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Notes on Recent Cases

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NOTES ON RECENT CASES

INTOXICATING LIQUORS—Prohibition agent held to have probable cause for search of automobiles, in view of previous information and investigation concerning defendant.

This case raises the question of whether, the facts and circumstances within a prohibition agent's knowledge were sufficient "to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in an automobile". The facts briefly were these: The federal prohibition department received a letter to the effect that liquor was being transported from a certain house in East Dedham in an automobile. The registration number of the car was given in the communication. The letter was turned over to an agent who interviewed the writer. The agent believed the information to be trustworthy, and with that belief, he made several visits to the place indicated in the letter, saw the defendant about the place, and made several inquiries concerning him. On at least one occasion he detected the odor of distillation while passing the house. On the morning of the search the agent saw the defendant come out of the house with a bundle wrapped in burlap, and place it in an automobile bearing the registration number corresponding to that concerning that which he had been informed. The agent followed the defendant, and after the defendant had stopped his car, left it, the agent searched it, finding therein a quantity of liquor; and upon defendant's returning to the car, the agent arrested him. The court held, applying the rule of Carroll v. United States 69 Law Ed. 543, that the officer is not limited to what he sees, hears or smells at the time of search, but he may also rely upon any "convincing information that he may previously have received as to the use being made of the automobile". The court admitted that if this rule was not applied the agent "could hardly be said (to have) had anything more than a mere suspicion upon which to proceed, since the defendant's conduct was entirely consistent with that of innocence". United States V. Lukas 35 Fed. (2nd) 599.

That the National Prohibition Law or the Volstead Act has limited and circumscribed the Fourth Amendment to the

Constitution can hardly be doubted. To a clear understanding of this note it is necessary to know the provisions of the Fourth Amendment and the provisions of the National Prohibition Law relating to searches and seizures. The former provides that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized". Section 25 Title II. of the National Prohibition Act provides that no search warrant may be issued to search any private dwelling as such unless used to sell liquor or used in fact for some quasi public business. Section 26 Eitle II. of the Act provides that when officers acting under the Act discover any person transporting liquor in a vehicle they may seize both the liquor and the car. Subsequently to the passage of this Act an Amendment was passed subjecting anyone searching a house without a valid warrant directing such search to a fine or imprisonment. The original draft of the Amendment extended also to property, but the Amendment as finally adopted referred only to "premises". It will be seen at once a grave question could arise as to whether these provisions of the National Prohibition Act did not seem counter to the Fourth Amendment. And this question has arisen in a great number of instances.

A case which has given great effect to the above provisions of the National Prohibition Act than perhaps any other is United States V. Kaplan 286 Fed. 963. The court held in that case that where an officer is informed by his sense of sight and smell that a crime against the liquor laws is being committed in a house he may make a search without a warrant. The position taken is that a search without a warrant is not ipso facto unreasonable; that a search may therefor be made without a warrant upon reasonable grounds therefor; "but in such case, by reasons of its being impractical (bold face ours) to procure a warrant, the conclusion as to the existence of such unreasonableness must be determined by the officer at his risk". The position thus assumed is supported, in the opinion of the court, by the rule existing at "common law" that where a crime was being committed in the presence of an officer he could arrest

the person without a warrant, and where a crime was being perpetrated in a building the officer could enter such building without a warrant. The court then proceeds to say that the knowledge that justifies belief as to the actual or probable existence of the crime may arise from any of the senses. To the same effect are McBride V. United States 284 Fed. 416, O'Connor V. United States 281 Fed. 396 and the United States V. Borkowski.

The Kaplan case is also cited for the rule that the fact of finding liquor by reason of a search of an automobile does not justify a search without a legal warrant or without probable cause for believing that a crime was being committed in the presence of an officer.

"It has been held that, in view of the impossibility of procuring warrants for the search of automobiles suspected of transporting liquor, the officers have a right, without warrant, to stop and search automobiles and the finding of liquor therein justifies the search." Corpus Juris Searches and Seizures, Section 376.

That of course caps the climax: Suspicion warrants the search, and the finding of liquor jujstifies it. The case of United States V. Bateman 278 Fed. 231, is cited in support of the rule. The court says in its opinion, "If an automobile could not be seized without a search warrant, it could not be seized at all, as a search warrant, under the law, can only be obtained upon affidavit showing that such automobile had intoxicating liquor in it. Such an affidavit cannot be made upon information and belief but must be positively sworn to. Before a search warrant could be obtained, of course the "effect" to be searched would be out of reach. Any person must necessarily reach this conclusion. Under the circumstances the Eighteenth Amendment would have been stillborn. The court declares that the power of determining what is a reasonable search rests with the courts; that Congress has no power to declare what is reasonable and make that binding upon the courts. The court then in determining whether the seizure was reasonable in the case referred to the National Prohibition Act as passed in 1919, noted that Congress in the Act referred to warrants in section 25 only with relation to "premises" and not property, and then referring to the Stanley Amendment (imposing penalty above

referred to) and declare that "the failure of Congress to act in this manner is a tacit approval of the many acts which occurred prior to November 23, 1921 (when the Amendment was passed) and that an automobile might be searched.

The tendency of the law in the lower federal court appeared to be all one way, and so upon the scene came the Carroll case, cited above, and with the first pronouncement by the United States Supreme Court on this question. The case was decided on March 2, 1925, the majority opinion being rendered by Chief Justice Taft, and a well-reasoned, logical minority opinion by Justice McReynolds in which Justice Sutherland concurred. No longer would the Federal Courts construe the law their own way. They were bound now by the pronouncement of the Supreme Judiciary. In that case Carroll and one Kiro were pursued en route from Detroit to Grand Rapids by a prohibition agent and his subordinates. The officers found liquor in the car and arrested Carroll and Kiro. The introduction of the liquor was objected to on the ground that the search had been unlawful. In a very extensive opinion, Justice Taft pointed out that it has always been the law, and was at the time the Constitution was adopted that a nation may declare goods liable to duties and goods which are made unlawful to possess to be forfeited and provide that upon probable cause any vehicle or vessel containing such contraband may be searched and the contents seized and destroyed; that this cannot violate the Fourth Amendment for the law existed at the time the Consitution was adopted; that the true rule is that if the search and the seizure without a warrant are made upon probable cause, that is upon a belief, reasonably arising out of the circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. And that rule, therefor, became the established rule on the subject.

But the dissenting opinion of the keen-minded Justice McReynolds is interesting. He takes the view that this is not a proceeding to forfeit goods which have been seized and therefore revenue acts do not apply; that the volstead Acts do not apply; that the Volstead Act has made no provision for arrest upon suspicion and without warrant for the first offense; that unless

a statute creating a misdemeanor contains some contrary provision mere suspicion of its violation does not justify an arrest, for arrest for misdemeanor at common law without a warrant can be made only where the offense is committed in the officer's presense; that Section 26 of the Act by using the words "shall discover" does not mean "to suspect". The arrest was therefor unlawful and the search and seizure made thereupon was unlawful. But the majority of the court held the view of the Chief Justice and that rule became established and, as shown by the principal case, followed and applied.

—Raymond Young

HAGGENJOS V. CITY OF CHICAGO Supreme Court of Illinois—1929—168 NE 661.

The municipal council of the City of Chicago passed an ordniance which provided in effect that no person owning, controlling or operating any vehicle should permit it to stand on any public street within the business and shopping district known as the "Loop" between the hours of 7 o'clock in the morning and 6:30 in the evening, except on Sundays, certain holidays, and after 3 o'clock on Saturday afternoons. The plaintiff in error violated this ordinance by leaving his car on a street within the restricted district while he entered his office. The car was at the entrance to his office building and upon his return thirty minutes later he was arrested. He was fined $5 in the Municipal Court. From this judgment he sued out a writ of error questioning the validity of the ordinance.

The Supreme Court reversed the trial court saying "It might have been a reasonable exercise of power by the council to restrict the right to stand on the street to a short time or to prevent it altogether at certain hours and in cerain parts of the territory. But it was not a reasonable exercise of the power to prohibit the standing of any vehicle on the streets in question during the entire business day".

Since the introduction of automobiles many cases have arisen, in different states, respecting the validity and construction of statutes and ordinances regulating their use upon public highways, and it has been uniformly held that the state, in the exercise of its police power may regulate their speed, and provide

other reasonable rules and restrictions as to their use. Com. v. Boyd (Mass) 74 N.E. 255; Christy v. Elliott (Ill) 74 N.E. 1075; People v. Schneider, 139 Mich. 673, 103 N.W. 172; People v. MacWilliams 86 N.Y. Supp. 357; Fletcher v. Dixon 107 MD. 420, 68 Atl. 875; State v. Swagerty 203 Mo. 517; 10 L.R.A. (NS) 601.

There can be no doubt about the power of a municipality to control travel upon its streets. Such regulations, on account of the crowded conditions of the streets are a necessity for the safety and welfare of the public as well as the convenience of th travellers. City of Chicago v. Mariotto 332 Ill. 44, 163 N.E. 369; Com. v. Fenton 139 Mass. 195, 29 N.E. 653; Veneman v. Jones 118 Ind. 41, 20 N.E. 644; Taylor v. Roberts (Fla) 94 SO 874. The public have a right of free and unobstructed transit over streets, and this is the primary and appropriate use to which they are generally dedicated. Whatever interferes unreasonably and unnecessarily with this use is a nuisance which a city council may prohibit by ordinance. The fact that there is still room of passage, notwithstanding the obstruction, will not exempt the car from the liability to removal whenever ordered by the proper municipal authority. 138 Iowa 426, 114 N.W. 205: 117 Iowa 587, 91 N.W. 793.

The individual, as such, has rights separate and distinct from his right as a member of the general public, in the use of the public highways. The right given the citizen is to use the public highway for travel, but not so as to impede the free passage of other citizens upon it generally. As early as 1812 Lord Ellenborough of England had occasion to speak on this question in the case of Rex v. Cross, 3 Camb. 224. In this case the defendant was indicted for causing coaches to stand and remain in the public highway, to the great annoyance of his Majesty's subjects. Lord Ellenborough said, "And is there any doubt that, if coaches on the occasion of a route wait an unreasonable length of time in a public street, and obstruct the transit of his Majesty's subjects who wish to pass, the persons who so cause such coaches to wait are guilty of a nuisance." It is in this particular case that we find for the first time this often quoted passage "The King's highway is not to be used as a stable yard."

—J. H. Flanagan

EVIDENCE—Cross-examination as to usual speed on highway was properly excluded, where it did not appear that witness had seen cars on road previously. DAILY V. SPANN, 147 A. 807. (Conn.)

Plaintiff brought action in the Superior Court to recover damages for the death of plaintiff's intestate alleged caused by defendant's negligence. Judgment for plaintiff. Defendant appeals, alleging erroneous rulings upon evidence.

Two witnesses for plaintiff testified as to the speed of defendant's car. Upon cross-examination one was asked if the traffic in the locality of the accident was not uniformly at a pretty high rate of speed, and the other was asked what was the average rate of speed along there. Questions excluded, since it did not appear that either witness had ever seen cars traveling on that road before, and since defendant offered evidence to prove that there was no other traffic on the road at the time of the accident.

Defendant's witness testified that he visited the scene of the accident the day after and was shown certain marks which plaintiff claims to be defendant's wheel marks. On direct examination he was asked whether the marks were those of defendant and how their size compared with those of the defendant. Questions excluded. It was not shown that the witness had any knowledge of the kind of marks the wheels of defendant's car would make.

The Supreme Court of Errors of Connecticut held that the rulings for the reasons stated were correct.

—T. Hayran

DIVORCE—Groundless charge of unchastity and lewd and lascivious conduct against wife constitute such cruel and inhuman treatment as to afford ground for divorce to wife. MORGAN V. MORGAN 21 S.W. (2d) 652. (KY.)

Robert P. Morgan brought divorce action against Elva Morgan wherein defendant counterclaimed for divorce on ground of cruel and inhuman treatment. Judgment for absolute divorce denied defendant; she appeals.

The only evidence introduced by plaintiff to sustain his charge of lewd and lascivious conduct constituting unchastity

was the testimony of Mrs. Walter Morgan. The witness testfied that on a certain day the defendant was looking out a window toward the barn where a young man was at work, and she remarked jokingly that she loved him, and loved every bone in him.

The Court of Appeals here held that the making by the husband of a deliberate and unfounded charge of unchastity and lewd and lascivious conduct against his wife was such cruel and inhuman treatment as would afford her grounds for divorce. (Smith v. Smith, 181 Ky. 55, 203 S.W. 884. Johnson v. Johnson 183 Ky. 421, 209 S.W. 385.) But is not such grounds where the husband makes such charge in good faith with reasonable basis for so doing, (Sallee v. Sallee 213 Ky. 125, 280 S.W. 932.), but a cause can hardly be imagined where such a charge would be more groundless than this one. Judgment reversed.

—T. Havran

EQUITY—"He Who Comes inty Equity Must Come with Clean Hands"—Plaintiff, Knights of the Ku Klux Klan, showing by its bill that it is a corporation of Georgia, organized for benevolent, religious and charitable purposes, comes into equity to enjoin defendants' use of its corporate name. Evidence was introduced disclosing the facts that plaintiff operating through a small group of men in violation of its own charter and worthy purposes, had established and was maintaining a despotic rule in certain areas, opposed to rights and liberties of the people and committing other unlawful acts resulting in breaches of the peace, bloodshed, and loss of life. Thus, in view of this evidence, the many questions which were raised by its bill in litigation are reduced to the single one whether the plaintiff is entitled to an injunction restraining the defendants from belonging to or in any way maintaining lodges bearing its name, which the plaintiff regards as out-law lodges.

The trial court found that in its own use of the name the hands of the plaintiff reaching out for this relief are unclean, and so unclean as to move the court to refuse the relief which otherwise it would freely give. Knights of the Ku Klux Klan v. Strayer et al. (Dist. Ct. W. D. Penna.), 26 F. (2d) 727.

And the upper court held that this evidence, to which the plaintiff objected as irrelevant, was admissable, that it was enough to sustain the fact finding made, and that the decree of the trial court dismissing the bill must be affirmed. Had the plaintiff been so operating as was alleged in the bill, that is, that it was incorporated as "a purely benevolent and eleemosynary society" and organized for "benevolent, religious and charitable purposes", then it would have the right to the exclusive use of its corporate name. But it introduced no evidence that performed any of the purposes for which it was incorporated and organized—and, on the other hand, the defendants proved that in many instances plaintiffs activities and purposes were quite opposeed to those declared in its charter and constitution. Consequently the court administered justice here in the application of the maxim of clean hands, holding that the plaintiff, disregarding its charter and constitution and engaging in practices antagonistic to its declared purposes, cannot hide its hands and demand equitable relief.—**Knights of the Ku Klux Klan v. Strayer et al.** (C. C. A., Third Cir., Penna., 1929), 34 Fed (2d) 432.

This case is an interesting and apt illustration of the interpretation by a court of equity of a doctrine which is solidly established and universal in its application. Other outstanding cases decided in courts of last resort in which this maxim was predominant in the decision are **Anderson v. Resler,** (N. D., 1929), 223 N.W. 707; **Shaw v. Etheridge** (Texas, 1929,), 15 S.W. (2d) 722; **Fischer v. Hammons** (Ariz., 1927), 259 Pac. 676: **Dow v. Worley,** 126 Okla. 175, 256 Pac. 56; **Humphreys-Mexia Co. v. Arseneaux** (1927), 116 Texas 603, 297 S.W. 225: **Interior Securities Co. v. Campbell** (1919), 55 Mont. 459, 178 Pac. 582; **Cerino v. Van Orden** (N. J., 1926), 98 N.J.Eq. 7, 129 A. 704, decree affirmed 134 A. 916; **Kinsman Nat. Bank v. Jerko** (1924), 111 Ohio St. 633, 146 N.E. 210; **Miller v. Kraus** (Calif.), 155 Pac. 834; **Dunscombe v. Amfot Oil Co.,** 201 Ky. 290, 256 S.W. 427; **Grether v. Nick** (1927), 193 Wis. 503, 215 N.W. 571; **Howe v. Chmielinski,** 237 Mass. 532, 130 N.E. 56; **Alexander v. Shipard,** 146 Tenn. 90, 240 S.W. 287; **Jones Mining Co. v. Cardiff Min. & Mill. Co.,** 56 Utah 449, 191 Pac. 426; **Pittsburg & West Virginia Gas Co. v. Nicholson,** 87 W. Va. 540, 105 S.E. 784, 12 A.L.R. 1392; **Rural Home Telephone Co. v. Kentucky & I. Telephone**

Co., 128 Ky. 209, 107 S.W. 787, 32 Ky. Law Rep. 1068. In the last case cited, a corporation which in its origin and existence had continually violated the law could not ask the assistance of a court of equity to compel another corporation to transact business with it.

The maxim of clean hands is based on conscience and good faith, Teuscher v. Gragg (Okla., 1929), 276 Pac. 753; and nothing can call a court of equity into activity, but conscience, good faith, and reasonable diligence, these being wanting, the court remains passive. Miller v. Ash, 156 Calif. 544, 105 Pac. 600. At the origin of this maxim the courts adopted the theory that a court of equity interposes only to enforce the requirements of conscience and good faith with respect to matters lying outside of the jurisdiction of the courts of law. Occasionally, such matters may even be opposed to the strict rules of the law. (Pomeroy, Eq. Juris. §398).

The maxim is for the protection of the court rather than for the benefit of individual parties. Carpenters' Union v. Citizens Committee to Enforce Landis Award, 244 Ill. App. 540; White v. Baugher (1927), 82 Colo. 75, 256 Pac. 1092. It is not a matter of defense primarily, but the courts apply it because of the interest of the public, and not as a favor to the defendant. Bill & Howell Co. v. Bliss (C.C.A., Sev. Cir., 1919), 262 F. 131. Even where the parties were in "pari delicto", equity would sometimes give relief on ground of public policy. Weaverling v. McLennan (Neb., 1928), 217 N.W. 956.

In many instances the courts have applied this maxim not only to the participants in fraudulent transactions but also to their heirs, and to all parties claiming under or through either of them, in suits involving such transactions. Rust v. Gillespie (1923), 90 Okla. 59, 216 Pac. 480; Holmes v. Holmes (1923), 182 Wis. 163, 196 N.W. 248. The doctrine has also been applied to suits for divorce. Billion v. Billion, 124 Ore. 415, 263 Pac. 397; Hall v. Hall (Fla., 1927), 112 So. 622. Where P anticipated a divorce suit, and deeded a parcel of land to his mother without consideration, in order to make the judgment defective, and thereafter regained possession of the land and sued her to quiet title, it was held that P did not come into equity with clean

hands, and therefore the court refused to give relief. **Palmer v. Palmer** (1917), 100 Neb. 741, 161 N. W. 277.

As a general rule the equitable doctrine that a party with unclean hands will be denied relief does not apply unless his wrongdoing proximately relates to the subject matter in question. **Northwest Ready Roofing Co. v. Antes** (Neb., 1928), 219 N.W. 848; **Tulsa Torpedo Co. v. Kennedy** (128), 131 Okla. 159, 268 Pac. 205; **Comstock v. Thompson** (1926), 286 Pa. 457, 133 Atl. 638; **Shaver v. Heller**, 108 Fed. 821, 834. In the principal case for commentation the court, in discussing this factor of the proposition, stated that "the inequity which will dismiss one from a court of equity (precluding equitable relief) under clean hands doctrine must relate directly to matter concerning which he complains, and not to past and unrelated sins."

Both plaintiff and defendant must come into equity with clean hands. **Witthoft v. Commercial Development & Investment Co.** (Idaho, 1928), 268 Pac. 31. And they must not only enter with clean hands but they must keep them clean until the final decree. **Pfender v. Pfender** (N. J. Ch., 1929), 144 A. 333, vacating decree (Err. & App.) 144 A. 332 Same jurisdiction—**Gluck v. Rynda Development Co.** 135 A. 917. This rule must be applied strictly and relief must be invariably refused upon finding that either party has himself been guilty of conduct which, in the equitable aspect, has "stained his hands," for when equity assumes to act, it must do complete justice, regardless of whether the litigants came into court with unclean hands. **Wenzlaff v. Tripp State Bank** (S. D., 1927), 214 N.W. 844.

Theoretically, the maxim is a figurative expression representing the fundamental conception of one of the numerous aphorisms which are diligently treated within the scope of equity jurisprudence. In practice, the maxim speaks: "Whenever a party, who, as actor," states Pomeroy in his Equity Jurisprudence, "seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."

—Joseph P. Guadnola

FIXTURES—Tests in determining what are "fixtures" are annexation of fixtures to realty, adaptation to use or purpose, and intention in attaching article. Peninsular Stove Co. v. Young et al. (MICH.) 226 N. W. 225.

Plaintiff seeks by cross-bill to enforce a lien upon an apartment building erected by the defendants for the price of certain gas ranges placed therein. These ranges wre attached to a gas fixture installed in the apartment. Judgment dismissing the cross-bill was reversed.

In determining whether or not these ranges were fixtures attached to the realty, so as to give the plaintiff a lien under the "Mechanics Lien Law" of Michigan, the court laid down the following tests, "first, annexation to the realty, either actual or constructive; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and third, intention to make the article a permanent accession to the freehold."

In applying these tests the court held, the ranges were sufficiently attached to the gas fixtures; that the ranges were of such a character as to conduce to the realization of the purpose for which the apartment was built, namely, to accomodate tenants who required all the necessary conveniences for light housekeeping; and finally, the intention to install the ranges as fixtures was evident from the first two considerations.

The tests, as laid down by the Michigan court, have been almost uniformly adopted by all of the states in America. Some of the most recent of these are 22 Fed. (2d), 773 (Ohio); 4 S. W. (2d) 901 (Ark.); 10 S. W. (2d) 173 (ex.); 219 N. W. 439 (Wis.); 257 P. 189 (Cal.); 291 S. W. 1054 (Ky.) 214 N. W. 111 (Mich.).

These general tests do not establish a definite criteria upon which to base a decision as to whether or not an article or a structure is a fixture; however they do show the modern deviation from the old common law doctrine of physical attachment expressed in the maxim "Quicquid plantatur solo, solo cedit", meaning "whatever is affixed to the soil belongs to the soil". Under this doctrine annexation was the controlling element; but now use, nature, and intention enter into the question. Most states holding that the intention of the party making he annexaion is the chief element to be considered, and the fact of phy-

sical attachment is of importance only in disclosing such intention. 204 P. 19 (Cal.); 165 N. W. 213 (Iowa); 232 S. W. 245 (Mo.); 197 N. Y. S. 503; 256 S. W. 936 (Tex.). Pennsylvania has even held that annexation is not necessary as regards machinery in a mill, factory or other industrial enterprise. 37 Am. Dec. 517 (Pa.).

In a leading case on the subject of determining the intention of the party making the annexation, it was stated "the intention can be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made". Teaff v. Hewitt 1 Ohio St. 511. States holding in accord with this decision are 193 P. 902 (Ore.); 257 P. 190 (Cal.); 232 S. W. 245 (Mo.); 220 P. 1097 (Mont.); 128 S. E. 876 (S. C.).

Joseph Yoch