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## TRADE MARKS AND TRADE NAMES - UNAUTHORIZED USE OF REGISTERED VESSELS - SEARCH WARRANT

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TRADE MARKS AND TRADE NAMES — UNAUTHORIZED USE OF REGISTERED VESSELS — SEARCH WARRANT — A number of milk bottles bearing registered marks of various dairies were seized from the possession of plaintiff dairyman by defendant deputy sheriff, under a search warrant issued by defendant district judge, upon affidavit and showing by defendant deputy commissioner of agriculture that the bottles were being unlawfully used. Notice was given of a hearing to be held before the judge to determine the persons entitled to possession of the seized property. Plaintiff brought this action for an original writ of prohibition to restrain further proceedings, charging that the search

warrant section<sup>1</sup> of the statute under which the proceedings were authorized<sup>2</sup> was unconstitutional. *Held*, the search warrant section of the statute violated the state constitutional provisions against unreasonable searches and seizures<sup>3</sup> and against class legislation.<sup>4</sup> *Allen v. Trueman*, (Utah, 1941) 110 P. (2d) 355.

Statutes similar to the one in the principal case are relatively common.<sup>5</sup> Frequently called "bottling statutes," they provide in general for registering the marks used on specified types of vessels; declare unauthorized refilling or trafficking in the vessels or defacement of the marks to be unlawful and a misdemeanor; frequently declare possession by specified persons of another's registered vessels to be prima facie evidence of unlawful use; and often provide for issuance of injunctions or search warrants. Some courts have held such statutes unconstitutional, saying that their sole purpose is to assist the owners of specified classes of personal property in retrieving their goods, that there is no reasonable ground for such classification and that therefore the state constitutional provisions against class legislation are violated.<sup>6</sup> However, a majority of the cases have upheld bottling statutes. These courts, in general, recognize that the specified vessels are a class of property peculiar in their nature and use and that the public interest in protecting a dealer's good will and protecting the public from fraudulent "passing off" is sufficient to authorize the state to accord special treatment to this type of property.<sup>7</sup> It is submitted that the cases which support

<sup>1</sup> Utah Rev. Stat. (1933), § 95-2-10.

<sup>2</sup> Utah Rev. Stat. (1933), tit. 95, as amended by Utah Laws (1939), c. 110.

<sup>3</sup> Utah Const. (1895), art. 1, § 14.

<sup>4</sup> Utah Const. (1895), art. 1, § 24; art. 6, § 26 (16).

<sup>5</sup> See, for example, Cal. Gen. Laws (Deering, 1938), Act 8623; Colo. Stat. Ann. (1936), c. 165, § 14; Ind. Stat. Ann. (Burns, 1933), §§ 66-101 to 66-106; Kan. Gen. Stat. Ann. (1935), c. 81; Mass. Ann. Laws (1933), c. 110, §§ 17-20; Mich. Stat. Ann. (1937), §§ 18.621-18.627; Minn. Stat. (Mason, 1927), §§ 8330-8335; Mo. Rev. Stat. (1939), §§ 15471-15475; N. J. Rev. Stat. (1937), §§ 56:3-14 to 56:3-34; N. Y. Consol. Laws (McKinney, 1941), tit. 19, § 360 et seq.; Ohio Gen. Code (Page, 1939), § 13169; Ore. Comp. Laws Ann. (1940), §§ 99-2259 to 99-2261; Pa. Stat. Ann. (Purdon, 1939), tit. 73, c. 1; Wash. Rev. Stat. (Remington, 1933), § 11546; Wis. Stat. (1939), § 132.05.

<sup>6</sup> *Yaeger v. State*, 78 Fla. 354, 83 So. 525 (1919), noted in 18 MICH. L. REV. 546 (1920); *Lippman v. People*, 175 Ill. 101, 51 N. E. 872 (1898); *Horwich v. Walker-Gordon Laboratory Co.*, 205 Ill. 497, 68 N. E. 938 (1903); *State v. Wiggam*, 187 Ind. 159, 118 N. E. 684 (1918); *State v. Baskowitz*, 250 Mo. 82, 156 S. W. 945 (1913); *State v. Schmuck*, 77 Ohio St. 438, 83 N. E. 797 (1908). But see *Renner Brewing Co. v. Rolland*, 96 Ohio St. 432, 118 N. E. 118 (1917).

<sup>7</sup> *Bartolotti v. Police Court of City of Los Angeles*, 35 Cal. App. 372, 170 P. 161 (1917); *Associated Dairies of Wichita v. Fletcher*, 143 Kan. 561, 56 P. (2d) 106 (1936); *Commonwealth v. Golburg*, 167 Ky. 96, 180 S. W. 68 (1915); *Commonwealth v. Anselvich*, 186 Mass. 376, 71 N. E. 790 (1904); *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759 (1893); *People v. Ryan*, 230 App. Div. 252, 243 N. Y. S. 644 (1930); *Renner Brewing Co. v. Rolland*, 96 Ohio St. 432, 118 N. E. 118 (1917). Also see *State ex rel. Otero v. McLeod*, 139 Fla. 287, 190 So. 596 (1939); *State v. Baskowitz*, 250 Mo. 82, 156 S. W. 945 (1913).

bottling statutes are more realistic and founded on better reason and precedent.<sup>8</sup> In none of the latter cases, however, was constitutionality of a search warrant section in issue. The constitutionality of this type of provision has been questioned on at least three grounds: that the search is solely for evidence; that a special privilege is given to an arbitrarily created class; and that a drastic criminal process is being used for private purposes.<sup>9</sup> To the argument that the search warrant is being used solely to obtain evidence, the analogy of the intoxicating liquor and stolen and embezzled property cases where search warrants are allowed presents a strong answer.<sup>10</sup> As to the charge of class legislation, once it is decided that the state can properly make unlawful certain uses of registered vessels and provide ordinary criminal sanctions against such use, it would seem that the further criminal process provided by the search warrant does not then render the classification arbitrary. The criticism that the search warrant is being used for private purposes raises more question. Concededly, use of a search warrant for private ends is unconstitutional.<sup>11</sup> The search warrant sections of some bottling statutes provide that in the hearing following the seizure of the vessels, possession is to be awarded to the one entitled thereto and also that if possession or use by the former holder was unlawful, the penalty of fine or imprisonment, provided by the same or another section of the bottling statute, is to be imposed.<sup>12</sup> The provision for awarding of possession looks like a civil remedy; but the penal provision shows the procedure to be partly criminal in nature. Clearly, it would seem, a search warrant section so written does not pervert the writ to private ends. Where the search warrant section (as in the Utah statute under consideration in the principal case) provides only for an award of possession and makes no provision for imposition of penalty or a finding that the bottling statute has been violated, the remedy looks more like a pure civil remedy.<sup>13</sup> Of course, a criminal charge need not precede issuance of a search warrant.<sup>14</sup> It should be borne in mind also that all bottling statutes declare certain uses to be misdemeanors. Where a penalty is provided by the bottling statute, or some other

<sup>8</sup> The defendants are usually parties conducting their businesses by bootlegging bottles to save the expense of purchasing an adequate supply of their own. *Associated Dairies of Wichita v. Fletcher*, 143 Kan. 561, 56 P. (2d) 106 (1936).

<sup>9</sup> See *Lippman v. People*, 175 Ill. 101, 51 N. E. 872 (1898); principal case, 110 P. (2d) 355.

<sup>10</sup> See 24 R. C. L. 715 (1919); 3 A. L. R. 1514 (1919); 74 A. L. R. 1418 (1931).

<sup>11</sup> Principal case, 110 P. (2d) 355.

<sup>12</sup> For example, N. Y. Consol. Laws (McKinney, 1917), tit. 19, § 364.

<sup>13</sup> In the principal case, the court construed the search warrant section as not contemplating actual or intended criminal prosecution, drawing the conclusion from the fact that the section referred only to awarding of possession of the seized vessels, and from the fact that a provision requiring the officer serving the warrant to bring the possessor as well as the goods before the court had been omitted upon amendment of the section. Compare Utah Rev. Stat. (1933), § 95-2-10, with Utah Laws (1939), c. 110, § 95-2-10.

<sup>14</sup> See *Haworth v. Newell*, 102 Iowa 541, 71 N. W. 404 (1897).

statute of the state,<sup>15</sup> failure to provide in the search warrant section for imposition of penalty should not prevent the state from punishing violations of the law. Also, legality of the search warrant procedure should not depend on whether criminal prosecution actually follows the hearing but rather on whether criminal prosecution could be had.<sup>16</sup> Therefore it would seem that where the statute declares certain uses of registered vessels to be unlawful and provides penalties, use of a search warrant is not unconstitutional as being for a private purpose, whether the section of the statute outlining the search warrant procedure provides for imposition of penalties in addition to restoration of possession, or only for the latter.

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<sup>15</sup> The Utah bottling statute declares certain uses to be misdemeanors but does not prescribe penalties. However, in the criminal code there is a blanket provision prescribing penalties for those misdemeanors for which penalties are not otherwise provided. Utah Rev. Stat. (1933), § 103-1-16.

<sup>16</sup> Otherwise, it would seem that subsequent failure to prosecute would retroactively make a search warrant under which, for example, stolen goods were seized and returned to the rightful owner, an instrument of an unreasonable search.