

WHAT SEARCH OF HOMES FOR LIQUOR WOULD MEAN

Question Whether Constitutional and Common Law Rights of the Citizen Are Menaced Under New Prohibition Threat

NOTICE was served in the House of Representatives last week that when consideration of the prohibition enforcement measure was resumed an amendment would be offered to make it unlawful for a person to retain possession of liquor stored prior to July 1.

In commenting on the situation William H. Hirst, lawyer for the Brewers' Association, declared that, in all probability, the amendment would be passed. The movement, he said, was just one step further along the program of enactments which deprived the individuals of the nation of their constitutional rights.

"This is a comparatively unexpected measure on the part of the prohibitionists," he said. "I have not yet given the matter a thorough study. One thing, however, is certain, that the laws of search and seizure which have come down to us from centuries of civilization are at stake.

"The matter cannot be fought on the score of being private property or being protected by ex post facto laws. If the Federal law is made to read that liquors are open to confiscation, then they can be confiscated, private property or not. Neither do ex post facto laws give any solution to the problem. It is true a man may have bought his liquor on June 30. The law will have no quarrel with him on that point and will not take any measures against him on that point. It will, however, prosecute him for having in his possession on July 1, or Aug. 1, or any day thereafter, a quantity of liquor. The point at issue is not when he bought it, but when he had it in his possession.

A Policy of Trespass.

"It is not surprising that the prohibitionists propose to abolish the sacredness of one's home as well as to crush out the personal liberty of the individual. One is corollary to the other. Of course, the English common law and the Constitution of the United States prohibit this, but once the opening wedge is made there seems to the extremist no limit to the trespass upon the rights of liberty, property, and home. If Congress is going to attempt to galvanize an unconstitutional statute and destroy our system of government by an amendment of tyranny, the natural sequence would appear to be further enactments vesting arbitrary power in Government officials and destructive of the liberty to which the Constitution was dedicated when it was erected to protect the inalienable right to life, liberty, and the pursuit of happiness.

"The common law of England consisted of maxims of freedom, order, and enterprise, which were adapted for the conduct of public affairs, management of private business, and the regulation of domestic institutions. It was the out-

growth of habits and customs of generations, and was modified as civilization advanced. Many of the features of the common law were harsh, but, as Judge Cooley remarks:

It was the peculiar excellence of the common law of England that it recognized the worthy and sought especially to protect the rights and privileges of the individual man. * * * Awe surrounded and majesty clothed the King, but the humblest subject might shut the door of his cottage against him, and defend from intrusion that privacy which was as sacred as the king's prerogatives. * * * and if the Criminal Code was harsh, it at least escaped the inquisitorial features which have ever been fruitful of injustice, oppression, and tyranny.

"This code of law accompanied the Colonists to America, and it remained their law in the New World. It finds expression in our Federal Constitution, and permeates our entire system of government. Again quoting Judge Cooley:

Relying upon it, they had well-known and well-defined rules of protection; without it they were at the mercy of those who ruled; and, whether actually oppressed or not, were without freedom.

"It was the same spirit which occasioned this eloquent outburst from Pitt:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter, the rain may enter, but the King of England may not enter. All his forces dare not cross the threshold of the ruined tenement.

"That is the idea of a Government by law—that is the notion of putting it out of the power of the Government to violate fundamental rights of the people—that is the reason for subjecting the Government as well as the people to certain constitutional limitations.

Constitutional Safeguards.

"The maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the Government so deeply impressed the framers of the Federal Constitution that they deemed it important to incorporate in the Constitution a provision which would safeguard the people against unwarrantable intrusion of executive agents into their houses. Thus the Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"There are cases where search warrants are allowed to be issued, but the exercise of this right must not be unreasonable, and a warrant may only issue upon probable cause supported by oath or affirmation, particularly describing the place to be searched and the things to be seized. It is an arbitrary process and is only intended to be resorted to for very urgent reasons and under very strict limitations. A warrant will only be granted in cases expressly authorized by law and only after it has been shown before a judicial officer, under oath, that a crime has been

committed, and that the party complaining has reasonable cause to suspect that the property which was the instrument of the crime is concealed in some particular place. The suspicion itself is not sufficient, but courts have held that it must be well founded. The warrant is not allowed for the purpose of obtaining evidence of an intended crime; the evidence of an offense actually committed must precede the issuance of a warrant.

"In pursuance to this right of search and seizure, search warrants have heretofore been allowed to search for stolen goods, for goods supposed to have been smuggled into the country in violation of the revenue laws, for implements of gaming or counterfeiting, for lottery tickets, or for liquors kept for sale contrary to law. The courts have generally held that the power of the Legislature to authorize a resort to search and seizure is one which can properly be exercised only in extreme cases and have been very careful, as a rule, in throwing protection around the sacredness of the home. Judge Cooley says:

"To incline against the enactment of such laws is to incline to the side of safety. In principle they are objectionable; in the mode of execution they are necessarily odious, and they tend to invite abuse and to cover the commission of crime.

Is Possession a Crime?

"I know of no controlling cases in which the courts have sustained a law which makes the possession of alcoholic liquors for personal use a crime. Before search and seizure would have any value or efficacy as a remedy in the hands of an executive officer it would first have to be established that the possession of liquor for private use was a crime. If the courts were to sustain an enactment which made such possession a crime, then a search and seizure warrant might be issued upon suspicion which was well founded upon facts. But in the light of the English common law and its development and the constitutional limitation upon search and seizure, it could not be successfully contended that such a search and seizure was reasonable.

"It would unquestionably be most remote from the purpose and the intention of the founders of our republican system of government to subject our people to that kind of tyranny, but if the courts countenanced an act which made the mere possession of liquor a crime, the exercise of search and seizure would probably become a common practice. The officious keepers of other people's consciences and the conservators of their neighbors' health and morals would, indeed, be very busy, and visitors, attendants, servants, and other employes in one's household would be importuned to become informers, and the sacred precincts of our abodes would be infested with sneaks and eavesdroppers, and in the absence of evidence from such sources rumors, idle tales, and curious guesses would be availed of to throttle

the liberty of every person whom an army of spies with roving commissions might be pleased to suspect.

"The men who originally put a limitation upon the right of search and seizure in the English common law made an unreasonable warrant appear ridiculous in so much as it was construed as a warrant against the whole English Nation. Should Congress hearken unto the prohibitionists to the extent of making the possession of liquor for private use a crime, they will pronounce an indictment against the American Nation, and should they allow search and seizure in such cases they will sanction the issuing of a warrant against the American Nation. But the frenzy and the arbitrariness with which prohibition legislation has been pushed leaves us in doubt as to what rights, privileges, and immunities really are protected and guaranteed by the Constitution. If you were to ask me whether Congress has a right to pass the search and seizure measure in question, I should say no, if it is guided by the unquestioned and clear purposes and provisions of the Constitution, the hundreds of years of the development of the common law from Magna Charta and the growth and development of the American system of government by sane and scientific judicial interpretation.

Progressive Aggression.

"The consideration of prohibition legislation, both realized and contemplated, makes one wonder how rapidly and recklessly the rights, privileges, and immunities guaranteed by the Constitution can be swept away. Each step of aggression furnishes a precedent for the next one, and a continuance of them is threatened which will make us fail to recognize the Government set up by the founders.

"The Federal prohibition amendment not only introduces a freakish element into the Constitution, but it would prove stultifying in its operation. This is emphasized when we contemplate the very confiscation of property involved, about which complaint is made by British stockholders in American breweries. Public opinion in America seems to be resenting this extreme abuse of the so-called police power. It recognizes that when the Federal Government appropriates the inherent police power of the State and does so in a manner which destroys liberty and property, it is introducing into the Federal Constitution an amendment that either repeals or nullifies the Fifth Amendment, which protects the individual against the National Government by providing that * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

"The prohibition amendment arbi-

trarily violates the fundamental idea of personal liberty, and it also confiscates property without compensation. It flies absolutely in the face of the Fourteenth Amendment, which puts the very limitation on the States that the prohibition amendment removes from the Federal Government, namely, that no State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Due process of law, and just compensation for private property taken for public use, and equal protection of the laws mean, if they have any significance at all, that a person may not be deprived of his liberty unless he has committed some offense or violated some law, and only after a fair trial; and that he may not be deprived of his property or livelihood except for some public benefit, and then only after he has been compensated therefor. These safeguards of individual rights do not discriminate between persons nor are they respecters of persons. All are dealt with alike. If the Government takes property for widening a street or to remove a menace to the purity of water supply, it not only is authorized to act for the public benefit but must pay for the property appropriated according to the process provided by law. If it takes away a business and a goodwill or a private stock of liquor it cannot disregard the rights of the persons concerned, but must pay for them; otherwise it is acting without due process and the persons affected are denied just compensation and the equal protection of the laws.

"The prohibition amendment deals a fatal blow to this elementary principle of justice and will establish a dangerous precedent. Following the lead of the national prohibition amendment the only thing required to override a vested or guaranteed right or to overturn a fundamental principle of government is to amend the Constitution. The same process which grafts a local police ordinance on the Constitution and which challenges the original jurisdiction of the United States Supreme Court and upsets the supremacy of the Constitution in Federal matters, may be invoked to repeal Section 10 of Article I. of the Constitution, which provides: 'No State shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts * * *.' If the sanctity of liberty and property and equal protection of the laws guaranteed by the Constitution may be swept away by amendment, then there is no right, privilege or immunity which may not be ruthlessly sacrificed when enough States get ready to amend the Constitution. It may then indeed be said, what is the Constitution between States? The republican form of government set up by the founders will be no more.

"The Revolutionary War resulted in the Union of States under our Federal Constitution. The civil war decided that the Union of States created by that Constitution could not be broken up. The issue over the prohibition amendment will decide whether or not our Constitution may be broken down by the States. We are facing the supreme test. The destructibility or the indestructibility of our Government is the question. We are to determine at this time whether the Constitution is to be annihilated or whether it is to be immortalized."