Washington University Law Review

Volume 12 | Issue 1

January 1926

Criminal Law—Experiments by Jurors—Inspection of Contents of Bottle

192-200. Ex Parte Hennen decided in 1839 established this construction as the one which this Court will follow. That this is the executive construction is amply proved by the consistent action of all the Presidents, following the advice of their Attorney-General, in removing officers without the consent of the Senate. The conflict was sharp over President Jackson's removal of Secretary Duane and he refused to yield to the Senate. President Johnson dared impeachment rather than surrender the point, and it was insisted upon by Cleveland in 1886, Wilson in 1920, and Coolidge in 1924.

The dissenting opinions attack the theory of the court on four general grounds. That by Mr. Justice Holmes is, that this office is a creation of Congress which has the power of control over its own creations; that of Mr. Justice McReynolds is, that there is no such broad power inherent in the executive as laid down by the Court and that Congress has repeatedly asserted its control; and that by Mr. Justice Brandeis admits the control of the President over high political officers, but points out the distinction between such officers and the complainant. W. M. T. '27.

[Due to lack of time before going to press this note contains only a digest of the Court's opinion.]

CRIMINAL LAW—EXPERIMENTS BY JURORS—INSPECTION OF CONTENTS OF BOTTLE.—The defendant was charged with the possession of intoxicating liquor. After the court had directed the attention of the jury to bottles which had been introduced in evidence one of the jurors took up one of the bottles and tasted the contents. The defendant's motion to withdraw the case from the jury was overruled and he duly excepted to the ruling of the court. *Held,* that permitting the juror to taste the liquor and the refusal to withdraw the case from the jury was reversible error. *Nix v. City of Andalusia,* (Ala. 1926) 109 So., 182.

In recent years two distinct lines of judicial decisions with respect to the propriety of permitting jurors to taste liquor introduced in evidence and upon whose intoxicating character the guilt of the accused depends have grown up. Cases in which the practice has been permitted and sanctioned are: *People v. Kinney* (1900) 124 Mich., 486, 83 N. W., 147; *Schulenberg v. State* (1907) 79 Neb., 65, 112 N. W., 304, 16 Ann. Cas., 217; *State v. Simmons,* (1922) 183 N. C., 684, 110 S. E., 591; *Troutner v. Commonwealth,* (1923) 135 Va., 750, 115 S. E., 693. In close proximity with these decisions are those holding that it is proper for the jurors to test by their sense of smell the liquor which has been introduced in evidence. *Reed v. Territory* (1908) 1 Okl. Cr., 481, 98 P. 583, 129 A. S. R., 861; *Enyart v.* People, (1921) 70 Colo., 362, 201 P. 564; *State v. Dascenzo,* (1924) 30 N. M., 34, 226 P. 1099. This latter doctrine also obtains in Missouri where jurors have been permitted to "inspect and smell" the liquor introduced. *State v. Sissom,* (Mo. 1926) 278 S. W., 704. In *State v. Stapleton,* (1923) 155 Minn., 499, 193 N. W., 35, it was held proper to permit the jury to pour the liquor into saucer and touch a match thereto for the purpose of testing its alcoholic content. The chief grounds of decision in these cases seem to be: (1) that the jurors do not learn facts independent of evidence but simply test the evidence already introduced in order properly to determine its truth or probative value; (2) that to a juror the best and highest proof of which any fact is susceptible is the evidence of his own senses; (3) that he should be permitted to requisition freely any or all of these senses in the determination of a disputed question of fact because the ultimate purpose for which the evidence is introduced is to assist the jury in reaching the correct conclusion; (4) and that jurors must necessarily take into consideration their knowledge and impressions founded upon experience in their everyday life and jurors without such knowledge and impressions could not be had.

In accord with the principal case holding that it is reversible error to permit jurors to taste liquor introduced in evidence are: *State v. Lindgrove,* (1895) 1 Kan. App., 51, 41 P. 688; *Skinner v. State,* (1925) 101 Tex. Cr. R., 68, 274 S. W., 133; *Peru v. United States, Bird v. United States,* (C. C. A., 8th Circuit, 1925) 4 F., (2d) 881. The case going to the greatest length in this direction is *Commonwealth v. Brelsford,* 161 Mass., 61, 36 N. E., 677, where it was held proper to reject an offer on the part of the defendant to have jurors taste the liquor. There are fewer cases holding that permitting jurors to smell the liquor is improper. Among these is *Jianole v. United States,* (C. C. A., 8th Circuit, 1924) 299 F., 496, where it was held an abuse of discretion for the court to direct an attendant to pour a liquid into a glass "and let the jury smell of it" though no proper objection was made at the time. These courts apparently rest their decisions upon the grounds: (1) that all evidence must be introduced openly in court; (2) that the jury must be satisfied from evidence apart from their individual knowledge and belief; (3) that when jurors acquire knowledge peculiar to themselves they cease to be jurors and should be sworn as witnesses; (4) and that the court should ascertain whether all jurors are equally expert in taste and smell. In *Gallaghan v. United States, Colwell v. United States,* (C. C. A. 8th Circuit, 1924) 299 F., 172, it is said that "the practice is not in keeping with an orderly and dignified administration of justice." That the practice, where permitted, should be in open court, in the presence of the defendant and at all times subject to the control of the court see, *Reed v. Territory,* (1908) 1 Okl. Cr. 481, 98 P. 583, 129 A. S. R., 861; *State v. Dascenzo,* (1924) 30 N. M., 34, 226 P. 1099...*Contra, State v. Elmers,* (1924) 198 Iowa, 1041, 200 N. W., 723; *State v. Barker,* (1912) 67 Wash., 595, 122 P. 335; also *State v. Foell,* (1923) 37 Idaho, 722, 217 P. 608 (statute permitting taking of exhibits to jury room), holding that an examination of the liquor in the jury room was not improper.

T. S. '27.

EVIDENCE—JUDICIAL NOTICE OF A FORD CAR.—This case arose in an action for damages by Mrs. Stone, plaintiff below, in which she seeks to recover for a failure, through negligence of the company, to deliver a telegram. The telegram informed her that her brother had but a few hours to live. It was not delivered until too late for her to attend the funeral, her brother having died shortly after the telegram was sent to her. In the trial court Mrs. Stone was permitted to introduce evidence to the effect that she would have departed for her brother's home immediately upon receipt of the telegram and would have traveled in a Ford car, continuously, making the 300 miles distance in 20 hours. The appellant Telegraph Company assigns the admission of this evidence as error and contend that travel in this manner is not such an established and usual mode as must have been in the contemplation of the parties when the contract was entered into. Considering this objection the court says, "We can not assent to the view that travel by a Ford automobile was not, in 1923, an established and usual mode of travel in this state. Appellee's counsel in their brief have ably defended the Ford car against the reflection upon it implied by the assertion that it is not an established and usual mode of travel in this state. These assignments need not be discussed at length. A few observations will dispose of same and vindicate the Ford. It is a matter of common and general knowledge of which we may take judicial notice that in 1923, and for some years prior thereto, Mr. Ford's car was recognized in Texas as an established, usual, and favorite method of transportation; that, barring accidents and undue heating the motor, it is fully capable of making 300 miles in 20 hours, even if much of the road be unpaved and must be traveled at night. The mastery which this car possesses over bad roads and ability to reach its destination under adverse conditions are also matters of common knowledge." *Western Union Telegraph Company v. Stone* (Tex. 1926) 283 S. W., 259.