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Intoxicating Liquor: Search and Seizure: Preliminary Hearing

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different from what was due under the contract, the guarantor might be able to show new consideration and therefore a release because of accord and satisfaction.

3. The fact that plaintiff did not file its claim against the estate of the agent, is in no way a bar to it recovering from the guarantor. By his contract, the guarantor became primarily liable for whatever money might be due and owing under the terms of the contract. The plaintiff elected to collect from the guarantor and such election was within the privilege of their contract.

In the case of *Loverin and Brown Co.* v. *Travis,* 135 Wis. 332, it is held that where a guaranty is one of payment and not of mere collection, no efforts to collect from the debtor are necessary before making demand on the guarantor. See also *Minter* v. *Branch Bank of Mobile,* 23 Ala. 762; *Bull* v. *Doe,* 77 Cal. 54; and *Willis* v. *Chowning,* 90 Tex. 617.

SYLVESTER S. SANGER

Intoxicating Liquor: Search and Seizure: Preliminary Hearing

In thumbing over recent decisions reported in the *Federal Reporter* advance sheets, we find many of the cases have come up as a result of someone violating the prohibition law. Most of us are wholly unfamiliar with the operation of the law in the prosecution and the defense of these liquor violators, so a typical case has been singled from among a number of such decisions and a report thereon is herewith given so that we may have at least a faint recollection of coming in contact with the subject. There is a marked similarity among all the cases in this field, for after all, they usually arise out of similar circumstances. The case under discussion is *Herter* v. *United States,* 33 Fed. 400, and 33 Fed. 402.

To make a long story short and to start at the end and work toward the starting of the action, Herter's house was raided by agents by virtue of a search warrant issued by one Jackson who was the United States Federal Prohibition Director for the district of Montana. As a result of this raid, there was delivered up to Jackson and placed in his care, 456 quarts of beer, three quarts of wine, one pint of whiskey, and various pieces of personal property, such as, copper boilers, copper buckets, steins, etc. Herter contends that the issuance of the warrant was void and that as there is to be no action taken on the seizure that he is entitled to have his property returned to him. He appears in Federal Court petitioning it to order Jackson to return his property. Here is the story that is presented to the court:

Adams, an undercover agent of the government, went to the dwelling of Herter and represented himself as being an attorney in search of the

heirs of a certain Herter. During his visit he was treated to several helpings of beer (served in the decorative steins that are now in the custody of Jackson) but he was unable to buy any beer although he had expressed a desire to do so. Adams filed an affidavit with his chief to the effect that he knew the reputation of Herter and his dwelling and that he believed that Herter sold intoxicating liquors on the place. He further stated that he visited the place and had imbibed in liquor that was probably intoxicating but had not been able to buy any. He had further exacted a half promise from Herter to the effect that he might be able to buy some on the morrow.

Comes now Dibble, the government's second undercover man in this case. This agent hired a cab and drove to the scene of action. He was told by the driver that there would be no chances of getting any liquor unless he (the driver) went in alone. So the driver leaves his cab and starts for the house with Dibble trailing in the shadow. But Dibble was unable to get close enough to hear much of the conversation. He did hear Herter say "I'm sorry that I haven't anything today for your party but expect to have some tomorrow and will let you have some then." Dibble made out his affidavit to this effect and the warrant was issued on the strength of the two affidavits.

Not having sufficient information to go ahead with the prosecution the district attorney has informed the court that it does not intend to prosecute Herter. The question before the court now is, can Herter get back the property seized on the ground that it was an illegal search and seizure?

As a matter of law the court decided that the information furnished in the two affidavits was sufficient to warrant the issuance of the search warrant. There being a valid warrant, plaintiff cannot recover his property on the ground of illegal search and seizure. But the court finds power to entertain the plaintiff's petition and to return the boilers, kettles and steins (which might have a legitimate use) in the statutes,[1] wherein search warrants are authorized, with the provision that: "Such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully used, the liquor and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order." So the plaintiff is awarded his pots, kettles, and steins.

It is interesting to note that two months after the first raid, Herter's house was again raided and certain stores of liquor seized. The warrant

[1] Sec. 25 of title 2 of the National Prohibition Act, 41 Stat. 315, 27 U.S.C.A. 39.

was issued in this instance on an affidavit of one Sharp who stated positively that he had purchased intoxicating liquor from the appellant at his residence on September 24. At the preliminary hearing before the commissioner, Herter brought in twelve good men who swore that they had seen him at various places on the twenty-fourth and that for that reason the affidavit of Sharp must be false. The commissioner decided that the affidavit might have been incorrect and that the *preponderance* of evidence showed that no intoxicating liquor was served to Sharp on the day in question. The commissioner ordered the warrant quashed and the evidence obtained thereunder suppressed. As to disposing of the liquor seized, the commissioner left that to the court.

At the trial, Herter objected to the introduction of any evidence obtained under the warrant, not on the ground that the warrant was void but solely because of the ruling of the commissioner at the preliminary hearing. But the court found that the decision of the commissioner was not binding as a matter of law and that therefore the evidence was properly admitted and the conviction sustained.

JOHN J. MCRAE

Parties: Service of Process: Witnesses: Non-Resident

It appears to be well established that service of process on witnesses or parties from foreign states while in attendance in the court in which the cause is pending, is invalid.

In *Harvey* v. *Harvey et al.* Wis. 225 N.W. 703, the defendants, residents of Ohio, came to Milwaukee at the request of a party to an action then pending in the Circuit Court of Milwaukee County. They were prepared to testify as witnesses, if necessary. While in attendance, the defendants in *Harvey* v. *Harvey et al., supra,* were each served with a summons. The lower court, passing on the motion, set aside such service on the ground that the defendants were exempt from service while attending court within the state.

The basis of the appellant's argument was that the general rule of privilege does not apply to witnesses or parties not necessarily in attendance. But the court was of the opinion that as a matter of public policy non-resident witnesses or parties shall be exempt from service of process upon them which seeks to subject them to liability while they are attending court in another state.

The decisions are all in accord in declaring that witnesses or parties from a foreign state who are necessarily in attendance on a court are immune from the service of a summons while so within the state.[1]

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[1] *Kaufman* v. *Kennedy,* 25 Fed. 785; *Skinner and Mounce Co.* v. *Waite,* 155 Fed. 828; *Cameron* v. *Roberts,* 87 Wis. 291, 58 N.W. 376; *Rix* v. *Sprague,* 157 Wis.