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Shrinking Bill of Rights

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THE SHRINKING BILL OF RIGHTS

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Man has always paid for his membership in organized society. The price has ever taken the form of liberties and privileges exacted from the individual by the ruling powers of the commune. It was anciently believed and practiced that the possession of any and all individual liberty was at the pleasure of the ruler, who may have held himself out as the supreme representative of the good of the group, the prototype of God on earth, or a military gentlemen of parts. Whether he was one, the other or all three made little difference to him who paid the price; paid it whenever it was assessed and in whatever amount it was demanded of him. Of law the hopeless "subject" understood only the maxim; "the king can do no wrong." After Christianity was some years old, pious philosophers began to see that this time worn theory was strangely at variance with the practice of free will and individual responsibility before God. Some of them began to assert that the individual had rights that the king (society) was bound to respect. These rights were eventually codified and as kings grew weaker, the list was lengthened. Finally, a hundred and fifty years ago, wanting a few months, a certain rebellious group in a remote corner of the world made so bold as to assert that the material rulers of society had no rights not given to them by the members of society themselves. Further than this, it was said that certain rights of the individual were God-given and were entirely unalienable; that is to say that these particular rights could not be taken from the individual nor surrendered by him upon any pretext. "To secure these rights" a new government was accordingly created which subsequently became known as "The United States of America."

What was written into the original declaration was generally understood; namely, that the respective governors had their power and authority only by the consent and contribution

of the governed, and that any act in excess of these grants was but a meaningless and ineffective gesture. Notwithstanding this applicable rule of construction, the individuals, in rare jealousy of their rights, served upon each authority as it was created a list of express prohibitions known as a bill of rights. These bills, which were made a part of the Constitution of each State and later appended to that of the Federal Government, positively commanded that no express or implied power granted to the respective ruling authorities should ever be so construed as to violate the reserved rights which they described. It was further made plain that the statement of certain rights was not to be understood to imply the waiver of others not described or stated. The bill of rights was intended to prevent the future violation of those liberties the spoliation of which by England had brought on the Revolution. The men who framed its provisions had tasted the vinegar and gall of tyranny. As between anarchy and even a suspicion of renewed tyranny they showed a decided inclination in favor of anarchy.

And so it happened that the government in America was thus in the very beginning reduced to the character of a parasite whose potentialities were very carefully and deliberately trimmed to the quick. The first Americans were evidently resolved to get the benefits of organized society at an unprecedented bargain.

When the respective American governments had been securely fettered by the bill of rights, American leadership concerned itself principally with the task of keeping the bandages in place. What is simply true to-day had the advantage then of being generally understood to be true; namely, that the powers of government can be increased only at the expense of the liberty of the individual citizen. In view of this general understanding the early Nineteenth Century population of the United States was keyed to the necessity of curbing the appetite of the parasite government. Subsequent events disarmed this vigilance. The scourges of the Revolutionary period passed from common recollection, and the tense grip of the bill of rights was relaxed.

Of all the rights which Revolutionary America sought to make inviolable none was more unmistakably emphasized in the bill of rights than that which called for immunity from unreasonable searches and seizures. The violation of this right was one of the primary and moving causes of the War for Independence. In 1761 "Writs of Assistance" had been issued by the King's authority to the English custom officials engaged in locating smuggled goods in America. Armed with a writ an officer could search any house for contraband, though neither the house nor the goods were required to be mentioned in the warrant.. American opposition to this measure was immediate. James Otis held the office of advocate-general in Massachusetts at the time, but when the validity of the writs was questioned he immediately resigned his position and appeared for the people against the issue of the writs. This controversy was the very beginning of the struggle that ended in American Independence. Consequently, in the bill of rights, this provision appears: "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 Warrant shall issue, but upon proable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized (Am. Art. 1. V., U. S. Const.)

Since they objected so strenuously to searches under a mere general warrant it is not probable that the framers of the bill of rights intended to sanction searches and seizures *without any warrant at all.* The language of the bill seems to indicate that any unwarranted search would be illegal and that before a warrant could be obtained for this purpose the requirements of Oath, description, etc., would have to be complied with. This was the construction that was understood and relied upon for more than a century. However, in *Carroll v. United States,* (267 U. S. 132), decided in 1925, the Supreme Court upheld the search of an automobile, made upon mere suspicion that liquor was being transported therein contrary to the provisions of the Eighteenth Amendment and the Volstead Act, *which search was made without any warrant at all.** The liquor found in the unwarranted search

*See 1 NOTRE DAME LAWYER 93 for an extended discussion of this case.

was held to be proper evidence against the drivers of the car. In its decision the court maintained that the language of the bill of rights previously quoted, is a protection against *unreasonable* searches and seizures, but declared that a *reasonable* search of an automobile might be made without a warrant. It has been generally held that in contractural and statutory construction, words of general import ("unreasonable searches and seisures") are limited by words of restricted import ("and no *warrant* shall issue") immediately following and relating to the same subject. (*Nance v. Southern R. R. Co.,* 149 N. C. 366). The application of this rule to the provision of the bill of rights dealing with searches and seizures would seem to make the warrant as described, a prerequisite to the reasonableness of the search. Yet, in the Carroll case, actuated undoubtedly by the necessity of enforcing the Eighteenth Amendment, the court made certain distinctions between houses and automobiles that are not apparent on the face of the Fourth Amendment and moved the once solemn and emphatic protection against unreasonable searches over to the uncertain ground of reasonable and sufficient intentions on part of the searching officer.

Next to the rights of life and liberty, the right to acquire and hold private property was given place in the bill of rights: "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Am. Art. V. U. S. Const.) It thus appears that private property was apparently secure against the demands and encroachments of the state. The right to hold private property naturally carried with it the right to use such property profitably. Even though title remains "there can be no conception of property aside from its control and use, and upon its use depends its value," (154 U. S. 439). But it is now well settled by the weight of accumulated decisions that the right to use private property is subject always to the right of the state to exercise its *police power.* And what is police power? "Having in mind the sovereignty of the state, it would be folly to define the term. To define is to limit that which from the nature of things cannot be limited but which is rather to be adjusted to conditions touching *common welfare,* when covered by legisla-

tive enactments." (*State v. Mountain Timber Co.*, 75 Wash. 581). It seems therefore, that in spite of the attempts of the framers of the bill of rights, private property is now held subject to a power in the state which "cannot be limited." If this be true then in the language of Marshall, "written constitutions are absurd attempts, on part of the people, to limit a power in its own nature illimitable."

Mr. Justice Holmes, speaking in 1911 of the availability of the police power says that "it may be put forth in aid of what is sanctioned by usage or held by prevailing morality or strong preponderant opinion to be greatly and immediately necessary to the public welfare." (*Nobile State Bank v. Haskell*, 219 U. S. 104). But hear the same Justice in 1922, after the Fifth Amendment has suffered eleven years bombardment at the hands of the police power: "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . When this *seemingly absolute protection* is found to be qualified by the police power, *the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.*" (*Pennsylvania Coal Co., v. Mahon*, 260 U. S. 393). When private property disappears, as Justice Holmes predicts, private liberty will disappear with it and communism will take the place of both.

The remarks of Westenhaver of the Federal District of Northern Ohio, holding invalid certain zoning ordinances passed under the assumed authority of the police power are pertinent: "If police power meant what is claimed, all private property is now held subject to temporary and passing phases of public opinion, dominant for a day, in legislative or municipal assemblies. (*Ambler Realty Co., v. City of Euclid*, 297 Fed. 315.) Yet zoning ordinances in one for or another have been and are constantly being upheld in the name of the police power. 193 Mass. 364, 161 Cal. 220, 62 Ill. 494, 132 Pac. 584, and *United States v. Richards*, 35 App. Cas. 450.

Says the Sixth article of the bill of rights: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public

trial *by an impartial jury* . . . ." And the Fifth article; "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury . . , nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

After declaring the manufacture, sale, etc., of intoxicating liquor a crime and punishable as such, the Volstead Act (Section 21) declares that any place where intoxicating liquor is manufactured or sold, kept or bartered in violation of the act, as well as all such liquor, is a "common nuisance." Fine and imprisonment is provided for any one found guilty of maintaining such a nuisance. Under the nuisance provision of the Volstead act, anyone who is suspected of being guilty of violating the provision may be enjoined in equity from maintaining a liquor nuisance. In applications for injunctions to prevent such maintainance it is not necessary to prove facts necessary to sustain it beyond a reasonable doubt, a mere preponderance of evidence being sufficient (141 Pac. 1133). Subsequently, the original party to the injunction proceeding, or even one not a party to it (76 Kansas 411) may be punished by the court (without a jury) for contempt if it is proven to the satisfaction of the judge that the premises have been used contrary to the terms of the injunction. The penalty for violating the injunction need not be the same as that fixed by law for the original offense of maintaining the injunction but may exceed it. (216 Ill., App. 519).

In *United States v. Reisenweber,* (288 Fed. 520) the nuisance provision of the Volstead and its dire consequences to the right of indictment and trial by jury, have all been upheld.

This simply means that in future criminal legislation it will only be necessary for the legislature to designate violations as nuisances in order to edit out of the Constitution the right of jury protection. The injunction proceeding flies directly in the face of the bill of right provision against double jeopardy, since the fact that a criminal action for the violation of the law is pending will not prevent the injunction from being issued, nor will it be cause for postponement of the equity proceeding. (71 Kansas 450). Thus we see that in spite of the bill of rights one may be

tried twice for the same offense just as effectively by resort to injunction as he may be by appeal to the concurrent enforcement provisions of the Eighteenth Amendment. Its effect upon the guarantee of indictment is equally patent.

So loose have the once closely restricting shackles of "Ye Ancient Bill of Rights" become, that the parasite now walks about quite freely thru the field that was once the individual's sacred preserve. Against the domain of religion (by their sturdy valiant efforts to maintain Genesis and "morality"), speech and the press, courts and legislatures join in common assault. Verily, the bargain made by the Fathers in the beginning, is becoming, —if it has not already become—a wanton extravagance.