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Intoxicating Liquors--Searches and Seizures--Construction

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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 upholstering. 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-

ed for without warrant by officers having probable cause for suspecting its presence. *Carroll et al* v. *United States,* 45 S. Ct. 280, (Decided March 2, 1925).

This decision of the highest tribunal of justice in this country has aroused considerable judicial, juristic and lay comment. It is apparently the first ruling by the Supreme Court on the validity under the Fourth Amendment of a seizure without warrant of contraband goods in the course of transportation and subject to forfeiture or destruction. The leading case on search and seizure is *Boyd* v. *United States,* 116 U. S. 616, 6 S. Ct. 525, 29 L. ed. 746, which is followed and affirmed by *Weeks* v. *United States,* 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652 and several other cases. But in none of these cases were the goods, in the course of transportation when searched for and seized.

It has been held however by state courts and lower federal courts that an officer without a warrant cannot search an automobile for intoxicants. *United States* v. *Meyers,* 287 Fed. 260; *United States* v. *Kaplan,* 286 Fed. 963; *Butler* v. *State,* 129 Miss. 778, 93 So. 3; *Hoyer* v. *State,* 193 N. W. 89 (Wis.). But even the most ardent supporter of the doctrine of *stare decisis* would not claim that the Supreme Court of the United States was bound by these decisions of inferior courts.

The argument has been advanced however, that no search and seizure has ever been allowed heretofore in misdemeanor cases unless the midemeanor was committed in the presence of the arresting officer. For the purpose of argument let it be granted that such is the general rule. Is not, then, the practical impossibility of enforcement of the prohibition law in such a case a sufficient justification for departure from the general rule?

At least eight states, Connecticut, *State* v. *Magnano,* 117 Atl. 550; Georgia, *Jenkins* v. *State,* 4 Ga. A. 859, 62 S. E. 574; Kentucky, *Royce* v. *Com.,* 194 Ky. 480; Mich. *People* v. *Chyc,* 219 Mich. 273; Montana, *State* v. *Mullen,* 207 Pac.634; Oklahoma, *Hess* v. *State,* 84 Okla. 73; South Carolina, *State* v. *Kanellos,* 117 S. E. 640, and Texas, *Green* v. *State,* 241 S. W. 1014, hold, that where an officer has direct personal knowledge through his hearing, sight or other sense, he may, without a warrant, seize intoxicating liquors or implements for their manufacture. And this is also the established rule in the lower Federal courts. *In re Mobile,* 278 Fed. 949; *United States* v. *Camarota,* 278 Fed. 388; *Elrod* v. *Moss,* 278 Fed. 123; *Herine* v. *United States,* 276 Fed. 806. These are cases in which the officer saw the liquor, and thus these cases come under

the general rule in regard to misdemeanors, although the rule as stated in the cases last cited, would include smelling, feeling and hearing and make a search, on other reasonable grounds for belief, illegal. This is a remarkable result and is avoided by the holding in the principal case.

It may be seen from this however, that the chief ground of contention is the answer to the question, "What is reasonable?" As the court in *United States* v. *Kaplan,* 286 Fed. 963, aptly puts it, "Unreasonable search is the menace against which the Fourth Amendment to the Constitution and the search warrant statutes protect. Reasonable searches are always permissible." Construed in the light of what was deemed an unreasonable search and seizure when the amendment was passed, which has ever been the rule, is such a search of the fastest wheeled vehicle unreasonable? An officer may spend some time procuring a warrant to search a house and yet be reasonably certain that the house will be there when he returns. No so with an automobile, it and the liquor in it, may be in the next state by that time.

It is submitted that the case is sound, both on authority and common sense and that its practicability will have a universal appeal with the laity as well as with the members of the bar.

—C. M. L., Jr.

SPECIFIC PERFORMANCE OF A PAROL AGREEMENT TO CONVEY REAL ESTATE. PART PERFORMANCE TO TAKE THE CONTRACT OUT OF THE STATUTE OF FRAUDS.—F, and old man, orally promised P, his daughter, to convey to her certain real estate in recompense for her services and companionship while maintaining his home and caring for him during old age. P did so care for F, and maintained his home for a period of ten years, but never went into possession of the land. F died, not having conveyed or devised the property as agreed, and P sued for specific performance of F's agreement. *Held,* Performance of a parol agreement to convey land in consideration of companionship during old age will be granted by a court of equity despite non-possession of the promisee. *Hurley* v. *Beattie et al.,* 126 S. E. 562 (W. Va. 1925).

Section 4 of the Statutes of Frauds, Ch. 98 § 1, W.Va. Code provides "no action shall be brought to charge any person upon any contract or sale of lands, tenements or hereditaments, or any in-