

April 1925

## Intoxicating Liquors--Indictment for Unlawful Transportation-- Failing to Negative the exception in the Statute

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### Recommended Citation

J. G. J. Jr., *Intoxicating Liquors--Indictment for Unlawful Transportation--Failing to Negative the exception in the Statute*, 31 W. Va. L. Rev. (1925).

Available at: <https://researchrepository.wvu.edu/wvlr/vol31/iss3/10>

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interest of the sheriff and his bondsmen in not being held pecuniarily liable on a contract, the probable consequence of which they might well have foreseen. It is believed then, that upon both principle and authority, the result reached in the principal case was undesirable, and that a contrary conclusion could well have been reached had the attention of the court been called to *Lucas v. Locke*, and to Chapter 10 § 6 of the Code.

—R. T. D.

**INTOXICATING LIQUORS—INDICTMENT FOR UNLAWFUL TRANSPORTATION—FAILING TO NEGATIVE THE EXCEPTIONS IN THE STATUTE.**—The defendant was indicted under Chapter 32A, § 31a, Barnes' West Virginia Code, 1923, which reads as follows: "It shall be unlawful for any person to order, purchase, sell, or cause intoxicating liquors to be transported into the state, or from one place to another within the state, in any manner, except pure grain alcohol, for medicinal, pharmaceutical, scientific, and mechanical purposes, and wine for sacramental purposes to be used by religious bodies, as now provided by law."

The indictment against the defendant alleged, . . . "that the defendant had unlawfully transported grain alcohol into the state, against the peace and dignity of the state." In the lower court the defendant made a motion to quash the indictment on the ground that it failed to negative the exceptions in the statute above. This motion was overruled, the defendant convicted, and an appeal taken. The West Virginia Supreme Court of Appeals held that the indictment should have been quashed for failing to negative the exceptions in the statute; and as the defendant was not indicted within one year, he was discharged. *State v. Taylor*, 95 W. Va. 518, 121 S. E. 573.

It is the desire of the writer to discuss this case on the point which holds that a failure to negative the exceptions in the statute furnishes sufficient grounds to quash an indictment. The purpose of this article is to show, first, that this decision fails to carry out one of the primary purposes for which the law was established; second, that the decision is decidedly against the weight of authority in this country; and, third, that it is not strictly in accord with our West Virginia decisions.

The writer feels that no authority is necessary to support him in saying that, "One of the essential purposes of the law is to

punish a person who is guilty of violating a law which is a crime against society." However, it is to be remembered that any person charged with a crime is entitled to all the rights which are necessary for his defense. In the principal case, however, the question of whether or not the defendant was guilty was not considered; the reason for this being that the quashing of the indictment placed the defendant under another law, which operated upon him to the extent of discharging him from the crime for which he was indicted.

The decision in the principal case raises the following questions: First, are any of the rights of a defendant injured by not requiring the indictment to negative the exceptions in the statute? Second, is any purpose served by requiring the indictment to negative the exceptions in the statute?

When one is charged with unlawfully transporting grain alcohol into the state, it is a matter of common sense to say that there is enough information furnished in the indictment to sufficiently inform the accused of his offense, and to enable him to ascertain and prepare his defense. If the defendant comes within any of the exceptions in the statute, his attorney would, most assuredly, lose no time in setting up the exceptions as a defense. This can and would be done whether the indictment negated the exceptions or not. It has been held: "The burden of proving the existence of a license is on the defendant, even though the indictment does negative the exceptions in the statute." *State v. Merico*, 77 W. Va. 314, 87 S. E. 370. The reason for this holding is, that the existence of a license is a fact particularly within the knowledge of the defendant, and the proof of the non-existence of the license would be too difficult. How then, would the defendant be injured by a failure to allege something which, even if alleged, nevertheless would place the burden of proof on the defendant? This indicates that the exceptions in the statute are for the purpose of defensive matter only.

It must be admitted that a rule of law which allows one who may be guilty to go unpunished, and which may often result in consuming a large amount of the Court's time, and incurring a great expense to the state, should be a rule of law having back of it a purpose, the object of which is to safeguard some essential right or feature of the law. What purpose, then, is gained by requiring the indictment to negative the exceptions in the statute?

This question brings the discussion into the field of technicalities. The main arguments are: first, the indictment, by using the word

“unlawfully,” unsupported by the negation of the exceptions, is pleading a legal conclusion; second, the exceptions are a part of the offense. In this connection, it is interesting to note that could this “so called” exception be construed to be a proviso, then the indictment would not be required to negative the exceptions. BISHOP’S NEW CRIMINAL PROCEDURE, 2nd Ed., § 639. A careful inspection of the statute above, will reveal the fact that the matter referred to as an exception cannot be strictly considered an exception. The statute reads, “. . . . as now provided by law.” This refers to Chapter 32A, § 4, Barnes’ West Virginia Code 1923, which makes wine for sacramental purposes, and pure grain alcohol for medicinal purposes, etc., lawful purposes. An additional difficulty to consider along with this technical discussion is the effect to be given Chapter 158, § 9, Barnes’ West Virginia Code 1923, which reads, “All allegations unnecessary to be proved, may be omitted in any indictment or other accusation.” This at least renders a perplexing question, and, at the same time, shows that a defendant who may be guilty of a crime against society may escape punishment while the court is trying to distinguish the difference between an exception and a proviso, a distinction which, in principal, is small, and whether one or the other, puts the burden of proof on the defendant.

Before commenting on the decision in the principal case, it may be well to consider how this point is regarded in our sister states. A careful review shows that the following states are in accord with the West Virginia view: Kentucky, Mississippi, Louisiana, and Texas, until 1923, when by statute, as shown by *Stringer v. State*, 241 S. W. 159, it was made unnecessary for the indictment to negative the exceptions. The following states hold: “If there are any cases in which a person may transport intoxicating liquors lawfully, then that would be matter of defense which need not be anticipated and negated in an indictment charging unlawful transportation.” *Asher v. State*, 142 N. E. 407 (Ind.); *People v. Cencovich*, 220 Pac. 448 (Cal.); *Spooner v. Curtis*, 96 So. 836 (Fla.); *Commonwealth v. Finch*, 80 Pa. Super. Ct. 386; *Massey v. U. S.*, 281 Fed. 293; *State v. Turner*, 110 S. E. 525 (S. C.); *Kelly v. State*, 114 Atl. 888 (Md.); *State v. Harris*, 200 Pac. 926 (Ore.); *People v. Grabiec*, 178 N. W. 55 (Mich.); *State v. Nordstrom*, 178 N. W. 164 (Minn.); *State v. Hichs*, 102 S. E. 388 (N. C.).

Some of the West Virginia law bearing on this point has already been given. Chapter 32A, § 3, Barnes’ West Virginia Code 1923, which, in providing for the indictment and punishment for the

unlawful sale, storage, and manufacture of intoxicating liquors, reads: ". . . and upon conviction of the same person for the second offense under this act, he shall be guilty of a felony . . . ." *State v. Vandetta*, 86 W. Va. 186, 103 S. E. 54, says, "The indictment need not aver that the former conviction has not been set aside or reversed. This is defensive matter, the burden being on the defendant to prove it at the trial." If this case is good law it appears that its effect is to allow the indictment to plead a legal conclusion. One cannot be considered as "*convicted*" as long as there are exceptions which may clearly establish that he is not convicted.

The purpose of this article is not that of denying to a defendant any right or defense which is necessary in a fair trial, or to disturb any well recognized rules of pleading, but to use the principal case as an illustration to show that when one is indicted under a statute, the main question is whether or not the accused is guilty of violating that statute. When the primary object of the court is to decide that question, when the interests of society demand that the question be answered, any final decision which results, or may result, in not allowing that question to be decided, is *prima facie* evidence of bad law. When it is discovered that the reason back of that holding is the safeguarding of a "*doubtful*" technicality, it seems that a finding in the lower court based on the "very right of the case" should not be disturbed.

—J. G. J., Jr.

INTOXICATING LIQUORS—SEARCHES AND SEIZURES—CONSTRUCTION—Federal prohibition agents having personal knowledge, arising from a former offer of defendants to sell them intoxicating liquors, that defendants were engaged in transporting and selling contraband liquors, searched, without a warrant the car in which they found defendants on a highway three months later. As a result of this search sixty-eight bottles of liquor were found concealed in the upholstery. Defendants were indicted and convicted under the National Prohibition act and now assail the conviction on the ground that liquor found as a result of a search and seizure without warrant could not properly be used in evidence, as in violation of the Fourth Amendment to the Constitution of the United States. *Held*, Concealed contraband liquor being illegally transported in an automobile or other vehicle may be search-