

# CASE AGAINST NATIONAL PROHIBITION

## Ex-Judge Cullen Says Federal Amendment Would Be Particularly Bad Just Now and Productive of Evil in the Future

By GEORGÉ MacADAM.

THE proposed prohibition amendment which, when it is ratified by the Legislatures of thirty-six States—six have already ratified it—will become a part of the basic law of this nation is unqualifiedly condemned, both from a legal and a practical standpoint, by Edgar M. Cullen, retired Chief Judge of the Court of Appeals, the highest court in the State of New York.

Mr. Cullen believes that a Judge should speak only through his decisions. The rule of reticence that he followed during thirty-three years on the bench—twenty years in the Supreme Court and thirteen years in the Court of Appeals—he has followed since his retirement. It is only because of the gravity of the issues involved in the present prohibition legislation that he has consented to be interviewed.

"You ask my attitude toward the prohibition amendment now pending before the States for adoption," said Mr. Cullen. "I should think that my views on that question were too well known to those who would be at all likely to pay any attention to them to require restatement now. However, as you ask for them, you may have them. I am opposed to the adoption of such an amendment at any time. I am particularly opposed to its adoption now.

"Let me deal with the second objection first. All honest people must concede that there is a great difference of opinion among our citizens as to whether the use of intoxicating liquors should be prohibited by law. The country is now engaged in a war in which the issue is believed by most of us to involve the continuous existence of democratic government in the world. For that reason, all of our loyal citizens are willing to make almost any sacrifice that the Government may deem necessary for success in the war. No question is being made as to legal power of the Government to exact these sacrifices. They are submitted to cheerfully. But they are submitted to solely as necessary sacrifices to our success, because that success requires that the Government should have the united support of our citizens. That it is now receiving; and even those who doubt the wisdom or the right of some of the measures adopted by the Government, properly keep silence lest even the discussion of the subject may embarrass and hinder the successful prosecution of the war.

"Judge Hughes, in a recent address, well said: 'If we don't win this war it will make very little difference whether a man calls himself a Democrat or a Republican.' The Senate committee last week, in reporting the act dealing with the Government control of railroads during the war, very properly declared that this was not the time for determining the question of whether we should have Government or private ownership of the roads.

"It seems to me that this is equally true of the question of prohibition. Already Congress has passed a law greatly restricting the manufacture and use of intoxicating liquors during the war. In this legislation the whole country has acquiesced. The same reasons that dictate that the question of Government ownership of railroads should be left for determination in normal times equally dictate the same course as to prohibition.

"I am informed, though I am unable to verify the statement from first hand, that they are serving to the English troops when in the trenches rations of rum and to the French strong wine, not to give them factitious courage, but to protect their health under the great hardships to which they are exposed. I know

that many medical men do not believe in the beneficial effects of alcoholic beverages even under such circumstances, but the experience of the surgeons and officers of the armies of the Allies now extending over three and a half years must entitle their judgment to the greater weight.

"Our troops should be accorded the same treatment. The paramount necessity of this time is to win the war. If we lose it, prohibition will have little standing in the world, for America seems to be its home. The victors may even prescribe, as a condition of peace, that we shall import so many thousand casks of Munich beer to aid German commerce and industry.

"I am opposed to incorporating in the Federal Constitution the proposed amendment at any time. I appreciate fully the magnitude of the evils which excessive indulgence in intoxicants entails. I honor all those good and earnest men and

women who are working to diminish the evil by impressing on the people its injurious effects. Though I differ with him, I admire the devotion to his faith of one who, believing that all drinking is wrong, wholly abstains from it. Years ago there was a President of the United States who believed that, and at his state dinners served no wine.

"I always defended his action, asserting that it would be monstrous that mere social customs should constrain one to violate what he believed to be a moral duty. But the same right that he had to regulate his conduct is possessed by others who differ from him. The 'total abstainer' is wholly different from the prohibitionist. The first lives up to his own standard of morality, which, as it affects only himself, he has a perfect right to do. The second seeks to impose his standard upon others who do not believe in it and to compel them by law to regulate their lives according to his notions.

"It also seems to me that if we should assume that prohibition is a proper subject to be dealt with by the nation, as distinguished from the States or localities, the proposed amendment is objectionable in both form and substance. In form it authorizes the States, as well as the United States, to enforce prohibition against the importation, manufacture, or sale of liquors in the United States. Surely this does not mean that the State of Kansas may enforce prohibition in New York, though that is what it says.

"But construing the amendment as undoubtedly it would be construed, that State action under it is to be confined to the State, the evil that will result from the conflicting powers of State and nation on the same subject matter is so great that it has led the Bar Association of this State at a recent meeting to almost unanimously condemn the amendment.

"But apart from any criticism of the amendment from a legal point of view, it is well to consider its practical operation. Under the terms of the amendment, the prohibition there prescribed does not go into effect until one year

after the adoption of the amendment, and the prohibition is only against the importation, manufacture, sale, or transportation of liquor. Therefore, if the amendment is adopted, those people who are possessed of sufficient pecuniary means and foresight may acquire a stock of wines and liquors great enough to last them during their natural lives and to bequeath a supply to their descendants.

"I do not know what induced the postponement of the operation of the amendment for a year. If it proceeded simply from a regard for property rights and was intended to give the owners of this kind of property an opportunity to dispose of it, and if intoxicating liquors are such a poison, it would seem more consistent and more moral to have the amendment go into immediate effect and provide for compensation for the property destroyed.

"Whatever the motive, I fear the suspicious will charge that it was intended to have just the effect I have pointed out, that is, to enforce prohibition on one part of the people and not on the other, especially when they see persons advocating the passage of this amendment who at the same time are serving wines and liquors at their own dinner tables. He who deems the use of intoxicating liquor so wrong as to justify the amendment should, if he is honest and lives up to his faith, avoid the use of liquor without any amendment or



Edgar M. Cullen.

law. If he does, however, use it, it establishes either that he is a hypocrite or that he believes in prohibition simply for the masses and a different rule for himself. Charity should lead us to ascribe his action to the second motive rather than to the first, but many will resent this assumed superiority more strongly than hypocrisy.

"Again, if the subject of prohibition were to be committed to the National Government, the amendment should have simply authorized Congress to legislate on the subject, so that if experience should show that national prohibition was unwise, or could not be practically enforced, it might be repealed. The object of making the amendment mandatory is not to carry out the will of the people, but to defeat that will in case the views of the people at any time in the future should change.

"To determine the merits of prohibition, it is well to see how it has worked. Tennessee is a prohibition State. (It is made criminal to manufacture wine, spirits, or malt liquors anywhere in the State and to sell any such liquors within four miles of a schoolhouse, public or private, where a school is kept, whether the school is in session or not, which practically inhibits such sale everywhere except in the swamps of the Mississippi.) Memphis is the principal city of Tennessee. In that city in the year 1916 there were 134 homicides, being at the rate of 90 to every 100,000 of population; in Atlanta, Ga., another prohibition State, 59, being 31 to the 100,000; New Orleans, La., a nonprohibition State, 95, or 25 to the 100,000, while in New York City the number was 256, or only 5 per 100,000. These statistics I now give are not taken from the

Census Office, but from an insurance journal. Two years ago, however, I confirmed statistics then given by the same journal by a report that I obtained from the Census Bureau and found that they were substantially correct. Taking whole States, the proportion of homicides to the population is several times as great in the Southern States as in the Northern.

"From these statistics I do not charge that prohibition causes murder, but that it alone has very little efficacy in reducing the number of murders. The reason that homicides are so frequent in the South is because the criminal law is not carried out. If they punished their murderers, the number would soon greatly decrease, prohibition or no prohibition. In London the frequency of homicides is still less than in our city. This is because there such crimes almost certainly entail punishment.

"Nor are we in New York free from the same charge of disregard for law. I think it will hardly be doubted that gambling on the result of public elections is one of the most serious and injurious forms of that evil. It was election gambling chiefly that led to the strong provisions of the Constitution of 1894 against gambling. During the Fall of last year, for months the odds on the Mayoralty election then pending were announced as regularly in the daily papers as the market prices of wheat and cotton, and the names of the persons betting or offering to bet were given. Yet not a single arrest was made or any one prosecuted for the offense, so far as I have heard.

"I know that under our statute the mere making a bet, though illegal, is not a crime, but if any record is made of the bet or any evidence of its existence passes between the parties, the offense is complete. It is not possible that for months bets could have been continuously made between very many persons without some record of them or some evidence of their existence having been made.

"The most remarkable thing is the attitude of the public press toward the matter. I do not say that the journals are bound to enter into detective work or to actively engage in the enforcement of criminal law. Doubtless they may report crimes as part of the news of the day, but mark the way in which the offenders were treated. In the case of election betting it was said that Mr. —, 'Betting Commissioner,' had announced that the betting on the candidates was as stated.

"During this period, some few persons having been arrested for playing poker in the back room of a saloon, it was published in the daily papers under the flaming headlines, 'Arrest of Gamblers.' Boys found playing 'craps' in the street were arrested, and I think their finger prints were taken. I fear the cynic may accuse us of becoming a nation of hypocrites and may repeat what Butler wrote a quarter of a millennium ago against certain extravagant enthusiasts of his day:

Compound for sins they are inclined to  
By damning those they have no mind to.

"It may be worth while to consider the effect of the adoption of the amendment which now seems likely. For years the abuse of drinking intoxicating liquors has steadily diminished. This is due to the change of the public attitude toward the practice. Many eminent public men of times before the civil war could not, if living today, maintain their positions in society, still less their reputations, without a radical change in their habits.

"Today in private life society frowns on intemperance, while the habit is a most serious bar to success in almost any walk of life. All this has been accomplished by arousing the conscience and pride of people, and it is due largely to

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the voluntary and most meritorious labors of various temperance organizations. The work will doubtless go on successfully in the future, and the question is whether the cause of temperance will be better served by radical measures instead of those that are now proving efficient. I think it will not.

"I do not believe that it will be practicable to enforce national prohibition permanently, though for a time under the enthusiasm of the moment a strong effort will be made to do so. From the earliest times civilized man has used intoxicants. I know of no great nation in which prohibition exists or has existed. Even the assurance of a sensual paradise has not induced the fanatical Moham-medans to observe the injunction of the Koran to abstain from wine.

"Let us see what will be the practical result of an attempt to enforce nationwide prohibition. The movement has its strength in the rural parts of the country; its opposition in the cities. The United States is continually becoming more and more industrial and less agricultural. Indeed the rural population in many, if not in most of the States, is actually decreasing, while the population of the cities is increasing by leaps and bounds. Even in the prohibition States the majority of the inhabitants of large cities are opposed to prohibition. Especially is that true of the artisans or workingmen, so-called. It is from that class chiefly that the political party which controls the South has in the North its adherents. If that class is alienated the party that represents the South will for many years have small chance of

again controlling the National Government.

"Moreover, with any enforcement of national prohibition will go the enforcement of all the provisions of the Federal Constitution. It will not be tolerated that, when New York is forced to obey an eighteenth amendment, Mississippi may ignore or evade the fifteenth amendment. The Southern prohibitionists will get neither sympathy nor support in that matter from the Northern prohibitionists. The great majority of Northern prohibitionists are as radical on the negro question as they are on the liquor question. Already one of the leading New York journals has declared that now that the Government has taken over the railroads Jim Crow cars and similar arrangements for segregating the races on public conveyances must cease. This is what the South must face.

"Finally there is no justification for Federal control of the subject at all. We all believe in home rule. The observance of this principle, instead of weakening our loyalty to national unity, is the dominant cause of our great devotion to it. It needs no amendment of the Constitution to protect the rights of prohibition States. Under recent acts of Congress and the decisions of the Supreme Court construing them, a prohibition State has now the same absolute power to forbid not only the manufacture, use and sale of liquors, but to restrain their importation into the State as if the State were an independent nation. But what those States seek is not to protect their own people, but to rule those of the other States. It cannot, however, be denied that this is eminently a human trait, but nevertheless a most unfortunate one and productive of great evil."

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