

# Prohibition

## *Federal Commissioner Is Held to Lack Authority to Dispose of Seized Property*

### *Power to Quash Search Warrant and to Suppress Evidence Denied by Appellate Court.*

KARL HERTER, APPELLANT, V. UNITED STATES. No. 5751, CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

A United States Commissioner has no authority under the Espionage Act to dispose of property seized in the enforcement of the National Prohibition Act, the Circuit Court of Appeals for the Ninth Circuit held in the opinion herein, since the Espionage Act is inoperative within the realm of the Prohibition Act.

In affirming the judgment of the District Court, the Court also held that the Commissioner does not have authority under the Espionage Act to quash a search warrant issued by him nor to suppress evidence so obtained.

On appeal from the District Court for the District of Montana.

Before Rudkin, Dietrich, and Wilbur, Circuit Judges.

The full text of the opinion of the Court, delivered by Judge Dietrich, follows:

On November 1, 1928, the District Attorney for Montana filed an information charging appellant, in the first count, with the unlawful possession of intoxicating liquor, and in the second, with the maintenance of a nuisance under the National Prohibition Act. Appellant was later convicted on the first charge and acquitted on the second, and from a judgment entered January 29, 1929, imposing a fine, he prosecutes this appeal.

The assignment he most persistently presses involves the reception over his objection of evidence secured by the prohibition agents in a search of his residence. The residence is at Helena and the search was made on October 5, 1928, under authority of a search warrant issued by a United States Commissioner at Great Falls on September 28. The warrant was based upon information contained in an affidavit made the day before by B. M. Sharp, who stated positively that on September 24 he purchased from appellant at his residence a number of drinks of intoxicating liquor, both beer and whisky, for which he paid at the rate of 25 cents a drink; that appellant was keeping quantities of liquor upon the premises and was selling the same, and further, that by common reputation, he was engaged in selling liquor upon such premises.

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fect that there was no sale of intoxicating liquor by Karl Herter \* \* \* on the 24th day of September, 1928, at or on the premises described in the search warrant, and I so find." And he adds (as a Conclusion of Law), "I therefore find that there was no probable cause for the issuance" of the warrant. Whereupon he ordered the warrant quashed and the "evidence" obtained thereunder "suppressed." The disposition of the liquor, however, he expressly "left subject to such order as" the court "may deem proper."

### *Contends Search Warrant Was Rendered Void*

We have thus set forth in considerable detail what occurred prior to the trial for thus more clearly may be brought into view the strange consequences that would follow if appellant's contention be sustained. His objection to the reception of the evidence was not predicated upon the theory that in issuing the search warrant the commissioner acted without a sufficient showing of probable cause, or, for any other reason, illegally, or that the officers executing the warrant proceeded unlawfully. The warrant was issued and executed in the manner and under the conditions sanctioned by both Constitution and statutes. Appellant did not offer to the court any original proof that in fact the search warrant affidavit was false.

His contention was and is that the subsequent action of the commissioner was conclusive upon the court, that by reason of such action the search warrant was rendered void ab initio, and that hence the evidence thus obtained was inadmissible. In short, the contention is that after a prosecution has been commenced, predicated upon disclosures accomplished by means of a search warrant duly issued and executed, the court in which the proceeding is pending may be foreclosed of the right to receive the evidence and the prosecution virtually frustrated by the action of a magistrate not necessarily learned in the law. It is to be borne in mind that within the scope of the commissioner's order here the proceeding was not an independent one admitting of an appeal but was incident only to the criminal prosecution pending in the District Court. *Cogen v. United States*, 278 U. S. 221.