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The "Right of Castle" and Prohibition Enforcement*

By Forrest Revere Black

The world has moved since James Otis made his impassioned protest against the use, by British officials, of the writ of assistance. John Adams, who was present, was impressed by this eloquent defense of the "right of castle" and in a letter fifty-six years later said, "American independence was then and there born." It is a commonplace observation that during the last decade especially, our legislatures have been constantly expanding the police power at the expense of the due process conception. In the process of creating morality by law, it is being discovered that Bills of Rights, state and federal are being denaturized. Lovers of liberty are asking, "Can this tendency toward arbitrary power be checked, or will it rise to the dignity of an evolutionary process?" In this change of emphasis from rights to duties, it seems that the courts have attempted in some instances to outrun the legislatures. Old landmarks in the law are crumbling before this combined assault. It is our purpose to deal briefly with four judicial decisions that have made serious inroads into the doctrine of the "right of castle"; Dowling v. Collins, South Carolina v. Seabrook and Harrington, Olmstead v. United States, and Burdeau v. McDowall.

Dowling v. Collins1 was an action in chancery in the U. S. District Court for the eastern District of Kentucky, for the return of a quantity of liquor seized by the defendant, a prohibition director, at the home and residence of the plaintiff in Lawrenceburg, Kentucky, on the night of March 26, 1923. The plaintiff is the widow of John M. Dowling, who at the time of his death in 1903 was the owner of two distilleries near Lawrenceburg. After his death Mrs. Dowling, the plaintiff, continued to operate the distilleries "until prohibition became effective" (sic). At this time Mrs. Dowling made inquiry of the prohibition administration

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1 The District Court case is not reported in the Federal Reporter.

* This is one chapter of a book soon to be published under the general caption "Ill-Starred Prohibition Cases."
for the State of Kentucky as to the necessary legal procedure to protect the large store of liquor on hand. She was informed that she could either place it in a bonded warehouse or keep it in her own cellar for the use of her family and guests. A considerable quantity of pre-prohibition whisky was stored in her cellar at the time of the seizure.

The Dowling home is one of the show places of Lawrenceburg, being a large three-story brick residence containing fifteen or twenty rooms. The plaintiff had lived in this house for nearly fifty years. Her family had been raised there and at the time of the seizure she and several other members of her family were living there. The United States District Attorney contended that because the plaintiff used one room of this residence as a private office and kept a desk and certain business papers there, this fact changed the status of the building as a residence, and brought it within one of the exceptions recognized in Section 25 of the Prohibition Act. He further contended that inasmuch as this building was being used for "business purposes" it could be raided and searched without a warrant.

The Hon. A. M. J. Cochran, United States District Judge for the Eastern District of Kentucky, upheld the contentions of the District Attorney and this doctrine was affirmed by the United States Circuit Court of Appeals, Sixth Circuit. A writ of certiorari was denied by the Supreme Court of the United States. It should be noted that the raiding officers had a warrant but it was contended that the warrant was invalid, and neither the District nor the Circuit Court of Appeals judges attempted to defend the validity of the warrant. The status of the officers under this "warrant" was therefore the same as if no warrant had been issued. Judge Mack, speaking for the Circuit Court of Appeals said, "We concur fully in the findings of the trial judge that, irrespective of the validity of the search warrant, the search and seizure under the circumstances was not unreasonable. It was not the private dwelling, but the business building that was searched, and it was in the basement of that business building that the liquor was found."
In the basement of this home the officers found 478 sacks, each containing twelve quarts of whisky. The property, which was soon to be confiscated, was placed there on the advice of one of the prohibition officials. There was no feature of the case demanding immediate action. The officers, if they had probable cause to believe that this liquor was being sold illegally, should have been required to obtain a valid warrant before the search and seizure could be made. The legal implications of this case are far reaching. If this is the law, then let it be understood that nearly all professional and business men, who have a library or den (it is immaterial how they designate the room) in which they conduct some business and keep some private business papers, thereby lose the security of the "right of castle" as guaranteed them by the law of the land.

Another case that has cut a deep inroad into the doctrine of the "right of castle" is South Carolina v. Seabrook and Harrington. This case is the logical and inevitable sequel to the doctrine in Carroll v. United States which holds that where officers have reason to believe that liquor is being transported illegally, they have the right to enter upon and search such SUSPECTED vehicles without a warrant.

In May, 1925, in the County of Beaufort, South Carolina, Federal Prohibition Agent Seabrook and State Constable Harrington were informed of the expectancy of a shipload of liquor. About midnight, seeing what they thought to be a signal, they approached the houseboat of J. D. Pittman and supposing the Pittman boat to be the one referred to by the informer, they boarded it and were in the act of crawling along the deck when they were discovered by the owner. When Mr. Pittman discovered them the officers called out to him to hold up his hands, declaring that they desired to search the boat. The owner, instead of doing as commanded, went into the cabin, secured a gun, and fired at the prowlers, whereupon the trespassing officers returned the fire and killed him.

The investigation established several indisputable facts. (1) The officers had no warrant authorizing them to make

5 United States District Court for the Eastern District of South Carolina decided in the October, 1925, term at Charleston, South Carolina, before the Hon. Ernest F. Cochran and not reported in the Federal Reporter.
a search. (2) The boat was not the one supposed to be carrying liquor. (3) The “boat” was not floating on the water. It was supported by blocks. (4) The boat was occupied by Pittman as a house. This poor, friendless trapper had no other home.

Federal Judge Ernest F. Cochran, after hearing the evidence, did not allow the case to go to the jury. He directed a verdict of justifiable homicide in self-defense and expressed the view that the officers were within their rights in their methods of boarding the craft and of invading the home of Pittman at the midnight hour. These killers are at large. They are being paid by the public. The decision of a United States court proclaims them to be free—to repeat the South Carolina tragedy, if they so please!

Chief Justice Taft in the Carroll case had laid down the proposition that where officers have reason to believe that liquor is being transported illegally, they have the right to stop, enter, and search such vehicles without a warrant. Judge Cochran extends the Carroll doctrine so that it now reads, “Where officers have probable cause to believe that liquor is being transported illegally, they have the right without warrant to enter and search such SUSPECTED vehicles.” The Fourth Amendment was intended to protect “persons, houses, papers and effects.” The logical implications of the Carroll doctrine left only “houses” unscathed. By attempting to introduce into the law the recognition of the maxim, “Once a boat, always a boat,” the latter case represents a further stealthy encroachment.

The next case to be briefly considered is the wire-tapping case, Olmstead v. United States. By a five to four decision the Supreme Court held that wire tapping was not a search or seizure within the meaning of the Fourth Amendment because that Amendment only protected “material things,” to-wit: “Persons, houses, papers and effects.” The effect of this decision is to hold that no case of wire tapping by federal officials can violate the Fourth Amendment even though consummated by trespass, force or fraud. The court further held without stating any reason therefor,

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7 ibid (6).
8 277 U. S. 438.
that without the sanction of an act of Congress, it was helpless and had no discretion to exclude the evidence so secured.

Justice Holmes in a dissent which is "a model of Saxon English and pointed brevity" declares, "For those who agree with me, no distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed. . . . We are free to choose between two principles of policy. . . . For my part, I think it a less evil that some criminals should escape than that the Government should play an ignoble part."

Justice Brandeis, in an able and vigorous dissent protests against this latest invasion of the "right of castle" and declares that "as a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping." Brandeis the Justice thus has the opportunity in this case to apply the doctrine that he was instrumental in formulating thirty-seven years before.\(^9\) In a prophetic utterance that will rank with James Otis' protest against the writ of assistance, Brandeis says, "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.\(^9\)

The fourth case in this series of decisions that makes a further stealthy encroachment on the "right of castle" is *Burdeau v. McDowell*.\(^10\) Here the plaintiff's private papers were stolen. The thief, to further his own ends, delivers them to an officer of the United States. The Government, aware of the outrage, retains the papers as evidence against

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\(^10\) 256 U. S. 465.
the plaintiff who is thereupon convicted. This decision has placed a premium on lawlessness and has given aid and comfort to the law enforcement enthusiast who is interested solely in the enforcement of one law.

Justice Brandeis and Holmes in a powerful dissent declared; “Respect for law will not be advanced by resort in its enforcement to means which shock the common man’s sense of decency and fair play. At the foundation of our civil liberty lies the principle which denies to governmental officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen.” Do not be surprised if there is created a peace-time twin of the war-time American Protective League.\(^\text{11}\) Who is bold enough to assert that there will be no law enforcement patriots, who still glory in the malodorous deeds of the A.P.L. eager and ready to again express their Americanism in the new prohibition spy army acting as an auxiliary to the United States Department of Justice.

Yes, the world has moved since James Otis thundered against the excesses of arbitrary power. As evidence of a century and a half of “progress” in our political thinking, compare the eloquent declaration of the Earl of Chatham that “A man’s home is his castle” with the latest declaration of Ex-Governor Pierce of Oregon, “We claim the right to go into any place at any time as SECRET agents and discover if possible, violations of the law. . . . Keep your house in such order that you will be glad to welcome the inspector.”

Do we have a right to hope that the pendulum will swing back to the freeman’s doctrine of the past?

\(^{11}\) See Emerson Hough’s official history of the A.P.L. “The Web.”