and amendments thereto."

The validity of this new law was soon challenged in a quo warranto action filed by the attorney general on July 6, 1978, in the Supreme Court of Kansas. Thereafter, a motion by the Kansas Hotel and

Motel Association to intervene was filed on July 21, 1978, and subsequently granted on August 2, 1978, and application to file a brief as amici curiae was granted to The Portobello Club, Inc., and Down Home, Inc., on August 28, 1978. The attorney general was ordered to file his brief on or before September 26, 1978, and the respondent, intervenor and amici were ordered to file briefs by October 12, 1978. The clerk was ordered on the court's own motion to advance the case for hearing. The case was advanced and given a preferential setting on the Supreme Court's docket to be heard on October 27, 1978. Motions by amici curiae and the intervenor both proponents of the liquor legislation, for an extension of time to file their briefs out of time were denied in order to prevent further delay.

At no time did the petitioner, the respondent, the intervenor or amici suggest to the court or request by motion expedited consideration of decision in this case prior to the general election on November 7, 1978.

On this state of the record oral arguments were heard on October 2 1978. Counsel for the respondent in oral argument to the court on that date requested the court to announce its decision prior to certification of the county referendum by the secretary of state. See L. 1978, ch. 186 § 10.

Notwithstanding validity of the legislation was under constitutional attack by the attorney general, at the time of oral argument 45 counties in Kansas were submitting the question concerning the licensing of class B clubs specified in subsection (b)(3)(B) of L. 1978, ch. 186, § 3, to the qualified voters of their respective counties at the general election pursuant to L. 1978, ch. 186, § 10.

After duly considering the briefs and oral arguments of the respective parties, the intervenor and amici curiae this court entered judgment for the petitioner in State ex rel. Schneider v. Kennedy, 225 Kan. , P.2d (filed November 13, 1978) as follows:

> "After examining the record and giving the matter due consideration we hold, by a divided court, the petitioner's writ of quo warranto shall be granted. The

court finds the 1978 legislative amendments to K.S.A. 41-2601 et seq., and K.S.A. 41-803, authorize the maintenance of an 'open saloon' in violation of Article 15, Section 10 of the Kansas constitution.

. . . .

"This brief opinion announcing the decision of the court will be supplemented by a formal opinion to be filed when it is prepared."

With this brief historical background we now consider petitioner's claim that K.S.A. 41-2601 et seq., and K.S.A. 41-803, authorize the maintenance of an open saloon in violation of article 15, section 10 of the constitution.

A brief review of the function of the Supreme Court in determinin a constitutional question within the spectrum of our constitutional form of government is in order at this point.

Statements made in State, ex rel, v. City of Topeka, 31 Kan. 452, 2 Pac. 593 (1884), that the various branches or departments of the government are simply the instruments of sovereignty, and not the sovereignty itself, are explained in State v. Durein, 70 Kan. 1, 78 Pac. 152 (1904), aff'd on rehearing 70 Kan. 13, 80 Pac. 987 (1905), aff'd 208 U.S. 613, 52 L.Ed. 645, 28 S.Ct. 567 (1908), where the court said:

"But the people have set the constitution over themselves as a limitation upon their own sovereignty, and it is their duty to obey it precisely the same as officials who are given authority under it. By that instrument a government has been established, and its powers defined and distributed. Among the powers granted are such as are designated legislative, executive, and judicial. These are sovereign powers, and the people, having delegated them to instruments of their own creation, cannot interfere with their exercise. They may meet in their organized political capacity and change the fundamental law, but so long as the constitution stands they

cannot legislate, or execute laws, or adjudicate controversies. The recognition of any other doctrine would sound the death-knell of constitutional government.

"It is elementary law that grants of power by state constitutions to state legislatures include all legislative power that is not expressly withheld." (pp. 36,37.)

It is fundamental that our state constitution limits rather than confers powers. Where the constitutionality of a statute is involved, the question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby. Hunt v. Eddy, 150 Kan. 1, 90 P.2d 747 (1939); see also Leek v. Theis 217 Kan. 784, 539 P.2d 304 (1975); Schumacher v. Rausch, 190 Kan. 239, 372 P.2d 1005 (1962); State, ex rel., v. Anderson, 180 Kan. 120, 125, 299 P.2d 1078 (1956).

The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. Leek v. Theis, 217 Kan. at 784, Syl.¶ 2; see also Rogers v. Shanahan, 221 Kan. 221, 223, 565 P.2d 1384 (1976); State, ex rel., v. Bennett, 219 Kan. 285, 289, 547 P.2d 786 (1976); Brown v. Wichita State University, 219 Kan. 2, 9-10, 547 P.2d 1015 (1976).

In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. State, ex rel., v. Fadely, 180 Kan. 652, ¶ 2, 308 P.2d 537 (1957). See also Brown v. Wichita State University, 219 Kan. at 2, Syl.¶ 3; Leek v. Theis, 217 Kan. at 792; Shelton v. Phalen, 214 Kan. 54, Syl. ¶ 5, 519 P.2d 754 (1974).

Statutes are not stricken down unless the infringement of the superior law is clear beyond substantial doubt. Hunt v. Eddy, 150 Kan. at 2, Syl. ¶ 7; see also In re Estate of Diebolt, 187 Kan. 2, 13, 353 P.2d 803 (1960); State, ex rel., v. Urban Renewal Agency of Kansas City, 179 Kan. 435, Syl. ¶ 1, 296 P.2d 656 (1956); State, ex rel., v. Board of Education, 173 Kan. 780, 790, 252 P.2d 859 (1953).

Courts do not strike down legislative enactments on the mere ground they fail to conform with a strictly legalistic definition on technically correct interpretation of constitutional provisions. The test is rather whether the legislation conforms with the common understanding of the masses at the time they adopted such provisions and the presumption is in favor of the natural and popular meaning in which the words were understood by the adopters. Hunt v. Eddy, 150 Kan. at 2, Syl. ¶ 6; Leek v. Theis, 217 Kan. at 793; State, ex rel., v. Highwood Service, Inc., 205 Kan. 821, 825, 473 P.2d 97 (1970); Wall v. Harrison, 201 Kan. 600, 603, 443 P.2d 266 (1968); Higgins v. Cardinal Mfg. Co., 188 Kan. 11, 360 P.2d 456 (1961).

The propriety, wisdom, necessity and expedience of legislation are exclusively matters for legislative determination and courts will not invalidate laws, otherwise constitutional, because the members of the court do not consider the statute in the public interest of the state, since, necessarily, what the views of members of the court may be upon the subject is wholly immaterial and it is not the province nor the right of courts to determine the wisdom of legislation touching the public interest as that is a legislative function with which courts cannot interfere. State,ex rel.,v. Fadely, 180 Kan. at 659; see also City of Wichita v. White, 205 Kan. 408, 469 P.2d 287 (1970); Republic Natural Gas Co. v. Axe, 197 Kan. 91, 415 P.2d 406 (1966); Tri-State Hotel Co. v. Londerholm, 195 Kan. at 760.

All the parties agree the definitional content of the term "open saloon" is not prescribed by the constitution. The petitioner questions whether the legislature has the power to enact controlling definitions o constitutional prohibitions. In State v. Nelson, 210 Kan. 439, 502 P.2d 841 (1972), our court held 1971 legislative amendments to the gambling laws which exempted bingo from the statutory definition of lottery unconstitutional. We stated:

> "Although a constitution is usually a declaration of principles of fundamental law, many of its provisions being only commands to the legislature to enact laws to carry out the purposes of the framers of the constitution, it is entirely within the power of those who establish and adopt the constitution to make any of its provisions self-executing . . . Prohibitory provisions in a constitution are self-executing to the extent that anything done in violation of them is void.
>
> "It is the function and duty of this court to define constitutional provisions. The definition should achieve a consistency so that it shall not be taken to mean one thing at one time and another thing at another time. It is the nature of the judicial process that the construction becomes equally as controlling upon the legislature of the state as the provisions of the constitution itself." (pp. 445.) (Emphasis added.)

It is true as the respondent argues that the legislature may enact legislation to facilitate or assist in the operation of a prohibitory provision provided the legislation adopted is in harmony with and not in derogation of the provisions of the constitution. See State, ex rel., v. Board of Education, 212 Kan. 482, Syl. ¶ 7, 511 P.2d 705 (1973). However, this does not give the legislature carte blanche to circumvent the mandates of the constitution.

Our court must necessarily determine the scope and content of the open saloon prohibition. We are unaided by the two previous decisions cited by all the parties, the Larkin opinion and the Londerholm opinion, because the construction or definitional content of the term "open saloon" as used in the Kansas constitution was not in issue.

The petitioner argues the term "open saloon" is synonymous with liquor by the drink, while the respondent contends a licensed food servic establishment, as defined by K.S.A. 1977 Supp. 36-501 and amendments thereto, which derives 50% or more of its gross receipts from the sale of food is not an open saloon. The respondent cites Hammond v. McDonald, 49 Cal. App. 2d 671, 122 P.2d 332 (1942) and Denver v. Gushurst, 120 Colo. 465, 210 P.2d 616 (1949) as authority.

The Hammond case, later followed in Covert v. State Board of Equalization, 29 Cal. 2d 125, 173 P.2d 545 (1946), relied upon a definition of "saloon" from Webster's New International Dictionary (2d ed. 1934) to mean a place where liquor is sold for consumption on the premises "commonly without meals."

This definition is not controlling for purposes of our determination. In fact, the evolution of the term "saloon" suggests a broader definition is in order. In the 1930 edition of Webster's New International Unabridged Dictionary the term was defined as:

> "A place where intoxicating liquors are sold and drunk; a grogshop; - used commonly of a place where there are no lodgings or regular service of meals as in a hotel."

This definition was subsequently modified to that found in the Covert opinion. Today, Webster's Third International Dictionary (1961) simply defines saloon as " a room or public establishment in which alcoholic beverages are sold and consumed." See also Black's Law Dictionary 1506 (4th ed.rev.1968)Marshall v Smith, 86 Ohio Abs. 302, 306, 1974 N.Ed. 2d 558 (1960).

The California cases, Hammond and Covert, have no persuasive significance on the issue presently confronting this court. The California constitution in effect when these two cases were decided, after vesting in the state the exclusive power to regulate dealings with intoxicating liquors, further provided:

> "Intoxicating liquors, other than beers, shall not be consumed, bought, sold, or otherwise disposed of for consumption on the premises, in any public saloon, public bar or public barroom within the State; provided, however, that subject to the aforesaid restriction, all intoxicating liquors may be kept and may be bought, sold, served, consumed, and otherwise disposed of in any bona fide hotel restaurant, cafe, cafeteria, railroad dining or club car, passenger ship, or other public eating place, or in any bona fide club after such club has been lawfully operated for not less than one year." Hammond v. McDonald, 49 Cal. App. 2d at 675.

Clearly, the people of Kansas have not granted authority to the legislature in article 15, section 10 of the Kansas constitution as the people of California have done in their state. In California the people have given express authority in their constitution to dispense liquor for consumption on the premises in any bona fide hotel, restaurant, etc. The prohibition in the Kansas constitution is, "The open saloon shall be and is hereby forever prohibited."

Moreover, the Gushurst opinion cited by the respondent is easily distinguishable from the case at bar. There, in referring to a prohibition against the establishment or maintenance of a "saloon" contained in article 22 of the Colorado constitution the court stated:

> "We are persuaded, as all parties hereto seem to agree, that the aim, intent, and primary purpose of the people in the adoption of article XXII of the Constitution, and of the general assembly in the passage of the liquor code . . . was to completely outlaw and eradicate the old-time public saloon or barroom with its well-known obnoxious characteristics, vices and effects, and at the same time to authorize, under proper regulations and safeguards, the sale and consumption of intoxicating liquors in bona fide restaurants and hotels." (pp. 469-70.)

Kansas history differs significantly from the history of the State of Colorado.

The Colorado Supreme Court previously held in Lendholm v. People, 55 Colo. 467, 136 Pac. 70 (1913), the legislative definition of a "saloon" to be controlling, where it had defined the term as "any place where spiritous or vinous liquors are sold in quantities of less than one quart." There a restaurant which served any intoxicating liquors was held to be within the prohibition of the statute. The court specifically stated the comparative number of such sales of food and of liquor, or the comparative revenue derived from one or the other was not important. Thereafter the court in Gushurst approved a legislative change in the definition of a "saloon."

As our history indicates, Kansas was primarily a "dry" state and any argument the open saloon prohibition was intended merely to prohibit the sale of liquor in a particular environment ignores the constitution.

Our court is faced with the construction of the term "open" as well as that of "saloon." Foreign authority aids us little. Oklahoma has a constitutional prohibition regarding the open saloon, but the term is defined in the constitution.

Prior to November 3, 1970, article 16, section 20(a) of the Texas constitution provided:

> "The open saloon shall be and is hereby prohibited. The Legislature shall have the power, and it shall be its duty to define the term 'open saloon' and enact laws against such.
>
> "Subject to the foregoing, the Legislature shall have the power to regulate the manufacture, sale, possessio and transportation of intoxicating liquors, including the power to establish a State Monopoly on the sale of distilled liquors." Williams v. State, 476 S.W. 2d 307, 308 (Tex. Crim. 1972).

Under specific provisions of the Texas constitution as quoted the Texas legislature was free to formulate its own definition of an "open saloon."

In the Kansas constitution the term "open" connotes public as opposed to private and restrictive. The legislative interpretation of "open saloon" in the Private Club Act of 1965 discloses, in substance, that the legislature construed the term "open" to be within the parameter of the court's interpretation of the term in this opinion.

We hold an open saloon is any establishment open to the public, without discrimination, where alcoholic beverages are dispensed or sold and served for consumption on the premises. Thus, under this definition, a food service establishment which is open to the public and dispensing or selling alcoholic beverages for consumption on the premises is an open saloon. The comparative revenue derived from food or alcoholic liquor is immaterial. Therefore this court finds the 1978 legislative amendments to K.S.A. 41-2601 et seq., and K.S.A. 41-803, authorize the maintenance of an "open saloon" in violation of article 15, section 10 of the Kansas constitution.

As petitioner suggests the real issue in this case is whether the people of the state must be permitted to delete the prohibition against the "open saloon" by constitutional amendment rather than allow the legislature to authorize the sale of liquor by the drink through appropriate legislation. Our court has consistently protected the constitution against subtle and artful attempts to evade and circumvent it. We decline to depart from this role here.

Signals given in the 1978 amendments to the intoxicating liquor statutes that clearly indicate the legislature was attempting an end run around the Kansas constitutional prohibition of the "open saloon" are briefly summarized.

For 30 years the legislature followed its definition of an "open saloon" as set forth in K.S.A. 41-803 in 1949. It distinguished private consumption and sale of intoxicating liquor by the drink from public consumption and sale in the Private Club Act of 1965. That definition of an "open saloon" and the enactments which followed are reasonably within the parameters of the construction given the term "open saloon" in the Kansas constitution by the Supreme Court in this opinion.

In 1970 the legislature recognized an amendment to the constitution was required, if the sale of liquor by the drink for consumption on the premises was to be permitted in public places, by submitting to a vote of the people an amendment of article 15, section 10 of the Kansas constitution, but the voters of Kansas defeated the amendment.

Then in 1978 the legislature assumed it had the full right to define the term "open saloon" in the constitution because the constitution had not defined an open saloon. See Heinemann, Legislation 1978, 47 J.B.A.K. 81, at 101 (1978), and the Governor's message on Senate bill 952, L. 1978, p. 1803. This is emphatically illustrated by the 1978 amendment of K.S.A. 41-803(b) which reads:

"As used in section 10 of article 15 of the constitution of the state of Kansas and this section, 'open saloon' means any place, public or private, where alcoholi liquor is sold or offered or kept for sale by the drink or in any quantity of less than two hundred (200) milliliters (6.8 fluid ounces) or sold or offered or kept for sale for consumption on the premises where sold, but does not include any class B club licensed in accordance with K.S.A. 41-2601 to 41-2634, inclusive, and amendments thereto." L. 1978, ch. 189, § 13.

By this amendment the legislature disclosed it was redefining "open saloon" as used in section 10 of article 15 of the constitution of the State of Kansas. The people of Kansas, however, did not give the legislature the right to define an "open saloon" in the Kansas constitution.

Further, by amending the Private Club Act of 1965 (K.S.A. 41-2601 et seq.), which authorized private and restrictive consumption of liquor by the drink on certain premises, the legislature, in substance, did an about face and converted private to public by authorizing new class B clubs which were open to the general public to sell liquor by the drink for consumption on the premises.

It is argued the sale of liquor by the drink in bona fide restaurants is merely incidental to the sale of food which is served in the same room where the alcoholic liquor is sold for consumption. Although it is not necessary or material to this decision where we hold the dispensing or sale of any amount of intoxicating liquor in an establishment open to the public for consumption on the premises is violative of the constitutional prohibition, the nebulous character of this argument is illustrative. Nowhere does the legislature in the 1978 amendments to the intoxicating liquor laws use the term "bona fide restaurant." It authorized the sale of intoxicating liquor in a "licensed food service establishment" as defined in K.S.A. 1977 Supp. 36-501 and amendments thereto, which reads:

"(e) 'Food service establishment' means any place in which food is served or is prepared for sale or service on the premises or elsewhere. Such term shall includ but not be limited to, fixed or mobile restaurant, coffee shop, cafeteria, short-order cafe, luncheonette, grill, tea room, sandwich shop, soda fountain, tavern, private club, roadside stand, industrial-feeding establishment, catering kitchen, commissary and any other private, public or nonprofit organization or institution routinely serving food and any other eating or drinking establishmen or operation where food is served or provided for the public with or without charge." (Emphasis added.)

Note in particular the public establishments emphasized where the legislature would authorize the sale of liquor by the drink for consumption on the premises. We hold the petitioner's writ of quo warranto shall be granted.

The respondent is prohibited from the issuance of any class B club licenses as designated in subsection (b)(3)(B) of L. 1978, ch. 186, § 3.

McFARLAND, J., concurring: Think of the word "saloon" and the image that comes to mind is of swinging doors, swaggering gunfighters, and painted women with hearts of gold. This is the picture that Hollywood has painted for us of the Old West. A modern restaurant serving drinks to its customers just does not fit our mental picture of a saloon.

If this case involved what a saloon was in 1865 or 1870, perhaps the Hollywood image could be considered on the basis of whether it was historically accurate. But that question is not before us. What this Court has to decide is what "open saloon" meant in 1948 when article 15, section 10 of the Kansas constitution was amended. The provision, prior to amendment, stated:

> "The manufacture and sale of intoxicating liquors shall be forever prohibited in this state, except for medical, scientific and mechanical purposes."

The amendment of 1948 stated:

> "The legislature may provide for the prohibition of intoxicating liquors in certain areas. Subject to the foregoing, the legislature may regulate, license and tax the manufacture and sale of intoxicating liquors, and may regulate the possession and transportation of intoxicating liquors. The open saloon shall be and is hereby forever prohibited."

The question then is precisely what did the people of Kansas intend to forever prohibit when they voted that "the open saloon shall be and is hereby forever prohibited"?

Strangely enough the word "saloon" had not, prior to 1948, been defined by either the legislature or the courts of Kansas. The

best evidence of what the term "open saloon" was intended to encompass is found in the definition enacted by the 1949 Kansas Legislature as found in K.S.A. 41-803 as follows:

> "It shall be unlawful for any person to own, maintain, operate or conduct either directly or indirectly, an open saloon. For the purposes of this section, the words 'open saloon' mean any place, public or private, where alcoholic liquor is sold or offered for sale or kept for sale by the drink or in any quantity of less than one-half pint, or sold, offered for sale, or kept for sale for consumption on the premises where sold. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars ($500) and by imprisonment for not more than ninety (90) days."

Just four months after "open saloon" was amended into our constitution, we see that the term was defined as any place where liquor by the drink is sold. This definition is clearly contrary to the present amended definition in question, which was enacted almost 30 years after the constitutional prohibition. Was the 1949 definition unreasonable and not in accord with other legal definitions of saloon? Let us look at how some other jurisdictions have defined the term:

Alabama - The "saloon," in common parlance, is a place where intoxicating liquors are sold. Fourment v. State, 155 Ala. 109, 113, 46 So. 266 (1908).

Minnesota - A "saloon" is a place where liquors are kept for sale to the retail trade. Kelly v. Theo. Hamm Brewing Co., 140 Minn. 371, 374, 168 N.W. 131 (1918).

Nebraska - The word "saloon," which originally meant a large public room or parlor, has now acquire a more restricted meaning, and is usually applied to a place where intoxicating liquors are sold. McDougall v. Giacomini, 13 Neb. 431, 434, 14 N.W. 150 (1882).

New Jersey - A "saloon" is a place where intoxicating liquors are sold or consumed. Proprietors Realty Co. v. Wohltmann, 95 N.J.L. 303, 112 A. 410 (1921).

Texas - A "saloon" is a place of refreshment. I common parlance, the word "saloon" is used to designate a place where intoxicating liquors are sold. Hinton v. State, 137 Tex. Crim. 352 356, 129 S.W.2d 670 (1939)

United States case law on the subject is summarized in the legal encyclopedia, Corpus Juris Secundum, in volume 48 at pages 149-150 wherein it is stated:

> "As a word of modern origin, the term 'saloon' has a very definite general meaning, which is well-known, and generally understood as a place where intoxicating liquors are sold at retail, and consumed or drunk; a building or place where liquors are kept for sale at retail . . . ."

Some dictionary definitions of "saloon" are as follows:

Random House Dictionary of the English Language (unabridged ed 1970): "1. U.S. a place for the sale and consumption of alcoholic drinks."

Webster's New Collegiate Dictionary (1977): "3c. a room or establishment in which alcoholic beverages are sold and consumed."

Webster's Third New International Dictionary (1961): "d: a room or public establishment in which alcoholic beverages are sold and consumed: barroom, taproom."

Black's Law Dictionary (4th ed. rev. 1968): "A place of refreshment. An apartment for a specified public use. In common parlance a place where intoxicating liquors are sold and consumed." (Citations omitted.)

The common thread that runs throughout these various definitions including the 1949 Kansas definition is the selling of liquor by the drink — the sale of liquor for consumption on the premises.

The consumption of alcoholic beverages in private clubs is easily distinguished as the clubs are not "open" to the public and are not "saloons" because they do not sell liquor.

We have a constitutional form of government. The constitution provides the basic framework for government. It is difficult to change a constitutional provision, and rightly so. Members of legislatures come and go. The basic framework on which our government rests should not be subject to change by caprice, whim, or shrewd political maneuvering. The constitution cannot be changed in a "smoke-filled room" by a handful of politicians in the middle of the night. Change comes in the light of day with the vote of the people after ample opportunity for all sides to be heard. If the open saloon prohibition is to be changed, it must be done in the same manner that it was put into the constitution. That is, by the majority of all the voters of Kansas.

If the term "open saloon" can be defined and redefined by legislative act, thereby changing the Kansas constitution without amendment, then why not yet another redefinition in a year or two limiting an open saloon to a drinking establishment with swinging doors and a portrait of a reclining plump female nude behind the bar?

I must therefore concur that "open saloon" encompasses any place open to the public where liquor by the drink is sold and join in the majority opinion.

OWSLEY, J., joins in the foregoing concurring opinion.

Minutes of March 7, 1983
Attachment #4

MEMORANDUM

TO: Honorable Edward F. Reilly, Jr.
Chairman, Senate Federal and State Affairs Committee

FROM: THOMAS J. KENNEDY, Director, ABC Division

RE: Modifying Club Licensing Act to allow temporary memberships for "Fund Raising" purposes.

DATE: March 7, 1983

PURPOSE

The purpose of this memorandum is to provide sample language for the modification of the Club Licensing Act to allow temporary memberships for "Fund Raising" purposes.

PERSPECTIVE

Political groups, fund raising organizations, conventioneers and others are constantly wanting to host public oriented activities where alcoholic liquors would be sold by the drink.

COMMENTS AND/OR RECOMMENDATIONS

While the constitutional prohibition against the "Open Saloon" must be kept in mind, we feel amendments to Kansas Statute Annotated 41-2601 would allow flexibility in this area.

Recommend that K.S.A. 41-2601 be amended to read:

"(c) Any class B club licensed under the provisions of this Act may establish rules where a guest at a bona fide private party held on the premises of the licensed club for the purpose of fund raising may file application for temporary membership in the club for the period of the private party, and such temporary membership shall not be subject to the waiting period or dues requirement of this section. A list consisting of the name, address, and age of each private party guest shall be submitted to the club management at least 3 days in advance of the function and only a person(s) whose name appears on this list may be authorized temporary membership status. Any club intending to issue temporary memberships as authorized under this section must notify the Alcoholic Beverage Control of the name of the fund raising organization, and the date and time of the function at least 7 days prior to the function.

Rules and regulations may be promulgated as necessary to control such functions and the Director of Alcoholic Beverage Control shall have broad discretionary authority to govern such activities."

This amendment will permit attendees of a bona fide private party held for the purpose of fund raising to have temporary membership in a class B private club, purchase tickets or make donations to the group, and purchase and consume alcoholic liquors in the club. A requirement for temporary membership status is that people attending must be identified on a roster to be furnished in advance of the date of the function with no one being granted temporary membership if their name is not on the roster.

Further recommend that subparagraphs (c), (d), (e) and (f) be relettered (d), (e), (f) and (g).

Respectfully submitted,

THOMAS J. KENNEDY, DIRECTOR
Alcoholic Beverage Control Division

TJK:cjk