The Cañon City Liquor War

BY FRANK GIBBARD

For over a dozen years in the early 1900s, Cañon City and its anti-liquor crusaders fought a running battle against Joseph Walton, an entrepreneur who sought to sell alcohol within the city. The war also involved the city's social clubs, which attempted to circumvent its strict liquor laws. The war was fought with rhetoric, legislation, subterfuge, and civil and criminal court proceedings. On at least one occasion, it veered into outright violence. Most of the major battles in this dispute occurred in 1906 and 1907, but the appellate litigation involving them did not finish until 1912. Just four years after that, Colorado adopted statewide prohibition. But for a decade or more, alcohol-related litigation from Cañon City was a frequent feature in Colorado's appellate courts.

The 1899 Case

Cañon City was founded in 1860 as a mining town. The Colorado Territorial Penitentiary opened there in 1871, beginning the city's long association with the state's correctional facilities.

In the late 1800s, the city enacted a series of on-again, off-again prohibition laws. Prior to 1896, saloons could be operated within the city with a license. But in 1896, Cañon City banned the sale, bartering, or giving away of "intoxicating, malt, vinous, mixed, or fermented liquors" within city limits.[1] Then, in 1898, it changed course again, once more permitting saloons to be licensed within the city.

It appears outright prohibition was in effect when Joseph Walton was convicted of selling liquor "contrary to the ordinances of Cañon City,"[2] resulting in his first appearance in Colorado's appellate courts. He was arraigned in police magistrate court on three separate charges of violating Cañon City's ordinance prohibiting the sale of liquor within the city limits. The magistrate found him guilty of all three charges and fined him. Walton appealed to the Fremont County Court and received a de novo jury trial.

The county court judge instructed the jury to determine Walton's guilt or innocence of the charges but did not charge it with deciding his sentence. The jury found Walton guilty of one of the charges but acquitted him of the other two. The magistrate assessed a fine of $100 and ordered Walton to be incarcerated until the fine and costs were paid in full.

Walton appealed to the Colorado Court of Appeals. He argued that in a de novo county court trial after an appeal from the magistrate court, it was the jury's job to determine both guilt and innocence and the amount of the penalty. The court of appeals agreed and reversed the county court's judgment.[3]

The 1900 Case

Less than a year later, Walton again found himself before the Colorado Court of Appeals after another conviction for violating Cañon City's liquor ordinance.[4] This conviction involved what would now be referred to as a "controlled buy."

At Walton's trial, Richard Knight testified that he had purchased a bottle of beer at Walton's place of business. Louis Taylor, the city's deputy marshal, testified that he had instructed Knight to buy the beer and had given him the money to purchase it. The court of appeals found it "entirely evident" that Taylor had "contrived a violation" of the city's ordinance.[5] It stated that "public policy will not permit a municipality to derive a profit from acts which are instigated by its officers."[6] It therefore reversed the judgment and remanded with instructions to dismiss the case.

The 1907 Case

In 1901 and 1905, Cañon City passed additional ordinances restricting alcohol sales within the city limits. The "dry" forces, represented by the Anti-Saloon League, gained increasing power in the city. Not only did the city prohibit alcohol sales; it even enacted provisions that strictly regulated the sale of nonalcoholic soft drinks.[7]

Walton and a partner, Jack Lloyd, developed a plan to circumvent Cañon City's liquor ordinances. They incorporated a nonprofit, private club known as the "Cañon City Labor Club (CCLC)." Their plan was simple: CCLC owned a house where liquor was stored. The club made 300 keys to the house and sold them to its members for $1 apiece. Only those members with a key were allowed to enter the clubhouse and drink there.[8]

The anti-liquor forces were not fooled. They began agitating for the CCLC clubhouse to be shut down. Local churches turned up the pressure by circulating a petition addressed to Cañon City's mayor calling on him to shutter CCLC. The petition referred to CCLC as "Joe Walton's Whiskey Club joint."[9]

By August 1906, Walton and his associates were complaining to Cañon City officials that the city was discriminating against CCLC by demanding that their club be closed while permitting the Elks Club to operate.[10] A committee was appointed to study the matter. (As will be discussed, the Elks Club ultimately proved no more immune to Cañon City liquor laws than CCLC.)

Around this time, the city brought a case against Walton and Lloyd for violating its liquor ordinances in police magistrate court.[11] Walton and Lloyd and two other confederates were convicted of liquor violations. They obtained a trial de novo in county court. There, a jury also convicted them.

The county court sentenced them for the violations on March 27, 1906. They filed a motion for a new trial, which the county court denied on May 19, 1906. The defendants then appealed their convictions to the Colorado Supreme Court.

The supreme court held that defendants' appeal was untimely because their notice of appeal had not been filed within five days of the March 27 judgment. Their motion for a new trial had not tolled the time for filing a notice of appeal. The county court had attempted to fix this problem by entering an order on June 22, 1906, that backdated their notice of appeal, nunc pro tunc, to March 27. But the supreme court would not allow this procedural work-around. It stated that the county court "has no right to change its record by a nunc pro tunc order because of the alleged oversight of one of the parties" in failing to perfect a timely appeal.[12] In February 1907, the court dismissed their appeal.

This was not the end of the matter, however. The supreme court permitted the untimely appeal to proceed on a writ of error. It would not issue its decision on the writ of error for another two years.

The "War" Continues

In the meantime, on Sunday July 1, 1906, the city raided and trashed CCLC's premises.[13] This incident resulted in a judgment against the raiders and an appeal to the Colorado Court of Appeals. (The court of appeals' 1912 decision in that case is discussed further, below.)

Walton and Lloyd were again charged for their sale of liquor at the CCLC saloon. They demanded a trial by jury. The city presented testimony from five witnesses that they had purchased liquor at the CCLC. For its part, the defense put on no witnesses. The jury was out for several hours and returned its verdict at 11:00 p.m. on July 10, 1906. It acquitted both men.[14]

In 1908, Cañon City passed one of the strictest alcohol prohibition ordinances in the country. The law strictly regulated the sale of alcohol by drugstores, closing a traditional loophole that favored drinkers in cities with prohibition ordinances. Although it did permit sales of alcohol for mechanical, scientific, and medicinal purposes, the law required the purchaser to sign a logbook (much as a buyer of some forms of decongestant must sign for purchases in our day as a deterrent to the manufacturing of methamphetamine).

City residents opposed to becoming a "dry" community decided to form their own, nearby community where alcohol could be sold. This "wet" community became known as Prospect Heights.

The 1909 Elks Club Case

In 1909, the Colorado Supreme Court issued a watershed decision, arising out of Cañon City, involving the use of "clubs" to avoid liquor prohibition ordinances. This decision concerned the Cañon City Elks Club. The city had charged the Elks Club board with violating its liquor ordinance, and the board members were convicted in Fremont County Court. The defendant board members appealed.[15]

The court acknowledged that the Elks Club was no mere "front" organization for selling liquor, like CCLC. The case was therefore a good one to test the application of the ordinance. If even the venerable Elks Club was barred from distributing liquor in this way, more dubious venues must also a fortiori be subject to the law.

The court began its decision with facts that illustrated how the Elks Club was a bona fide civic organization:

> The club is a part of and under the control of the Canon City Lodge of the Benevolent Protective Order of Elks of the United States of America. The membership of the order is in excess of a quarter of a million persons, and it, through the subordinate lodges, maintains clubs in many of the towns and cities of the country, and there are clubs of the order maintained in most of the important cities and towns of this state. This club is a bona fide club, and, as found by the court below, is composed of about 400 substantial and respectable citizens of Canon City. It is maintained for the entertainment, pleasure, and benefit of the members of the order, and any member of the order, whether a resident of Canon City or elsewhere, is entitled to the privileges of the club. The club is supplied with newspapers, magazines, and such reading matter as the management may deem advantageous or desirable for the members. It maintains billiard, pool, and card tables. Food and liquors are dispensed to such of the members as may desire them. In short, it is a social club, like any other social club to be found in the larger towns and cities of the country; the dispensing of liquors being a mere incident to, and not the object of, the organization.[16]

The court further noted that only club members, not their visitors or guests, were permitted to purchase and pay for alcoholic beverages at the club. The funds from these purchases were used to replenish the stock of beverages and for club expenses. The question was, under these circumstances, "whether the dispensing of liquors by the defendants in the clubroom is or is not a sale within the meaning of the statutes and the ordinance in question."[17]

The board members argued that the dispensing of alcohol to club members was not a prohibited "sale" within the meaning of the ordinance. The city countered that the distribution qualified as a "sale." The supreme court noted an irreconcilable conflict in the cases from other jurisdictions on this subject. But it concluded that the weight of authority, including the better-reasoned cases, had concluded that when a club dispenses liquor to its members for a payment, the transaction constitutes a sale. The court found significant language from a Missouri case that explained, "The principle of law that prohibits a laboring man from buying a drink of liquor in a saloon ought to prevent wealthy gentlemen from organizing themselves into a corporation for the purpose of selling it to their members."[18] It quoted another case from a Pennsylvania federal court, which reasoned that

> [p]rivilege and privileged class are, and ought to be, intolerable; and it comes irritatingly near to a privilege when social clubs, offering advantages of comfort and luxury that are only within the reach of the more prosperous, escape a share of the public burdens, because a refined reasoning declares that they are doing no more than distributing a common stock of liquor among their members, while the robust sense of the community, not excluding the club members themselves, know the transaction to be a sale.[19]

The supreme court concluded that distribution of alcohol to club members for payment was not a mere distribution of common club property to its members but represented a sale. It therefore upheld the board members' convictions.

As it later came out, the raid had not been confined to violence against property. It had also undisputedly involved police brutality. Walton later testified about the rough treatment he had received at the hands of the police. He stated that when he was arrested, a deputy told him, "Ah, ha, we've got you now Joe."

The 1909 CCLC Case

After it decided the Elks Club case, the Colorado Supreme Court issued its decision in the pending CCLC writ proceeding.[20] It rejected each of the defendants' arguments and affirmed their convictions.

The defendants argued that the affidavit supporting the warrant under which they were arrested had been deficient. The court explained that a warrant for violating a city ordinance had to be supported by an affidavit alleging that the affiant had reasonable ground for believing the defendant was guilty of violating the ordinance.[21] But in this case, the defendants had waived any issue about the sufficiency of the affidavit by filing to raise the issue before the police magistrate.

Turning to the merits, the supreme court rejected the defendants' argument that their distribution of alcohol to club members was not a "sale." The court found its Elks Club case conclusive on that question.

The court also rejected the defendants' argument that some of them, including CCLC's directors and a manager, had not personally made the sales in question and could therefore not be convicted. The ordinance made them equally liable for "authorizing, permitting, and directing the sales to be made."[22]

Finally, the court concluded that because this was a civil and not a criminal action, the court properly instructed the jury to return a verdict against the defendants. Under the evidence presented, that was the only lawful verdict.

The 1912 Trespass Case

In 1906, the Cañon City council passed a resolution declaring CCLC to be a nuisance and ordering the city marshal to abate the nuisance by arresting its officers and agents and confiscating and bringing before the police magistrate all liquor found on the premises, along with the arrested officers and agents. On Sunday, July 1, 1906, a group of Cañon City officials acted on this resolution by carrying out a raid on CCLC's headquarters.

The headquarters was located on Main Street, in a block adjacent to the city's opera house. At 9:00 in the morning, the city marshal and his deputies tried the front door of the clubhouse but found it locked. They knocked on the door, but no one answered. So, the marshal used a key he had obtained from a club member to open the door. Inside, they found Joseph Walton behind the bar, serving drinks at 9:00 a.m. on a Sunday.[23]

After arresting Walton, the deputies turned to their second mandate: seizing the liquor on the premises. Things quickly went south. The raid devolved into a frenzied orgy of vandalism, as the deputies smashed not only liquor bottles but also "the bar mirror, front windows, ground glass screens [and] the clock" and demolished "[a] slot machine, striking machine, and platform scales."[24] The deputies also smashed many wine barrels, flooding the back yard of the clubhouse with a lake of wine several inches deep. They carried away the remaining liquor

bottles and other property, including cigars, and placed them in storage.

A crowd of nearly 1,000 local churchgoers had gathered to watch the raid. After the mayhem was complete, the crowd sang a hymn, "Praise God From Whom All Blessings Flow."[25] A few mournful drinkers responded by singing "Take Me Down Where the Wurzburger Flows."[26]

As it later came out, the raid had not been confined to violence against property. It had also undisputedly involved police brutality. Walton later testified about the rough treatment he had received at the hands of the police. He stated that when he was arrested, a deputy told him, "Ah, ha, we've got you now Joe."[27] Walton did not respond. The deputy told him he had a warrant for Walton's arrest, and Walton asked to see it. The marshal attempted to let him read the warrant, but then another deputy yelled, "Beef him, kill, him, damn him!"[28] Someone struck him from behind with a blunt instrument, and Walton fell to the floor. He tried to get up, but the deputies knocked him down again and beat or kicked him while he was lying on the floor. He finally managed to get to his feet and struggled to the door but was again knocked down in the hallway and struck on the cheekbone with an instrument that left a scar. He fell unconscious.

Walton sued the city, the marshal, and eight others for trespass in Fremont County District Court. He brought his action as the assignee of CCLC, seeking damages for the value of alcoholic beverages, other drinks that had been on the premises, and cigars.

The defendants raised two defenses. The first was a general denial. The second was that the defendants had acted pursuant to a city resolution adopted pursuant to a city ordinance that prohibited the keeping and sale of intoxicating liquors within the city limits and declaring such keeping or sales a nuisance.

Walton demurred to the second defense, and the district court struck it. Walton then dismissed the city from the entire action, and the claims against the remaining defendants proceeded to trial. The district court instructed the jury that if it found for Walton, it should award him the full amount for the goods that he had alleged in his complaint. The jury ruled in Walton's favor, and on December 3, 1908, he recovered a judgment for $2,295.25 against the defendants. They appealed.

A divided court of appeals upheld the judgment. The primary issue on appeal was whether the district court had properly struck the special defense, which sought to justify the raid and seizures because CCLC was conducting an illegal liquor business, and the defendants had acted to abate a nuisance. The defendants also argued that as the proprietor of an illegal business, Walton could not seek damages for the destruction of illegally held property, which had no lawful market value.

The court of appeals' majority opinion cited case law stating that nuisances may only be abated summarily without a judicial determination when they "affect the health, or interfere with the safety of property or person, or are tangible obstructions to streets and highways, under circumstances presenting an emergency."[29] The court acknowledged that the city had the power to pass the ordinance declaring that CCLC's place of business and the goods kept there were a nuisance. But the ordinance was not self-executing, did not provide the manner of abatement, and did not permit city officials to summarily abate the alleged nuisance by self-help without a court order.

The court also rejected the defendants' claims that the seizure or destruction of contraband liquor could not be redressed with damages because such liquor had no value in the law. It had found no case law to this effect. Under state law, spiritous liquors were regarded as property, are taxed, and could be legally purchased, possessed, and used. Therefore, compensation could be awarded for their wrongful conversion or destruction.

The court provided a technical answer to the defendants' argument that Walton could not found his cause of action based on his own wrongdoing. His action for trespass, it reasoned, was not founded on his own wrongdoing. To file his complaint with the court, he was not required to state anything other than his ownership and possession of the property and its wrongful seizure. This pleading, the court reasoned, was sufficient "against a naked trespasser or wrongdoer."[30] Although an Oklahoma case had concluded otherwise, that case was based on a state law that expressly declared there were no property rights whatsoever in liquor kept or used in violation of state law. The overwhelming consensus of other cases supported the trial court's dismissal of the defendants' second defense in this case.

The court further justified its decision by noting "the arrest of plaintiff by the defendants [that] was effected by unnecessary force and violence amounting to assault and battery," the "destruction of property . . . [which] included much legitimate merchandise," and the defendants' "acts which attracted such attention as to disturb the peace of an otherwise orderly community on a Sabbath morning."[31] It deplored the defendants' resort to violence, riot, and mob rule. The court also rejected other, miscellaneous assignments of error based on the trial court's denial of the defendants' motion for a new trial.

Judge Scott specially concurred. His opinion detailed the violence and destruction that the defendants had used in conducting the raid, which he found went beyond the city's resolution that authorized the abatement of a nuisance. He emphasized that "neither municipalities nor persons may take the law into their own hands," and that democratic government "must be a government of law, not of force."[32]

Judge Cunningham, joined by Judge Morgan, dissented. He concluded the trial court had improperly stricken the second defense, which the defendants should have been permitted to prove. "Proper self-respect requires," he stated, "that courts of justice should not sustain actions in regard to property which is admittedly bought and kept for the sole purpose of defying the law, whether that property be the implements of a burglar, the spurious coin of a counterfeiter, the grog of a bootlegger, or the paraphernalia of a gambler."[33]

The 1912 Quo Warranto Case

CCLC and Walton did not fare so well in the other 1912 court of appeals case.[34] In March 1906, H.M. Jamieson and other Cañon City voters and taxpayers affiliated with the Anti-Saloon League had brought a quo warranto action to annul CCLC's corporate charter. They

stated they had resorted to this action after the city's district attorney refused to take action against CCLC. The district court permitted them to proceed on behalf of the people of the state of Colorado.

The plaintiffs alleged that CCLC had taken over the premises formally occupied by a saloon and the property affiliated with those premises; "that Joseph Walton, owner of said saloon, was made manager of the club, Frank Goldsberry, one of the incorporators, formerly bartender of the saloon, became bartender for the club, and John D. Lloyd, one of the owners of the building, became secretary and treasurer of the club."[35] CCLC proceeded to sell intoxicating liquor to its members, providing them as many drinks as they desired, at all hours of the day and night. The case was tried to the court, which determined that CCLC was not a good-faith social club but merely a device or subterfuge for illegally carrying on the liquor sale business for a profit. The district court revoked CCLC's articles of incorporation and fined it for its unlawful holding and use of its corporate franchise.

CCLC raised a number of issues, most notably that the plaintiffs' complaint failed to state a claim. The court of appeals soundly rejected this argument, noting that the evidence supported the trial court's findings and that by selling alcohol without a license, CCLC had violated not only Cañon City's municipal ordinances but also Colorado state law. The court of appeals cited Walton's statement that the club was being run "just for a blind to beat the town."[36] While acknowledging that the "decree of dissolution [of a corporation] bears the same relation to a corporation that a sentence of death bears to a natural person,"[37] the court of appeals found the "corporate death penalty" warranted in this case, due to CCLC's incorporation under false premises and violations of the law.

Aftermath

With the quo warranto decision, the anti-saloon forces had finally stripped CCLC of its corporate charter. Meanwhile, however, the defendants in the trespass case still owed damages and court costs—which had now grown to $3,600—for the raid on CCLC's premises. After the court of appeals' decision, congregants from several local churches held a fundraiser in January 1913 at the First Methodist Church in Cañon City. They raised about $2,500 to help pay the fines and costs.[38]

Four years after the court of appeals' 1912 decisions, Colorado adopted statewide prohibition. Nationwide alcohol prohibition followed four years later and was not repealed until 1933. CL

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NOTES

1. "Ordinance 171," *Cañon City Clipper*, p. 5, col. 3 (May 6, 1898).
2. *Walton v. City of Cañon City*, 56 P. 671 (Colo.App. 1899).
3. *Id.* at 672.
4. *Walton v. City of Cañon City*, 59 P. 840 (Colo.App. 1900).
5. *Id.* at 841.
6. *Id.*
7. "Ordinance No. 14," *Cañon City Clipper*, p. 4, col. 7 (Nov. 21, 1905).
8. "City Council Enforcing 'Dry' Town Ordinances," *Rocky Mountain News*, p. 1, col. 8 (Dec. 10, 1905).
9. "Church People Appeal to Mayor," *Rocky Mountain News*, p. 7, col. 3 (Aug. 21, 1906).
10. "Cañon City Liquor Club Alleges Discrimination," *Rocky Mountain News*, p. 9, col. 2 (Aug. 3, 1906).
11. The facts here are drawn from *Walton v. Cañon City*, 88 P. 860 (Colo. 1907).
12. *Id.*
13. *See, e.g.*, "Temperence People Go to Aid of the Raiders," *Daily Sentinel (Grand Junction)*, p. 1, col. 2 (Jan. 29, 1913).
14. "Temperance People Meet Defeat in Criminal Trial," *Rocky Mountain News*, p. 2, col. 4 (July 11, 1906).
15. *Manning v. Cañon City*, 101 P. 978 (Colo. 1909).
16. *Id.* at 978.
17. *Id.* at 979.
18. *Id.* at 980 (internal quotation marks omitted).
19. *Id.* at 981 (internal quotation marks omitted).
20. *Lloyd v. Cañon City*, 103 P. 288 (Colo. 1909).
21. *Id.* at 288.
22. *Id.* at 289.
23. "Police Outdo Carrie Nation," *Rocky Mountain News*, p. 1, col. 4 (July 2, 1906).
24. *Id.*, p. 9, col. 2.
25. *Id.*
26. *Id.*
27. *Houston v. Walton*, 129 P. 263, 269 (Colo.App. 1912) (Scott, J., specially concurring).
28. *Id.*
29. *Id.* at 265.
30. *Id.* at 267.
31. *Id.*
32. *Id.* at 259 (Scott, J., specially concurring).
33. *Id.* at 270 (Cunningham, J., dissenting).
34. *Cañon City Lab. Club v. People ex rel. Jamieson*, 121 P. 120 (Colo.App. 1912).
35. *Id.* at 121.
36. *Id.* at 124 (internal quotation marks omitted).
37. *Id.*
38. *See* "Temperence People Go to Aid of the Raiders," *supra* note 13.