INTOXICATING LIQUOR: Shipments of intoxicating liquor when interstate and when intrastate.

CRIMINAL PROCEDURE: When officers may search and seize liquor.

February 23, 1939

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FILED

Mr. Walker Pierce, Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

This is in reply to yours wherein you requested an opinion from this department on two questions, namely:

> "Assuming that a transporter from Tennessee, who is a bootlegger in Tennessee, personally or by individual agent acquires a truck load of distilled spirits and wine in Illinois from an Illinois wholesaler and then in order to deliver the whiskey and wine so acquired to his own place of business, transports them across the state of Missouri, then is such a transaction in interstate or intra-state commerce?
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> "Assuming that an officer authorized to make arrests should make an arrest of one of these cars on a motor vehicle violation charge and in procuring the evidence necessary to obtain a conviction for the motor vehicle violation should find unstamped liquor, would that liquor be contraband and could it be used as evidence in prosecuting a case involving the transportation of unstamped liquor, even though the liquor was not obtained by search warrant?"

I.

The first request involves the question of whether or not the transaction which you have described is one in interstate commerce. For the purpose of reviewing the background of the commerce clause, we find a statement made by Justice Brown in Cook v. Marshall County, 196 U. S. 471, 49 L. Ed. l.c. 475, which is as follows:

> "The power of Congress to regulate commerce among the states is perhaps the most benign gift of the Constitution. Indeed, it may be said that without it the Constitution would not have been adopted. One of the chief evils of the confederation was the power exercised by the commercial states of exacting duties upon the importation of goods destined for the interior of the country or for other states. The vast territory to the west of the Alleghanies had not yet been developed or subdivided into states, but the evil had already become so flagrant that it threatened an utter dissolution of the confederacy. The article was adopted that all of states of the Union might have the benefit of the duties collected at the maritime ports, and to relieve them from the embarrassing restrictions imposed upon the internal commerce of the country. But the same policy which authorizes the use of this power as a shield to protect commerce from the vexatious interference of the states forbids its employment as a sword to assail measures designed for the preservation of the public health, morals, and comfort. States may differ among themselves as to the necessity and scope of such measures, but so long as they are adopted in good faith, with an eye single to the public welfare, they are as much entitled

> to the recognition of the general government as if they were uniformly adopted by all the states.
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> "While this court has been alert to protect the rights of nonresident citizens, and has felt it its duty, not always with the approbation of the state courts, to declare the invalidity of laws throwing obstacles in the way of free intercommunication between the states, it will not lend its sanction to those who deliberately plan to debauch the public conscience and set at naught the laws of a state. The power of Congress to regulate commerce is undoubtedly a beneficient one. The police laws of the state are equally so, and it is our duty to harmonize them. Undoubtedly a law may sometimes be successfully and legally avoided if not evaded; but it behooves one who stakes his case upon the letter of the Constitution not to be wholly oblivious of its spirit. In this case we cannot hold that plaintiffs are entitled to its immunities without striking a serious blow at the rights of the states to administer their own internal affairs."

Since the enactment of the twenty-first amendment to the United States Constitution, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause. This amendment was ratified December 5, 1933, and the second section provides as follows:

> "The transportation or importation into any state or territory, or possession of the United States for delivery therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

This amendment was under consideration in Finch and

Company v. McKittrick, Volume 83 L. Ed. Supreme Court Advance Opinions, Volume 6, page 238, 240, and the court said:

> "* * * * Since that amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause. As was said in State Bd. of Equalization v. Young's Market Co. 299 U. S. 59, 62, 81 L. ed. 38, 40, 57 S. Ct. 77, 'The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes.' To limit the power of the states as urged 'would involve not a construction of the Amendment, but a rewriting of it.' * * * * * * * * "

In our research on your question we find that nearly all of the cases in which such a transaction was involved were brought either in the state from which the shipment came, or the state to which the shipment was destined. However, we have found one case in which the facts are similar to yours in this respect, namely, a state which is neither the state in which the shipment originates nor the state to which the shipment is destined. In other words, it is the state through which such shipment passes to reach its destination in another state.

The Supreme Court of Tennessee in Haumschilt v. State, 221 S. W. 196, had before it a case in which whiskey was being purchased in Missouri, loaded into an automobile by the purchaser who intended to take it to Mississippi. In order to reach his destination, the purchaser passed through the State of Tennessee which state had a law prohibiting transportation of intoxicating liquor. In that opinion we find the following statement of the court:

> "The trial judge instructed the jury that if the defendant below brought whisky in an automobile from another state to Richardson's Landing, in

> Tipton county, Tenn., and drove the automobile containing such whisky off the ferryboat to any point in Tipton county, Tenn., he would be guilty as charged in the presentment, and that this would be true, whether he was going to Mississippi as the destination of his journey or not."

And the court said at l.c. 97, paragraphs (1) and (2):

> "We think the propriety of the instruction depends on whether or not it was legal under Mississippi statutes to sell whisky in that state. If it was legal to bring whisky into Mississippi for sale, we do not think that the journey of the plaintiff in error from Missouri across the state of Tennessee could have legally been interrupted or penalized by our officers or courts. Kelley v. Rhoads, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359; Bowman v. Chicago & N. W. R. Co., 125 U. S. 465, 8 Sup. Ct. 689, 31 L. Ed. 700; Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088.
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> "On the other hand, if it was not lawful to sell whisky, in Mississippi, then we think such liquor while in transit for such purpose was deprived of the protection of the commerce clause of the federal Constitution, by reason of the provisions of the Webb-Kenyon Act. 37 Stat. 699, c. 90 (U.S. Comp. St. section 8739).
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> "This transaction occurred prior to the Federal Wartime Prohibition Act (40 Stat. 1045), the Eighteenth Amendment, and the Volstead Act (41 Stat. 305). At that time such transportation of liquor from one state to another state in which it could lawfully be sold was legitimate interstate

commerce.

"The Webb-Kenyon Act divests intoxicating liquors of their interstate character, as we understand it, when they are being shipped into a state to be received, possessed, sold or in any manner used in violation of the law of that state. In other words, such liquors, when in transit to such a state, are not legitimate articles of commerce, and are subject to the laws of the states into which they are brought or through which they pass. That the law of the state controls in such cases fully appears from Austin v. State, 101 Tenn. 563, 48 S. W. 305, 50 L. R. A. 478, 70 Am. St. Rep. 703, and the Supreme Court decisions therein reviewed.

"Now we cannot judicially know what the statutes of Mississippi were. If it should develop on a subsequent trial that the sale of intoxicating liquor in Mississippi was illegal, then we think that defendant was not protected by the commerce clause of the federal Constitution while passing through Tennessee with such liquors, but was subject to the Tennessee laws against the transporation of liquor within the boundaries of this state. On the other hand, if it should develop that there was no statute of Mississippi prohibiting the use of the whisky in that state to which defendant intended to put his liquor when he arrived there, we think, as stated before, that he was not amenable to the Tennessee Transportation Act while pursuing his journey through this state. We think this conclusion is borne out by the decision of the Supreme Court of the United States in United States v. Gudger, 249 U. S. 373, 39 Sup. Ct. 323, 63 L. Ed. 653, and other cases. The decision in the Gudger Case, while construing the Reed Amendment (U.S. Comp. St. sections 8739a, 10387a-10387c), and not the Webb-Kenyon Act, is in

> point, since the language of these two federal enactments is quite similar."

In Collins v. U. S. 263 Fed. 657, l.c. 660, the court, in passing on a somewhat similar question, said:

> "* * * * * By a like liberality of construction, the causing of intoxicating liquor to be transported from one state into another state, where its sale or manufacture is prohibited, would seem to be complete as soon as the interstate journey was entered upon, even though the liquor failed to reach the prohibited territory."

Since the Volstead Act has been repealed, the commerce clause applies to intoxicating liquor shipments the same as to shipments of any other property unless they are in violation of the Webb-Kenyon Act, which provides as follows: (U. S. C. A. Vol. 27, section 122 (1935) found in the pocket supplement to said volume)

> "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any

> manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

or unless it is in violation of section 2 of the 21st Amendment to the Constitution of the United States which is as follows:

> "'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.'"

In Dunn v. U. S. 98 Fed. (2d) 119, 121, the court said:

> "The effect of Section 2 of the Twenty-First Amendment U. S. C. A. Amend. 21, section 2, was to qualify the Commerce Clause, U.S.C.A. Const. art. 1, section 8, cl. 3 so as to permit a state to prohibit or condition the importation or transportation of intoxicating liquor thereinto."

In State v. Kirmeyer, 88 Kansas 589, the court held:

> "Where the commerce clause of the federal constitution is invoked as a protection to traffic in intoxicating liquor, the courts are not precluded from an inquiry into methods and practices to determine whether the transactions involved constitute legitimate interstate commerce, or are colorable merely and intended to

> evade and defeat the just operation of the constitution and laws of this state."

On the question of whether or not the commerce clause applies to transportation of liquor by a private person in an automobile, we find that the United States Supreme Court has held in United States v. Simpson, 252 U. S. 465, 64 L. Ed. 665, cited in 10 A. L. R., page 510, as follows:

> "The transportation by the owner in his own automobile of intoxicating liquors for his personal use is comprehended by the prohibition of the Reed Amendment of March 3, 1917, section 5, against the transportation of intoxicating liquors in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes."

> "Transportation, in order to constitute interstate commerce, need not be by common carrier, and may consist of the transportation by one of his own goods."

You state in your request that bootleggers are carrying on these questionable intoxicating liquor activities. From this expression, we assume that you mean that such persons are violating the intoxicating liquor laws of the state in which they reside and which is the destination of the liquor shipment. In State v. Frazee, 97 S. E. 604, 605, the court, in discussing a similar question and applying the provisions of the Webb-Kenyon Act, supra, said:

> "Thus is withdrawn from the shipment of transporation of intoxicating liquors the immunity of interstate commerce, and expressly forbidden the shipment or transportation into a state of liquors intended to be received or possessed

> there in violation of the law of such state. In Clark Distilling Co. v. Western Maryland Ry. Co., supra, 242 U. S. 325, 37 Sup. Ct. 185, L.R.A. 1917B, 1218, Ann. Cas. 1917B, 845, the court said:
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> "'The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that * * there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution.' The Webb-Kenyon Act 'did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.'"

If these parties are taking this intoxicating liquor into a state with the intention of violating the liquor laws of that state, then they cannot claim the protection of the provisions of the Interstate Commerce Clause of the Constitution. Each of these cases will have to stand on its own bottom and since it is a question of law and fact whether such a person is carrying as an interstate commerce carrier depends on the destination of the shipment and the provisions of the liquor law of the state to which the liquor is destined.

CONCLUSION.

From the foregoing, we are of the opinion that the transportation and possession of intoxicating liquor by a

carrier, public or private, in any form of a vehicle across the State of Missouri, which shipment originates in another state and is destined to a state for the purpose of violating the laws of the state to which it is destined, is not protected by the interstate commerce provision and such a shipment is intrastate. In such case the officers of the State of Missouri may arrest the carrier for any violation of the liquor laws of the State of Missouri and he may be prosecuted therefor.

II.

Your second question has to do with the right of search and seizure, in the event the driver of a car transporting intoxicating liquor is apprehended and arrested in connection with another violation of law, a traffic violation for instance.

Section 11, Article II, of the Missouri Constitution has the following provision:

> "That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by oath or affirmation reduced to writing."

From a reading of the above section, it is apparent that it is the unreasonable search and seizure that is prohibited by the Constitution.

The Supreme Court of Missouri in the case of State v. Padgett, 289 S. W. 954, had before it a situation similar to

the question you have proposed. The statement of facts as given by the court in that case is as follows (l.c. 955):

> "The city marshal of Versailles stopped a car on the streets of that town, in which the defendant and another were riding, on account of the reckless manner in which they were driving. In so doing the marshal jumped upon the running board, and, turning off the switch, stopped the car. While thus engaged, he discovered that the defendant and his companion were drunk, and he took them into custody. As he pulled the defendant out of the car, a bottle of whisky fell out of his pocket, and, upon an examination of the car, two other bottles were found beneath the seat where the defendant had been sitting. One of these contained intoxicating liquor, commonly called 'hootch' or 'moonshine.'"

At the close of the plaintiff's testimony, defendant filed a motion to suppress the evidence which was overruled by the trial court. In holding that the city marshal of Versailles had the unquestioned right to search the car under the circumstances without a search warrant and to seize the intoxicating liquor, the court said (l.c. 956):

> "Defendant contends that he was deprived of his liberty without due process of law, in that he was arrested without process, and that his automobile was examined without a search warrant. The legality of his arrest is to be determined by the facts and circumstances attending the same and the law applicable thereto. The place of his arrest was in the city of Versailles, and the moving cause for same was his driving an automobile while in an intoxicated condition. We will take judicial notice, not only of the corporate character of municipalities within the state (State v.

White (Mo. Sup.) 263 S. W. 192), but also that the population of Versailles, as shown by the last federal census, authorizes its designation as a city of the fourth class (State v. McBrien, 265 Mo. 594, 178 S. W. 489), and that it is within the purview of the statutes defining the powers of officers of this class of cities (section 7613 and art. 6 of chapter 72, R. S. 1919). A marshal in a city of the fourth class is a police officer, and, as such, is empowered to arrest any person without a warrant violating any law of the state or city when committed in his presence. Section 8426, R.S. 1919; State v. Underwood, 75 Mo. 230.

"Irrespective of the place where committed, it is declared to be a misdemeanor for any one to operate a motor vehicle while in an intoxicated condition. Section 7595, R.S. 1919. Of this offense the defendant was guilty when arrested by the marshal. His apprehension under this state of facts was authorized, and he has no valid cause of complaint on this account. In making this arrest, it was disclosed that the defendant was in the act of transporting whisky, and, the evidence of his guilt being, as the marshal determined, present and apparent from the bottles of liquor found beneath the seat of the defendant's car, and the offense being a felony, his detention to answer the charge of the latter after his arrest for the misdemeanor was authorized. The felony no less than the misdemeanor was being committed in the presence of the marshal, and hence within the terms of the statute, the potential effect of which is to include within the marshal's power arrests without process of parties guilty of any offense against the state or city. * * * * * * * * * * * * *

"The marshal was not required to procure

a search warrant to authorize him to search the defendant's car. The Supreme Court of the United States, in an exhaustive opinion on searches and seizures as applied to automobiles (Carroll v. U. S., 267 U.S. 132, 45 S. Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790), holds that search and seizure, without a warrant, of an automobile engaged in the illegal transportation of intoxicating liquors, is not a violation of the Fourth Amendment to the federal Constitution, provided such search and seizure is made upon probable cause; that is, upon a belief, well founded, arising out of the circumstances known to the officer that the automobile contains contraband goods which by law are subject to search and seizure. Of like tenor are the rulings of several United States District Courts and Courts of Appeals. U.S. v. Fenton (D.C.) 268 F. 221; O'Connor v. U.S. (D.C.) 281 F. 396; Elrod v. Moss (C.C.A.) 278 F. 123; Lambert v. U.S. (C.C.A.) 282 F. 413.

"The facts in the instant case are of like effect to those set forth in the Carroll Case, and the rule there invoked is deemed appropriate here. The reason for the rule, as announced by Chief Justice Taft in that opinion, is that such delay would be occasioned in obtaining a warrant as to afford a vehicle of the character of an automobile time to be beyond the reach of officers or to have disposed of its cargo before the writ could be procured. This reasoning is in harmony with a purpose to effectively administer the law and punish offenders, and should meet with our approval. We therefore overrule defendant's contention in this behalf."

Consequently, if an officer should arrest a person in charge of one of such cars on a traffic violation, it being a misdemeanor, such officer can without a search warrant search the automobile following the arrest if such person were thereby found to be engaged in the commission of another crime and particularly that of illegally transporting intoxicating liquor which is in fact contraband goods, the liquor can be seized and will constitute proper evidence.

The legislature, in enacting Section 30-g of the Liqour Laws, Laws of Missouri, 1935, page 279, declared that any liquor being unlawfully transported is contraband, and that arrests for such violations can be made with or without warrant. The pertinent parts of said section read as follows:

> "* * * * * * * * * * * * * * * * All intoxicating liquor unlawfully manufactured, stored, kept, sold, transported or otherwise disposed of, and the containers thereof and all equipment used or fit for use in the manufacture or production of the same, including all grain or other materials used, in the unlawful manufacture of intoxicating liquor, and which are found at or about any still or outfit for the unlawful making or manufacture of intoxicating liquor, are hereby declared contraband, and no right of property shall be or exist in any person or persons, firm, or corporation owning, furnishing or possessing any such property, liquor, material or equipment;
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> but it is hereby expressly made the duty of the sheriffs and constables and their deputies within their respective counties, and of marshals, chiefs of police and policemen in cities, towns and villages, and of all other officials whose duty it is or shall be to make arrests, to diligently suppress any violation of this Act, and to this end such officers are hereby authorized and directed to arrest,

> with or without a warrant, any person or persons found violating any such provisions; * * * * * * * * * * * * * * "

Furthermore, under the authority of the case of Jackson v. City of Columbia, 217 S. W. 869, rendered by the Kansas City Court of Appeals, we are of the opinion that no action in replevin would lie to recover such liquor from the officers. In that case the officers, without a warrant, seized intoxicating liquor, arrested the plaintiff and charged him with storing the same illegally. The plaintiff brought replevin action and the court said at l.c. 870-871:

> "The plaintiff, while insisting that he was the exclusive owner of the goods, admitted he got them for the purpose and with the intention of selling them in violation of the law. This raises an interesting question whether or not a court is bound to aid him in obtaining possession of such goods thereby enabling him to violate the law, even though there be no law in Missouri destroying property rights in intoxicating liquors. Courts will not enforce rights arising out of an illegal contract. Oscanyan v. Arms Co., 103 U.S. 261, 26 L. Ed. 539; Haggerty v. St. Louis Ice Co., 143 Mo. 238, 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. Rep. 647; Smith v. Rose, 192 Mo. App. 580, 184 S. W. 910. Nor will they assist a party to regain what he has parted with for an illegal purpose, and the same principle prevails where it is attempted to recover that which was intended to be sold in violation of the law. Marienthal v. Shafer, 6 Iowa, 223. In Blunk v. Waugh, 32 Okl. 616, 122 Pac. 717, 39 L. R. A. (N.S.) 1093, it was held that--
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> "'If the courts will not open their doors to enforce an illegal contract, we do not

think they should lend their aid to enable a person to unlawfully engage in the liquor traffic.'

"See, also, Robertson v. Porter, 1 Ga. App. 223, 57 S. E. 993; Howe v. Stewart, 40 Vt. 145; Crigler v. Shepler, 79 Kan. 834, 101 Pac. 619, 23 L. R. A. (N.S.) 500. In most, if not all, of these cases, however, there were statutes which either forbade recovery or destroyed property rights in the goods in question. There is no such statute in Missouri, and, on the contrary, sections 4855 and 4856, R. S. 1909, provide that liquors being sold illegally may be taken and held until the prosecutions therefor are ended, and the fines paid, and for the selling of such liquors to pay the fines in case they are unpaid. However, in a case where the plaintiff seeking to recover liquors admits he got them for the purpose of violating the law and the court is convinced that the result of turning them over to plaintiff will enable him to violate the law, it is an interesting question whether, in such a case, the court may not withhold its aid and leave the plaintiff 'unsanctified by its favor and unaided by its process,' even in the absence of a statute forbidding recovery or destroying property rights in the goods sought. * * * * * * * * * * * * * * "

CONCLUSION.

It is our conclusion, therefore, that if an officer arrests the driver of a motor vehicle for the violation of any law governing the use of motor vehicles such officer then has the right to search the automobile. If in the course of such search the officer discovers evidence which

tends to show that the driver of the car is transporting intoxicating liquors illegally and in violation of law, then such officer is within his rights in seizing such liquor and the same may be used as evidence against the offender in the case in which he is charged with the violation of the intoxicating liquor laws. In order to make such evidence competent it is not necessary, under those circumstances, that the officer be armed with a search warrant at the time the intoxicating liquor was seized.

Respectfully submitted

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