



4-1-1930

Federal Court Intervention in the Trials of Prohibition Officers

Robert F. Eggeman

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Robert F. Eggeman, *Federal Court Intervention in the Trials of Prohibition Officers*, 5 Notre Dame L. Rev. 400 (1930).

Available at: <http://scholarship.law.nd.edu/ndlr/vol5/iss7/7>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Federal Court Intervention in the Trials of Prohibition Officers

By ROBERT F. EGGEMAN.

The enforcement of National Prohibition has given rise to a number of procedural practices which have become the subject of intense discussion by citizens both in and out of the legal profession. The present-day practice of the Federal Government in ordering the removal of cases of prohibition agents accused of crimes of violence from the State to the Federal Courts, is of paramount importance.

The first act passed by Congress, having for its purpose the protection of Federal Officers, was known as the "Force Act," enacted in the year 1833, to thwart the attempt of the state of South Carolina to nullify certain tariff laws, by criminal proceedings against Federal Collectors. It provided that whenever any civil suit or criminal prosecution was brought against any officer engaged in the collection of customs duties, "on account of any act done under color of his office," the suit or prosecution "may at any time before the trial or final hearing thereof, be removed for trial into the district court" of the United States. The protective cloak was later extended to include internal revenue collectors and under the act now in force:

Judicial Code—Section 33

Title 28 U. S. Code Ann., Section 76

"All officers appointed under or acting by authority of any revenue law of the United States" are given the right of removal."

Since the advent of Prohibition the courts in a number of cases have been called upon to again extend the meaning of Section 33 of the Judicial Code so as to include Federal Prohibition officers, and put them on an equal basis as to protection in the discharge of their duties, as revenue officers. Some district courts have done just that, notably in the cases of *Oregon v. Wood*, (Oregon) 268 Fed 975 and *State of Illinois v. Moody* (Ill.) 9 Federal (2d Ed.) 628)

To the same effect is the decision of *Morse v. Higgins*, (New Hampshire) 273 Federal 832. In that case the court's observation is as follows:

"It seems rather unfortunate that authority to do this (ordering the removal) must, in a large degree, at least, be rested upon the ancient acts for the protection of revenue officers—Acts which primarily had reference to the protection of officers who were distinctively revenue officers. Yet I am disposed to follow the reasoning of *Oregon v. Wood*.

However, in the cases of *Smith v. Gilliam* (Kentucky) 282 Federal 628; and *Walkin v. Gibney* (New York) 3 Federal (2d Ed.) 960, it was held that the National Prohibition Act is not a "revenue act," and Prohibition officers are not "revenue officers" such as to entitle them to removal under Section 33. The Supreme Court of the United States in the case of *Lipke v. Lederer* 259 U. S. 557 although not a removal case, held that the Federal Prohibition Act is not a revenue act.

The right of removal, therefore, is based on the construction of Section 28 of the National Prohibition Act (Title 27) U. S. Code Ann. Sec. 45, which confers on prohibition agents "all the power and 'protection' in the enforcement of this act—which is conferred by law for the enforcement of existing laws relating to, the manufacture or sale of intoxicating liquors under the laws of the United States."

In the interpretation of this section the court in the case of *United States ex. rel Asher v. Pennsylvania* (1923) 293 Fed. 931, takes the view, "that the right of removal is authorized for the reason that such 'removal' is a 'protection' to prohibition agents, since the danger which they would incur in the performance of their duties if subject to prosecution in local courts, would be great."

Following this reasoning, the Supreme Court of the United States in the case of *Maryland v. Soper*, 270 U. S. 9 (1926) involving the removal of a prosecution for homicide against prohibition agents, decided that such agents are brought within the application of Section 33 of the Judicial Code by the provision of section 28 of the Prohibition

Act. Chief Justice Taft in the opinion states: "We have no doubt that the word 'protection' was inserted for the purpose of giving to officers and persons acting under the authority of the National Prohibition Act in enforcement of its provisions, the same protection of a trial in a Federal Court of State prosecutions as is accorded to revenue officers under section 33."

The Supreme Court, by way of explaining the extension of this extraordinary protection to Prohibition Officers states:

"Congress not without reason, assumed that the enforcement of the National Prohibition Act was likely to encounter in some quarters a *lack of sympathy* and even obstruction and sought . . . *to defeat the use of local courts to embarrass* those who must execute it."

Thus one can readily see that the highest court of the land recognizes and is cognizant of a national feeling of "lack of sympathy" bordering on resentment, with regard to the conduct of Prohibition officers in numerous instances.

Murder in the first instance, is a crime against the State wherein it is committed, and as such, should be handled by the legal machinery of the State. However, in this class of cases, the prosecutions are not conducted along ordinary lines. State officials, even where State Enforcement Acts are in force, have been thrust aside; the defendants have been taken from them under writs of "habeas corpus," and the trials have been held in Federal courts. As a result of this extraordinary mode of proceeding, United States Attorneys have been placed in a peculiar position. Primarily they are prosecuting attorneys in the Federal courts of their own district, but as the State undertakes the prosecution, the Federal attorney changes his status from a prosecutor to a defender of the alleged criminal.

The Supreme Court refers to the "use of local courts to embarrass" national enforcement officers. This statement appears to be to the effect, that judges of State courts may show prejudice against an accused Federal officer, because of local sentiment against prohibition enforcement. Taking into consideration the fact that the accused enforcement offi-

cer and the Federal judge are both placed in the same category of Federal Officers in the employment of the Federal Government, it could in like manner be stated that the Judges of the Federal Courts might show just the same species of prejudice in such a case tried, after removal, in a Federal Court.

The practice of removal, while entirely within the law as construed, has not infrequently blocked the punishment of reckless agents, and the efforts of the Federal Government to throw the cloak of protection about Federal Prohibition officers to save them from real or fancied prejudice, have obstructed proceedings to determine the defendant's guilt or innocence.