

# Prohibition's Absurdities

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*Some gems of inconsistency and paradox in the law and methods of enforcement*

VOLTAIRE once wrote to a friend that there was one short prayer he often made. "My God," it was worded, "make our enemies very ridiculous!"

Were he alive today and opposed to Prohibition, he would be happy without finding it necessary to call on the Deity for help. For the Prohibitionists are doing that job themselves; and, if ever any other proponents of a cause have surpassed them in that respect, historians have not done their duty to the rest of us and humorists have overlooked a glorious opportunity to win immortal fame. Nor has there ever been a movement or an effort to regulate human conduct by force that was more prolific in absurdities than Prohibition in these United States of the Anti-Saloon League, or else the name thereof has been buried with its too solemn advocates and defenders.

As a former Prohibitionist who can obtain considerable information on the subject by looking into my own past and who now has the grace to blush at some of my former antics, I offer the readers of THE NORTH AMERICAN REVIEW an inventory of

some of the major of these absurdities. Of course, the specific enumeration of certain particular items does not imply the non-existence of others not named.

WHEN the Anti-Saloon League was incorporated thirty-five years ago, its object was stated to be "the extermination of the liquor traffic." Nothing was said about the use of liquor. And its official spokesmen at all times both implicitly and explicitly created the impression that the League was not aiming to make drinking illegal.

This same impression was deliberately fostered when the Eighteenth Amendment was proposed. The things to be prohibited by it were "the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation from, the United States — for beverage purposes." It was absolutely silent regarding purchase, possession, or use. And that was no accident. The proponents of the Amendment were running true to form. They centred attention on the traffic and concealed their real purpose.

But behold what happened as soon as the Amendment had been securely incorporated in the Constitution. Forthwith the Anti-Saloon League and its allies revealed their true aims. The so-called Volstead Act, actually the child of Wayne B. Wheeler though bearing another's name, was introduced and passed, carrying the bald pronouncement that its object was the prevention of "the use of intoxicating liquor as a beverage." And to effectuate this object the Act provided not merely that the five things named in the Eighteenth Amendment should be prohibited, but also that it should be a crime to deliver, furnish or possess intoxicating liquors. And that is the law now.

**B**UT why, if the object was merely to prohibit the traffic, are the provisions of the Enforcement Act enlarged to include matters about which the Amendment is silent? Why does the Eighteenth Amendment not explicitly prohibit the purchase, possession and use of alcoholic beverages?

The answer is as obvious as an office-seeker's affability at election time. If the Amendment had plainly prohibited drinking without excepting anybody under any circumstances, it would have had no more chance of adoption than one prohibiting the eating of apple pie by the American male or the wearing of silk hose by the American female.

Here is a riddle: when is a non-intoxicating beverage intoxicating?

The answer has been solemnly handed down by the Supreme Court. It is: when Congress says so.

What happened was that Congress

in the Volstead Act defined intoxicating liquor as being any liquor or compound containing one-half of one per cent or more alcohol by volume, although the Eighteenth Amendment contains no definition but simply prohibits the manufacture, sale, transportation, importation and exportation of "intoxicating liquors — for beverage purposes"; and the Supreme Court approved.

The consequences are that, in spite of the literal provisions of the Amendment, any beverage containing over one-half of one per cent of alcohol is under the ban, and the man who makes or transports or possesses it is a criminal. Under the Jones Law he may be branded as a felon for selling beer with an alcoholic content of three-fourths of one per cent, though not a man could get drunk on it if it were as plentiful as rainwater in Western Oregon.

**T**HAT this is not an idle assertion is shown by the case of Mrs. James McHaney, of Birmingham, Alabama, fifty-six years of age and the mother of six children. She was recently sentenced to six months in jail for owning five bottles of home-brew of one and one-half per cent alcoholic content, for possessing a non-intoxicating beverage arbitrarily made into an intoxicating liquor by legislative enactment and judicial decree.

Having usurped the power to extend the prohibitions of the Eighteenth Amendment to liquor not in fact intoxicating, Congress proceeded next to lay its hands upon liquor not intended for beverage purposes. It assumed authority to dictate to the medical profession when and to what extent intoxicating

liquors might be prescribed for the country's sick.

Malt liquors have been entirely prohibited; and of vinous and spirituous liquors a physician may prescribe only so much once in ten days for one patient as contains not more than one-half pint of alcohol. In other words, Congress in its ineffable wisdom has decided that when alcohol is necessary at all in the treatment of disease, six and four-tenths teaspoonfuls a day is the proper maximum dose. In actual practice, however, because of a provision limiting the alcoholic content of the liquor that may be so prescribed to twenty-four per cent by volume, and because of the "cutting" of even medical liquor, the amount mentioned is more than cut in half. The patient is lucky if he gets three teaspoonfuls a day.

THERE is a difference of opinion regarding the therapeutic value of alcohol. But in 1927 the House of Delegates of the American Medical Association, after a lengthy debate, voted unanimously for legislation permitting physicians to prescribe "whatever amounts of alcoholic liquors may be needed for their respective patients."

Dentists are not permitted to prescribe alcohol at all for their patients. But they have recently joined in a nation-wide appeal for a change; and in that connection one of them has said: "Experience has taught us that there is only one antidote for novocaine, and that is whiskey."

But, of course, legislators know more about these subjects than the dentists and the physicians. They have confidently expressed their su-

perior judgment in the Volstead Act and supplemental laws. It will be a glorious day when they become as wise in matters of government as they assume to be in these matters of human life and health.

IT is an old and long-established rule of American law that criminal statutes are to be strictly construed, and that an accused person is presumed innocent until proved guilty.

But in the prejudiced minds of the Prohibitionists the Eighteenth Amendment is of such over-shadowing importance that these traditional rules and guarantees appear not as bulwarks to be respected but as barriers to be destroyed. Bills of rights and long accepted guarantees, therefore, become mere scraps of paper when they stand in the way of the Prohibitionist crusade. This is evidenced by a declaration in one of the first sections of the Volstead Act to this effect: "All the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

However, the ultimate in absurdity and mediævalism is reached in a later section of the Act, which provides that the mere possession of intoxicating liquor shall be *prima facie* evidence of guilt, and that "the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was legally acquired, possessed and used." In other words, if you are charged with a violation of the National Prohibition Law and there is evidence that liquor was found in your possession, though it may have been stuck in your pocket by the arresting officer or planted in your

house by a stool-pigeon, as in the notorious Etta May Miller case in Michigan, you are not protected by the American presumption of innocence, but are back in the days of witch-hunters and are presumed guilty until you prove yourself innocent.

With the Prohibitionists abrogation is a logical doctrine and a consistent procedure.

AS ALREADY pointed out, Congress, aided and abetted by the Supreme Court, has violated both the letter and the spirit of the Eighteenth Amendment, by a process of extension, forbidding what the Amendment on its face does not. But Congress has gone just as far in the other direction and violated the Amendment by a process of exclusion, permitting what the Amendment on its face does not.

The Volstead Act, marvelous joint product of the Prohibitionist and the legislative mind, having stretched the Amendment, operated next to emasculate it, being so drawn as to permit the manufacture of cider and fruit juices in the home for personal use. In this case the one-half of one per cent limit does not apply; and the cider or fruit juice must be intoxicating in fact to sustain a criminal prosecution. It has, therefore, been judicially decided that home-made wine with a strength of twelve per cent is within the law. In short, home brew with an alcoholic content of more than one-half of one per cent is intoxicating and subjects the maker or the possessor to the penalty of the law, but cider or wine as strong as old-time champagne may be made and used in the home with

impunity. The former is intoxicating by legislative fiat. The latter is not intoxicating, by legislative sanction, the verdict of juries, and judicial interpretation. What a glorious example of consistency and of equality before the law!

Recognizing this state of affairs with becoming sympathy, the grape-owners of the country have kindly done everything possible to help the home-owner to satisfy his thirst. Not only do they ship him wine grapes, now piously called "juice" grapes, but they even prepare the juice for him, deliver it at his door and carefully instruct him what steps to take in order that nature may do its work efficiently and give him a palatable product.

Where the grapes themselves are shipped, our Prohibition Government accommodatingly steps in and certifies the grapes at the car; and from the certificate issued the purchaser can tell just what to expect. For the certificate gives the sugar content, and it is just twice what the alcoholic content of the juice will be if treated with due care and affectionate anticipation. The growers and the users both rejoice.

OFFICIAL Governmental nullification in its highest form, however, manifested itself when the enforcement of the Volstead Act against foreign vessels was imminent. As was to be expected, the owners of these vessels raised the cry that nationality followed the flag and that the Eighteenth Amendment could not interfere with them.

The Supreme Court decided against them, and held that the Eighteenth Amendment applied to

“all territory subject to the jurisdiction” of the United States, including the adjacent waters for a distance of three miles, without any exceptions or preferences whatsoever. For any vessel, foreign or domestic, therefore, to enter the ports and harbors of the United States, having on board alcoholic beverages, was held to be a violation of the Eighteenth Amendment and to render the vessel subject to the penalties of the Volstead Act regardless of the flag it flew.

INTERNATIONAL complications naturally followed this decision and gave the President and the State Department some uneasy hours. But eventually, some astute person, versed in legalistic circumlocutions, proposed a way out of the dilemma. Following his suggestion, treaties were negotiated, which the Senate duly ratified, providing that foreign vessels might enter our territorial waters with liquor on board, provided it was kept under seal, and that no penalties should be applicable to the liquors, the vessels or the owners. In short, the teeth of the Enforcement Act were painlessly extracted, and the Eighteenth Amendment was nullified to that extent.

Respect for law, like many other things, might well begin in Washington.

An ordinary criminal statute reads: “Whoever does thus and so shall be guilty of such and such crime and shall be punished by imprisonment for so long or a fine of so much.”

On this model a Prohibition law, embodying the exact language of the Eighteenth Amendment, could be drawn in fifty words.

But the members of Congress and

their ready advisers knew well enough that such a simple law would be altogether inadequate as an enforcement Act for the Eighteenth Amendment. Such a law suffices in ordinary cases because there is a practical unanimity of public opinion as to the nature of the act condemned — the law has a moral sanction.

THE uncommon character of Prohibition stands revealed in the very length of the Volstead Act and in the complicated and unusual means, methods and penalties invented and adopted to make its provisions effective. The Act itself contains more words than the two chapters in an average State code covering all crimes against the person and all crimes against property, as for instance, in New Jersey; and the elaborate and distinctive measures provided for its enforcement are such as have never been thought of in connection with any other criminal statute. They constitute a positive admission that a mere Prohibition law cannot be made to prohibit. The supplemental acts, including the Jones Law, and the new measures recommended by the Wickersham Commission, all constitute additional official confessions of this incontrovertible truth.

To the layman the danger and viciousness inherent in the extraordinary provisions of these laws may not be immediately apparent. The gist of them is that they enable the Federal Government to proceed against an alleged offender, not merely by a prosecution in a criminal court, but also by a suit in equity. And the object is to bring

about the punishment of the offender without giving him a chance to submit his case to a jury. Not satisfied with depriving a defendant of the traditional presumption of innocence and loading on his shoulders the burden of proof, the Prohibitionists sought in addition to contrive a way to deprive him of his right to a jury trial. The injunction and padlock proceedings are the result.

**T**HIS, however, is not all. The Volstead Act further provides that where any automobile or other vehicle is used for the illegal transportation of intoxicating liquor, it may be ordered sold and the proceeds paid into the United States Treasury.

This takes us back to the days when an object, like a tree or a sword, that was instrumental in causing the death of a person, was punished or forfeited to the king. Were we to apply the same procedure to other cases, an automobile in which a murder was committed or which was used in violating the Mann Act, would be confiscated, a hotel in which an act of adultery was committed would be subject to padlock, and the train on which a pickpocket or a gambler operated would be laid up for a year.

But even the drastic penalties and the despotic procedure already described proved to be inadequate for the purpose of those Government officials upon whom fell the duty of making the country dry. So they resurrected a provision of the old revenue laws under which a building or vehicle may be seized and confiscated if taxable articles on which the tax has not been paid are found concealed in it. Under this law it is

not necessary to find anyone guilty of a violation of the National Prohibition Law. But if an officer finds liquor in your car on which no tax has been paid, the car may be confiscated even though you knew nothing about the liquor and though no one is prosecuted or convicted for a violation of the Prohibition Law. And the joke is that you could not pay the tax if you wanted to. The Government of this free and glorious Republic takes your property on the ground that you have failed to do what there is no possible way for you to do.

**B**UT there is still worse to come. For Judge Charles E. Woodward, sitting in the United States District Court at Chicago, held recently that where contraband liquor is found in a home, the Government agents, proceeding under the Internal Revenue Acts, may seize all personal property that they may find with the illicit liquor. In other words, if liquor on which the tax has not been paid is found in your home, the officers may confiscate, not merely the liquor itself, but also your piano, your kitchen range and the baby's crib.

Not only in the case of the seizing of a car under the revenue laws, but also in the ordinary Prohibition cases, especially those involving padlock proceedings, is the penalty wholly disproportionate to the offense. For failure to pay a theoretical tax of a few cents, a new and costly car may be forfeited, and for making a sale of a highball or even for furnishing the "set-up" — ice and ginger ale — a hotel dining-room may be padlocked and a year's profits lost.

Leaving aside, however, these ex-

traordinary penalties, it is startling to compare the other penalties imposed in Prohibition cases with those imposed in other criminal cases.

**T**HE maximum punishment for violation of the Prohibition laws, exclusive of the extraordinary penalties already discussed, is five years imprisonment in the penitentiary or a fine of \$10,000, or both. The following are the maximum penalties for other Federal crimes:

Breaking into a postoffice: 5 years and \$1,000 or both  
Stealing mail: 5 years and \$2,000 or both  
Using mails to defraud: 5 years and \$1,000 or both  
Transporting stolen auto: 5 years and \$2,000 or both  
Perjury: 5 years and \$2,000 or both  
Extortion by an official: 1 year and \$500 or both  
Conspiracy to violate any law: 2 years and \$10,000 or both  
Seditious conspiracy: 6 years and \$5,000 or both

But it is not merely on the books that the penalties vary so extremely. In the meting out of punishment the courts discriminate similarly against violators of the Prohibition laws. Hundreds of actual cases could be cited in support of this statement; but there is space for only a few:

Last November in the United States District Court for the Eastern District of Missouri, Judge Davis sentenced a bartender, who had sold a Prohibition agent a drink of whiskey, to a year and a day in the penitentiary and fined him \$500. A few minutes later the same Judge sentenced a former policeman, who had raised Post Office money orders, to six months in jail.

On September 27, last year, two men were convicted for two different crimes in the Circuit Court of Mackinac County, Michigan. Noah Bailey had killed a man by hitting him over the head with a shot-gun and then using an ax to finish the job. Perry Gish had made and sold whiskey. Bailey was sentenced to two and a half years in State prison, and Gish to seven and a half years.

As we have already seen, there is only one part of the Constitution over which the Prohibitionists show any concern, their own pet Amendment. When they preach loyalty to the Constitution, they have that one part in mind. For the instrument as a whole they have no particular regard or devotion; and in the interest of the Eighteenth Amendment, they are ready to scrap it. The guarantees of the Bill of Rights must give way to the crusade for a dry America.

How this attitude has expressed itself in the evasion of trial by jury we noted in our analysis of the Volstead Act. Just as vicious in its remote as well as in its immediate consequences is the flagrant disregard of the rights of the citizen under the double jeopardy and the search and seizure clauses of the Bill of Rights.

**U**P TO the time National Prohibition went into effect, comparatively few cases arose where double prosecution took place. Now, however, every violation of the Volstead Act and the supplemental acts also constitutes a violation of the State law in any State that has a Prohibition law of its own. Hence, thousands of people are constantly laying them-

selves liable to be thus doubly prosecuted. One case will suffice to show the possible results.

In 1927 four men, found with three quarts of liquor in their possession, were arrested in Atlanta, Georgia, and arraigned in both a State and a Federal court. The first was sentenced by the State court to four months in the chain-gang, and by the Federal court to six months imprisonment and a fine of \$500. The second got one year on the chain-gang in the State court but was found "Not Guilty" in the Federal court. The third drew six months on the chain-gang and a fine of \$50 in the State court, but was never tried in the Federal court. And the fourth was given one year on the chain-gang by the State court and fined \$50 while in the Federal court he was given four months in jail.

The Fourth Amendment guarantees that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." From the time of its

adoption until the adoption of the Eighteenth, there were less than a hundred and fifty cases involving the question of unlawful search and seizure in all the Federal courts and in all the State appellate courts. Since 1920 there have been over eight hundred. That fact alone speaks to the world of the flagrant abuse of power that characterizes the Noble Experiment.

The Fourth Amendment applies, not merely to one's house but to one's person, property and papers. Yet there is not a day that the newspapers do not contain stories of arrests and searches without warrants, especially searches of the person and of automobiles. Furthermore, the Supreme Court of the United States has put its stamp of approval on the practice of tapping the telephone wires of suspected persons, even where under existing State laws to tap a telephone wire is a criminal offense.

Truly, we are a peculiar people. We praise liberty and complacently bear tyranny.

