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Intoxicating Liquor-Transportation-Sufficency of Evidence

INTOXICATING LIQUOR—TRANSPORTATION—SUFFICIENCY OF EVIDENCE—When officers first saw the appellant, he was standing by the side of an automobile and Gambino was repairing a tire. When the officers returned, the appellant and Gambino drove away. Later, when the appellant was arrested, he was riding in the car with Gambino, the confessed owner thereof, in which there was found hidden from view one hundred and thirty gallons of liquor, which was being transported. Appellant was tried and convicted in the circuit court of Cass county on a charge of transporting liquor under the Indiana statute.[1] Appellant appealed, assigning as error, the overruling of his motion for a new trial, by challenging the sufficiency of the evidence to support the conviction. *Held*, evidence was insufficient to support the conviction.[2]

Evidence showed that appellant was an Italian by birth, who has resided in Grand Rapids for almost four years and at the time of the arrest was a hitch-hiker on his way to Indianapolis to look for work, when he was per-

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[11] (1929), 279 U. S. 1, 49 Sup. Ct. 215.
[12] Sec. 28, Art. 20, Georgia Banking Act of 1919.
[13] See Sec. 3965, Burns' Indiana Statutes, 1929 Sup.
[1] Burns' R. S. (1926), Sec. 2720.
[2] *Impellizeri v. State*, Supreme Court of Indiana, June 10, 1932.

mitted to ride by Gambino, who was also a resident of Grand Rapids and the confessed owner of the car in which the liquor was being transported and the defendant was riding when the arrest was made. Evidence did not show that the defendant had any interest in the liquor or the car in which it was being transported or that the defendant conspired with, aided, abetted or encouraged the actor in the commission of the crime charged or that there was any other act of participation on the part of the defendant.

An analysis of the facts and a study of related or similar criminal acts support the decision of the higher court in its reversal of the lower court. When the meaning of a word is not clearly defined in the statute, the rule is that the ordinary meaning of the words, used in the statute, is adopted, and transportation, under the Indiana Statute,[3] has been interpreted to mean "to carry and convey from one place to another."[4] There was an act of transportation in the instant case,[5] but the evidence shows only the presence of the appellant, when arrested, and mere presence of a person at a place, when another commits a crime, is not sufficient evidence to prove his guilt, unless he is shown to have conspired with, aided, abetted or encouraged the actor in the commission of the crime.[6] Applying the same rule to the specific crime of transportation of liquor, it follows that something more than mere presence in an automobile, which is being used to transport liquor, is required to prove one guilty of the charge of transportation of liquor.[7]

Murray v. State[8] and *Howard v. Commonwealth*[9] held that evidences, sufficient to sustain the conviction of one defendant, was not sufficient to sustain the conviction of his guest or traveling companion, unless it was shown that he was interested in the liquor, its purchase or in the automobile used to convey it. The decision of the higher court is further supported by analogies drawn from other criminal acts. Mere presence at a still is not sufficient evidence to sustain a conviction for the crime of manufacturing liquor.[10] There must be some act of participation on the part of the defendant.[11] The same rule is invoked to sustain a conviction on a charge of possession of liquor, in which case, a conscious and substantial possession

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[3] Indiana Acts, 1923, Chapter 34, Section 1, page 108.

[4] *Boyer v. State* (1908), 169 Ind. 691, 83 N. E. 360.

[5] *Impellizeri v. State,* Supreme Court of Indiana, June 10, 1932.

[6] Burns' R. S. (1926), Sec. 2028-29; *Rasnake v. Commonwealth* (1923), 135 Va. 677, 115 S. E. 543; *Carey v. State* (1924), 194 Ind. 626, 144 N. E. 22.

[7] *Richardson v. State* (1921), 89 Tex. Crim. App. 17, 228 S. W. 1094; *Simpson v. State* (1925), 195 Ind. 633, 146 N. E. 747; *State v. Peters* (1928), (Mo.),6 S. W. (2nd) 838; *Henson v. City of Malvern* (1930), (Ark.), 29 S. W. (2nd) 1079; *Payne v. State* (1931), (Tex.), 46 S. W. (2nd) 316.

[8] (1917), 19 Ariz. 49, 165 Pac. 315.

[9] (1924), 138 Va. 835, 122 S. E. 112.

[10] *Guyton v. State* (1921), 21 Ga. App. 639, 109 S. E. 520; *Biddle v. State* (1924), 19 Ala. App. 560, 99 S. E. 59, *Farmer v. State* (1924), 19 Ala. App. 563, 99 S. E. 59.

[11] *Leedy v. Commonwealth* (1927), (Ky.), 294 S. W. 164; *Taylor v. State* (1927), (Okla.), 255 Pac. 714; *Bowlin v. State* (1931), (Ala.), 132 So. 600; *Graceffo v. United States* (1931), (Pa.), 46 Fed. (2nd) 852.

is required.[12] *Reynolds v. State*[13] defines such possession, as having personal charge or exercising ownership, management or control over liquor. To invoke any other rule in a criminal act, might involve an innocent person, who, without choice, might be present at the commission of the most heinous crime and a person, who violates the prohibition law, should have the same consideration in the courts, as one charged with any other criminal act.

In the instant case,[14] evidence, in its most favorable light to the state, proved only the presence of the defendant, as a passenger, and no conviction of a passenger for transportation of liquor in an automobile should be sustained, unless there is some evidence of his single or joint ownership, possession or control thereof, or of his aiding, abetting, or encouraging another in the crime of transportation of liquor. Such evidence should not only be consistent with his guilt, but should be inconsistent with and exclude every other hypothesis or belief of innocence. It has been supported by many decisions that unless there is substantial evidence of facts, which exclude every other hypothesis or belief than that of guilt, it is the duty of the trial judge to direct the jury to return a verdict for the accused, and where all the evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment against the accused.[15]

J. H. H.

REAL PROPERTY—CONDITIONS SUBSEQUENT IN DEEDS—This action was brought to eject appellees from certain real estate and quiet title thereto. Appellees, by cross-complaint, seek to quiet title as against appellants. On October 11, 1880, N and his wife "conveyed and warranted" to the trustees of X church "and their successors in office" the real estate in question (one-half acre of land in consideration of thirty dollars) "in trust that said premises shall be kept and maintained as a place of worship for the use of X church, the building to be erected thereon free for all funeral services at all times and under all circumstances. It shall also be free for all orthodox denominations when not desired for use by the above named church."

A church was built, half on this half acre and half on the adjoining lot. April 21, 1930, the trustees conveyed the property to the appellees with covenants of warranty.

Appellants being sole heirs of N and his wife, both deceased, claim that the deed given by N and his wife granted an estate in trust upon conditions subsequent only and that the conveyance by the trustees to the appel-

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[12] *Beander v. Barnett* (1921), (Calif.), 255 U. S. 224; *State v. Harris* (1923), (Ore.), 211 Pac. 944; *Nelson v. State* (1925), (Wis.), 203 N. W. 343; *State v. Gates* (1925), (N. D.), 204 N. W. 350; *Clayton v. State* (1927), (Ala.), 114 So. 787; *Jelks v. State* (1927), (Ga.), 137 S. E. 840; *State v. Anno* (1927), (Mo. App.), 296 S. W. 825.

[13] *Reynolds v. State* (1926), (Fla.), 111 So. 285.

[14] *Impellizeri v. State*, Supreme Court of Indiana, June 10, 1932.

[15] *Hart v. United States* (1898), 84 Fed. 799; *Vernon v. United States* (1906), 146 Fed. 121; *Tucker v. United States* (1915), 224 Fed. 833; *Weiner v. United States* (1922), 282 Fed. 799; *Sullivan v. United States* (1922), 282 Fed. 575; *Yusem v. United States* (1925), 8 Fed. (2nd) 6; *Noscowitz v. United States* (1922), 282 Fed. 575; *Ridenour v. United States* (1926), 14 Fed. (2nd) 888; *Van Gordner v. United States* (1927), 21 Fed. (2nd) 939; *Salinger v. United States* (1927), 23 Fed. (2nd) 48.