Unconstitutional Beer Legislation

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I wish to bring to your attention some Constitutional defects in the Collier Beer Bill, (H. R. 13312).

Section 4 is unconstitutional when and as limited by Section 5 to non-intoxicating liquor; Congress cannot any more control, regulate or say who can and who cannot manufacture non-intoxicating liquor than it can control, regulate or say who can or who cannot manufacture ordinary jellies, preserves, applebutter, cheese, coca-cola and etc. Congress did not have such power before the 18th Amendment and that amendment did not authorize such power.

Congress cannot prohibit the manufacture of non-intoxicating beverages or any other commodity in any state; consequently, it cannot regulate its manufacture nor require permits. It can tax non-intoxicants as it does gasoline, but that is the limit of its authority. (See cases below).

Nor can it derive such power through the National Prohibition Act or by attaching statutes thereto, as the authority and power of Congress to enact the National Prohibition Act is derived solely from the 18th Amendment and is thereby restricted to intoxicants. War Time Prohibition was sustained solely as a war measure and for the health of the soldiers and the saving of food products; the United States Supreme Court said: "For prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency". (*Hamilton vs. Ky. D. & W. Co.*, 251 *U. S.* 157).

Section 6 is unconstitutional as Congress cannot prohibit transportation of any legitimate commodity from one state to another. Intoxicants and traffic therein has always been held as a privilege and not a right; they were not a legitimate business unless so allowed by law; therefore the prohibition thereof from transportation by the Webb-Kenyon Act was sustained. (See cases below).

But such prohibition could not be sustained against non-intoxicating beverages any more than it could be against Pennsylvania coal, Massachusetts shoes, Virginia cattle, Mississippi cotton, North Carolina tobacco, or wheat or corn or automobiles and etc. (See cases below).

Section 10, as well as Section 5, is an arbitrary attempt by Congress to change the intoxicating alcoholic content to defeat or thwart the prohibition, which the United States Supreme Court, in National Prohibition cases, said Congress was unable to do. The government at the request of the Brewers, in 1867 fixed the alcoholic content of in-

toxicating liquors at ½ of 1%, and in all United States Statutes and Regulations, the same content has been declared intoxicating. It was again so declared in the Volstead Act, and the United States Supreme Court held it valid and not arbitrary or unconstitutional.

Congress having declared ½ of 1% non-intoxicating, and the Supreme Court having said it was valid and not arbitrary, (R. I. vs. Palmer, 253 U. S. at 384, 385-6-7), then many states, including Virginia and West Virginia, declared ½ of 1% intoxicating. In the above case, the Court decided and made conclusions as follows:

> "7. The second section of the Amendment, the one declaring 'The Congress *and* the several states shall have *concurrent power* to enforce this article by appropriate legislation' does not enable Congress *or* the several states to *defeat or thwart* the prohibition, but only to enforce it by the appropriate means.
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> 8. The words 'concurrent power' in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs."

The next paragraph says that the power confided in Congress is not exclusive.

Intoxicating beverage is what the 18th Amendment prohibits, and Virginia alone can under the Amendment enforce it; and under Virginia and West Virginia Law any transportation into or through those states of what Congress, the Courts, Virginia and West Virginia and many other states have heretofore determined and fixed as intoxicants would still under the Constitution be intoxicants regardless of what Congress later says or does and Virginia and West Virginia can and should enforce the 18th Amendment under such circumstances; under the Supreme Court decision in the above case and cases it cites and in Vigliotti v. Com. 258 U. S. 403 which held any state law passed before or after 18th Amendment that prohibits intoxicants is valid and is in enforcement of 18th Amendment and the Act of Congress could not repeal it.

Many states fixed the same alcoholic content as intoxicating; West Virginia did so and the United States Supreme Court construing the West Virginia statute and Constitution in May 1932 in McCormick vs. Brown, 285 U. S. held that ½ of 1% was not arbitrary, but was in support of and "appropriate legislation" for the enforcement of the 18th Amendment and the Court said:

> "That the State may adopt appropriate means to that end was expressly provided in section 2 of the Amendment in declaring that

'The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.' National Prohibition Cases, 253 U. S. 350, 387; Vigliotti vs. Pennsylvania supra: *'In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and* left her free to enact prohibition laws applying to *all transactions within her limits."*

In Vigliotti vs. Com. 259 U. S. 403 the United States Supreme Court held that the Pennsylvania statute passed before the 18th Amendment was "appropriate legislation it is clear" for the enforcement of the Amendment and was valid and that the states had concurrent power with Congress to enforce the 18th Amendment and stated that the Brooke law "is merely an additional instrument which the state supplies in the effort to make prohibition effective"; had it been to "defeat or thwart" the 18th Amendment it would be invalid.

Many people including numerous lawyers have failed to realize or have forgotten this concurrent power of the States which power is something entirely new for the States under the Federal Constitution.

The 18th Amendment forbids Congress to enact legislation tending to nullify or weaken the Amendment or to "defeat or thwart" it and on the other hand it requires and makes mandatory "appropriate legislation" to enforce and strengthen the Amendment.

The Curtis and Brandegee Revised Annotated Constitution prepared for the use of the United States Senate, discussing Section 2 of the 18th Amendment says at p. 753:

"The term 'appropriate legislation' as used in this section necessarily means such legislation as will tend to make this constitutional provision completely operative and effective.

Rose v. United States, 274 *Fed.* 245.
Ex parte Virginia, 100 *U. S.* 339.
United States vs. Rees, 92 *U. S.* 214.
State v. Ceriani, 113 *Atl.* 316.
Ex parte Gilmore, 228 *S. W.* 199."

In Crogan vs. Walker, 259 U. S. 89 the Court said:

"The 18th Amendment meant a great revolution in the policy of this Country, and presumably and obviously meant to upset a good many things on as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. True, this discouraged production here, but that was forbidden already and the provision applied to liquors already lawfully made. See Hamilton vs. Kentucky Distilleries & Warehouse Co. 251 U. S. 126, 151 n. 1. *It is obvious that those whose wishes and opinion were embodied in the Amendment meant to stop the whole business.* They did not want intoxicating liquors in the United States, and reasonably may have thought that if they let it in some of it was likely to stay. When,

therefore, the Amendment forbids, not only importation into and exportation from the United States, but transportation within it, the natural meaning of the words expresses an altogether probable intent. The Prohibition Act only fortifies in this respect the interpretation of the Amendment itself."

The foregoing is the Supreme Court's construction of the purpose, spirit and intent of the 18th Amendment and that Court in the Holy Trinity Church case stated the rule as familiar that a statute or Constitution must be taken at its spirit and intact and not just its letter.

Congressmen should not allow their real belief and knowledge that 3.2 beer is intoxicating to muddle their minds into thinking they can prohibit its shipment under the Volstead Act (as the Collier Bill in effect does) into states having a prohibition statute and then authorize its manufacture and sale in other states by the mere *ipse dixit* of the bill that such beer is non-intoxicating. Congress cannot by statute declare beer non-intoxicating in one state and then in some statute declare the same beer intoxicating to prevent its shipment into another state.

The United States Supreme Court held in the Child Labor cases (247 U. S. 269) that Congress cannot control or regulate manufacture or sale of non-injurious or non-immoral commodities in any state and this includes non-intoxicants.

When Congress assumes by statute power to control and regulate the manufacture and sale of 3.2 beer it must be construed to be intoxicating as it cannot be presumed that Congress exceeded its constitutional limitations upon the control manufacture and sale of non-intoxicants.

In the Child Labor Cases, above, the United States Supreme Court said:

"In Gibbons v. Ogden, 9 Wheat 1 Chief Justice Marshall speaking for this court and defining the extent and nature of the commerce power said: 'It is the power to regulate,—that is, to prescribe the rule by which commerce is to be governed.' In other words the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities, and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them, is such that the authority to prohibit is, as to them, but the exertion of the power to regulate. The first of these cases is Champion v. Ames, 188 U. S. 321, the so-called Lottery case, in which it was held that Congress might pass a law having the effect to keep the channels of commerce free from use in the transportation of tickets used in the promotion of lottery schemes. In Hipolite Egg Co. v. United States, 220

U. S. 45, this Court sustained the power of Congress to pass the Pure Food and Drug Act, which prohibited the introduction into the state by means of interstate commerce of impure foods and drugs. In Hoke v. United States 227 U. S. 308 this Court sustained the constitutionality of the so-called "White Slave Traffic Act", whereby transportation of a woman in interstate commerce for the purpose of prostitution was forbidden. In that case we said, having reference to the authority of Congress, under the regulatory power, to protect the channels of interstate commerce:

'If the facility of interstate transportation can be taken away from the demoralization of lotteries the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and more insistently, of girls.' In Caminetti v. United States 242 U. S. 470 we held that Congress might prohibit the transportation of women in interstate commerce for the purposes of debauchery and kindred purposes. In Clark Distilling Co. vs. Western Maryland R. Co., 242 U. S. 311 the power of Congress over the transportation of intoxicating liquors was sustained. In the course of the opinion it was said:

'The power conferred is to regulate and the very terms of the grant would seem to repel the contention that only prohibition of movement in interstate commerce was embraced. And the cogency of this is manifest since, if the dectrine were applied to those manifold and important subjects of interstate commerce as to which Congress from the beginnings has regulated, not prohibited the existence of government under the Constitution would be no longer possible.'

And concluding the discussion which sustained the authority of the government to prohibit the transportation of liquor in interstate commerce the Court said:

"The exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and *affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace.*"

In the Abby Dodge 223 U. S. 166 the United States Supreme Court held that the taking or gathering of sponges from land under water within state territorial limits is not subject to congressional control, and the Court said:

"While it is true that it would be possible to interpret the statute as applying to sponges taken in local waters it is equally certain that it is susceptible of being confined to sponges taken outside of such waters. In view of the clear distinction between state and national power on the subject, long settled at the time the act was passed and the rule of construction just stated we are of the opinion that its provision must be construed as alone applicable to the subject within the authority of Congress to regulate and therefore be held not to embrace that which was not within such power."

In the Knight case, (156 U. S. 131), the Supreme Court held Congress could not forbid or control manufacture of sugar and said:

"It is vital that the independence of the commercial power and the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

In the Dewitt case, (9 Wall 41), the United States Supreme Court held invalid an act of Congress prohibiting the mixing and sale of naphtha and oils in the states as it was purely a state matter over which Congress had no control.

If the beer is non-intoxicating, then Virginia and West Virginia statutes forbidding its importation are invalid under the decision of the Supreme Court in Brimmer vs. Reoman, 138 U. S. 78, holding that the Virginia statute forbidding the sale of certain uninspected meats was unconstitutional under the Interstate Commerce Clause of the Constitution.

In the License cases, 5 Wall. at 470, the United States Supreme Court said:

"Thus Congress having power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, may, without doubt, provide for granting coasting licenses, licenses to pilots, licenses to trade with the Indians and any other licenses necessary or proper for the exercise of that great and extensive power; and the same observation is applicable to every other power of Congress to the exercise of which the granting of licenses may be incident. All such licenses confer authority and give rights to the licensee.

But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of *powers clearly granted to the legislature.* The power to authorize a business within a state is plainly repugnant to the exclusive power of the State over the same subject. It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity. Thus limited and thus only it reaches every subject, and may be exercised at discretion. But it reaches only existing subjects, *Congress cannot authorize a trade or business within a State in order to tax it.*"

The cases clearly establish that Congress cannot control, regulate, or prohibit the manufacture and sale, or even transportation of non-intoxicating beverages.

Congress cannot, under the decisions construing the 18th Amendment and the Volstead Act, with the laws and statutes of Congress and

the various States, increase the alcoholic content above ½ of 1% and declare the beverage non-intoxicating, as the Supreme Court held in Ruppert v. Caffey, 251 U. S., 299 that the ½ of 1% alcoholic content was reasonable and not arbitrary; to increase it would be arbitrary; the Court said in that case:

> **"It is therefore clear both that Congress might reasonably have considered some legislative definition of intoxicating liquor to be essential to effective enforcement of prohibition and also that the definition provided by the Volstead Act was not an arbitrary one."**

Can a Congressman vote for a bill he knows is unconstitutional and that will tend to nullify and assist in defeating the enforcement of an article of the Constitution without violating his oath of office to support the whole Constitution?

I am not discussing his conscience, that is beyond my field, but only legal questions. If such a vote constitutes a violation of his oath of office should not such Congressmen under the Constitution, the statutes, and the rules be expelled from Congress? The Judiciary Committee of the House of Representatives has held that the Federal Judge who has violated his oath of office, in an unimportant matter, is subject to impeachment therefor.

The enactment of an unconstitutional statute, like the Collier Bill is, will be for a while the legal excuse for flooding the country with all kinds of beers (and under cover of beer all kinds of intoxicants) as both the legal and illegal manufacturers and sellers will know or be advised by counsel that the statute will be declared invalid, and then later it will be declared, and no tax will be collected, or if collected, refunded, and no one will be punished; you cannot punish violations of invalid statutes as was held in prosecutions under the Lever Act for hoarding food.

If the bill is amended as some suggest to carry out so-called party platforms by adding a section prohibiting the sale of 3.2 beer in saloons, such section will be declared unconstitutional under the License cases and the Child Labor cases mentioned above, and then the liquor people will have what they secretly admit they want and expect, saloons with no law to control them. Can a Congressman voting for such a law justify this violation of his oath of office to support the Constitution by the statement that he is carrying out a party platform? The Wets state that the supposed wishes of constitutents are superior to conscience; will Congressmen vote that party platforms are superior to their oath of office?

I am satisfied that an unprejudiced study of the decisions and statutes discussed herein will convince any reasonable minded man that the Collier Beer Bill if enacted would be unconstitutional and invalid.