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Brief for the State. The State of Kansas versus Joseph E. McNaught

Section 2, Pages 31 - 33

Brief for the State in the Supreme Court of the State of Kansas. The State of Kansas, plaintiff versus Joseph E. McNaught, Defendant.

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If you answer all these questions in the affirmative from the evidence in this case beyond a reasonable doubt, and so believe them all to be affirmatively true, and resolve them all against the defendant, you will be justified in finding the defendant guilty as charged in the first count set out in the complaint, otherwise you should acquit him on that count.

It is submitted that there is no error in this. It must be construed in connection with the election to which attention was called in stating these questions. It does not, when so construed, let in any other transaction than that elected to be relied upon.

The next objection is to the instructions on page 384 of the record. It is claimed they are wrong and misleading. We submit they are not. A druggist well acquainted with a certain man and his health and his habits, and knowing that he is not sick, and knowing that he is an habitual drinker, cannot willfully close his eyes and his senses against his common knowledge derived from the appearance, the habits, and the character of the person, and because a statement is presented in due form, make such person a sale of intoxicating liquors and escape liability. The statute is not against selling to persons *he knows* are obtaining the same for other than the excepted purposes. It is against selling to persons whom *he has reason to believe* are obtaining the same for unlawful purposes. Knowledge of the purpose is not necessary.

And under the second count for selling to persons in the habit of becoming intoxicated, the court instructed the jury that it was not necessary for the State to prove knowledge on the part of the defendant that Colean was a habitual drunkard. This was right. It is the rule of law everywhere.

Com. *v.* Boynton, 2 Allen, 460.
Com. *v.* Farren, 9 Allen, 489.
Com. *v.* Nichols, 10 Allen, 199.
Com. *v.* Mash, 7 Met. 472.
Com. *v.* Elwell, 2 Met. 160.
State *v.* Hartfiel, 24 Wis. 60.
Barnes *v.* State, 19 Conn. 398.
Farmer *v.* People, 77 Ills. 324.
State *v.* Heck, 23 Minn. 550.

In the Illinois case the following forcible language is used:

"It is unlawful to sell without a license, and he, when a license was granted to him, took it upon the condition among others that he would not sell to a minor without authority from parents or guardians. He impliedly undertook to perform the condition. It was then incumbent upon him in performing his duty to learn and know whether he was violating his undertaking. Being unlawful to sell to any and all classes, he applied for and obtained a license to sell to only a portion of the community, and he must see that he sells to only such as is permitted by his license. If a different construction is given to the statute as contended for, it would almost amount to an abrogation of this prohibition, as knowledge would be difficult to prove in a large number of cases."

In the Minnesota case the court says:

"It was not necessary to prove that the defendant knew that C. was an habitual drunkard. The statute does not make such knowledge a constituent part of the offense; and when, without reference to the intent, the statute forbids the doing of an act in certain circumstances, and a party is under no obligation to do it, unless he knows it to be lawful, if he does the forbidden act he violates the law, irrespective of his knowledge or ignorance of the circumstances mentioned."

Numerous other objections to the instructions are urged — some relating to the counts under which conviction was had, and some under which no conviction was had. But the charge is set out in full in this brief. It is the best argument that can be made. The objections are technical, and are not based on a fair interpretation of the charge.

There is nothing in this case which brings it within the rule laid down in the Brooks case. The complaint was verified by John Tontz, positively, and by the county attorney on information and belief. The record does not show that Tontz did not have the requisite knowledge or information.

The defendant relies on the silence of the record, not on what it contains. The presumptions are in favor of the regularity of the proceedings. The presumption of the law is that Tontz had knowledge of the offenses specified in the complaint. If the defendant believed that Tontz did not know of the offenses relied upon by the State, he should have made it ap-

pear by positive testimony. The *Brooks* case does not confine the proof to the testimony of the prosecuting witness; and it is not necessary for the *State* to show knowledge or information by the prosecuting witness as a foundation for the introduction of other testimony. The point invoked by the defendant in his brief under the *Brooks* case, is not raised in this case.

It is respectfully submitted that the judgment of the court below should be affirmed.

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For the State.