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What Will Become of Prohibition

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WHAT WILL BECOME OF PROHIBITION?

The Drys have it. In spite of the fact that National Prohibition has failed and in spite of the fact that nearly everybody knows that it has failed the Eighteenth Amendment is in the Constitution to stay. All over the great American "desert" are irreconcilables who pose ostrich-like and shout their enforcement pronouncements through the resulting showers of sand. With these people and their dependable following devotion to Prohibition is an emotion, and we cannot refute an emotion. In all probability there will always be a sufficient number of these ladies and gentlemen to prevent any orderly retreat from the unfortunate Constitutional position that we so hastily and hysterically took in the adoption of the Eighteenth Amendment. What therefore is to be done?

The *Literary Digest* recently asked millions of Americans to vote upon three thoroughly impossible propositions. Many discerning persons failed to return their ballots because none of the suggested alternatives was possible of achievement. A proposition to establish Florida winters and Canadian summers throughout America would probably be carried in all States by comfortable majorities, and yet, even in a country where the reforming potentialities of statute law are taken to be all-embracing, it is assumed that no one believes that such an establishment is possible. The questions submitted by the *Literary Digest* were just as hypothetical as if they had dealt with the climatic reform mentioned above. It is impossible to repeal the Eighteenth Amendment. It is impossible to obtain a valid "wine and beer" law while the Eighteenth Amendment remains in the Constitution.¹

¹ Even a conservative attempt by Congress to legalize some description of beer and wine would unquestionably meet the disapproval of the Supreme Court. If what Congress permits will not intoxicate it will neither satisfy public demand

And finally, eleven years of scandalized hypocrisy, public and private, official and unofficial have convinced all who are susceptible of conviction that possibilities for "strict enforcement" are definitely relegated to "the limbo of forgotten things." If the *Digest* poll was expected to elicit an accurate and valuable expression upon the "burning question" we might have been asked simply:

"Are you in favor of continuing the presently constituted system of National Prohibition in the United States? Yes or No."

Taking the country by and large, at least three out of every five persons solicited would answer "No." But three out of every five persons in the United States cannot repeal the Eighteenth Amendment, nor four out of five nor five out of six. There were 36,724,823 popular votes cast in the Presidential Election of 1928. Of this number, a minimum of 897,608 apportioned properly in thirteen States can prevent the repeal of the Prohibition Amendment.² It is thus evident that less than three per cent of the American electorate can—and probably will—stand in the way of any ratification of a repeal of Constitutional Prohibition even if it is ever possible to persuade two thirds of both houses of Congress to propose such a repealer. This is a sickening reflection and undoubtedly it does things to our smug notions of majority rule in democratic America, but if the rude reality serves to drive home in the average American mind even a crude idea of what the Constitution of the United States was intended to be, then may the end be said to have at least partially justified the means. The facts being what they are, does it then follow that the "three out of

nor cure present enforcement evils; if what Congress permits is intoxicating its judgment will be reversed by the Supreme Court as violative of the Eighteenth Amendment.

² This number is arrived at by taking the sum of a majority of the votes cast in the following States: New Mexico, Mississippi, Montana, Nevada, New Hampshire, Idaho, Georgia, Florida, Arkansas, Wyoming, South Carolina, Utah and Vermont.

five" must forever yield submissively to the bludgeonings of a compassionless minority? Let us see:

The Eighteenth Amendment is unique in many respects but it is singular in this; namely, it is the only amendment of our National Constitution that is enforced and interpreted by specific legislation of Congress. The Fourteenth and Fifteenth Amendments are unsupported by Federal statutes. The language of these amendments standing alone, determines a certain public policy of which the courts will take cognizance in proper cases. State laws are frequently declared unconstitutional because they are adjudged by the Supreme Court to deprive persons of liberty or property without "due process of law" (Fourteenth Amendment) and a State law that would restrict the right of suffrage to white citizens would be declared void as violative of the Fifteenth Amendment. The failure of Congress to pass interpretative enforcement legislation for the Fourteenth and Fifteenth Amendments does not therefore prevent these Amendments from being effective in the indicated cases. On the contrary, that portion of the Fourteenth Amendment providing for the decreased Congressional representation of those States whose laws impose extraordinary restrictions upon the exercise of suffrage have been entirely ineffectual for the reason that Congress has consistently refused to supply the necessary enforcement legislation. Why should two such sharp teeth as the Volstead Act and the Jones "Five and Ten" Law be provided for the clarification and enforcement of the Eighteenth Amendment when no other Constitutional Amendment is so favored? This is the first problem to which the "three out of five" must address themselves.

Both the Volstead Act and the Jones Law may be repealed by simple majorities of the House and Senate. Consequently, granting a proper Congressional apportionment, a preponderant majority of the American people through their representation in Congress can and should effectuate the repeal

of all Federal legislation that has been passed to clarify or enforce the terms of the Eighteenth Amendment. Assuming that this is done, what then will be the legal status of National Prohibition? The Eighteenth Amendment will remain with all of its uncompromising prohibitions against the "manufacture, sale or transportation of intoxicating liquor for beverage purposes." But what *penalties* will now be meted out if the prohibitions of the Eighteenth Amendment are defied? The Congressional legislation providing penalties, padlocks, enforcement agents and procedures will have been repealed. Since no penalty will be legally provided for, it will be impossible for Federal courts to sentence liquor violators. Thus, from the standpoint of criminality at least, the Eighteenth Amendment will cease to be effective. The several States of the Union may still go as far as they please in the direction of Prohibition enforcement but always by virtue of their own State laws and appropriations. If at the time of the repeal of the Federal Prohibition legislation any State is without a State enforcement act (as is New York, Wisconsin, Montana and Maryland at present) then the manufacture, sale or transportation of intoxicating beverages in that State would not be punishable either by State or Federal authorities. If this condition eventually becomes intolerable the legislature of the State will always be in a position to enact any Prohibition enforcement measure that it feels to be desirable. It may, for instance, pass a law forbidding within the confines of the State the manufacture, sale or transportation of any beverage containing more than one half of one per-cent of alcohol and provide extreme penalties for convicted violators. Such a statute will make the State as "bone dry" as it was before the repeal of the Volstead Act—but with these salutary differences: The law will be consistent with the time-honored right of each State to determine its own police regulations in accordance with the will of its people. "Double jeopardy" for the same Pro-

hibition violation will no longer be possible as it is at the present time.³ The protection of Constitutional search warrant guaranties, now subject to nullification through the collusion of State and Federal agents, would be restored.⁴ Officers who killed or wounded persons in the process of law enforcement would be tried by the courts of the State and not as at present, by "foreign" Federal courts whose jurisdiction in such a case is, to say the least, extremely artificial. So much for the State that elects to be "bone dry."

What course will be open to a jurisdiction that favors a "wine and beer" regime with a strict prohibition of stronger drinks? Would the legislature of such a State be in a position to pass a valid statute authorizing and licensing the manufacture of beverages below a certain alcoholic content? No, for the reason that the Eighteenth Amendment standing by itself forbids the manufacture, sale or transportation of intoxicating beverages, and consequently any State

³ At present, if "A" is apprehended selling liquor in a State having a State Prohibition enforcement act he may be arrested tried and convicted by the State authorities and sentenced to fine and imprisonment under the State law. Subsequently, after he has served his sentence or paid his fine or both, the Federal authorities may institute charges against him under the Volstead Act, using the same evidence that was presented in the State trial. Upon conviction in the Federal Court he may be required to pay another fine or serve another sentence or both. *Herbert v. Louisiana*, 272 U. S. 312 (1926). In this connection, see Manion, *What Price Prohibition?* 2 NOTRE DAME L. 85 (Last citation, Editor's note.)

⁴ The Fourth Amendment of the Federal Constitution protects persons against "unreasonable searches" and in most cases a warrant is required to make the search reasonable and the evidence secured thereby properly presentable against the defendant at the trial. This amendment restricts only Federal officers. All States have similar provisions in their State constitutions or laws for the protection of their citizens against "unreasonable searches" by State officers. At present, in a State having a State Prohibition enforcement act, a State officer may secure liquor evidence by an "unreasonable search" and while such evidence is not presentable in a State prosecution of the defendant because of the State Constitutional provision, the evidence may be turned over to the Federal authorities who may introduce it in a federal proceeding against the defendant. The Federal Courts have held that the Federal Constitutional provision (Fourth Amendment) restricts only Federal Officers, and all evidence, however procured, by persons other than Federal officers may be used to secure the conviction of accused persons in Federal courts. *Burdeau v. McDowell*, 256 U. S. 465 (1921). In this connection, see Manion, *What Price Prohibition?* *supra*, note 3, at 83, 84. (Last citation, Editor's note.)

law positively permitting and authorizing a violation of the Eighteenth Amendment would be held to be void. A similar fate would wait upon the attempt of any State to set up liquor control systems such as prevail in the provinces of Canada. But the State legislature could pass a valid law forbidding and providing punishment for traffic in beverages containing *more* than any stated percentage of alcohol. Such a Statute would be perfectly consistent with the Eighteenth Amendment as long as it did not *positively* authorize traffic in alcoholic beverages. Liquor containing *less* alcohol than the percentage fixed by the statute could then be freely manufactured and sold in such a jurisdiction without fear of punishment either by State or Federal authorities. However, even where, because of the failure of the State to provide punishment for it, traffic in alcoholic beverages may be freely carried on, certain inevitable economic restrictions will impede the business. Liquor dealers will not be permitted to incorporate. State laws making it possible for alcoholic beverage dealers to incorporate for the purpose of carrying on that business would contravene the plain mandate of the Eighteenth Amendment and would consequently be declared unconstitutional by the courts. Contracts for the sale of alcoholic beverages will not be enforceable in either State or Federal courts for the same reason. Thus the two indispensably necessary features of modern "Big Business" namely, corporate and credit facilities will be denied to liquor traders. They will be doomed to exist upon a cash and carry basis as "small men." Strange as it may seem, this will be one of the striking advantages of the new system.

The political machinations of the "Liquor Trusts" and the "Brewers' Associations" gave the Prohibitionist his first and most effective argument. Very seldom did the literature or oratory of the political liquor reformer take a position against the *consumption* of alcoholics. This attitude was left for the non-political temperance societies—and still is. The

Supreme Court of the United States has recently upheld that the Volstead Act shows no intention on part of Congress to punish purchasers or drinkers of intoxicants.⁵ Thus the evil largely responsible for the adoption of the Eighteenth Amendment will be definitely and permanently removed under the system resulting from the repeal of Federal enforcement legislation, for the reason that there cannot conceivably be an operative influential "Trust" or "Association" without the possibilities for incorporation and credit. In the absence of these same corporate and credit facilities the subsidized "saloon chains" through which mammoth breweries and distilleries controlled elections and disposed of their enormous productions will be impossible. The saloon as it was known before the passage of the Eighteenth Amendment will be no more.

Under the new system, liquor and liquor selling will be unlicensed and non-taxable. The Eighteenth Amendment standing alone will prevent the constitutionality of any State or Federal law designed for such a purpose. This too, will doubtless prove to be a blessing in disguise. It is an historical fact that when untaxed liquor was sold in general stores along with sugar and kerosene there was no liquor problem in America. The trouble started when the intoxicating beverage was singled out as a revenue producer. The "Whiskey Rebellion"

⁵ It is not a crime to purchase intoxicants and the buyer is not an aider and abettor of the seller. *U. S. v. Kerper*, 29 F. (2d) 744 (D. C. Pa. 1928), reversed on other grounds but *affirmed as to this point* *Norris v. U. S.* 34 F. (2d) 839 (C. C. A. Pa. 1929), and subsequently reversed on other grounds *United States v. Norris*, 50 S. Ct. 424, 281 U. S. 619, 74 L. Ed. 1076 (1930). In the language of Thomson, D. J., in *Norris v. U. S.*, *supra*, "* * * It is conceded that, under the Eighteenth Amendment, and the Volstead Act passed to carry it into effect, the purchase of liquor is not made an offense. It follows that the purchase, as such, does not subject the buyer to punishment. This is perfectly clear from the act itself. Not only did Congress carefully exclude the purchaser from the penal provisions of the act as originally passed, but has taken no step to extend its provisions to the purchaser, in the 10 years of legislation which have since intervened. That the intention and purpose of Congress is in harmony with the act, as drawn, is thus made perfectly manifest."

of Washington's first administration has a much greater historical significance than is generally attached to it for the reason that the "rebellion" was brought about by the first attempt of the government to tax intoxicants. It was the beginning of the parade to the Eighteenth Amendment. Thereafter liquor taxes were steadily increased until in 1919, more than ninety cents of every dollar paid by the consumer for alcoholic stimulants went either directly or indirectly to the government for taxes and licenses. In order to show the same relative margin of profit, the liquor dealer's gross sales volume was thus required to be ten times as great as that of the average manufacturer of ordinary commodities. The soap consumer for instance, who was also a liquor consumer, would have to take ten ten-cent drinks for every single ten-cent bar of soap that he used, in order that the manufacturers of the respective commodities would be in the same earning classification. The result of this burdensome taxation was first, "mass production" of intoxicants in the interest of lower costs; secondly, intensive campaigns for sales promotion; thirdly, determined political manipulation by the "liquor interests" in an effort to lower taxes and remove the mounting legal restrictions upon the liquor business. These three distinct results naturally became intensified with each increase in liquor taxation. Conversely, the energy and influence of the Prohibitionists increased in just the proportion that these stated results of liquor taxation became more noticeable. It was a thoroughly "vicious circle" of activity that was ultimately squared by the adoption of the Eighteenth Amendment.

The "license system" made the price of liquor abnormally high and this in turn made the intensive commercialization of the liquor industry inevitable. With the repeal of Federal enforcement legislation, liquor, where it is not prohibited by State law, will be ridiculously cheap. Public officers being without authority to suppress the traffic, there will be no

necessity for bribes for "protection" as at present. Since liquor dealing will no longer be punishable by fine or imprisonment, the dispensation of intoxicants will cease to be the private and profitable preserve of gunmen and criminal elements. On the other hand there will be no such thing as the traditional "powerful liquor interests." The "merger" trend that has recently swept factory and farm, butcher, banker, baker and merchant into the watchful wardship of the giant "chains" and "holding companies" will of necessity pass the liquor industry by. Exempt forever from corporate and credit influences, it bids fair to be the ultimate last stand of individualism in business. In this particular field "the man and his works" will maintain a natural and necessary adjacency. Quality of liquor, like the quality of food will be determined by the discernment of the clientele, and local reputations for wholesome dispensations will be built and sustained accordingly. "Bonds" and "stamps" will lose their magic; the purchaser will be called upon to exercise the well-nigh atrophied faculties of individual judgment. Taking it all in all, it is quite conceivable that we will have blundered into a situation that will be unusually interesting and distinctly worth while.

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